

172 FERC ¶ 61,058
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER16-1404-001

New York Independent System Operator, Inc.

Docket No. ER16-1404-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND
COMPLIANCE

(Issued July 17, 2020)

■ In the February 2020 Order,¹ the Commission accepted in part, subject to condition, and rejected in part the New York Independent System Operator, Inc.’s (NYISO) April 13, 2016 compliance filing to implement renewable resources and self-supply exemptions to its buyer-side market power mitigation rules. The Commission conditionally accepted Market Administration and Control Area Services Tariff (Services Tariff) revisions to be effective for the Class Year 2019² and directed NYISO to file, within 30 days of the date of the February 2020 Order, a further compliance filing with the proposed revisions to its Services Tariff.³ As discussed below, we accept, subject to condition, NYISO’s compliance filing in response to the February 2020 Order, with the conditionally accepted Services Tariff revisions to be effective for the Class Year 2019.

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

² *Id.* P 17 (noting that “[t]o provide greater certainty for Class Year 2019 participants,” the Commission is “conditionally accepting NYISO’s Services Tariff revisions to implement the renewable resources and self-supply exemptions effective for the Class Year 2019”).

³ Capitalized terms that are not defined in this order have the meaning specified in the tariff.

■ Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),⁵ however, we are modifying the discussion in the February 2020 Order and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

■ NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new capacity resources must enter the New York City or G-J Locality Installed Capacity (ICAP) markets (mitigated capacity zones)⁷ at a price at or above an applicable offer floor until their capacity clears 12 monthly auctions.⁸ NYISO will exempt a new entrant from the offer floor if the new entrant passes either Part A or Part B of the mitigation exemption test.⁹ Under Part A, NYISO will exempt a new entrant from the offer floor if the forecast of capacity prices in the first year of a new entrant's operation is higher than the default offer floor, which is 75% of the net cost of new entry (CONE) of the hypothetical unit modeled in NYISO's most recent demand curve reset. Under Part B, NYISO will exempt a new entrant from the offer floor if the forecast of

⁴ *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

⁵ 16 U.S.C. § 825l(a) (2018) ("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 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 Defense Project*, slip op. at 30. The Commission is not changing the outcome of the February 2020 Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ The Services Tariff defines "Installed Capacity" as "External or Internal Capacity, in increments of 100 kW, that is made available pursuant to Tariff requirements and ISO Procedures." NYISO, Services Tariff, § 2.9 (27.0.0). The G-J Locality (mitigated capacity zones) consists of Load Zones G, H, I, and J, zones "within which a minimum level of Installed Capacity must be maintained." *Id.* § 2.12 (8.0.0) (defining "Locality").

⁸ *Id.* § 23.4.5.7 (26.0.0).

⁹ *Id.* § 23.4.5.7.2 (26.0.0).

capacity prices in the first three years of a new entrant's operation is higher than the unitspecific net CONE of the new entrant.

A. Complaint Order and April 2016 Compliance Filing

■ In 2015, the Commission granted in part, and denied in part, the complaint filed by the New York Public Service Commission (New York Commission), New York Power Authority (NYPA), and New York State Energy Research and Development Authority (NYSERDA) (collectively, the Complainants), alleging that NYISO's buyer-side market power mitigation rules are unjust, unreasonable, or unduly discriminatory or preferential because the rules are overbroad and result in over-mitigation.¹⁰ In the Complaint Order, the Commission found NYISO's Services Tariff to be unjust, unreasonable, or unduly discriminatory or preferential insofar as the buyer-side market power mitigation rules therein applied to certain narrowly defined renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.¹¹ The Commission therefore required NYISO to make a compliance filing to revise its buyer-side market power mitigation rules to exempt a narrowly defined set of renewable and self-supply resources.¹²

■ With regard to the renewable resources exemption, the Commission found that applying NYISO's buyer-side market power mitigation rules to certain renewable resources up to a megawatt (MW) cap was unjust, unreasonable, or unduly discriminatory or preferential because such resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. The Commission explained that intermittent renewable resources¹³ with low capacity factors and high development costs, including many wind and solar resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power.¹⁴ In order to ensure that the renewable resources exemption is limited to only renewable resources with limited or no incentive and ability to exercise buyer-side market power,

¹⁰ *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015) (Complaint Order), *reh'g denied*, 154 FERC ¶ 61,088 (2016).

¹¹ Complaint Order, 153 FERC ¶ 61,022 at PP 2, 36.

¹² *Id.* P 2.

¹³ The Commission defined "intermittent renewable resources" for purposes of the renewable resources exemption to mean renewable resources that cannot be stored by the facility owner or operator and that have variability beyond the control of the facility owner or operator. *Id.* P 47 n.116 (citations omitted).

¹⁴ *Id.* P 2.

the Commission required NYISO to define the exemption to limit the type and amount of renewable resources that may qualify.¹⁵ The Commission stated that NYISO should work with its stakeholders to develop a MW cap for renewable resources eligible for exemption based on NYISO's mitigated capacity zones and to provide support for the proposed limitation.¹⁶

■ As for the self-supply exemption, the Commission found that certain self-supply resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power. The Commission reasoned that, if a load serving entity, such as a municipality, cooperative, or single customer entity, self-supplies the majority of its needed capacity, the amount of capacity it procures from the ICAP markets will be relatively small. Therefore, the Commission explained, uneconomic entry would reduce the cost of procuring this portion by less than the cost of financing the uneconomic entry in the first place.¹⁷ The Commission required NYISO to exempt from its buyer-side market power mitigation rules those load serving entities whose ICAP portfolios are consistent with reasonably anticipated levels of their future ICAP obligations, as measured by use of appropriate net-short and net-long thresholds.¹⁸ The Commission also directed NYISO to consider: (1) the impacts of state decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity; (2) whether to bar from the self-supply exemption projects that have irregular or anomalous cost or revenue advantages that do not reflect arms-length transactions or that are not in the ordinary course of the self-supply load serving entity's business; and (3) whether to exclude from the self-supply exemption load serving entities that have arrangements for payments or subsidies specifically tied to the load serving entity clearing its project in NYISO's ICAP market or to the construction of the project.¹⁹

■ On April 13, 2016, in compliance with the Complaint Order, NYISO filed proposed revisions to its Services Tariff to implement renewable resources and self-supply exemptions to its buyer-side market power mitigation rules (April 2016 Compliance Filing). NYISO's April 2016 Compliance Filing included rules governing eligibility for both exemptions, rules addressing the revocation of each exemption, a MW cap on the amount of ICAP eligible for the renewable resources exemption in a given Class Year, net-short and net-long thresholds for the self-supply exemption, certification

¹⁵ *Id.* PP 49-50.

¹⁶ *Id.*

¹⁷ *Id.* P 61.

¹⁸ *Id.* P 62.

¹⁹ *Id.* P 63.

and acknowledgement requirements for the self-supply exemption, and limits on requesting multiple exemptions in the same Class Year.²⁰

B. February 2020 Order

■ In the February 2020 Order, the Commission accepted in part, subject to condition, and rejected in part, NYISO's April 2016 Compliance Filing to implement renewable resources and self-supply exemptions, directing that the conditionally accepted Services Tariff revisions be effective for the Class Year 2019. The Commission also directed NYISO to submit a further compliance filing within 30 days.²¹

■ Relevant to this order, the Commission accepted in part NYISO's proposed eligibility criteria for the self-supply exemption, but rejected NYISO's proposal to allow certain instrumentalities of the State to be eligible for the exemption. Specifically, the Commission rejected NYISO's proposal to allow "public authorit[ies] or corporate municipal instrumentalit[ies], including a[ny] subsidiary thereof, created by the State of New York that own[] or operate[] generation or transmission and that [are] authorized to produce, transmit or distribute electricity for the benefit of the public," to be eligible for the self-supply exemption, finding that it would be contrary to the rationale underlying the self-supply exemption, as set forth in the Complaint Order.²²

■ Also, as relevant here, the Commission rejected NYISO's proposed annual 1,000 MW cap on the renewable resources exemption (measured in ICAP), finding that NYISO's proposed cap failed to comply with the Complaint Order.²³ Specifically, the Commission found that, rather than basing the cap on the mitigated capacity zones, as noted in the Complaint Order, NYISO proposed a cap based on historical entry of all resource types across the entire New York Control Area (NYCA). Therefore, the

²⁰ NYISO conducts its interconnection process through Class Years, by which a new generator elects to join a Class Year and provides NYISO the required information, including any application for an exemption to the buyer-side market power mitigation rules. See NYISO, Open Access Transmission Tariff (OATT), Attach. X, § 30.1 (9.0.0) (defining Class Year); NYISO, OATT, Attach. S, § 25.5.9 (11.0.0) (explaining Class Year start date and schedule); NYISO, Services Tariff, Attach H. § 23.4.5.7.9.1 (26.0.0) (regarding requesting a competitive entry exemption); Proposed Services Tariff §§ 23.4.5.7.13.1, 23.4.5.7.14.1.1(a) (regarding requesting a renewable resources or selfsupply exemption).

²¹ February 2020 Order, 170 FERC ¶ 61,121 at P 1.

²² *Id.* PP 53, 65, 66.

²³ *Id.* PP 48, 49.

Commission directed NYISO to submit a revised cap that would be: (1) narrowly tailored to the mitigated capacity zones, and not based on the entire NYCA; and (2) based on unforced capacity (UCAP)²⁴ rather than ICAP. The February 2020 Order emphasized that the MW cap would limit “the risk that the renewable resources exemption will significantly impact market prices and it is such limitation that makes this tariff revision just and reasonable.”²⁵ The Commission further directed NYISO “to be mindful of the relationship between: (1) the size of the MW cap; and (2) the limit the MW cap imposes on the renewable resource exemption’s impact to market prices.”²⁶

II. Requests for Rehearing of the February 2020 Order

■ On March 20, 2020, the New York Commission, NYSERDA, NYPA, and Long Island Power Authority (LIPA) (collectively, NY Parties), filed a request for rehearing of the February 2020 Order. On March 23, 2020, the American Public Power Association (APPA) filed a request for rehearing of the February 2020 Order. As discussed more fully below, NY Parties and APPA seek rehearing regarding the Commission’s finding that public power entities should not be eligible for NYISO’s self-supply exemption. NY Parties also seek rehearing regarding the Commission’s rejection of the 1,000 MW cap for the renewable resources exemption.

A. Substantive Matters

1. Excluding State Entities from Self-Supply Exemption

a. Requests for Rehearing

■ APPA and NY Parties argue that the February Order’s exclusion of public power entities from the self-supply exemption is arbitrary and capricious because it is inconsistent with the Commission’s directives in the Complaint Order and fails to address

²⁴ ICAP represents the installed capacity or nameplate of a facility, while UCAP is the amount of ICAP that NYISO has qualified to participate in the ICAP market, which takes into account forced outages and forced deratings. The Services Tariff defines “Unforced Capacity” as the “measure by which Installed Capacity Suppliers will be rated, in accordance with formulae set forth in the ISO Procedures, to quantify the extent of their contribution to satisfy the NYCA Installed Capacity Requirement, and which will be used to measure the portion of that NYCA Installed Capacity Requirement for which each [load serving entity] is responsible.” NYISO, Services Tariff, § 2.21 (3.0.0); *see also supra* note 6 (defining “Installed Capacity”).

²⁵ *Id.* P 48.

²⁶ *Id.*

provisions of the self-supply exemption that prevent public power entities from exercising market power. Specifically, APPA and NY Parties argue that the Commission ignores the fact that the self-supply exemption includes a net-long threshold, and a limit on eligibility for the self-supply exemption to load serving entities with a history of self-supplying their ICAP requirements.²⁷ APPA and NY Parties contend that the Commission should have addressed these elements of the self-supply exemption in explaining its exclusion of public power entities from the exemption. NY Parties add that ignoring the effect of the net-long threshold is inconsistent with the Commission's directive in the Complaint Order to limit the potential for instrumentalities of the State to suppress ICAP prices on a state-wide basis because "[t]he primary reason for inclusion of the net-long threshold in the NYISO self-supply exemption proposal is to address the NYISO potential to impact ICAP prices."²⁸ Thus, APPA and NY Parties argue, the Commission's concern regarding the potential incentives of public power entities like NYPA were sufficiently addressed in NYISO's 2016 Compliance Filing through the net-long threshold and the requirement that eligible entities have a history of self-supplying their ICAP purchase obligations.²⁹

■ Moreover, APPA and NY Parties disagree with the Commission's finding that, because public power entities, like NYPA, act on behalf of all customers across the New York State, such entities have the incentive and ability to artificially suppress ICAP market prices. They state that the evidence cited for this assertion is a quote from a NYPA annual report describing the broad public purposes behind NYPA's mission.³⁰ Such a general mission statement, APPA and NY Parties argue, does not support the assumption that NYPA would have an incentive to pursue strategies to suppress ICAP prices regardless of the potential impact on the customers it serves.³¹ APPA contends that, by relying on NYPA's mission statement, the Commission misunderstood NYPA's mission and dismissed the effectiveness of the net-short and net-long thresholds as

²⁷ APPA Rehearing Request at 8; NY Parties Rehearing Request at 23.

²⁸ NY Parties Rehearing Request at 24-25.

²⁹ APPA Rehearing Request at 10; NY Parties Rehearing Request at 25-26.

³⁰ APPA Rehearing Request at 6-7; NY Parties Rehearing Request at 26-27. According to NYPA's 2012 Annual Report, NYPA's "mission is to provide clean, economical and reliable energy consistent with its commitment to safety, while promoting energy efficiency and innovation, for the benefit of its customers and all New Yorkers." NYISO's Market Monitoring Unit (MMU) June 1, 2016 Comments at 5 n.11 (quoting NYPA's 2012 Annual Report).

³¹ APPA Rehearing Request at 7; NY Parties Rehearing Request at 27.

applied to public power entities.³² APPA points out that NYPA’s mission, as described in a recent document³³ and on NYPA’s website³⁴ more accurately represents NYPA’s mission to provide power to its specifically defined set of customers, while recognizing that those customers provide broader benefits to the State overall.³⁵ APPA explains that NYPA provides benefits to New Yorkers outside of its customer base only as a side-effect of serving public and non-profit customers, some of whom provide service to the entire State.³⁶

b. Commission Determination

■ We disagree with APPA and NY Parties that the Commission’s determination, in the February 2020 Order, to exclude public power entities from the self-supply exemption is arbitrary and capricious and inconsistent with the directives in the Complaint Order. In the Complaint Order, the Commission expressed “concerns regarding the state’s ability to artificially suppress prices by channeling uneconomic entry through an exempted load serving entity” and directed NYISO to “consider the impacts of state decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity.”³⁷ The Commission also directed NYISO to propose net-short *and* net-long thresholds “tight enough to prevent a load serving entity from being able to deliberately overpay for a resource in an attempt to manipulate ICAP market prices in a way that benefits the load serving entity’s other purchases from the

³² APPA Rehearing Request at 6-7.

³³ *Id.* at 7 (noting that NYPA’s mission is “to power the economic growth and competitiveness of New York State by providing customers with low-cost, clean, reliable power and the innovative energy infrastructure and services they value.” (citing New York Power Authority, 2020-2023 *Approved Budget and Financial Plan*, at 1) (Dec. 11, 2019)).

³⁴ *Id.* (noting that NYPA “sells electricity to a wide variety of public, non-profit and business customers, all of whom have something in common: they provide jobs, education, health care, and important services to the citizens of New York.” (citing N.Y. Power Auth., *NYPA Customers*, <https://nypa.gov/power/customers/nypa-customers>)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ February 2020 Order, 170 FERC ¶ 61,121 at P 66 (citing Complaint Order, 153 FERC ¶ 61,022 at P 61).

ICAP market.”³⁸ In the February 2020 Order, the Commission found that NYISO had failed to comply with these directives because NYISO’s proposal to allow certain instrumentalities of the State to be eligible for the self-supply exemption did not account for the State’s ability to suppress ICAP market prices through self-supplied load serving entities.³⁹

■ Additionally, we are not persuaded by APPA and NY Parties’ arguments that NYISO’s net-long threshold fully accounts for the State’s ability to suppress ICAP market prices. We also disagree that the Commission ignored evidence regarding NYISO’s net-long threshold. The objective of the net-short and net-long thresholds is to “prevent a load serving entity from being able to deliberately overpay for a resource in an attempt to manipulate ICAP market prices in a way that benefits the load serving entity’s other purchases from the ICAP market.”⁴⁰ As the Commission previously explained, the “[n]et-short and net-long thresholds will avoid exempting from NYISO’s buyer-side market power mitigation rules self-supply resources that ‘buy’ substantially more capacity in NYISO’s ICAP markets than they clear or sell (i.e., that are significantly ‘net-short’) or that, conversely, clear or sell substantially more capacity than they ‘buy’ (i.e., that are significantly ‘net-long’).”⁴¹ Further, net-short and net-long thresholds protect against the exercise of market power only to the extent that both thresholds are meaningfully limiting. We acknowledge the self-supply exemption’s net-long threshold and the limit on eligibility that requires load serving entities to have a history of self-supplying their ICAP requirements. However, without the net-short threshold, we find that there would not be sufficient protections in place to ensure that a load serving entity seeking to use the self-supply exemption does not have the incentive and ability to artificially suppress ICAP market prices. As the Commission noted in the February 2020 Order, the net-short threshold is premised on the assumption that a load serving entity’s incentive is to minimize the costs of serving its specific set of customers, and that this assumption does not hold true for certain State entities, such as NYPA.⁴² The Commission also found that “[t]he incentive of certain instrumentalities of the State to act on behalf of the whole state is critical in considering whether NYISO’s [proposed net-

³⁸ Complaint Order, 153 FERC ¶ 61,022 at P 62.

³⁹ February 2020 Order, 170 FERC ¶ 61,121 at P 67.

⁴⁰ Complaint Order, 153 FERC ¶ 61,022 at P 62

⁴¹ *Id.*

⁴² *Id.* P 67. The net-short threshold assesses whether a load serving entity seeking to use the self-supply exemption would face costs for new entry that are greater than the cost saving that it and its affiliates might receive from any capacity price reduction due to that entry. April 2016 Compliance Filing at 26.

short and net-long] thresholds will achieve their intended purpose,” and that “these entities’ ‘other purchases from the ICAP market’ must be considered substantially greater than those purchases made to serve only the entity’s specific set of customers.” Therefore, the net-long threshold alone is insufficient to address state entities having the incentive and ability to artificially suppress ICAP market prices.

■ While APPA and NY Parties take issue with the Commission’s use of language in NYPA’s general mission statement to demonstrate that NYPA acts on behalf of more than its own specific set of customers, they have not shown sufficient evidence to the contrary. As APPA points out, NYPA’s 2020-2023 Budget and Financial Plan describes NYPA’s mission as “to power the economic growth and competitiveness of New York State by providing customers with low-cost, clean, reliable power and the innovative energy infrastructure and services they value.”⁴³ APPA adds that NYPA’s website describes NYPA’s customers as “non-profit and business customers, all of whom have something in common: they provide jobs, education, health care, and important services to the citizens of New York.”⁴⁴ We find that APPA’s description of NYPA’s mission statement and the website description of NYPA’s customers supports the conclusion that NYPA’s main focus is the welfare of New York State as a whole. Consistent with the February 2020 Order, we continue to find that public power entities, like NYPA, act on behalf of more than their own specific set of customers (i.e., the whole state) and, as a result, they have the incentive and ability to artificially suppress ICAP market prices.

2. Renewable Resources Exemption MW Cap

a. Requests for Rehearing

■ NY Parties argue that the February 2020 Order errs in limiting the renewable resources exemption more stringently than was required by the Complaint Order, which is contrary to what is required for the Commission to consider in a compliance proceeding.⁴⁵ According to NY Parties, NYISO’s April 2016 Compliance Filing complied with the Complaint Order’s directives to exempt from NYISO’s buyer-side market power mitigation rules renewable resources that have “limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices” and to limit the total amount of otherwise eligible renewable resources that could claim

⁴³ See *supra* note 29.

⁴⁴ See *supra* note 30.

⁴⁵ NY Parties Rehearing Request at 4 (citing *Kern River Gas Transmission Co.*, 133 FERC ¶ 61,162, at P 87 (2010)).

the exemption.⁴⁶ NY Parties state that NYISO, in order to strike a balance between the potential risk of ICAP market suppression and not to impede the entry of renewable resources unlikely to be used for artificial price suppression, proposed to cap the exemption at 1,000 MW per Class Year. In performing that balance, NY Parties assert, NYISO examined historical conditions within the mitigated capacity zones and whether entry at those levels would be likely to yield artificial price suppression in those zones. Therefore, NY Parties argue that the Commission should have accepted the proposed 1,000 MW cap, and the Commission's rejection of the proposed cap is arbitrary and capricious.⁴⁷

■ NY Parties also argue that the February 2020 Order errs in reframing the purpose of the renewable resources exemption MW cap and “shrinking the exemption granted in the Complaint Order.”⁴⁸ NY Parties argue that the Commission, in the Complaint Order, correctly exempted resources whose characteristics make them ineffective tools for exercising buyer-side market power, and capped the exemption to “further limit” the potential for “artificial price suppression.”⁴⁹ However, NY Parties assert, the February 2020 Order reflects a different view, one aimed at limiting renewable resources' effect on NYISO ICAP prices regardless of whether the effect is artificial or natural.⁵⁰ NY Parties contend that a more restrictive MW cap amounts to a price support aimed at maintaining high prices despite increase supply of renewable resources. Therefore, NY Parties assert that the February 2020 Order suggests that the renewable exemption is just and reasonable only if limited so that it will not “significantly impact market prices.”⁵¹ Similarly, NY Parties argue that such a limitation to cut back on the renewable exemption wrongly interferes with New York's authority to promote renewable generation by undermining New York's determination to rely increasingly on renewable generation resources and impermissibly interfering with states' authority to determine the mix of generation sources.⁵² NY Parties argue that, if New York State decides to introduce additional renewable resources into its market, knowing that adding supply in a market

⁴⁶ NY Parties Rehearing Request at 4-5.

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*

⁴⁹ *Id.* at 6. (citing Complaint Order, 153 FERC ¶ 61,022 at P 51).

⁵⁰ *Id.* at 9-10.

⁵¹ *Id.* at 9.

⁵² *Id.* at 10-11.

lowers prices, the price drop cannot be said to be artificial or unjust and unreasonable.⁵³ NY Parties add that the impact that state generation choices may have on the wholesale market is the “product of the ‘congressionally designed interplay between state and federal regulation’ and the natural result of a system in which regulatory authority is divided between federal and state government.”⁵⁴

■ NY Parties also argue that decreasing the renewable resources exemption will result in unjust and unreasonable wholesale rates.⁵⁵ NY Parties posit that if the Commission does not allow NYISO to accept low-cost offers for ICAP at auction, then NYISO will be required to buy expensive fossil-fueled capacity instead.⁵⁶ NY Parties argue that this goes against the Commission’s charge to afford consumers “a complete, permanent, and effective bond of protection from excessive rates and charges.”⁵⁷

b. Commission Determination

■ We disagree with NY Parties’ request for rehearing on this issue. We find that the Commission properly considered whether NYISO’s 2016 Compliance Filing complied with the directives contained in the Complaint Order. In the Complaint Order, the Commission found that it was “unjust, unreasonable, or unduly discriminatory or preferential to apply NYISO’s buyer-side market power mitigation rules to certain narrowly defined renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices,”⁵⁸ and, to further limit any risk of price suppression, the Commission required NYISO to “limit the total amount of these renewable resources—in the form of a megawatt cap—that may receive the renewable resources exemption required herein.”⁵⁹ The Commission also directed NYISO to “work with its stakeholders to develop a proposed cap on the total amount of renewable resources eligible for the exemption based

⁵³ *Id.* at 16.

⁵⁴ *Id.* at 17 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016)).

⁵⁵ *Id.* at 18.

⁵⁶ *Id.* at 18-19.

⁵⁷ *Id.* at 19 (citing *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959)).

⁵⁸ Complaint Order, 153 FERC ¶ 61,022 at P 2.

⁵⁹ *Id.* P 47.

on NYISO's mitigated capacity zones."⁶⁰ Based on these requirements, the Commission appropriately denied NYISO's proposed MW cap.⁶¹ NYISO proposed a broad MW cap based on historical entry of all resource types across the entire NYCA, which is inconsistent with the Complaint Order's specific directive to propose a MW cap that is narrowly tailored to the mitigated capacity zones. Although NY Parties contend that the 1,000 MW cap represents a reasonable balance between mitigating the potential risk of ICAP market suppression and impeding the entry of renewable resources, NYISO's proposal was not narrowly tailored to the mitigated capacity zones per the compliance directive. Therefore, we continue to reach the same result as the February 2020 Order and find that NYISO's April 2016 filing did not fully comply with the directives of the Complaint Order.

■ We also are not persuaded by NY Parties' argument that the February 2020 Order erroneously reframes the purpose of the renewable resources exemption MW cap. NY Parties argue that the Commission adopted a more restrictive MW cap in the February 2020 Order, resulting in a limited renewable resources exemption, which would maintain high prices despite an increasing supply of renewable resources. They argue that the Commission's actions wrongly interfere with New York State's authority to promote renewable generation. We disagree. First, we disagree with the assertion that the February 2020 Order results in a more restrictive exemption cap than the cap that was contemplated in the Complaint Order. At issue in the February 2020 Order was whether NYISO's April 2016 Compliance Filing met the directives contained in the Complaint Order. Finding that NYISO's proposed 1,000 MW cap did not comply with this directive, the Commission denied NYISO's proposal and required NYISO to propose a MW cap that was (1) narrowly tailored to the mitigated capacity zones and not based on the entire NYCA; and (2) based on UCAP rather than ICAP. The requirement in the February 2020 Order was neither contingent on a specific resource mix, nor did it require that NYISO propose a more restrictive cap than was required by the Complaint Order.⁶² The underlying purpose of the MW cap remains unchanged and is appropriately focused on mitigating the suppression of ICAP market prices caused by out-of-market actions.

■ We further disagree that the February 2020 Order interferes with New York State's authority to determine the mix of generation resources in NYCA. The

⁶⁰ *Id.* P 51.

⁶¹ February 2020 Order, 170 FERC ¶ 61,121 at P 28.

⁶² We note that this is illustrated by the fact that NYISO's most recent compliance filing in this proceeding (April 2020 Compliance Filing), which is discussed in more detail below, does not reflect a cap that is necessarily more restrictive than the cap proposed in NYISO's April 2016 Compliance Filing.

Commission does not improperly intrude on the states' authority to determine its energy resource mix and the development of new generation merely by implementing wholesale rules affecting matters within the states' jurisdiction.⁶³ We recognize that the FPA reserves to the state decisions concerning generation; but the FPA provides the Commission with the jurisdiction and authority to regulate rates for wholesale sales by those generation resources and we are obligated to ensure that such rates are just and reasonable and not unduly discriminatory. Indeed, the Commission noted, in the February 2020 Order, "it is the MW cap limitation that will make [NYISO's] tariff revision just and reasonable."⁶⁴ We find that the Commission did not take any action in the February 2020 Order to divest the New York State of its jurisdiction over generation facilities or to promote renewable generation. We also find that the Commission did not require NYISO to purchase capacity from a specific fuel source type, as NY Parties assert. Therefore, we find that it was within the Commission's jurisdiction to require NYISO to implement a cap meeting the requirements established in the February 2020 Order.

III. NYISO's April 2020 Compliance Filing

■ On April 7, 2020, NYISO submitted proposed revisions to its Services Tariff to address the Commission's directives in the February 2020 Order related to NYISO's renewable resources exemption. Specifically, NYISO proposes to calculate a MW cap for each mitigated capacity zone based on a formula, referred to herein as the Renewable Exemption Limit, rather than a static cap. NYISO states that using a formula to calculate

⁶³ See, e.g., *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016) ("When FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers—in short, when it takes virtually any action respecting wholesale transactions—it has some effect . . . on retail rates. That is of no legal consequence."); *ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 170 (2011), *reh'g denied*, 138 FERC ¶ 61,027 (2012), *aff'd sub nom. New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 295 (D.C. Cir. 2014)(finding that load serving entities are "free to shape their portfolios as they choose . . . 'provided these new resources clear the auction,'" and approving the Commission's discretion to determine that "encouraging renewable energies was less important than allowing [] out-of-market entrants to depress capacity prices."); *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (finding that the Commission's Installed Capacity Requirement affects capacity prices but not necessarily new capacity construction and, therefore, the Commission does not engage in impermissible regulation of generation facilities when it sets the price of capacity to incentivize procurement of resources adequate to meet forecasted peak load).

⁶⁴ February 2020 Order, 170 FERC ¶ 61,121 at P 67.

the Renewable Exemption Limit, as opposed to a static MW cap, will allow for a “dynamic limit that reflects the market conditions occurring in each mitigated capacity zone at the time NYISO applies the Renewable Exemption Limit.”⁶⁵ NYISO further states that the proposed Renewable Exemption Limit is narrowly tailored to the mitigated capacity zones because it: (1) accounts for each of the factors relevant to determining the capacity price impacts of renewable resource entry, such as retirements and load changes, as those factors vary over time; and (2) ensures that the renewable resources exemption will not significantly reduce capacity market prices.⁶⁶

■ NYISO elaborates that under its proposed formula, the Renewable Exemption Limit for each mitigated capacity zone will be equal to the greater of: (a) the UCAP MW associated with NYISO’s calculation of the Minimum Renewable Exemption Limit that would reduce the market price forecast for the mitigated capacity zone by no more than \$0.50/kW-month; or (b) the sum of: (1) the UCAP MW associated with the Change in Forecasted Peak Load; (2) the UCAP MW value identified by NYISO associated with the Incremental Regulatory Retirements; (3) the Unforced Capacity Reliability Margin⁶⁷ Impact of the Qualified Renewable Exemption Applicants in the Class Year Study, Additional System Deliverability Upgrade (SDU) Study, or Expedited Deliverability Study; and (4) the UCAP MW in the Renewable Exemption Bank for each Mitigated Capacity Zone.⁶⁸

■ NYISO states that it is also proposing to modify the procedures that govern the revocation provision to comply with the Commission’s February 2020 Order. Specifically, these modifications would provide an opportunity for an exemption holder to explain to NYISO why revocation may be inappropriate before NYISO revokes a renewable resources exemption.⁶⁹ NYISO also proposes ministerial and clarifying

⁶⁵ April 2020 Compliance Filing at 5.

⁶⁶ *Id.* at 7.

⁶⁷ NYISO proposes to define Unforced Capacity Reserve Margin, referred to herein as URM, as “the megawatt value calculated by the ISO when converting the (a) the Installed capacity Reserve Margin (IRM) for the NYCA or (b) the Locational Minimum Installed Capacity Requirement (LCR) for a given Locality within the NYCA into UCAP terms using ICAP to UCAP conversion factors consistent with the corresponding resource adequacy study.” Proposed Services Tariff § 23.2.1.

⁶⁸ April 2020 Compliance Filing at 6-7.

⁶⁹ *Id.* at 19.

revisions to relevant Services Tariff language to account for changes occurring in the time between the April 2016 and April 2020 compliance filings.⁷⁰

A. Notice of Filing and Responsive Pleadings

■ Notice of the Compliance Filing was published in the *Federal Register*, 85 Fed. Reg. 20,685 (April 14, 2020), with interventions and protests due on or before April 28, 2020. Public Citizen, Inc., American Wind Energy Association, Equinor Wind, Solar Energy Industries Association, Natural Resources Defense Council, the City of New York, the MMU, Helix Ravenswood, LLC (Ravenswood), Indicated New York Transmission Owners (Indicated NYTOs), and NYSERDA filed motions to intervene. The New York Commission filed a notice of intervention, and together with NYSERDA, and the City of New York (collectively, New York Entities) filed comments. The MMU and Clean Energy Advocates⁷¹ filed comments. Ravenswood filed a limited protest. Indicated NYTOs⁷² and Independent Power Producers of New York (IPPNY) filed protests.

■ On May 13, NYISO, IPPNY, and Equinor Wind filed answers.

B. Procedural Matters

■ Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷³ the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

■ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁷⁴ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority.

⁷⁰ *Id.* at 1-2.

⁷¹ Clean Energy Advocates include: the American Wind Energy Association, the Alliance for Clean Energy New York, the Natural Resources Defense Council, Sustainable FERC Project, and the Solar Council.

⁷² Indicated NYTOs include: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., Power Supply Long Island, and Rochester Gas and Electric Corporation.

⁷³ 18 C.F.R. § 385.214 (2019).

⁷⁴ 18 C.F.R. § 385.213(a)(2).

We accept NYISO's, IPPNY's, and Equinor Wind's answers because they have provided information that assisted us in our decision-making process.

C. Substantive Matters

■ We accept, subject to condition, NYISO's April 2020 Compliance Filing to implement its renewable resources exemption, with the conditionally accepted Services Tariff revisions to be effective for the Class Year 2019. We direct NYISO to submit a further compliance filing within 45 days of the date of this order, as discussed below. Unless otherwise discussed below, we accept NYISO's filing as in compliance with the February 2020 Order.

1. Incremental Regulatory Retirement

a. Incremental Regulatory Retirement Definition

i. April 2020 Compliance Filing

■ NYISO states that the Renewable Exemption Limit formula would account for "Incremental Regulatory Retirements," which is intended to reflect incremental retirements attributable to "direct" regulatory action that has taken place since the prior study period. NYISO states that the core concern associated with State policies that result in new entry of renewable energy resources is that they result in an out-of-market supply increase that can depress capacity prices. NYISO explains that its proposal for Incremental Regulatory Retirements recognizes that when the State takes out-of-market actions that reduce supply, these actions offset the effects of the renewable resource policies that increase supply.⁷⁵ According to NYISO, it is the net effect of State policy on supply in the capacity market that matters, which is the principle underlying the Competitive Auctions with Sponsored Policy Resources (CASPR) construct that the Commission accepted in ISO-NE.⁷⁶ NYISO contends that it is important that Incremental Regulatory Retirements only include retirements that are substantially caused by changes in regulatory policies or regulations, so NYISO does not propose to include any market exit that is a result of changes in market conditions or fluctuations that render a resource uneconomic. NYISO further elaborates that it proposes to have the Incremental Regulatory Retirements component only comprise those retirements where a

⁷⁵ April 2020 Compliance Filing at 8.

⁷⁶ *Id.* (citing *ISO New England, Inc.*, 162 FERC ¶ 61,205 (2018)).

public policy decision or action external to the market contributes materially to the retirement.⁷⁷

■ Proposed section 23.4.5.7.13.5.3 of NYISO's Services Tariff states that Incremental Regulatory Retirements:

[S]hall include the incrementally new MW of Retirements forecasted in accordance with . . . the Services Tariff that have retired, or are planning to permanently cease operation, in order to comply with or in response to new or amended regulations or statutes, or other regulatory or related action, including but not limited to those that impact (i) Generator emissions, (ii) inability to renew or modify the necessary operating permits, (iii) availability of fuel supply, (iv) assessment of property taxes, and (v) compensation or other incentive outside of the ISO markets received by a Generator that is contingent upon its permanently ceasing operation. In order for the ISO to identify UCAP MW of Incremental Regulatory Retirements such regulatory action must be a significant factor in the retirement of the Generator (i.e., a factor that contributes materially to the retirement).⁷⁸

ii. Protests and Comments

■ NY Entities, Clean Energy Advocates, and Indicated NYTOs principally argue that the Commission should direct NYISO to modify the UCAP MW value associated with the Incremental Regulatory Retirements to consider all incremental retirements.⁷⁹ Indicated NYTOs contend that limiting Incremental Regulatory Retirements to “those incremental retirements resulting from new or amended regulations or statutes, or other regulatory or related action,” is ambiguous and unworkable.⁸⁰ Indicated NYTOs add that the renewable resources exemption should allow Exempt Renewable Technology resources to offset all incremental retirements, as opposed to the subset of retirements

⁷⁷ *Id.* at 8-9.

⁷⁸ See Proposed Services Tariff § 23.4.5.7.13.5.3.

⁷⁹ NY Entities Protest at 5; Clean Energy Advocates Protest at 6; Indicated NYTOs Protest at 9-10.

⁸⁰ Indicated NYTOs Protest at 9.

flagged by NYISO.⁸¹ NY Entities note that nearly all retirement decisions are essentially economic, and that setting a discretionary standard for NYISO to distinguish between the reasons for a retirement would add unnecessary uncertainty and risk for preferential treatment to the process.⁸²

■ If, however, the Commission decides to accept NYISO's proposal to only use Incremental Regulatory Retirements in its proposed Renewable Exemption Limit, Indicated NYTOs and Clean Energy Advocates request a series of clarifications and modifications to NYISO's proposed definition and use of Incremental Regulatory Retirements. Indicated NYTOs first ask that the Commission direct NYISO to amend "new or amended regulations or statutes" to "any regulations or statutes."⁸³ Indicated NYTOs explain that a key event for the purpose of the renewable resources exemption is not when a regulation or statute is amended, but when a retirement occurs and how much UCAP was provided by retiring resources.⁸⁴ To illustrate their point, Indicated NYTOs provide the example of Indian Point Units 2 and 3.⁸⁵ Indicated NYTOs point out that, while the agreement to retire the units was reached in 2017, the actual retirement of the units will not take place until 2020 and 2021.⁸⁶ According to Indicated NYTOs, it would run contrary to the purpose of incorporating the impact of retirements on the supply of UCAP in the Renewable Exemption Limit if the retirements are disregarded on the basis that the antecedent regulation is not new enough or not amended.⁸⁷ However, Indicated NYTOs stress that if the Commission accepts NYISO's proposed use of "new or amended," the Commission should direct NYISO to revise the meaning of new or amended and clarify: (1) that the permitted offset of such incremental retirements would apply regardless of when the antecedent law or regulation contributing to retirement was enacted, promulgated or became effective, or whether it was considered in a prior Class

⁸¹ *Id.* at 10.

⁸² NY Entities Protest at 7.

⁸³ Indicated NYTOs Protest at 10.

⁸⁴ *Id.* at 10-11.

⁸⁵ *Id.* at 11.

⁸⁶ *Id.*

⁸⁷ *Id.*

Year Study; (2) whether NYISO can include retirements attributable to the Peaker Rule in the Formula.⁸⁸

■ Clean Energy Advocates argue that NYISO should specify a broader definition of “direct” regulatory action. Specifically, Clean Energy Advocates state that NYISO should broaden the “regulations or statutes” as used in the definition of Incremental Regulatory Retirement.⁸⁹ In support of their argument, Clean Energy Advocates explain that “much of the electric industry restructuring that has occurred in New York took place through orders of the New York Public Service Commission, and not through regulations or statutes.”⁹⁰ Noting this, Clean Energy Advocates suggest that NYISO should adopt language similar to that used in NYISO’s transmittal letter accompanying its compliance filing. In the transmittal letter, NYISO refers to “a public policy decision or action external to the market,” and to “a new regulatory action.”⁹¹

■ NY Entities and Clean Energy Advocates specify that Incremental Regulatory Retirements should include seasonally deactivated resources.⁹² According to NY Entities, NYISO’s intention to capture market exit that is the result of new regulatory action is “unworkable and invites manipulation and gaming.”⁹³ Clean Energy Advocates contend that, although the plants are not technically retired, the effect of unavailable units on summer capacity prices are the same as if they were retired.⁹⁴ Clean Energy Advocates add that NYISO’s proposed treatment risks incenting the exercise of market power by incumbent generation owners with multiple generation resources who can keep otherwise uneconomic plants open during the winter because the summer capacity price increase would boost summer capacity revenues for the owner’s portfolio.⁹⁵ NY Entities argue that owners with existing units that would be negatively impacted by a larger renewable resources exemption may try to avoid categorizing themselves as retired to

⁸⁸ *Id.* at 12.

⁸⁹ Clean Energy Advocates Protest at 8.

⁹⁰ *Id.*

⁹¹ *Id.* (citing April 2020 Compliance Filing at 8-9).

⁹² NY Entities Protest at 5.

⁹³ *Id.* at 6.

⁹⁴ Clean Energy Advocates Protest at 7.

⁹⁵ *Id.*

avoid being included in NYISO's calculation of the Minimum Renewable Exemption Limit.⁹⁶

■ Indicated NYTOs disagree with NYISO's proposal to only include generators that have retired or are planning to permanently cease operation when accounting for reductions in UCAP supply that may be covered by resources receiving the renewable resources exemption.⁹⁷ Indicated NYTOs explain that rather than electing to retire permanently and completely as an immediate response to such regulations, a generator might decide to enter an ICAP Ineligible Forced Outage and not fully retire until later, when the regulation may be deemed by NYISO or the MMU as no longer new, or an incumbent generator could adopt operational limits that amount to a seasonal derating or a partial deactivation.⁹⁸ Indicated NYTOs claim that it would be unreasonable to exclude the reductions in the supply of UCAP associated with the resources that may not operate in the summer for purposes of calculating the Renewable Exemption Limit applicable to the summer capability period.⁹⁹ Further, Indicated NYTOs' allege that the Renewable Exemption Limitation should be based upon the reduction in the supply of UCAP, rather than the retirement of specific generators because the focus should be on the withdrawal of supply.¹⁰⁰

■ Ravenswood contends that NYISO should specify that generators that are out of service at the time of retirement are expressly excluded from the Incremental Regulatory Retirement component of the Renewable Exemption Limit. Specifically, Ravenswood states that the Commission should direct NYISO to revise its proposal to state that units retiring after being either mothballed or placed into an Ineligible ICAP Forced Outage status will be excluded from Incremental Regulatory Retirements.¹⁰¹

■ IPPNY cites NYISO's proposed Services Tariff section 23.4.5.7.13.5.3, and argues that NYISO's proposed language is silent as to whether NYISO will ensure that Incremental Regulatory Retirements exclude a generation owner's economic decisions.¹⁰²

⁹⁶ NY Entities Protest at 7.

⁹⁷ Indicated NYTOs Protest at 12.

⁹⁸ *Id.* at 12-13.

⁹⁹ *Id.* at 13.

¹⁰⁰ *Id.*

¹⁰¹ Ravenswood Protest at 19. ¹⁰²

IPPNY Protest at 7.

IPPNY proposes that NYISO revise the relevant portion of section 23.4.5.7.13.5.3 to explicitly state: “Incremental Regulatory Retirements shall not encompass market exit that is a result of changes in market conditions or fluctuations that render a resource uneconomic.”¹⁰³

■ IPPNY and Ravenswood add that the Commission should direct NYISO to propose tariff language requiring NYISO to perform an economic analysis of retiring generators—to be provided to the MMU as a part of NYISO’s proposed consultation process with the MMU—before deciding whether a retirement qualifies as an Incremental Regulatory Retirement.¹⁰⁴ IPPNY further asks that the Commission require NYISO to clarify that regulatory changes that are applicable to all business in New York State are part of the normal costs of doing business. According to IPPNY, any retirement caused by an increase in operating costs related to this kind of regulatory change should not be classified as an Incremental Regulatory Retirement.¹⁰⁵ Ravenswood asks that the Commission direct NYISO to either explain why retirements resulting from the “assessment of property taxes” should qualify as Incremental Regulatory Retirements, or eliminate this aspect of the definition.¹⁰⁶ IPPNY also argues that the Commission should direct NYISO to clarify that Incremental Regulatory Retirements do not include proposed retirements that trigger a reliability need if a renewable resource is selected to meet the reliability need.¹⁰⁷ IPPNY states that any other approach would inappropriately increase the number of renewable MWs exempted.¹⁰⁸

iii. Answers

■ NYISO states that the principle underlying its proposed treatment of retirements is that buyer-side market power mitigation rules should protect the market from State actions that create an “artificial supply-demand disequilibrium.”¹⁰⁹ IPPNY states that the proposal to calculate the Renewable Exemption Limit based on all retirements is specious, and contends that, if implemented, would allow excessive quantities of

¹⁰³ *Id.* at 8.

¹⁰⁴ IPPNY Protest at 8; Ravenswood Protest at 20. ¹⁰⁵

IPPNY Protest at 8.

¹⁰⁶ Ravenswood Protest at 20.

¹⁰⁷ IPPNY Protest at 12.

¹⁰⁸ *Id.*

¹⁰⁹ NYISO Answer at 5.

subsidized resources to enter the capacity market as price takers, thereby holding market prices at low levels indefinitely.¹¹⁰ IPPNY warns that expanding Incremental Regulatory Retirements to include all retirements would result in “large quantities of subsidized resources” overwhelming “the supply-demand balance in the capacity market,” resulting “in substantial artificial capacity surpluses that may not be absorbed for several years.”¹¹¹ NYISO explains that “[u]ltimately, it is the net effect of State policy on supply in the capacity market that matters . . . ,” and points out that if a generator is uneconomic and unable to recover its costs sufficiently via the markets, regardless of State action, its exit is expected and should not count as an offset to non-market based entry.¹¹² NYISO adds that only State actions that reduce surplus supply truly ameliorate the price suppressive concerns associated with State-subsidized entry.¹¹³

■ Equinor Wind agrees with protesting parties that NYISO’s proposal should be modified to ensure that all retirements are considered when calculating the Renewable Exemption Limit.¹¹⁴ Equinor Wind states that it is important to ensure that the application of mitigation is based on transparent and objective criteria. Equinor Wind, however, contends that NYISO’s proposal for limiting the inclusion of retirements in its proposed Renewable Exemption Limit is dependent on NYISO’s and the MMU’s determinations.¹¹⁵ Equinor Wind expresses concerns about gaming, and contends that NYISO’s proposal would effectively encourage generator owners to take steps to avoid having their retirement count toward the Renewable Exemption Limit in order to artificially increase prices to benefit other resources in their portfolio.¹¹⁶

■ IPPNY states that it disagrees with Indicated NYTO’s proposal to add the retired unit Indian Point Unit 2’s capacity to the Renewable Exemption Limit because this capacity was included in NYISO’s 2017 Class Year.¹¹⁷ IPPNY adds that NYISO’s proposed tariff clearly excludes the Indian Point Units 2 and 3 retirements from being

¹¹⁰ IPPNY Answer at 3.

¹¹¹ *Id.* at 7.

¹¹² NYISO Answer at 5.

¹¹³ *Id.* at 6.

¹¹⁴ Equinor Wind Answer at 3. ¹¹⁵

Id. at 17.

¹¹⁶ *Id.* at 18

¹¹⁷ IPPNY Answer at 9.

considered Incremental Regulatory Retirements because the Renewable Exemption Bank will not include retirements that were addressed in prior Class Years.¹¹⁸ IPPNY argues that including Indian Point Units 2 and 3 could cause the G-J capacity market to move almost 1,000 MW beyond the zero crossing point of the G-J ICAP Demand Curve.¹¹⁹

■ NYISO argues that it is reasonable to exclude seasonally deactivated resources from the Renewable Exemption Limit because these resources will provide capacity for a portion of the year.¹²⁰ NYISO notes that to the extent these units are truly uneconomic, they will exit the market permanently and will eventually be included in the extent they qualify as Incremental Regulatory Retirements.¹²¹ According to IPPNY, protesting parties requesting the inclusion of units that do not operate in the summer fail to recognize that NYISO is expected to reflect the reduced summer average UCAP ratings of suppliers engaging in seasonal shutdowns in its Part A and Part B mitigation exemption tests.¹²² IPPNY contends that deeming suppliers that choose to cease operating during the summer months to be Incremental Regulatory Retirements would impermissibly suppress capacity prices during the months in which the supplier operates.¹²³ NYISO states that until these units permanently retire, they will be removed from the forecast used to evaluate the Part A and Part B mitigation exemption tests.¹²⁴ NYISO states that taking a seasonal outage is a legitimate regulatory compliance plan and states that the near-term risk posed by gaming stratagems related to these units appears to be low. NYISO explains that, to date, it is not aware of any instances in which a market participant has engaged in gaming associated with taking otherwise permissible seasonal outages.¹²⁵

■ NYISO explains that existing processes already require NYISO to evaluate units that are mothballed or placed in an Ineligible ICAP Forced Outage status and evaluate if they would become economic during the forecast period, in which case they would be

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 7-8.

¹²⁰ NYISO Answer at 7.

¹²¹ *Id.*

¹²² IPPNY Answer at 11-12. ¹²³

Id. at 3-4.

¹²⁴ NYISO Answer at 7.

¹²⁵ *Id.* at 8.

counted as existing units for buyer-side market power mitigation purposes.¹²⁶ However, NYISO further explains that if these units are forecasted to be uneconomic to return, or to continue operation, they would be included as a retirement under the buyer-side market power mitigation rules, and if the criteria for Incremental Regulatory Retirements are met, they would, and should, be included as Incremental Regulatory Retirements.¹²⁷ NYISO also states that NYISO will adjust the Renewable Exemption Bank to account for prior forecasts of retirements that did not materialize.¹²⁸ According to NYISO, this approach, combined with the Short-Term Reliability Process will ensure that Incremental Regulatory Retirements do not include resource retirements that are retained under a reliability-must-run (RMR) agreement.¹²⁹

■ NYISO states that it is already clear from the plain language included in the April 2020 Compliance Filing that purely market-based economic retirements will be excluded from the definition of Incremental Regulatory Retirements.¹³⁰ Therefore, NYISO argues, there is no need to add IPPNY's suggested language to the language proposed in its compliance filing. NYISO also argues that the Commission should reject IPPNY's suggestion that the Commission require NYISO to perform an economic analysis of retiring generators before determining whether the retirement qualifies as an Incremental Regulatory Retirement.¹³¹ NYISO explains that its proposal works in conjunction with existing tariff mechanisms to establish what subset of retirements would be included as Incremental Regulatory Retirements and notes that the provisions already provide for the economic evaluation IPPNY seeks.¹³² NYISO points out, for example, that section 23.4.5.6.1 of its Services Tariff empowers NYISO to conduct a physical withholding review whenever a market participant seeks to remove capacity from a mitigated capacity

¹²⁶ *Id.* at 13.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 13-14.

¹³⁰ *Id.* at 8.

¹³¹ *Id.*

¹³² *Id.* at 9-10.

zone.¹³³ NYISO adds that its recently adopted short-term reliability process requires resources to submit all relevant economic data for NYISO's use during review.¹³⁴

■ NYISO continues that Incremental Regulatory Retirements will not include units that are either found be needed for reliability or that are operating under an RMR agreement.¹³⁵ NYISO explains that Services Tariff sections 23.4.5.7.15.6 and 23.4.5.7.15.7 specify that various resources needed for reliability will be "Excluded Units" for buyer-side market power mitigation forecast purposes.¹³⁶ NYISO adds that when proposed generator retirements require a temporary RMR agreement, they are not included in the buyer-side market power mitigation forecast. Therefore, NYISO states, these retirements will not be counted in the determination of Incremental Regulatory Retirements.¹³⁷

■ Indicated NYTOs reiterate that all anticipated retirements and long-term deactivations should be considered in the Renewable Exemption Limit. However, if the Commission accepts NYISO's proposal, Indicated NYTOs contend that the Incremental Regulatory Retirement definition should be clarified.¹³⁸ Indicated NYTOs further reiterate that retirement decisions are complex and can have various interwoven assumptions and considerations unique to the owner(s) that involve the application of considered business judgment rather than textbook economics.¹³⁹ Indicated NYTOs also respond to IPPNY's statements regarding Part A exemptions and claim that it is not sufficient to reflect seasonal UCAP withdrawals only in examination of Part A exemptions because Part A exemptions are only available when the ICAP market is tight.¹⁴⁰

■ Additionally, Indicated NYTOs reiterate concerns regarding the likelihood of gaming if the UCAP MWs withheld from the ICAP market due to regulatory compliance

¹³³ *Id.* at 9.

¹³⁴ *Id.* at 9-10.

¹³⁵ *Id.* at 10.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Indicated NYTOs Answer at 4-8. ¹³⁹

Id. at 4-5.

¹⁴⁰ *Id.* at 9.

are not included in the Renewable Exemption Limit.¹⁴¹ Indicated NYTOs also contend that no such gaming could have been observed because the opportunity for gaming would arise only if the Commission were to accept NYISO's proposed Incremental Regulatory Retirement component. Indicated NYTOs further contend that while generation retirements are examined by NYISO for potential exercise of market power, there is no mechanism under the Services Tariff for NYISO to identify attempts to exercise market power by not retiring a unit.¹⁴²

iv. Commission Determination

■ We find that the Incremental Regulatory Retirement component of the Renewable Exemption Limit, as proposed in NYISO's April 2020 Compliance Filing, complies with the February 2020 Order. We first find that, as required by the February 2020 Order, the proposed Incremental Regulatory Retirement component is both expressed in UCAP and is narrowly tailored to the mitigated capacity zones. We also agree with NYISO that the proposed definition of Incremental Regulatory Retirement appropriately recognizes that out-of-market actions that reduce the supply of renewable resources in the capacity market offset the effects of renewable resource policies that increase supply of renewable resources in the capacity markets. Therefore, we find that the Incremental Regulatory Retirements component of NYISO's proposed Renewable Exemption Limit is mindful of the relationship between: (1) the size of the MW cap; and (2) the limit the MW cap imposes on the renewable resources exemption's impact to market prices, as required by the February 2020 Order.

■ We find that NYISO's proposal to limit the Incremental Regulatory Retirement component of the Renewable Exemption Limit to those units that NYISO determines qualify under its proposed definition of Incremental Regulatory Retirements complies with the requirements of the February 2020 Order. We disagree with protesters that NYISO should revise its proposal to include all retirements, as opposed to Incremental Regulatory Retirements, in the Renewable Exemption Limit. We find that the inclusion of all retirements would result in a MW cap that fails to represent the offsetting effect of out-of-market subsidies impacting entry. This result would be inconsistent with the requirements of the February 2020 Order.

■ We also find that NYISO's decision to exclude seasonally deactivated resources from its proposed definition of Incremental Regulatory Retirements component complies with the directives of the February 2020 Order. We therefore disagree with protesters that the Incremental Regulatory Retirement component should include seasonally deactivated resources. We agree with NYISO that those resources should not qualify as

¹⁴¹ *Id.* at 8-9.

¹⁴² *Id.* at 9.

Incremental Regulatory Retirements because those resources are not retired and therefore retain the ability to participate in any of NYISO's monthly auctions, even if they choose not to participate during certain months. Further, we agree with NYISO that taking a seasonal outage can be the result of a legitimate regulatory compliance plan. NYISO states that, should a unit choose to retire, NYISO would determine, in consultation with the MMU, whether the unit should be counted as an Incremental Regulatory Requirement. Therefore, we see no reason to delay the implementation of NYISO's Renewable Exemption Limit, as proposed, because of potential gaming-related concerns.

■ Additionally, we disagree with Ravenswood that NYISO's proposed Incremental Regulatory Retirement component needs to be revised to clarify that units that are mothballed or placed into an Ineligible ICAP Forced Outage status will be excluded. We find that NYISO has provided sufficient clarification on this point. As NYISO explains, the existing Tariff already requires NYISO to evaluate units in a mothballed or Ineligible ICAP Forced Outage status. Specifically, NYISO evaluates whether units would become economic during the forecast period. If so, such units would be counted as existing units for buyer-side market power mitigation purposes and thus excluded from the Incremental Regulatory Retirements. NYISO also evaluates whether units are forecasted to be uneconomic to return, or to continue operation. If so, such units would be included as a retirement under the buyer-side market power mitigation rules, and, if the units' retirement meets the criteria for Incremental Regulatory Retirements, then they would, and we agree should, be included as Incremental Regulatory Retirements. We also disagree with Indicated NYTOs that NYISO should take into account the reduction in supply of UCAP, rather than whether a given generation unit is being permanently and formally retired. We find that NYISO's proposal properly limits its calculation of retirements included in the Renewable Exemption Limit to those units meeting the proposed definition of Incremental Regulatory Retirements of "hav[ing] retired, or are planning to permanently cease operation."¹⁴³

■ We further find that NYISO's proposal to limit the UCAP MW of Incremental Regulatory Retirements to those retirements for which "regulatory action [is] a significant factor in the retirement of the Generator (i.e., a factor that contributes materially to the retirement)" complies with the requirements of the February 2020 Order.¹⁴⁴ We therefore find that it is not necessary for NYISO to revise its proposal to include a broader definition of "direct" regulatory action. We find, contrary to Clean Energy Advocates' arguments, that NYISO's proposed tariff language is sufficiently broad so as to include a public policy decision or action external to the market and a new

¹⁴³ Proposed Services Tariff § 23.4.5.13.5.3.

¹⁴⁴ *Id.*

regulatory action, as described in NYISO's April 2020 Compliance Filing.¹⁴⁵ We similarly deny as unnecessary IPPNY's request to direct NYISO to revise the relevant portion of section 23.4.5.7.13.5.3 of its Services Tariff to explicitly state that Incremental Regulatory Retirements shall not encompass market-based economic retirements. We agree with NYISO that the plain language of NYISO's proposal Incremental Regulatory Retirements clearly includes "... incrementally new MW of Retirements forecasted in accordance with ... the Services Tariff that have retired, or are planning to permanently cease operation, in order to comply with or in response to new or amended regulations or statutes, or other regulatory or related action."¹⁴⁶ Therefore, we find that the addition of IPPNY's requested language is unnecessary to comply with the February 2020 Order.

■ We also find that NYISO's proposal complies with the requirements of the February 2020 Order absent a mandatory economic analysis of retiring generators before determining whether a retirement qualifies as an Incremental Regulatory Retirement. As NYISO points out, existing provisions in NYISO's tariff already provide mechanisms that will enable NYISO to determine which retirements should be considered Incremental Regulatory Retirements. We therefore decline to require NYISO to perform an economic analysis as IPPNY and Ravenswood request.¹⁴⁷ Moreover, we find that directing NYISO to perform an economic analysis would impose a burden on NYISO to create and perform an economic analysis that may unnecessarily replicate existing tariff requirements and cause a delay in NYISO's determination of the Renewable Exemption Limit and/or the Class Year process.

■ We also deny IPPNY's and Ravenswood's requests to clarify that Incremental Regulatory Retirements do not include proposed retirements that trigger a reliability need if a renewable resource is selected to meet the reliability need. We find that NYISO's proposal complies with the February 2020 Order's directives and that NYISO has provided sufficient justification to explain that renewable resources selected to meet the reliability need will not be included in the definition of Incremental Regulatory Retirements. We agree with NYISO that its proposal is appropriately structured to work with NYISO's existing tariff mechanisms to ensure that Incremental Regulatory Retirements will not include units that are either found to be needed for reliability or that are operating under an RMR Agreement.

■ We also find that NYISO's proposal complies with the requirements of the February 2020 Order absent any modification regarding the regulations and statutes

¹⁴⁵ April 2020 Compliance Filing at 8-9.

¹⁴⁶ Proposed Services Tariff § 23.4.5.13.5.3.

¹⁴⁷ We add that IPPNY and Ravenswood do not describe the economic analysis they seek in any detail.

NYISO considers in determining whether a retirement qualifies as an Incremental Regulatory Retirement. Ravenswood and IPPNY raise additional concerns regarding the inclusion of certain regulations and statutes in NYISO's consideration of whether a retirement qualifies as an Incremental Regulatory Retirement (i.e., the assessment of a unit's property taxes and statewide regulatory changes leading to increased generator costs). We find that, to the extent changes in property tax rates and other statewide regulatory changes directly affect a generator's retirement decisions, they appropriately qualify under NYISO's definition of Incremental Regulatory Retirement. We agree with NYISO that its proposed definition of Incremental Regulatory Retirement will allow for predictable and transparent implementation by NYISO. We find NYISO's proposed formula for calculating a Renewable Exemption Limit, including its definition of Incremental Regulatory Retirements, complies with the February 2020 Order's directives and enables NYISO to capably assess retirements.

■ We find that NYISO's proposal to limit the Incremental Regulatory Retirements component of the Renewable Exemption Limit to retirements that are significantly attributable to new or amended statutes or regulations complies with the directives contained in the February 2020 Order. We disagree with protesters' arguments that the Incremental Regulatory Retirements component should instead capture all retirements significantly attributable to regulations and statutes, regardless of the timing of such retirements in relation to the passage of the relevant regulation or statute. Rather, we find that NYISO's proposal strikes an appropriate balance between specifying the retirements eligible for NYISO's consideration and the burden placed on NYISO to determine which retirements should qualify as Incremental Regulatory Retirements. Absent NYISO's proposed "new or amended" time parameter, we find that the burden on NYISO to determine whether a specific regulation or statute contributed materially to a particular retirement decision would be unreasonably high. Moreover, we note that NYISO's proposal properly enables NYISO to use its discretion as tariff administrator and determine which retirements should be considered Incremental Regulatory Retirements. Therefore, we find that NYISO's requirement to consider only retirements caused by "new or amended" regulations and statutes is appropriate because it provides specific time parameters (i.e., since the prior study period) under which NYISO must analyze the effect of regulations and statutes without creating an undue burden on NYISO in administering its tariff.

b. Commission and MMU Involvement

i. April 2020 Compliance Filing

■ NYISO states that, in order to determine which resources qualify as Incremental Regulatory Retirements, it must weigh the significance of policy and non-policy factors

in retirement decisions.¹⁴⁸ NYISO recognizes that this determination may significantly increase or decrease the Renewable Exemption Limit. In order to ensure that the Incremental Regulatory Retirements component is not construed too broadly, NYISO proposes that it be required to consult with the MMU when determining what retirements qualify as Incremental Regulatory Retirements.¹⁴⁹ NYISO's states that the MMU will also be prescribed reporting and posting obligations, which will provide for greater transparency to stakeholders. NYISO contends that this is consistent with other provisions that require NYISO to consider the MMU's input and authorize the MMU to report on any concerns that it may have with NYISO's conclusions.¹⁵⁰ In the event that the MMU does not endorse NYISO's determinations, NYISO proposes to submit the decision for Commission review and determination.¹⁵¹ NYISO proposed tariff language specifies that:

The ISO filing with FERC will describe the ISO's opinion and recommendation and include the Market Monitoring Unit's written opinion and recommendation. The ISO will request FERC to act on this filing within 60 days and will begin the Initial Decision Period of the Class Year Study, Additional SDU Study, or submit the Class Year Study or Additional SDU Study to the Operating Committee for approval, until FERC acts on the ISO's filing. Once FERC acts on the ISO's filing, the ISO will calculate the Renewable

¹⁴⁸ April 2020 Compliance Filing at 9.

¹⁴⁹ *Id.*

¹⁵⁰ See NYISO, Services Tariff, Attach. H, § 23.4.5.4.3 (requiring NYISO to consult with the MMU on projections of ICAP Spot Auction clearing prices in connection with calculation of physical withholding penalties); *Id.* § 23.4.5.6.1 (requiring NYISO to provide the results of audit of market participant decisions to remove or derate installed capacity from a mitigated capacity zone the MMU for review and comment); *Id.* § 23.4.5.7.2.5 (requiring NYISO to consult with the MMU on price projections and cost calculations regarding application of certain buyer-side market power mitigation exemptions); *Id.* § 23.4.5.7.3.8.2 (requiring the NYISO to consult with the MMU regarding inputs and methodology used to project net energy and ancillary services revenues for unforced capacity deliverability rights); *Id.* § 23.4.5.7.8 (requiring NYISO to consult with the MMU prior to determining whether an existing or proposed generator has commenced construction).

¹⁵¹ April 2020 Compliance Filing at 15.

Exemption Limit using the UCAP MW of Incremental
Regulatory Retirements consistent with the FERC decision.¹⁵²

ii. Protests and Comments

■ NY Entities, Clean Energy Advocates, and Indicated NYTOs argue that NYISO's proposal, if implemented as drafted, would inappropriately put NYISO in the position of making policy determinations as to which retirements are regulatory and which are not.¹⁵³ Indicated NYTOs point out that if NYISO and the MMU are not able to agree on whether a retirement qualifies as an Incremental Regulatory Retirement, the Commission will need to make a decision within 60 days to avoid delaying the Class Year.¹⁵⁴ Indicated NYTOs urge that the Commission should "not accept the invitation to referee disagreements between NYISO and the MMU."¹⁵⁵ Indicated NYTOs also contend that NYISO's proposed process improperly grants the MMU equal status to implement NYISO's Services Tariff, which exceeds the scope of the MMU's mandate.¹⁵⁶ Indicated NYTOs explain that Order No. 719 establishes a limited advisory role for market monitors and that the adjudicatory authority granted to the MMU under NYISO's proposal cannot be construed as falling within any of these functions.¹⁵⁷ According to Indicated NYTOs, the role NYISO's proposal contemplates for the MMU also conflicts with the buyer-side market power mitigation related authority delegated to the MMU.¹⁵⁸ Moreover, Indicated NYTOs add that the proposed MMU role also does not comport

¹⁵² *Id.* See also Proposed Services Tariff § 23.4.5.7.13.5.3.

¹⁵³ NY Entities Protest at 7; Clean Energy Advocates Protest at 6; Indicated NYTOs Protest at 17.

¹⁵⁴ Indicated NYTOs Protest at 18. ¹⁵⁵

Id. at 19.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 20 (citing *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071, at PP 354, 357 (2008) ("Order No. 719"), as amended, 126 FERC ¶ 61,261, order on reh'g, Order No. 719-A, 128 FERC ¶ 61,059 (2009) ("Order No. 719-A"), reh'g denied, Order No. 719-B, 129 FERC ¶ 61,252 (2009) ("Order No. 719-B")).

¹⁵⁸ *Id.* at 20-21 (citing NYISO, Services Tariff, Attach. H, §§ 23.4.5.7.6.8, 23.4.5.7.9.4.2 & 23.4.5.7.10, Attach. O, § 30.4.4).

with the limited role the Commission has permitted for market monitors in the mitigation process.¹⁵⁹

■ Ravenswood supports NYISO's proposed review requirements for determining whether a retirement should be considered an Incremental Regulatory Retirement.¹⁶⁰ However, Ravenswood argues that NYISO's proposal does not provide a clear basis on which NYISO, the MMU, or potentially the Commission would determine whether a retirement should be considered an Incremental Regulatory Retirement.¹⁶¹

iii. Answers

■ NYISO agrees that its proposal for the Commission to resolve disagreements between the MMU and NYISO over retirement determinations is a new procedural feature in its tariff.¹⁶² NYISO, however, disagrees that the compliance filing's proposed process for determining whether a given retirement is an Incremental Regulatory Retirement is problematic.¹⁶³ In support of its proposal, NYISO reasserts that other existing provisions in NYISO's buyer-side market power mitigation rules and parts of NYISO's Services Tariff require NYISO to make substantive determinations based on NYISO's independent expertise and judgment.¹⁶⁴ NYISO adds that the Commission has authorized and, on occasion directed, other ISOs/RTOs to make comparable decisions and argues that these provisions have been found to be consistent with Commission precedent that ensures ISOs/RTOs do not exercise unfettered discretion.¹⁶⁵ NYISO also contends that its proposal is the same kind of consultation that is provided for in other provisions of NYISO's buyer-side market power mitigation rules and other parts of NYISO's tariffs.¹⁶⁶ NYISO likens the proposed relationship between NYISO and the MMU in this context to other buyer-side market power mitigation rule provisions

¹⁵⁹ *Id.* at 20 (citing Order No. 719, 125 FERC ¶ 61,071 at P 128). ¹⁶⁰

Ravenswood Protest at 19.

¹⁶¹ *Id.*

¹⁶² NYISO Answer at 16.

¹⁶³ *Id.* at 14.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 14-15.

¹⁶⁶ *Id.* at 16.

requiring the MMU to post a report on its views.¹⁶⁷ IPPNY asserts that NYISO is capable of tracking regulatory actions that force retirement or cause significantly increased costs that result in retirement.¹⁶⁸ IPPNY also claims that NYISO can “easily perform” an economic test to determine the Incremental Regulatory Retirement results from a direct regulatory action and not other factors.¹⁶⁹

■ NYISO also disagrees that the proposed role for the MMU regarding Incremental Regulatory Retirement determinations would be inappropriate or inconsistent with Commission policy under Order No. 719.¹⁷⁰ NYISO argues that its proposal does not grant the MMU adjudicatory authority or a veto over Incremental Regulatory Retirement determinations. Rather, according to NYISO, the proposal gives the MMU an advisory role that is “functionally no different from the other advisory roles played by the MMU under the NYISO tariffs.”¹⁷¹

■ NYISO argues that there is no ambiguity surrounding what form NYISO’s filing to the Commission would take because any NYISO-MMU conflict brought to the Commission would be a “live controversy with tangible real-world implications.”¹⁷² NYISO adds that its proposal does not require the Commission to act within a certain

¹⁶⁷ *Id.*

¹⁶⁸ IPPNY Answer at 12.

¹⁶⁹ *Id.* at 13.

¹⁷⁰ *Id.* at 18.

¹⁷¹ NYISO Answer at 18. *See* NYISO, Services Tariff, Attach. H, § 23.4.5.4.3 (0.0.0) (requiring NYISO to consult with the MMU on projections of ICAP Spot Auction clearing prices in connection with calculation of physical withholding penalties); *Id.* § 23.4.5.6.1 (requiring NYISO to provide the results of audit of market participant decisions to remove or derate installed capacity from a mitigated capacity zone to the MMU for review and comment); *Id.* § 23.4.5.7.2.5 (requiring NYISO to consult with the MMU on price projections and cost calculations regarding application of certain buyer-side market power mitigation exemptions); *Id.* § 23.4.5.7.3.8.2 (requiring the NYISO to consult with the MMU regarding inputs and methodology used to project net energy and ancillary services revenues for unforced capacity deliverability rights); *Id.* § 23.4.5.7.8 (requiring NYISO to consult with the MMU prior to determining whether an existing or proposed generator has commenced construction).

¹⁷² NYISO Answer at 17.

timeframe.¹⁷³ NYISO also argues that the proposal would not deprive any third party of its ability to raise concerns at the Commission about Incremental Regulatory Retirement decisions. Implicating a third-party's option to file a complaint, NYISO explains that the Commission has previously acted on complaints regarding NYISO's application of its buyer-side market power mitigation rules.¹⁷⁴

■ Indicated NYTOs assert that they do not seek to challenge the well-established functions under which the MMU reports on a particular issue or consults with NYISO, except for NYISO's proposal that it must refer any determination with which the MMU disagrees to the Commission. Indicated NYTOs argue that this not only impermissibly expands the authority of the MMU, but it also asks the Commission to serve as referee in fact-intensive, project-specific dispute involving the impacts of State policy and regulations on a timeline that is, by any measure, unworkable.¹⁷⁵ Indicated NYTOs argue that this will result in undue delay and litigation and that the role of the MMU should be limited to the consultative and reporting responsibilities that are already well established.¹⁷⁶

iv. Commission Determination

■ We accept, subject to condition, NYISO's proposed role for the MMU in determining which retirements qualify as Incremental Regulatory Retirements as compliant with the February 2020 Order. Specifically, we require NYISO to modify its proposal to remove the Commission's role as arbiter in the event of a disagreement between NYISO and the MMU. We direct that NYISO's tariff instead provide that, in the event of a disagreement between NYISO and the MMU, NYISO's decision shall control. Thus, absent a section 206 complaint, the Commission will not have a prescribed role in such determinations. We find that NYISO's proposal invites delay to a time-sensitive process. In particular, we find that, if the Commission fails to act on a disagreement within 60 days, suspending the Class Year process could result in unacceptable delays to an already complex process that NYISO is working to streamline and for which developers need greater certainty. Additionally, we note that, under NYISO's proposal, it is unclear what standard of review the Commission would use in resolving a disagreement between the MMU and NYISO.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 17-18.

¹⁷⁵ Indicated NYTOs Answer at 10-11. ¹⁷⁶

Id. at 11.

■ We further find that it is appropriate for NYISO, as the market and tariff administrator, to make the final determination regarding which retirements qualify as Incremental Regulatory Retirements. Moreover, we find that allowing NYISO to determine which retirements qualify as Incremental Regulatory Retirements is consistent with NYISO and the MMU's existing arrangement, as enumerated under numerous other parts of NYISO's tariffs, including provisions of the buyer-side market power mitigation rules. We clarify that, while we are directing NYISO to revise its tariff to remove the proposed role for the Commission, we accept NYISO's proposed reporting and posting obligations for the MMU, which we agree will provide transparency to market participants into the decision-making process.

2. Unforced Capacity Reserve Margin Impact

a. April 2020 Compliance Filing

■ NYISO states that the Unforced Capacity Reserve Margin (URM) Impact in subpart (b) of the formula for calculating the Renewable Exemption Limit is intended to capture the change in the URM in a mitigated capacity zone that reflects how URM market requirements are expected to increase in response to renewable resource entry.¹⁷⁷ NYISO states that it will perform an analysis to determine the expected increased impact to URM market requirements as a result of the entry of the renewable projects in the Class Year Study, Additional SDU Study, and Expedited Deliverability Study. NYISO explains that the consideration of increased URM Impacts recognizes that URM market requirements are expected to increase in response to renewable resource entry and, when implemented as proposed, will not lead to price suppression.¹⁷⁸

¹⁷⁷ NYISO provides the following example: The New York State Reliability Council (NYSRC) recently performed an analysis of the expected change to Installed Reserve Margin (IRM) and URM requirements using a NYCA resource mix containing additional quantities of on-shore wind, off-shore wind, and solar PV renewable resources. The additional renewable resources that connected into Zone J were 2,000 MW of off-shore wind. The UCAP rating of the additional off-shore wind resources was approximately 590 MW under the NYISO's current market rules. The results of the NYSRC's analysis show that the Zone J UCAP requirement (i.e., URM as defined in this filing) increased by approximately 350 MW. Thus, the effect on the Zone J capacity supply due to the off-shore wind would be the UCAP supply added (+590 MW) less the increase in URM demand requirements (-350 MW), for a net increase in supply (relative to requirements) of +240 MW. NYISO explains that its proposed URM Impact value captures exactly this phenomenon. April 2020 Compliance Filing at 9.

¹⁷⁸ April 2020 Compliance Filing at 9.

■ NYISO adds that it will calculate the URM Impact of the Qualified Renewable Exemption Applicants separately for each mitigated capacity zone and technology type. NYISO elaborates that when there are no Qualified Renewable Exemption Applicants participating in the study the URM Impact of Qualified Renewable Exemption Applicants will be zero, otherwise NYISO will calculate the URM Impacts using the inputs and methods used to determine the most recently approved Installed Capacity requirements for the Localities (i.e., NYISO Locational Minimum Installed Capacity Requirements Study), to the extent practicable. NYISO further elaborates that each mitigated capacity zone's URM Impact will reflect the sum of the changes in URM caused by each Qualified Renewable Exemption Applicant in the study, prorated for any Qualified Renewable Exemption Applicants that drop out of the study.¹⁷⁹

b. Protests and Comments

■ IPPNY, Ravenswood, and Indicated NYTOs argue that the URM Impact component of NYISO's proposed Renewable Exemption Limit is flawed.¹⁸⁰ Ravenswood explains that NYISO is currently working on an initiative to tailor NYISO's existing UCAP methodology that, once implemented, will better align the UCAP value assigned to intermittent resources that would be eligible for the renewable resources exemption.¹⁸¹ According to Ravenswood, NYISO's proposed URM Impact component will fail to limit the risk that the renewable resources exemption will adversely impact competitive market signals required by new and existing resources.¹⁸² IPPNY, Ravenswood, and Indicated NYTOs note that NYISO's proposed URM Impact component accounts for the fact that NYISO's UCAP rating methodology overstates the UCAP rating for intermittent renewable resources.¹⁸³ IPPNY argues that, rather than embedding a URM Impact value into the Renewable Exemption Limit, NYISO should update its UCAP rating methodology and harmonize the proposed methodology with the reliability value of renewables.¹⁸⁴ IPPNY requests that the Commission direct NYISO to revise its proposed tariff to clarify that the renewable resources exemption will reflect

¹⁷⁹ *Id.* at 16.

¹⁸⁰ IPPNY Protest at 8; Ravenswood Protest at 21; Indicated NYTOs Protest at 23. ¹⁸¹ Ravenswood Protest at 23.

¹⁸² *Id.* at 21.

¹⁸³ IPPNY Protest at 9; Ravenswood Protest at 21. ¹⁸⁴

IPPNY Protest at 9.

NYISO's forthcoming update to the UCAP rating methodology.¹⁸⁵ Alternately, Ravenswood asks that the Commission direct NYISO to eliminate the URM Impact component and instead direct NYISO to continue with its efforts to develop UCAP rating methodology changes and assist the NYSRC in developing modeling modifications to account for these resources.¹⁸⁶

■ IPPNY points out that NYISO's proposal is silent as to whether or how a renewable resources exemption would be modified to reflect NYISO's updated renewable UCAP rating and states that if the Commission accepts NYISO's proposed URM Impact component, it should order NYISO to modify its proposed tariff language to clarify that the URM Impact component will not inappropriately inflate the Renewable Exemption Limit.¹⁸⁷ Specifically, IPPNY states that NYISO should designate a renewable resources exemption for a renewable facility as a percentage of that facility's nameplate rating, rather than defining the exemption in terms of an inflated UCAP value.¹⁸⁸ IPPNY points out that, given NYISO's plan to revise its UCAP rating methodology every four years, the renewable resources exemption should be tailored to ensure that any update to the methodology does not increase the renewable resources exemptions granted prior to the update.¹⁸⁹ IPPNY adds that the increase in the Renewable Exemption Limit that results from the URM Impact component should not be available to all renewable resources equally, neither in the granting of an exemption nor in the calculation of the Renewable Exemption Bank.¹⁹⁰ Consequently, according to IPPNY, the URM Impact component should be calculated for a specific resource that receives a Renewable Exemption.¹⁹¹

■ Indicated NYTOs agree with NYISO that adding intermittent resources increases the amount of UCAP needed for procurement in the capacity market, and that the calculation of the Renewable Exemption Limit should reflect this impact.¹⁹² However,

¹⁸⁵ *Id.* at 8-9.

¹⁸⁶ Ravenswood Protest at 25

¹⁸⁷ IPPNY Protest at 10.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Indicated NYTOs Protest at 22.

Indicated NYTOs argue that NYISO's compliance filing does not fully account for the impact of intermittent resources on URM requirements. Indicated NYTOs contend that, as a result, the incremental impact of new intermittent generation resources on the URM Impact will be under-recognized.¹⁹³ Indicated NYTOs ask that the Commission direct NYISO to use the URM Impact associated with all wholly or partially intermittent resources when accounting for the impact of intermittent resources on URM requirements.¹⁹⁴

c. Answers

■ NYISO states that there is no need to clarify that the URM Impact component will account for the most up-to-date NYISO processes because the proposed URM Impact tariff provisions will already incorporate any future changes to NYISO's UCAP rating methodology.¹⁹⁵ NYISO further states that the URM Impact component should not be removed for the Renewable Exemption Limit.¹⁹⁶ NYISO explains that modifying existing NYISO procedures so that they can be incorporated into the Renewable Exemption Limit in the manner requested by Ravenswood is beyond the scope of this proceeding.¹⁹⁷ NYISO adds that the URM Impact is narrowly tailored and is appropriately limited to Qualified Renewable Exemption Applicants.¹⁹⁸

■ NYISO asserts that its proposal, including its URM Impact component, strikes an appropriate balance between allowing the renewable resources exemption to cause price increases or price decreases. NYISO further asserts that its proposal, including the URM Impact component, limits the risk of significant price impacts that would result in prices outside the zone of reasonableness under the just and reasonable standard.¹⁹⁹

■ NYISO disagrees with Indicated NYTO's claims that the Renewable Exemption Limit fails to account for the impact of increases in UCAP requirements and argues that

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ NYISO Answer at 19.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 20.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 21.

Indicated NYTOs have overstated the potential impact of their concern.²⁰⁰ NYISO explains that calculating the URM Impact of Qualified Renewable Exemption Applicants using the reliability modeling used to establish the minimum ICAP requirements is a readily implementable, predictable, and transparent approach to further tailoring the Renewable Exemption Limit to the market dynamics in the mitigated capacity zones.²⁰¹

■ Equinor Wind argues that any concerns regarding the methodologies used to calculate the UCAP and reliability value of a resource are beyond the scope of this proceeding.²⁰² Notwithstanding that comment, Equinor Wind explains that any changes to NYISO's UCAP methodology that are ultimately adopted can be taken into account when calculating the URM adjustment for each Class Year.²⁰³

d. Commission Determination

■ We find that the Renewable Exemption Limit, with the URM Impact component, complies with the February 2020 Order. We disagree with protesters that NYISO's proposed Renewable Exemption Limit is flawed and find that the URM Impact component, as proposed, appropriately recognizes that URM market requirements are expected to increase in response to renewable resource entry. Furthermore, we find that NYISO's proposed URM Impact component of the Renewable Exemption Limit complies with the February 2020 Order because it is expressed in UCAP and is narrowly tailored to the mitigated capacity zones. As NYISO points out, the URM Impact component strikes an appropriate balance between allowing the renewable resources exemption to cause price increases or price decreases. Therefore, we find that this component of NYISO's proposal is mindful of the relationship between: (1) the size of the MW cap; and (2) the limit the MW cap imposes on the renewable resources exemption's impact to market prices, consistent with the directives in the February 2020 Order.

■ Additionally, we agree with NYISO and Equinor Wind that any forthcoming changes to NYISO's UCAP rating methodology are outside the scope of this proceeding, which is limited to considering whether NYISO has complied with the directives in the February 2020 Order. In the February 2020 Order, the Commission did not require NYISO to make tariff revisions related to, or otherwise address issues related to NYISO's UCAP rating methodology. Moreover, as various parties note, NYISO's proposed URM

²⁰⁰ *Id.* at 21-22.

²⁰¹ *Id.* at 22.

²⁰² Equinor Wind Answer at 13. ²⁰³

Id. at 15.

Impact tariff provisions will already incorporate future changes to the NYISO's UCAP rating methodology.

3. Renewable Exemption Bank

a. April 2020 Compliance Filing

■ NYISO explains that the Renewable Exemption Bank is the mechanism through which UCAP MWs not used in prior interconnection studies are “carried over” into subsequent studies. NYISO states that this factor ensures that any UCAP MWs derived from the other three factors—Change in Forecasted Peak Load, Incremental Regulatory Retirements, and the URM Impact—remain available to Qualified Renewable Exemption Applicants in future buyer-side market power mitigation determinations, thereby keeping supply and demand in the capacity market in balance even where entry and exit are lumpy over time.²⁰⁴ Specifically, NYISO explains that it will calculate the Renewable Exemption Bank for Zone J by subtracting the UCAP equivalent MW associated with the exempted Capacity Resource Interconnection Service (CRIS) MW received by Qualified Renewable Exemption Applicants in the current study in Zone J from the summation of the Change in Forecasted Peak Load, Incremental Regulatory Retirements, and the URM Impact. NYISO further explains that it calculates the Renewable Exemption Bank for the G-J Locality in the same manner, using the data relevant to the G-J Locality, but subtracts the UCAP equivalent MW associated with the exempted CRIS MW received by Qualified Renewable Exemption Applicants in the current study in both Zone J and the G-J Locality as well as any positive UCAP MW remaining in the Renewable Exemption Bank for Zone J. NYISO states that this requirement will avoid double counting “carryover” capacity from one study to the next. Moreover, NYISO explains that because Zone J is wholly nested within the G-J Locality, the Zone J bank must be deducted from the G-J Locality calculation.²⁰⁵

■ NYISO elaborates that because many of the terms in the formula for the Renewable Exemption Limit are also used in Part A of the mitigation exemption test, NYISO will avoid future price suppression by preventing eligible MWs from receiving different exemptions using the same criteria (i.e. the UCAP equivalent MWs found exempt under the Part A test will be deducted from the relevant Renewable Exemption Bank). As a result, NYISO states that the Renewable Exemption Bank can be positive or negative, and adds that it will true-up the Renewable Exemption Bank for previous

²⁰⁴ April 2020 Compliance Filing at 10.

²⁰⁵ *Id.* at 17.

forecasts that did not materialize.²⁰⁶ NYISO also confirms that the Renewable Exemption Bank will be calculated for each mitigated capacity zone.²⁰⁷

b. Protest and Comments

■ IPPNY argues that the Commission should direct NYISO to include any renewable resource that was granted a renewable resources exemption in a previously completed Interconnection study in the buyer-side market power mitigation forecast for each set of decision round determinations for the Interconnection Studies if NYISO has determined that five percent or more of the renewable resource's respective total project costs have been spent. IPPNY contends that such language would be consistent with tariff language approved by stakeholders at the April 15, 2020, Management Committee meeting as part of the NYISO's proposed revisions to the Part A test.²⁰⁸

■ NY Entities argue that NYISO's filing proposes an unreasonably restrictive definition of Incremental Regulatory Retirement because it excludes retiring resources that were not removed from the supply mix under Part A of NYISO's buyer-side market power mitigation exemption test.²⁰⁹ NY Entities explain that excluding values that were not included in the complete prior buyer-side market power mitigation analysis will understate the Incremental Regulatory Retirements and may result in a smaller exemption than appropriate.²¹⁰ For these reasons, NY Entities argue that NYISO should be directed to include retiring resources in the definition of Incremental Regulatory Retirement unless it was previously retired in both Part A and Part B buyer-side market power mitigation tests for the prior Class Year.²¹¹

²⁰⁶ April 2020 Compliance Filing at 10.

²⁰⁷ *Id.* at 16. *See also* Proposed Services Tariff § 23.4.5.7.13.5.5.

²⁰⁸ IPPNY Protest at 13. Such language would be consistent with tariff language approved by stakeholders at the April 15, 2020, Management Committee meeting as part of the NYISO's proposed revisions to Part A of NYISO's buyer-side market power mitigation exemption test, which is currently pending at the Commission (Docket No. ER20-1718-000).

²⁰⁹ NY Entities Protest at 8.

²¹⁰ *Id.*

²¹¹ *Id.*

c. Answer

■ NYISO states that all determinations under the buyer-side market power mitigation rules, including exemption determinations, are performed in parallel through NYISO's interconnection process as part of the processing of each Class Year.²¹² NYISO explains that the Class Year process culminates with the execution of an Interconnection Agreement among the generator, the Connecting Transmission Owner, and NYISO. At this point, NYISO states that the generator owner has demonstrated a substantial financial and technical commitment to the construction and operation of the project. NYISO asserts that the Interconnection Agreement includes project milestones leading up to completion of engineering, procurement and construction activities required for the project to go into service. NYISO explains that delays in meeting milestones that impact the project's projected in-service date are subject to provisions of the Interconnection Procedures that limit permissible extensions of projected in-service dates. Thus, NYISO further explains, the risk of delay, or of untimely market entry, is already addressed by existing processes.²¹³

d. Commission Determination

■ We find that the Renewable Exemption Bank component of NYISO's proposed Renewable Exemption Limit complies with the Commission's February 2020 Order because it is expressed in UCAP and it is calculated for each mitigated capacity zone. Contrary to NY Entities' arguments, we find that NYISO's proposed Renewable Exemption Bank will not unreasonably limit the amount of renewable resources exemptions available because NYISO's proposed language will prevent eligible MWs from receiving different exemptions using the same criteria and that no clarifications or modifications are needed. Moreover, NYISO's proposal ensures that any UCAP derived from Changes in Forecasted Peak Load, Incremental Regulatory Retirements, or the URM Impact remain available in future buyer-side market power mitigation determinations. We also find that IPPNY's concerns are addressed by NYISO's proposal to true-up the Renewable Exemption Bank for previous forecasts that did not materialize as well as NYISO's explanation that risk of delay, or of untimely market entry, is already addressed by existing tariff provisions.

²¹² NYISO Answer at 25.

²¹³ *Id.* at 25-26.

4. Pro Rata Allocation

a. April 2020 Compliance Filing

■ NYISO proposes to convert the CRIS MW requested for each Qualified Renewable Exemption Applicant in a Class Year Study, Additional SDU Study or Expedited Deliverability Study to a UCAP MW equivalent value in accordance with applicable UCAP Deration Factor and in accordance with NYISO Procedures. NYISO explains that the UCAP Deration Factor will be based on the specific type of Exempt Renewable Technology being proposed by the Qualified Renewable Exemption Applicant. NYISO further explains that it will award renewable resources exemptions to Qualified Renewable Exemption Applicants in each mitigated capacity zone up to, but not to exceed, the UCAP MW value calculated in the applicable Class Year Study, Additional SDU Study or Expedited Deliverability Study to be the Renewable Exemption Megawatt Limit for the mitigated capacity zone. NYISO elaborates that if the UCAP MW equivalent value of the total requested CRIS MW received from Qualified Renewable Exemption Applicants in a given study exceeds the applicable UCAP MW Renewable Exemption Megawatt Limit calculated by NYISO then NYISO would award renewable resources exemptions on a *pro rata* basis using the UCAP MW equivalent value it calculated for the requested CRIS MW of each Qualified Renewable Exemption Applicant that remains in the relevant study.²¹⁴

b. Protests and Comments

■ IPPNY asserts that while not readily apparent in NYISO's April 2020 Compliance Filing, NYISO advised market participants during the stakeholder process that it will address *pro rata* allocation of the Renewable Exemption Limit sequentially. IPPNY explains that the Renewable Exemption Limit for Zone J will be applied on a *pro rata* basis to renewable resources in Zone J and then, resources in Zone J can be awarded renewable resources exemptions made available by the Renewable Exemption Limit calculated for the G-J Locality after the Renewable Exemption Limit for Zone J has been exhausted.²¹⁵

■ IPPNY and Ravenswood argue that the Commission should direct NYISO to modify its proposed tariff language to prohibit NYISO from applying the Renewable Exemption Limit for the G-J Locality to renewable resources in the Zone J.²¹⁶ Instead, IPPNY and Ravenswood ask that the Commission require NYISO to modify its proposed

²¹⁴ April 2020 Compliance Filing at 18.

²¹⁵ IPPNY Protest at 14.

²¹⁶ Indicated NYTOs Protest at 22; Ravenswood Protest at 13-14.

tariff language to state the amount of renewable resources exemptions awarded to Zone J must be limited to the calculation of the Zone J Renewable Exemption Limit.²¹⁷ IPPNY contends that if NYISO is permitted to implement the Renewable Exemption Limit beyond this limit, NYISO would violate the February 2020 Order's directive that the renewable resources exemption cap must be narrowly tailored to the mitigated capacity zones, and not based on the entire NYCA.²¹⁸ Moreover, IPPNY states that implementing the Renewable Exemption Limit as proposed would fail to limit "the risk that the renewable resources exemption will significantly impact market prices," and therefore cannot be just and reasonable.²¹⁹ Ravenswood adds that this would result in a market price reduction that would not meet the Commission's requirements in the February 2020 Order to craft the renewable resources exemption by mitigated capacity zone and to establish a MW cap that limits the risk that the renewable resources exemption will significantly impact market clearing prices.²²⁰

c. Answers

■ NYISO disagrees that the proposed relationship between the Renewable Exemption Limit calculations in Zone J and the G-J Locality is problematic or that it violates the February 2020 order.²²¹ NYISO states that Zone J has been treated as "nested" within the G-J Locality for all market design purposes since the latter mitigated capacity zone was established.²²² NYISO adds that the proposed method is consistent with how the unit specific economic evaluation happens under the buyer-side market power mitigation rules today.²²³ Specifically, NYISO explains under Part B of the mitigation exemption test, in times when the G-J Locality is expected to set the clearing price for Zone J, ICAP prices for Zone J would be set from the G-J Locality requirements for that time period. NYISO argues that a Zone J resource passing the Part B test under this scenario is similar to what IPPNY and Ravenswood protest here.

²¹⁷ IPPNY Protest at 16; Ravenswood Protest at 17.

²¹⁸ IPPNY Protest at 14.

²¹⁹ *Id.* (citing February 2020 Order, 170 FERC ¶ 61,121 at P 48). ²²⁰

Ravenswood Protest at 15-16.

²²¹ NYISO Answer at 23.

²²² *Id.*

²²³ *Id.*

■ Equinor Wind contends that the ability of Zone J resources to benefit from the renewable resources exemption in Zones G-I will be more limited than Ravenswood suggests.²²⁴ Equinor Wind also argues that NYISO's proposal properly accounts for the fact that Zone J resource are located within, effectively deliverable to, and necessarily play a role in meeting the reliability requirements of the G-J Locality.²²⁵ Equinor Wind states that this "inherent" relationship between Zone J and the G-J Locality means that preventing resources in Zone J from being eligible for a renewable resources exemption in the G-J Locality could prevent resources capable of meeting reliability needs in the G-J Locality from clearing the market.²²⁶ Indicated NYTOs agree with NYISO and Equinor Wind's comments regarding NYISO's proposal with respect to the nesting relationship between Zone J and the G-J Locality.²²⁷

d. Commission Determination

■ We find that NYISO's proposed pro rata allocation methodology complies with the February 2020 Order's directives because it appropriately recognizes the nested structure of NYISO's mitigated capacity zones. As the Commission explained when establishing the G-J Locality:

"... although Zone J would be a part of the new capacity zone, Zone J would also continue to be a separate capacity zone with its own Locational Capacity Requirement and its own ICAP Demand Curve. Therefore, Zones G, H, and I, by themselves, would not have a separate Locational Capacity Requirement or ICAP Demand Curve. Rather, Zones G, H, I, and J together would have an aggregate Locational Capacity Requirement and ICAP Demand Curve. This means that capacity located anywhere within the G-J new capacity zone could be used to meet the Locational Capacity Requirement of the new capacity zone."²²⁸

■ Contrary to protesters' assertions, we find that this element of NYISO's proposal complies with the Commission's directive to narrowly tailor the renewable resources

²²⁴ Equinor Wind Answer at 9.

²²⁵ *Id.* at 11.

²²⁶ *Id.*

²²⁷ Indicated NYTOs Answer at 13.

²²⁸ *N.Y. Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126, at P 53 (2013).

exemption to the mitigated capacity zones. Specifically, we find that it is appropriate for a resource in Zone J to be awarded a renewable resources exemption under the Renewable Exemption Limit calculated for the G-J Locality after the Renewable Exemption Limit for Zone J has been exhausted. We also find that NYISO's proposed pro rata allocation methodology aligns with the mechanics of the Renewable Exemption Bank. As discussed above, the Renewable Exemption Bank, is designed to consider the "nesting" of Zone J within the G-J Locality and provides for the subtraction of the Zone J Renewable Exemption Bank from the G-J Locality Renewable Exemption Bank. This design avoids double counting by ensuring that the Zone J MW awarded a renewable resources exemption are removed from both the Renewable Exemption Bank for Zone J and for the G-J Locality. Additionally, the MW that are "carried-over" to the following study period in the Renewable Exemption Bank for Zone J are subtracted from the Renewable Exemption Bank for the G-J Locality.²²⁹

5. Minimum Renewable Exemption Limit

a. April 2020 Compliance Filing

■ Subpart (a) of NYISO's proposed formula for the Renewable Exemption Limit establishes the Minimum Renewable Exemption Limit, which is designed to ensure that the renewable resources exemption does not have more than a *de minimis* effect on the market price forecasts in a single mitigated capacity zone. NYISO proposes a *de minimis* threshold of \$0.50/kW-month and explains that the value is the same value used in physical withholding thresholds under NYISO's supplier-side capacity market power mitigation rules.²³⁰ NYISO explains that having a minimum threshold is appropriate considering that buyer-side mitigation evaluations are typically performed years before a resource actually enters the market, and are based on a forecast of market conditions. NYISO further explains that this threshold, which is approximately four percent of the levelized net cost of new entry for the current demand curve unit for New York City, has been used to avoid excessive mitigation of conduct that would have a *de minimis* impact on market outcomes. Thus, NYISO concludes that this threshold strikes a reasonable balance between preventing price suppression and excessive mitigation that unnecessarily limits legitimate public policy objectives.²³¹

²²⁹ See *supra* note 70.

²³⁰ April 2020 Compliance Filing at 7. See also NYISO, Services Tariff, Attach H. § 23.4.5.6.3 (1.0.0).

²³¹ April 2020 Compliance Filing at 7-8.

b. Protests and Comments

■ NY Entities, Clean Energy Advocates, and Indicated NYTOs propose changes to the \$0.50/kW-month value assigned to NYISO's proposed Minimum Renewable Exemption Limit. NY Entities argue that NYISO should revise the Minimum Renewables Exemption Limit to be "the greater of \$0.50/kW-month or \$0.50/kW plus the price impact of the sum of (i) load forecast, (ii) UCAP Incremental Retirements, (iii) URM Impact, and (iv) the UCAP MW in the Renewable Exemption Bank for each mitigated capacity zone."²³² Clean Energy Advocates and Indicated NYTOs contend that NYISO's proposed Renewables Exemption Limit is not consistent with the Commission's allowance for some *de minimis* price impact and recommend that NYISO should instead propose an overall renewable resources exemption cap number.²³³ Clean Energy Advocates and Indicated NYTOs argue that NYISO's proposed \$0.50/kW-month value is too low and recommend that NYISO use \$2.00/kW-month or \$1.50/kw-month value, respectively, for assessing price impacts from the renewable resources exemption.²³⁴ According to Clean Energy Advocates, this would strike a better balance between moderating effects on capacity prices and accommodating state policies without resulting in improper price impacts.²³⁵ Indicated NYTOs argue that, unless NYISO implements this change, the quantity of available renewable resources exemptions would preclude a possible decrease in the price of UCAP, but would make substantial price increase possible.²³⁶

c. Answers

■ IPPNY argues that any proposal to increase the Minimum Renewable Exemption Limit beyond \$0.50/kW-month or to combine it with the level produced under the Renewable Exemption Limit would result in unreasonable market price suppression and should be rejected.²³⁷ IPPNY contends that this would violate the Commission's directive that the MW cap must limit the risk that renewable resources exemptions

²³² NY Entities Protest at 8.

²³³ Clean Energy Advocates Protest at 9.

²³⁴ *Id.* at 10; Indicated NYTOs Protest at 26. ²³⁵

Clean Energy Advocates Protest at 10. ²³⁶

Indicated NYTOs Protest at 26.

²³⁷ IPPNY Answer at 14.

significantly impact market prices.²³⁸ IPPNY adds that NYISO's proposed \$0.50/kW-month threshold is appropriate because a larger amount would result in the "uneconomic entry of subsidized resources [that] would suppress prices well into the future."²³⁹ In response to IPPNY's statements, Indicated NYTOs argue that the assumption that any new resource receiving a renewable resources exemption is uneconomic and subsidized is unsubstantiated and is not correct.²⁴⁰

d. Commission Determination

■ We find that NYISO's Minimum Renewable Exemption Limit complies with the Commission's February 2020 Order because it is expressed in UCAP and it is calculated for each mitigated capacity zone. We disagree with protesters that NYISO's proposed Minimum Renewable Exemption Limit should be greater than \$0.50/kW-month. We agree with NYISO that it is appropriate to mirror the same value in the Renewable Exemption Limit that is used in physical withholding thresholds under NYISO's supplier-side capacity market power mitigation rules to help ensure that the renewable resources exemption does not have more than a *de minimis* effect on the market price forecasts in a single mitigated capacity zone. Thus, we find that NYISO's proposed Minimum Renewable Exemption Limit complies with the February 2020 Order's directive to be mindful of the relationship between: (1) the size of the MW cap; and (2) the limit the MW cap imposes on the renewable resources exemption's impact to market prices.

6. Revocation

a. April 2020 Compliance Filing

■ NYISO proposes language to comply with the February 2020 Order's directive to provide an opportunity for renewable resources exemption holders to explain to NYISO, before the revocation of their exemption, why the revocation may be inappropriate.²⁴¹

²³⁸ *Id.* at 15.

²³⁹ *Id.* at 11.

²⁴⁰ Indicated NYTOs Answer at 11.

²⁴¹ As explained in the February 2020 Order, NYISO's revocation provisions ensure that, under the circumstances that NYISO outlines, resources lose their exemption if they no longer qualify (or if they should never have qualified in the first place) for renewable resources exemption. February 2020 Order, 170 FERC ¶ 61,121 at P 141.

NYISO explains that its proposed language builds on NYISO's previous compliance proposal and adds further procedural details.²⁴²

■ Specifically, NYISO proposes language providing that, when a renewable resources exemption holder timely notifies NYISO that changed circumstances could mean that it is no longer eligible for a renewable resources exemption: (1) NYISO is required to respond by providing written notice of its intent to revoke an exemption and set forth its reasons within 10 business days of receiving notice from an exemption holder; (2) the exemption holder would have 20 business days to schedule a meeting with NYISO in order to make a final attempt to demonstrate why the exemption should not be revoked; and (3) NYISO would be obliged to determine within 10 business days of the meeting whether the revocation of the renewable resources exemption should be finalized and to post a revocation determination on its website. In the same vein, NYISO proposes to require that when a renewable resources exemption holder does not timely notify NYISO, but NYISO has identified a development that could invalidate a renewable resources exemption: (1) NYISO's notice must be in writing and must provide the exemption holder with an opportunity to submit documentation to NYISO and meet with NYISO to attempt to rebut NYISO's findings within 30 days; and (2) NYISO would be obliged to determine within 10 business days of the meeting whether the revocation of the Renewable Exemption should be finalized and post a revocation determination on its website.²⁴³

b. Protests and Comments

■ IPPNY alleges that NYISO's proposal allows for the possibility that NYISO could award two different renewable resources exemptions using the same amount of MWs in the Renewable Exemption Bank if the generator to which those MWs are first granted does not use them in a timely manner, i.e., double-count exemptions by permitting the resource first given the awarded MWs to retain its exemption and subsequently using the same MWs to provide an exemption to a second project. IPPNY thus requests that the Commission direct NYISO to clarify in the Tariff that any renewable resource that has been granted a renewable resources exemption will be assumed to be proceeding when NYISO evaluates other projects for a renewable resources exemption until the resource either forfeits its renewable resources exemption or NYISO revokes the exemption.²⁴⁴

²⁴² April 2020 Compliance Filing at 18-19.

²⁴³ *Id.* at 19.

²⁴⁴ IPPNY Protest at 13.

c. Answers

■ NYISO asserts that adding new exemption revocation rules is outside of the scope of this proceeding.²⁴⁵ NYISO adds that it already has rules in place to prevent duplicative exemption awards.²⁴⁶

d. Determination

■ We find that NYISO's revisions to the renewable resources exemption revocation provision comply with the February 2020 Order because, as required, they provide an opportunity for a renewable resources exemption holder to explain to NYISO, before the revocation of its exemption, why revocation may be inappropriate. Further, we agree with NYISO that the consideration of additional revocation provisions, such as those described by IPPNY, are beyond the scope of this proceeding, which is limited to the consideration of whether NYISO has complied with the directives in the February 2020 Order.

■ Additionally, as discussed above, we find that the Renewable Exemption Bank component of NYISO's proposed Renewable Exemption Limit complies with the Commission's February 2020 Order absent any modifications. We agree with NYISO that its proposed Renewable Exemption Bank has rules in place to prevent duplicative exemption awards. Therefore, we disagree with IPPNY that additional clarity on this matter is necessary.

The Commission orders:

(A) In response to APPA's and NY Parties' requests for rehearing, the February 2020 Order is hereby modified and the result sustained, as discussed in the body of the order.

(B) NYISO's April 2020 Compliance Filing is hereby conditionally accepted, effective for the Class Year 2019, subject to a further compliance filing, as discussed in the body of this order.

²⁴⁵ NYISO Answer at 25.

²⁴⁶ *Id.*

(C) NYISO is hereby directed to submit a further compliance filing, within 45 days of the date of this order, as discussed in the body of this order.

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

Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket Nos. ER16-1404-001
ER16-1404-002

(Issued July 17, 2020)

GLICK, Commissioner, *dissenting*:

■ I dissent from today's order because it perverts buyer-side market power mitigation into a series of unnecessary and unreasoned obstacles to New York's efforts to shape the resource mix. Buyer-side market power mitigation should be all about and only about buyers with market power. Applying buyer-side market power mitigation to entities that are not buyers or buyers that lack market power is nonsensical. Moreover, even when applied to buyers who may have market power, mitigation must reasonably address their potential to exercise that market power.

■ In this order, the Commission continues to apply buyer-side market power mitigation where it does not belong. In addition, the Commission also adopts a series of unreasoned and over-the-top restrictions on public power entities under the guise of mitigating market power. The sum total effect of these changes is to frustrate New York's efforts to achieve its environmental goals while at the same time increasing costs to consumers. That is not just and reasonable.

I. Buyer-Side Market Power Mitigation Should be Limited to Buyers with Market Power

■ When first introduced, buyer-side market power mitigation rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise its monopsony power to lower the capacity market clearing price. To the extent that the Commission required buyer-side mitigation of capacity market offers, it limited the mitigation to only resources that could be used effectively for the purpose of depressing capacity market prices or to resources with both the incentive and ability to depress capacity market clearing prices.¹

¹ See, e.g., *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34, 103-04 (2006) (discussing the buyer-side market power mitigation provisions imposed as part of the settlement that created the Reliability Pricing Model); see also Richard B. Miller, Neil H. Butterklee & Margaret Comes, “*Buyer-Side” Mitigation in Organized Capacity Markets: Time for a Change?*”, 33 Energy L.J. 449, 460-61 (2012) (*Time for a Change?*)

In short, buyer-side market power mitigation was all about and only about the exercise of buyer-side market power.²

■ The Commission has abandoned that narrow focus. It no longer requires a resource to be a buyer, much less a buyer with market power, before subjecting that resource to buyer-side market power mitigation. Buyer-side market power rules—often referred to as minimum offer price rules or MOPRs—that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states’ exercise of their authority over resource decisionmaking.³ The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the basis that it promotes competition.⁴ But, in reality, the Commission is not promoting anything remotely resembling actual competition.⁵

(discussing the Commission’s early approach to buyer-side market power mitigation).

² See, e.g., *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 (“The Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply.”); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 106 (2008) (explaining that buyer-side market power “mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost.”).

³ See *Calpine Corp. v. PJM Interconnection L.L.C.*, 169 FERC ¶ 61,239, *reh’g denied*, 171 FERC ¶ 61,035 (2020) (*Calpine v. PJM*) (Glick, Comm’r, dissenting at P 4); see also Miller, Butterklee & Comes, *Time for a Change?*, 33 Energy L.J. at 461 (“[B]uyer mitigation has effectively become new entrant mitigation under which all new entrants are subject to mitigation unless otherwise exempted because they have somehow demonstrated that their new facility is not ‘uneconomic.’”).

⁴ See, e.g., *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 38 (discussing the Commission’s finding on the need to maintain the “integrity of competition”); *id.* P 17 n.38 (“This Commission determined many years ago that the best way to ensure the most cost-effective mix of resources is selected to serve the system’s capacity needs was to rely on competition.”); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 (2018) (asserting that states’ exercise of their authority over generation facilities “raises a potential conflict with . . . competitive wholesale electric markets”).

⁵ See *Calpine Corp. v. PJM Interconnection*, 171 FERC ¶ 61,035 (2020) (*Calpine v. PJM Rehearing*) (Glick, Comm’r, dissenting at P 3) (explaining that the Commission’s [PJM MOPR orders] “turned the ‘market’ into a system of bureaucratic pricing so pervasive that it would have made the Kremlin economists in the old Soviet Union

■ The basic premise of market competition is that sellers should compete to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the “missing money” that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.⁶ That means that capacity market competition should follow a single ‘first principle’: Enabling resources to vie with each other to require as little missing money as possible in order to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly competitive, resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. True competition can produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

blush”). It is also worth noting that this Commission’s infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power. One example is the Chairman’s premature termination of the enforcement process regarding the nearly 1,000 percent year-over-year increase in prices in MISO Zone 4 and the Commission’s failure to provide any justification for its finding that such a rate is just and reasonable. *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm’r, dissenting at PP 4-5). Another example is the Commission’s failure over the course of the last year to take any action on the complaints regarding PJM’s Market Seller Offer Cap. Those complaints allege that PJM’s current rules allow for the exercise of market power, which increase the total cost of capacity by more than a billion dollars. *See PJM Independent Market Monitor Complaint*, Docket No. EL19-47-000 at 11-12 (Feb. 21, 2019). That complaint has now sat before the Commission for more than 15 months, and it has been more than a year since the last substantive filing was made in that docket.

⁶ *See, e.g.*, James F. Wilson, “Missing Money” Revisited: Evolution of PJM’s RPM Capacity Construct 1 (2016), https://www.publicpower.org/system/files/documents/markets-rpm_missing_money_revisited_wilson.pdf (discussing the concept of missing money and the origin of capacity markets in the eastern RTOs); Roy J. Shanker Comments, Docket No. RM01-12-000 (Jan. 10, 2003) (discussing the idea of missing money).

■ Instead of promoting true competition, the Commission’s approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.⁷ Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate⁸ of what a new resource “should” cost, while existing resources are permitted to bid at a lower level.⁹ In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources’ incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity markets tend to be disproportionately made up of new technologies and resources needed to satisfy state or federal public policies, the Commission’s use of MOPRs also has the unmistakable effect (and, recently, the intent¹⁰) of slowing the transition to a cleaner, more advanced resource mix.

⁷ *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at P 4).

⁸ In previous orders, the Commission has made much out of so-called unit-specific exemptions, which permit a resource to bid below a default offer floor if it can convince the relevant market monitor that its estimated net going-forward costs are below that floor. If the resource succeeds in that endeavor, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing. See *Calpine v. PJM Rehearing*, 171 FERC ¶ 61,035 (Glick, Comm’r dissenting at P 86).

⁹ In ISO New England and NYISO, existing resources are exempt from mitigation. *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,119, at P 38 (2020) (*NYPSC v. NYISO*) (“NYISO’s buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones[.]”); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 3 (“ISO-NE utilizes a minimum offer price rule, or MOPR, that requires new capacity resources to offer their capacity at prices that are at or above a price floor set for each type of resource[.]”). The Commission’s recent order in *PJM* applied the MOPR to existing resources, but makes them subject to a different—and generally more favorable—pricing regime than new resources. *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 2 (“[T]he default offer price floor for applicable new resources will be the Net Cost of New Entry (Net CONE) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (Net ACR) for their resource class.” (footnotes omitted)); *id.* (Glick, Comm’r, dissenting at PP 32-35) (criticizing the Commission for using different offer floor formulae for existing and new resources).

¹⁰ See *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at P 4).

■ That type of quasi-competition does not lead to an efficient market outcome. To achieve an efficient outcome, resources' capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly from Commission-jurisdictional markets.¹¹ If the market ignores some of those costs and revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

■ We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.¹² However, as explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

■ The FPA is clear. The states, not the Commission, are responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity, as well as practices affecting those wholesale sales,¹³

¹¹ The periodic demand curve resets that occur in the eastern RTOs illustrate the variety of factors that go into determining the missing money. For example, the development of net CONE in NYISO's most recent demand curve reset addressed factors ranging from federal, state, and local requirements related to environmental considerations, regional differences in capital and labor costs, as well as differences in social justice requirements. *See* NYISO Transmittal, Docket No. ER17-386-000, Ex. D (Nov. 18, 2016) (Analysis Group, Inc. study addressing demand curve parameters). Those factors affect not only what resource you build and where you can build it, but also how you can operate that resource and, therefore, what revenues you can expect to earn and what costs you can expect to incur. Considering all those factors is necessary to produce efficient price signals guiding when and where to site new capacity, notwithstanding the fact that they are not derived from Commission-jurisdictional markets.

¹² *See, e.g., NYPSC v. NYISO*, 170 FERC ¶ 61,119 at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a MOPR to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support[.]").

¹³ Specifically, the FPA applies to "any rate, charge, or classification, demanded,

Congress expressly precluded the Commission from regulating “facilities used for the generation of electric energy.”¹⁴ Congress instead gave the states exclusive jurisdiction to regulate generation facilities.¹⁵

■ But while those jurisdictional lines are clearly drawn, the spheres of jurisdiction themselves are not “hermetically sealed.”¹⁶ One sovereign’s exercise of its authority will inevitably affect matters subject to the other sovereign’s exclusive jurisdiction.¹⁷ For

observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission” and “any rule, regulation, practice, or contract affecting such rate, charge, or classification.” 16 U.S.C. § 824e(a) (2018); *see also id.* § 824d(a) (similar).

¹⁴ *See id.* § 824(b)(1) (2018); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that “the [FPA] also limits FERC’s regulatory reach, and thereby maintains a zone of exclusive state jurisdiction”); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 517-18 (1947) (recognizing that the analogous provisions of the NGA were “drawn with meticulous regard for the continued exercise of state power”). Although these cases deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court’s discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission’s role under the FPA.

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

¹⁶ *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a “Platonic ideal” of the “clear division between areas of state and federal authority” that undergirds both the FPA and the Natural Gas Act).

¹⁷ *See EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission “uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets[.]”).

example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.¹⁸ But the existence of such cross-jurisdictional effects is not necessarily a “problem” for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the “congressionally designed interplay between state and federal regulation”¹⁹ and the natural result of a system in which regulatory authority over a single industry is divided between federal and state government.²⁰ Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the cooperative federalism regime that Congress made the foundation of the FPA.

■ When the Commission tries to prevent a state public policy from having an inevitable, but indirect effect on a capacity market, it takes on the role that Congress reserved for the states. That is true even where the Commission claims that its only “policy” is to block the *effects* of state public policies, not the state policies themselves. After all, a federal policy of eliminating the effects of state policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

■ Moreover, as former Commission Chairman Norman Bay correctly observed, an “idealized vision of markets free from the influence of public policies . . . does not exist,

¹⁸ *Zibelman*, 906 F.3d at 57 (explaining how a state’s regulation of generation facilities can have an “incidental effect” on the wholesale rate through the basic principles of supply and demand); *id.* at 53 (“[I]t would be ‘strange indeed’ to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates.” (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that proceeding “can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close..... A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.”).

¹⁹ *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *id.* (“recogniz[ing] the importance of protecting the States’ ability to contribute, within their regulatory domain, to the [FPA]’s goal of ensuring a sustainable supply of efficient and price-effective energy.”).

²⁰ *Cf. Star*, 904 F.3d at 523 (“For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.”).

and it is impossible to mitigate our way to its creation.”²¹ Instead, public policy and energy markets are inextricably intertwined.²² Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.²³ Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a “competitive” market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission’s goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition, much less one that is insulated from public policy.

■ And the end result will be profoundly inefficient, no matter how many times my colleagues use the words “market” and “competition.” The resources procured through that market will require considerably more missing money than would the set of resources procured in the absence of this kind of over-mitigation.²⁴ Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, the capacity markets will procure more capacity than the regions actually need and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

²¹ *N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

²² As the FPA itself recognizes, “the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest.” 16 U.S.C. § 824 (2018).

²³ See *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm’r, dissenting at PP 27-28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (Glick, Comm’r, dissenting at 6-9) (explaining how “[g]overnment subsidies pervade the energy markets and have for more than a century”); *ISO New England Inc.*, 162 FERC ¶ 61,205 (Glick, Comm’r, dissenting in part and concurring in part at 3) (“Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation.”).

²⁴ That is particularly true given that the Commission permits a resource to increase its estimated costs due to state policy and environmental goals (*e.g.*, the increased fixed and variable costs associated with selective catalytic reduction, *see* NYISO Transmittal, Docket No. ER17-386-000 at 2), but not its revenue derived from state public efforts that may happen to be aimed at the exact same environmental goals.

■ In addition, widespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts, especially given the ever-growing threat posed by climate change.²⁵ A capacity construct that ignores those states' public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the wrong types of resources or resources that are not needed at all. It is hard for me to see how a price signal that encourages redundant investment is a "competitive" or desirable outcome, much less a just and reasonable one.

■ The Commission has suggested that if it succeeds in blocking state policies, then capacity markets will become efficient, little islands unto themselves.²⁶ But a capacity market is a means to an end, not an end in itself. It is a construct that is supposed to minimize the amount of money that customers spend on capacity in order to meet a target reserve margin.²⁷ A capacity market that does not serve that purpose and is "efficient" only if you disregard the fact that, in the real-world, it produces inefficient results is a market that we ought to reject out-of-hand.

■ Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should be all about—and only about—buyers with market power. In the event that a resource is not a buyer with market power, its capacity market offer should not be subject to buyer-side mitigation.²⁸ That result is both more consistent with the FPA's federalist foundation and the Commission's core responsibility as a regulator of monopoly/monopsony power.²⁹ That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level. In short, I believe that buyer-side market power

²⁵ See, e.g., *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 55).

²⁶ *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5; *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21.

²⁷ See *supra* P 5.

²⁸ State policies that exceed the states' jurisdiction because they set or aim at wholesale rates would, of course, remain preempted. See, e.g., *Hughes*, 136 S. Ct. at 1298.

²⁹ Cf. *Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that "FERC's authority generally rests on the public interest in constraining exercises of market power").

mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.³⁰

■ “Actual” is an important distinction here. The Commission has at times suggested extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.³¹ We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is an exercise of market power fundamentally misunderstands the role Congress reserved for the states under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission’s regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.³²

■ Some argue that Commission intervention is necessary to “protect” the market from states’ exercise of their authority under the FPA. But if we ever reach a point where the only way to “save” a capacity market is to unmoor it from reality by blocking the effects of state policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-

³⁰ In dissents from previous Commission orders addressing MOPRs, I have also argued that the Commission’s policy in those particular cases exceeded its jurisdiction because it directly targeted state policies. *E.g., Calpine v. PJM Rehearing*, 171 FERC ¶ 61,035 (Glick, Comm’r, dissenting at PP 5-25). I still believe that to be true. But my point today is a broader one: The Commission should altogether abandon the use of buyer-side market power mitigation regimes to address something other than actual buyer-side market, even putting aside whether the Commission’s application of those regimes exceeds its jurisdiction in the first place.

³¹ *See, e.g., NYPSC v. NYISO*, 170 FERC ¶ 61,119 at PP 37, 39; *see also N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (Bay, Chairman, concurring at 3) (“The MOPR is not applied to the state, which may not actually be a buyer and which is acting on behalf of its citizenry, but to the resource, which is offering to sell capacity to the market and which may be a commercial entity. The theory, in other words, assumes such a congruence of interests between the state and the resource that the resource is mitigated for the conduct of the state.”).

³² *See Hughes*, 136 S. Ct. at 1298 (“States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates[.]”); *see also New England Ratepayers Ass’n*, 168 FERC ¶ 61,169, at PP 41-46 (2019) (finding a state policy preempted because it sets a wholesale rate).

world outcomes or the Commission usurping the role that Congress reserved for the states.

■ Indeed, the Commission's efforts to "save" capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. New York provides the perfect example as the Public Service Commission has begun a proceeding to consider "taking back" from NYISO the responsibility for ensuring resource adequacy.³³ And numerous states are considering leaving the other eastern RTOs, both of which have capacity rules that hinder states' exercise of their resource decisionmaking authority. The Commission's overreach, affirmed in today's order, will no doubt create greater momentum in that direction.

■ As I explained in my dissent from the underlying order, I continue to believe that the foregoing analysis ought to compel the Commission to get back to the basics on buyer-side market power mitigation.³⁴ Where entities are not buyers they simply should not be subject to buyer-side market power mitigation.³⁵ End of discussion. And where entities are buyers, the Commission should impose buyer-side market power mitigation measures only when those buyers possess actual market power and, even then, the mitigation must be reasonably tailored to the potential for the exercise of market power.³⁶

■ Today's order is completely at odds with those principles, as it continues to apply buyer-side market power measures to resources that are not buyers. In addition, the Commission makes a hash out of the mitigation regimes applied through this order. As discussed in the following sections, the draconian measures imposed on the New York Power Authority (NYPA) are illogical and unreasoned, while the further limitations accepted regarding the already-miserly renewables exemption only add insult to injury.

³³ N.Y. Pub. Serv. Comm'n, Case 19-E-0530, *Order Instituting Proceeding and Soliciting Comments* (Aug. 8, 2019), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b1D25F4BE-9A05-463F-A953-790D36E318BC%7d>.

³⁴ *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (February 2020 Order) (Glick, Comm'r, dissenting at PP 19-20).

³⁵ *Id.* P 19.

³⁶ *Id.* P 20.

II. The Commission's Treatment of NYPA Is Arbitrary and Capricious

■ Self-supply entities are, by definition, buyers. As a result, they can have market power and, where they do, mitigation may be appropriate. But whatever mitigation is applied in those instances must be just and reasonable and take account of the circumstances of the mitigated resources. Consistent with that principle, the Commission previously concluded in this proceeding that “applying NYISO’s buyer-side market power mitigation rules to certain self-supply resources would be unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA, because such resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.”³⁷ Accordingly, the Commission directed NYISO to implement a self-supply exemption utilizing appropriate net-short and net-long thresholds.³⁸ In the resulting compliance order, however, the Commission effectively excluded public power self-supply entities from that exemption on the theory that because their mission is to benefit residents of the state as a whole, there is no way to protect the market from their actions.³⁹

■ That decision was arbitrary and capricious. As an initial matter, it assumes, based on a website alone, that NYPA would disadvantage its own customers for the benefit of other residents of the state that it does not serve.⁴⁰ As the NY Entities point out, NYPA’s mission statement does not demonstrate an “intent to achieve the agency’s public policy purposes and goals through any and all means, regardless of rules, norms of ethical behavior, and integrity.”⁴¹ A single hortatory statement of purpose is hardly substantial evidence suggesting that NYPA will act against its customers for the benefit of other load-serving entities’ customers.

■ Once you let go of that borderline offensive idea, the Commission has no support for its conclusion that the self-supply exemption thresholds are insufficient to adequately protect against the exercise of market power by NYPA, especially when those thresholds are combined with the requirement that only entities that operate “under a long-standing business model to meet more than fifty percent of its Load obligations through its own

³⁷ *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 61 (2015).

³⁸ *Id.* P 62.

³⁹ February 2020 Order, 170 FERC ¶ 61,121 at P 67.

⁴⁰ *Id.* P 67 & n.144.

⁴¹ NY Entities Rehearing Request at 27.

generation” qualify for the self-supply exemption.⁴² Instead of explaining its concern with the mitigation thresholds, the Commission simply insists that they are insufficient to protect against the exercise of market power.⁴³ It should go without saying that repeating the decision without any reasoning is not reasoned decisionmaking.

■ In any case, the record suggests that the proposed thresholds for the self-supply exemption would adequately protect against a state instrumentality, such as NYPA, exercising market power—indeed that was the very purpose for which they were designed.⁴⁴ As noted, the requirement that only entities that operate “under a long-standing business model to meet more than fifty percent of its Load obligations through its own generation” qualify for the self-supply exemption prevents states from creating a new load-serving entity that would uneconomically self-supply its entire capacity obligation. In addition, the net-long threshold prevents self-supply entities from purchasing capacity in excess of the amounts required to serve their customers, preventing the self-supply entity from significantly affecting capacity market prices.⁴⁵ Consider how those thresholds work in practice: As the NY Entities explain, the net-long threshold for a load-serving entity with 1,000 MW of load in New York City creates a self-supply exemption for only an additional 15.6 MW of capacity⁴⁶—hardly a major loophole. In the face of such evidence, the Commission’s failure to do more than simply insist that those thresholds are insufficient is arbitrary and capricious.

III. The Commission’s Treatment of the Renewables Exemption Is Arbitrary and Capricious

■ Today’s order also addresses the mechanics of NYISO’s renewable resource exemption from its buyer-side market power mitigation provisions. Although, as noted, I would altogether get out of the business of mitigating resources that are not buyers, much less buyers with market power, a few of the additional flaws in the Commission’s reasoning deserve further discussion. In particular, I disagree with the Commission’s rejection of NYISO’s original proposal to establish a 1,000 MW cap on the volume of intermittent renewable resources in each class year. The crux of the Commission’s

⁴² N.Y. Indep. Sys. Operator, Inc. Compliance Filing, Docket No. ER16-1404, at 18 (Apr. 13, 2016) (April 2016 Compliance Filing).

⁴³ *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058, at P 15 (2020) (Order).

⁴⁴ *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, Complaint, Docket No. EL15-64-000, Ex. B, Cadwalader Aff. ¶ 43 (May 8, 2015).

⁴⁵ See APPA Rehearing Request at 9.

⁴⁶ NY Entities Rehearing Request at 25.

reasoning is that the proposed cap was not based “on the mitigated capacity zones” but rather on “historical entry of all resource types across the entire New York Control Area.”⁴⁷ The Commission’s cursory rejection ignored the details of the proposal and supporting material, which explained how the cap was developed with an eye toward both NYISO-wide and the mitigated capacity zones.⁴⁸

■ The approved Renewables Exemption Limit is determined in large part by what is called “Incremental Regulatory Retirements.” This allows the renewables exemption to offset only retirements that are substantially caused by “new or amended” laws and regulations or statutes, or other regulatory or related actions that target generator emissions, operating permits, fuel supply, property taxes or retirement compensation and other incentives outside of the ISO markets.⁴⁹ This is a far more fundamentally flawed approach than the one the Commission previously rejected. Those flaws include an unreasonably narrow definition of incremental retirements, a failure to recognize permanent reductions in UCAP that are not directly linked to retirements, and an unreasonable limitation on connecting retirements to actual legislation or regulatory action. Let’s take those flaws in turn.

■ As I understand it, the theory of the cap is to limit renewable resources’ impact on capacity market clearing prices by ensuring that the MW capacity of new renewables does not exceed the MW capacity of resources retiring due to state regulation. I fail to see why, if the Commission were truly concerned with preventing renewables from suppressing prices, as it claims,⁵⁰ it would make sense to limit the MW quantity of new renewables to the MW quantity of all incremental retiring resources rather than attempting to limit it to those retirements due to state actions. After all, as Clean Energy Advocates explain, “[i]f the [MW] value for renewable exemptions is tied to the total quantity of retiring resources, the net effect of retirements and exempt renewable generators that enter the market is that suppliers in the market experience no change in

⁴⁷ Order, 172 FERC ¶ 61,058 at P 20.

⁴⁸ April 2016 Compliance Filing, Attach. V, Bouchez Aff. ¶ 13 (“allowing this quantity of ICAP MW to receive a Renewable Exemption in a given Class Year would be reasonable because it would not be likely to result in the artificial suppression of capacity prices in Mitigated Capacity Zones and it would not overly restrict the availability of Renewable Exemptions”)

⁴⁹ April 2020 Compliance Filing at 15.

⁵⁰ February 2020 Order, 170 FERC ¶ 61,121 at P 48 (“a MW cap limits the risk that the renewable resources exemption will significantly impact market prices and it is such limitation that makes this tariff revision just and reasonable”).

market prices over time.”⁵¹ In short, there is no price-based justification for limiting the exemption cap on new renewables to only those retirements caused by state action. Instead, this unnecessary exercise in parsing out a resource’s motivation for retiring only muddies the analysis and takes the Commission further afield from the buyer-side market power concerns that it purports to be addressing through these proceedings.⁵²

■ Even if you accept the flawed premise that new renewable supply should not exceed exiting supply caused by state action, this will not permit even that level of entry. Today’s order approves a cap that accounts only for retirements rather than quantifiable reductions in UCAP supply, even when those reductions can be tied to “direct” regulatory actions. Whether supply declines due to a retirement, a seasonal retirement, or a permanent de-rate should be irrelevant for a Commission truly concerned about the changes that supply can have to the clearing price of the market. A MW reduction is a MW reduction, regardless of what the resource owner does with the rest of its facility.⁵³ In ignoring every action short of a full retirement, the Commission overlooks what may be very real and permanent reductions in capacity, such as those caused by resources that, for example, respond to annual emissions limitations by operating only seasonally or derating their capacity in order to comply with emissions limitations.⁵⁴ Nothing in today’s order justifies that arbitrary distinction.

■ Finally, the Commission adopts NYISO’s proposal that the retirement must be the result of “new or amended” regulations, statutes, or related actions. Quite honestly, I have no idea what that means. And the Commission’s only response—that a temporal limitation is necessary to avoid some unspecified burden on NYISO⁵⁵—does not shed any further light on the matter. Such obvious ambiguity is a recipe for endless litigation. In any case, retirements can often lag significantly behind the motivating regulatory action. Consider the case of the Indian Point Energy Center which is retiring its two units in 2020 and 2021, pursuant to an agreement reached in 2017. No one with any understanding of the circumstances surrounding Indian Point’s retirement would argue

⁵¹ Clean Energy Advocates Protest at 6.

⁵² As the Clean Energy Advocates explain, “[r]etirement decisions are made after accounting for many factors, such as state and federal laws and policies, fuel prices, projected energy demand, competition, [and] revenue needs.” *Id.*

⁵³ *See* Clean Energy Advocates Protest at 7.

⁵⁴ For example, the Indicated NYTOs explain that several generators have adopted plans to materially deactivate during certain months to avoid contributing to ozone violations. Indicated NYTOs Protest at 13.

⁵⁵ Order, 172 FERC ¶ 61,058 at P 58.

that it is a “burden” to understand why the Indian Point units are retiring. I see no reason—and the Commission presents none—for why, in a situation like that, the time between the agreement to retire and the actual date of retirement should be relevant to whether the capacity counts towards the renewables exemption.

* * *

■ We should not lose the forest for the trees. New York City and the down-state area are about to experience an unprecedented number of retirements, including Indian Point, which itself represents more than 2,000 MW of capacity. In addition, to meet NO_x limits under the Clean Air Act, the New York State Department of Environmental Conservation adopted a rule that may lead to the retirement of over 3,000 MW of peaking units, almost all of which are in New York City and Long Island.⁵⁶ Meanwhile, New York State has passed ambitious legislation to address climate change, among other environmental concerns, by shifting its generation mix to cleaner resources. Today’s order undermines New York’s ability to achieve those environmental goals by obstructing the entry of new resources at a time when significant new capacity may be needed to address the unprecedented retirements in the downstate region. That is not just and reasonable.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

⁵⁶ Indicated NYTOs Protest at 4.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket Nos. ER16-1404-001
ER16-1404-002

(Issued July 17, 2020)

DANLY, Commissioner, *concurring*:

■ I concur in the result of this order, insofar as it correctly finds that New York Independent System Operator, Inc.'s (NYISO) compliance filing has satisfied the requirements of the Commission's February 2020 Order.¹ That order required specific narrow adjustments be made to NYISO's buyer-side market power mitigation rules, and I agree with the Commission that NYISO has made the required adjustments.

■ I write separately, however, to express my misgivings about the effects of NYISO's filing on the operation of its markets. Any regime that implements such exemptions in its market power rules may not be capable of properly employing market forces to arrive at just and reasonable rates. Markets function when they establish universal rules applicable to all participants—exemptions, regardless of the policy objectives they may seek to achieve, impede a market's ability to set prices that accurately reflect market forces.

■ Consequently, I urge the Commission to consider seriously the implications of the exemptions approved today on the overall effectiveness of NYISO's buyer-side market power mitigation rules if the Commission has the opportunity to do so in the future.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

¹ *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (February 2020 Order).