

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

New York Independent System Operator, Inc.)	
)	Docket No. ER16-120-000
)	

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

Pursuant to Rule 213 of the Commission’s¹ Rules of Practice and Procedure,² the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this request for leave to answer and answer (“Answer”). The Answer responds to the comments and protests of the NYISO’s reliability must run (“RMR”) service compliance filing submitted on October 19, 2015 in the above-captioned proceeding (“Compliance Filing”).³ The comments and protests were submitted by: (i) the New York State Public Service Commission (“NYPSC”),⁴ (ii) the New York Transmission Owners (“NYTOs”),⁵ (iii) the Utility Intervention Unit of the New York State Department of State (“UIU”),⁶ (iv) the City of New York and Multiple Intervenors (“NYC/MI”),⁷ (v) the Sierra Club (“Sierra”),⁸ (vi) Direct Energy,⁹ (vii) the Independent Power

¹ Capitalized terms not defined in this Answer shall have the meaning set forth in the NYISO Open Access Transmission Tariff (“OATT”) and Market Administration and Control Area Services Tariff (“Services Tariff”), including in the proposed revisions to those tariffs in the NYISO’s compliance filing.

² 18 C.F.R. § 385.213.

³ *New York Independent System Operator, Inc.*, Compliance Filing, Docket No. ER16-120-000 (October 19, 2015) (“Compliance Filing”).

⁴ *Notice of Intervention and Comments of the New York State Public Service Commission*, Docket No. ER16-120-000 (November 30, 2015) (“NYPSC Comments”).

⁵ *Motion to Intervene, Comments, and Requests for Clarification of the New York Transmission Owners*, Docket No. ER16-120-000 (November 30, 2015) (“NYTO Comments”).

⁶ *Comments of the Utility Intervention Unit of the New York State Department of State*, Docket No. ER16-120-000 (November 30, 2015) (“UIU Comments”).

⁷ *Limited Protest and Comments of the City of New York and Multiple Intervenors*, Docket No. ER16-120-000 (November 30, 2015) (“NYC/MI Protest”).

Producers of New York, Inc. and Electric Power Supply Association (“IPPNY”),¹⁰ (viii) the NRG Companies (“NRG”),¹¹ and (ix) Entergy Nuclear Power Marketing, Inc. (“Entergy”).¹²

The NYISO respectfully requests that the Commission accept its Compliance Filing with only the limited clarifications described below. The NYISO’s proposed tariff revisions to its Open Access Transmission Tariff (“OATT”) and its Market Administration and Control Area Services Tariff (“Services Tariff”) were carefully developed to bring the NYISO into full compliance with the directives of the Commission’s February 19, 2015, order in this proceeding (“RMR Order”).¹³ For the reasons described below, the Commission should reject changes to the RMR process proposed in the protests, which modifications would impede the NYISO’s ability to administer RMR services in New York in a manner consistent with the directives of the RMR Order. Finally, the Commission should reject as clearly beyond the scope of this proceeding the proposals to use this proceeding to enact changes to the NYISO’s energy and capacity market design.

⁸ *Comments of the Sierra Club*, Docket No. ER16-120-000 (November 30, 2015) (“Sierra Comments”).

⁹ *Motion to Intervene and Comments of Direct Energy Business, LLC, on Behalf of Itself and its Affiliate, Direct Energy Business Marketing, LLC*, Docket No. ER16-120-000 (November 30, 2015) (“Direct Energy Comments”). In this Answer, “Direct Energy” refers to Direct Energy Business, LLC and Direct Energy Business Marketing, LLC.

¹⁰ *Protest of Independent Power Producers of New York, Inc. and Electric Power Supply Association*, Docket No. ER16-120-000 (November 30, 2015) (“IPPNY Protest”).

¹¹ *Protest of the NRG Companies*, Docket No. ER16-120-000 (November 30, 2015) (“NRG Protest”).

¹² *Protest of the Entergy Nuclear Power Marketing, Inc.*, Docket No. ER16-120-000 (November 30, 2015) (“Entergy Protest”).

¹³ *New York Independent System Operator, Inc.*, Order Instituting Section 206 Proceeding and Directing Filing to Establish Reliability Must Run Tariff Provisions, Docket No. EL15-37-000 (February 19, 2015) (“RMR Order”).

I. REQUEST FOR LEAVE TO ANSWER

The NYISO may answer pleadings that are styled as comments as a matter of right.¹⁴

The Commission has discretion to, and routinely accepts, answers to protests where, as here, they help to clarify complex issues, provide additional information, are otherwise helpful in the development of the record in a proceeding, or assist in the decision-making process.¹⁵ The NYISO's Answer to the protests in this proceeding satisfies those standards and should be accepted because it addresses inaccurate or misleading statements, and provides clarification and additional information that will help the Commission fully evaluate the arguments in this proceeding. The NYISO, therefore, respectfully requests that the Commission accept this Answer.

In addition, to the extent that the Commission determines that the fifteen-day period established by Rule 213(d)(1) is applicable, the NYISO respectfully requests that the Commission accept this filing out of time.¹⁶ Due to the complexity of this matter, the number of comments and protests filed, and the fact that parties were afforded an extra three weeks (six weeks in total) to prepare the comments and protests, the NYISO submits that its taking twenty-one days to submit this Answer is reasonable. The modest additional time taken by the NYISO will not prejudice the parties to this proceeding or impede the Commission's timely consideration of any of the submissions in this proceeding.

¹⁴ See 18 C.F.R. § 385.213(a)(3).

¹⁵ See, e.g., *Southern California Edison Co.*, 135 FERC ¶ 61,093 at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its] decision-making process"); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding); *New York Independent System Operator, Inc.*, 140 FERC ¶ 61,160 at P 13 (2012) and *PJM Interconnection, LLC*, 132 FERC ¶ 61,217 at P 9 (2010) (accepting answers to answers and protests because they assisted in the Commission's decision-making process).

¹⁶ See 18 C.F.R. § 385.213(d)(1).

II. BACKGROUND

The Commission issued the RMR Order on February 19, 2015. The order identified the NYISO as the appropriate entity to administer RMR service in New York pursuant to Commission-jurisdictional tariffs. The RMR Order directed the NYISO to submit proposed tariff revisions to govern “the retention of and compensation to generating units required for reliability, including procedures for designating such resources, the rates, terms and conditions for RMR service, provisions for the allocation of costs of RMR service, and a *pro forma* service agreement for RMR service.”¹⁷ On October 19, 2015, the NYISO submitted in the Compliance Filing proposed revisions to its OATT and its Services Tariff to implement the directives of the RMR Order.

III. THE COMMISSION SHOULD REJECT AS BEYOND THE SCOPE OF THIS PROCEEDING ENTERGY’S PROPOSED CAPACITY AND ENERGY MARKET REDESIGN

A significant portion of Entergy’s protest, including an attached study performed on Entergy’s behalf by its consultant Pterra, LLC and an attached affidavit prepared by Dr. Roy J. Shanker, are devoted to explaining a proposal to re-design the NYISO’s capacity and Energy markets; ostensibly as a means to reduce or eliminate the need for the NYISO to enter into RMR Agreements.¹⁸ Entergy’s proposal is clearly beyond the scope of this proceeding, as Entergy itself implicitly recognizes.¹⁹ The Compliance Filing properly focused on implementing the directives of the RMR Order. The scope of these directives is set forth in paragraphs 2 through 4 of the RMR Order, which state in pertinent part:

¹⁷ RMR Order at P 11.

¹⁸ See Entergy Protest at 8-18, 24-32, 59-62, Attachment A (Pterra Report) and Attachment B (Shanker Affidavit).

¹⁹ See Entergy Protest at 8 (proposing that the Commission initiate a new Section 206 proceeding to consider its proposals in the event that they are found to be outside the scope of this proceeding).

2. ...While the Commission has repeatedly stated that our jurisdictional markets should utilize market mechanisms to ensure that the resulting rates are just and reasonable, the Commission has also recognized that short-term remedies, such as RMR agreements, may be appropriate in certain circumstances to address an immediate problem at hand....

3. ...[T]o ensure the proper and efficient operation of NYISO's markets, we find that NYISO should have on file the rates, terms, and conditions for RMR service....

4. As discussed below, NYISO's Tariff is unjust and unreasonable because it does not contain provisions governing the retention of and compensation to generating units needed for reliability. The Commission ... will require NYISO to submit ... proposed tariff provisions governing the retention of and compensation to generating units required for reliability...²⁰

Although the RMR Order granted the NYISO some discretion to propose tariff revisions beyond the Commission's "general guidance" regarding RMR agreements,²¹ this discretion cannot reasonably be read as broadening the scope of this proceeding to encompass global market design changes. The scope of Entergy's proposal is far broader than both the compliance filing the RMR Order directed the NYISO to submit and the NYISO's Compliance Filing.²² The NYISO, therefore, does not respond in this Answer to the aspects of Entergy's "protest" that fall outside the scope of the compliance directives in the RMR Order.

The Commission should also reject Entergy's alternative request that it "institute a new FPA Section 206 proceeding on its own initiative . . . to improve price formation in the New York capacity market."²³ Entergy's proposal would require drastic changes not just to the NYISO's capacity market, but also to its Energy markets and various other rules and procedures.

²⁰ Emphasis added; internal citations removed.

²¹ See RMR Order at P 12 n. 23.

²² Commission precedent is clear that a protest may not expand the scope of a compliance proceeding. See, e.g., *Consolidated Edison Company of New York*, 97 FERC ¶ 61,241 at 62,092 (2001); *Entergy Services, Inc.*, 52 FERC ¶ 61,317 (1990); *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040 at 61,062 (1990).

²³ Entergy Protest at 8.

Entergy has not shown that its proposed “reforms,” which go far beyond anything that exists in any Commission-jurisdictional capacity market, are necessary for the NYISO markets to continue to be just and reasonable. Its proposal is also premature given both the Commission’s ongoing inquiry into “price formation” issues in all ISO/RTO markets²⁴ and various ongoing NYISO-specific proceedings addressing potential capacity market adjustments, including the proposals in this Compliance Filing and the potential changes pending in Docket Nos. EL13-62-002²⁵ and AD14-6.²⁶

In short, if Entergy wishes to pursue the market design changes that it has proposed in this proceeding, it should do so through the NYISO stakeholder process in the first instance. Entergy’s proposal is not within the scope of this proceeding. The Commission should not allow consideration of these matters to delay action on the Compliance Filing. It likewise should not condition its approval of the Compliance Filing, which is a complete and just and reasonable proposal, on developments related to Entergy’s proposal.

IV. GAP SOLUTION RMR PROCESS

A. The NYISO’s Proposed 365 Day Notice Period Is Necessary and Reasonable

IPPNY, Entergy and NRG all argue that the NYISO’s proposed 365 day notice period is too long, and that it should either be shortened significantly, or that the NYISO should be required to enter into an RMR Agreement as soon as it determines that a Generator’s

²⁴ See, e.g., *Price Formation in Energy and Ancillary Services Markets Operated by Regional Transmission Organizations and Independent System Operators*, 153 FERC ¶61,221 (2015); *Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice of Proposed Rulemaking, 152 FERC ¶ 61,218 (September 17, 2015).

²⁵ See *New York Independent System Operator, Inc.*, Response to Information Request, Docket No. EL13-62-002 (December 17, 2015) (discussing potential screening and reporting approach regarding uneconomic retention and repowering issues).

²⁶ See *New York Independent System Operator, Inc.*, Informational Report, Docket No. AD14-6-000 (June 1, 2015) (addressing various potential changes to pre-define capacity zones).

deactivation will result in a Reliability Need (*i.e.*, 91 days after the NYISO's determines that a Generator Deactivation Notice is complete). The protests each argue that once the NYISO determines that a Generator's deactivation will result in a Reliability Need it should be required to pay the Generator a full cost-of-service rate during the notice period.²⁷

The NYISO responds to these arguments below. In reviewing the protests, the NYISO determined that it would not be opposed to allowing limited cost recovery under certain circumstances during the second half of the 365 day notice period, if the Commission determines that such a change would be necessary to produce a just and reasonable rate. The NYISO identifies the changes it would not oppose in its responses below.

1. The NYISO's Proposed 365 Day Notice Period Is Necessary for NYISO to Satisfy its Compliance Obligations

The 365 day notice period is the shortest period practicable for the NYISO to complete the Gap Solution process requirements in a manner that complies with the RMR Order. The proposed 365 day notice period provides the NYISO with the time necessary (1) to evaluate the reliability impacts of a proposed deactivation, and (2) if a Reliability Need is identified, to solicit alternative solutions to executing an RMR Agreement with the deactivating Generator, and (3) to consider all viable and sufficient alternatives to an RMR Agreement to address the identified Reliability Need. Performing a comprehensive review of alternative solutions is necessary for the NYISO to fulfill the RMR Order's mandate that it rely on RMR Agreements "only as a limited, last-resort measure."²⁸ If the notice period is abbreviated, the NYISO will not have sufficient time to adequately and thoroughly consider alternatives to executing an RMR Agreement with the deactivating Generator.

²⁷ See IPPNY Protest at 6, 7, 8-15; NRG Protest at 4-12; Entergy Protest at 3-4, 22, 39-42, 47-49.

²⁸ RMR Order at P 16.

2. The Proposal to Require the NYISO to Execute an RMR Agreement Immediately After a Reliability Need is Identified is Inconsistent with the Requirement that RMR Agreements be a Limited Last-Resort Measure

The RMR Order requires the NYISO, relevant transmission owners, and interested parties to consider alternatives to an RMR Agreement *before* the NYISO enters into an RMR Agreement with a Generator. The RMR Order states that RMR Agreements should be used “only as a limited, last-resort measure” and that alternatives to an RMR Agreement should be considered in order to “mitigate the need for an RMR designation.” Requiring the NYISO to enter into an RMR Agreement one day after the NYISO’s Generator Deactivation Assessment is completed (*i.e.*, on the 91st day of the notice period), would change RMR Agreements from a “limited, last-resort measure” into a “first resort” requirement that applies whenever the NYISO identifies a Reliability Need in a Generator Deactivation Assessment.²⁹ The Commission should reject the arguments in the protests and accept the NYISO’s compliance proposal because it provides the necessary time to plan and implement reliability solutions that could avoid the need to enter into an RMR Agreement.

In paragraph 13 of the RMR Order, the Commission instructed the NYISO to include in its compliance filing:

13. ...Provisions establishing a schedule by which a generator must notify NYISO of deactivation and ***clear timelines for action will ensure that NYISO, generation owners, all relevant transmission owners, and other concerned parties have sufficient time to plan and implement the reliability solutions necessary to address any identified reliability issue, which may ultimately mitigate the need for an RMR designation....***³⁰

²⁹ As addressed in Section IV.A.5 of this Answer, the proposal to require the NYISO to immediately enter into an RMR Agreement after the Generator Deactivation Assessment is completed would also be inappropriate because it does not take into account the deactivation date specified in the Generator Deactivation Notice or the circumstances under which, or when, the identified Reliability Need arises.

³⁰ Emphasis added; internal citations removed.

In paragraph 16 of the RMR Order, the NYISO was further instructed that:

16. ...The *evaluation of alternatives to an RMR designation is an important step that deserves the full consideration of NYISO and its stakeholders to ensure that RMR agreements are used only as a limited, last-resort measure.* To this end, NYISO, in its proposed tariff language, should explain its process for identifying RMR alternatives in detail, including how the process will *ensure a thorough consideration of all types of RMR alternatives in an open and transparent manner*.... Furthermore, NYISO's proposal must include the requirement that any future generation resource-specific RMR filing made with the Commission should *detail the alternative solutions evaluated and justify the term of the proposed RMR agreement vis-à-vis the timing of alternative solutions to the identified reliability need.* This last requirement reflects our belief that RMR filings should be made only to temporarily address the need to retain certain generation until more permanent solutions are in place and that *all alternatives should be considered to ensure that designating a generator for RMR service is a last resort option for meeting immediate reliability needs.*³¹

The proposed revisions to Section 31.2.11 of the NYISO's OATT were developed to satisfy the RMR Order's requirements. The NYISO proposes to perform a Generator Deactivation Assessment³² and, where a Reliability Need is identified, to solicit a broad range of possible Gap Solutions from Responsible Transmission Owners and Developers,³³ and to consider the possible return to service of Generators that are in a Mothball Outage or an ICAP Ineligible Forced Outage to address the identified Reliability Need.³⁴ The NYISO must next identify the proposed Gap Solutions that are viable and sufficient to satisfy the identified Reliability Need.³⁵ All viable and sufficient Gap Solutions are considered in determining how to address the identified Reliability Need³⁶ before the NYISO decides that it needs to enter into an

³¹ Emphasis added; internal citations removed.

³² See proposed OATT Section 31.2.11.2.4.

³³ See proposed OATT Section 31.2.11.3.

³⁴ See proposed OATT Section 31.2.11.4.

³⁵ See proposed OATT Section 31.2.11.6.

³⁶ See proposed OATT Sections 31.2.11.8 and 31.2.11.9.

RMR Agreement.³⁷ This process ensures that the NYISO only executes an RMR Agreement as a last-resort option, after all alternatives have been considered, consistent with the Commission's instructions.

The protests propose that the NYISO be required to enter into an RMR Agreement with the Generator that submitted a Generator Deactivation Notice³⁸ as soon as the NYISO identifies a Reliability Need, before the NYISO can even begin identifying and evaluating alternative solutions to the identified Reliability Need. The proposal to require the NYISO to immediately enter into an RMR Agreement is not consistent with the provisions of the RMR Order that require "thorough consideration" of alternative solutions before an RMR Agreement is executed, nor is it consistent with the rules adopted in other ISO/RTO markets.³⁹

Although it would not be appropriate to require the NYISO to enter into an RMR Agreement with a Generator that submitted a Generator Deactivation Notice immediately after it identifies a Reliability Need, the NYISO has carefully considered the arguments presented in the protests and believes some additional flexibility may be necessary during the notice period. The NYISO would not be opposed to compensating Generators that are required to remain in service beyond the 180th day of the notice period at the Generator's demonstrated avoidable costs, including its variable operating costs, if the Commission determines that such compensation is necessary to produce a just and reasonable result. Implementing this approach would return New

³⁷ See proposed OATT Sections 31.2.11.10.

³⁸ The protests do not propose to give the NYISO any time to identify alternative solutions or to negotiate an RMR Agreement with a different entity before NYISO is required to execute an RMR Agreement.

³⁹ The Midwest Independent Transmission System Operator, Inc.'s ("MISO's") tariff rules give the MISO 26 weeks (which is approximately 180 days) to identify a reliability need and develop a solution. See MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff Section 38.2.7. At minimum, the Commission should give the NYISO the same amount of time it granted the MISO to determine if a Reliability Need exists and to evaluate alternatives before it requires the NYISO to implement a non-market compensation method.

York Control Area (“NYCA”) Generators to approximately where they stood before the NYISO proposed its RMR rules.⁴⁰ Additional payments under an RMR-like agreement have not generally been available in New York until after the NYPSC’s 180 day notice requirement is satisfied.

3. NYISO’s Proposed 365 Day Notice Period Will Not Result in a Constitutional Taking

NRG claims that the NYISO’s proposed 365-day notice requirement is “*per se* unlawful” and unjust and unreasonable.⁴¹ It takes the position that generators may not be “held” in the market “any longer than necessary to meet reliability needs”⁴² and must receive compensation “*immediately*”⁴³ upon being found necessary to address such a need. According to NRG, to do otherwise would be “by definition confiscatory” and incompatible with ratemaking and constitutional principles that date back at least as far as the *Hope* and *Bluefield* decisions.⁴⁴ IPPNY and Entergy both also suggest or imply that the NYISO’s proposal implicates constitutional “takings” issues.⁴⁵

Commission and judicial precedent are clear that the compensation received by a public utility, including independent generators participating in Commission-jurisdictional markets, cannot be “just and reasonable,” or constitutional, if it is so low as to be “confiscatory.”⁴⁶ NRG

⁴⁰ See NYPSC Case No. 05-E-889, *Order Adopting Notice Requirements for Generation Unit Retirements* (December 20, 2005), which requires 180 days prior notice before Generators that are 80 MW or larger may deactivate.

⁴¹ NRG Protest at 5-7.

⁴² *Id.* at 5.

⁴³ *Id.* at 7 (emphasis in original).

⁴⁴ *Id.* at 6.

⁴⁵ IPPNY Protest at n. 52; Entergy Protest at 41.

⁴⁶ See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“[T]he Constitution protects utilities from being limited to a charge for their property that is so ‘unjust’ as to be confiscatory. . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property

asks the Commission to assume that the NYISO's proposed notice period is "by definition" confiscatory. But NRG makes no attempt to explain why a 365-day notice period is *per se* confiscatory when the "182 day" MISO notice period, which it acknowledges that the Commission has accepted, presumably is not.⁴⁷ Moreover, the NYISO is not aware of, and NRG does not cite, any example of a Commission ruling rejecting an ISO/RTO proposal to adopt a notice period longer than 182 days. It appears that the MISO's notice period was simply the longest one proposed prior to the Compliance Filing.

The fact that NRG does not question the legitimacy of shorter but still significant notice periods belies its claim that anything less than "immediate" compensation must be "per se" an unconstitutional taking. The NYISO submits that a one year notice period is not materially different than a 182 day period and is not unreasonable. Generators are generally long-lived assets and many will have experienced years of profitable operations before deciding to deactivate. The mere possibility that a generator might run at a loss for a handful of extra months under the NYISO's proposal is hardly sufficient to result in "per se" confiscation.

More broadly, any "taking" allegedly resulting from the NYISO's proposed notice period would be evaluated under "regulatory taking" jurisprudence because it would not involve the kind of physical and permanent expropriation of tangible property that could amount to a "per se" taking.⁴⁸ Under the Supreme Court's *Penn Central* test, regulatory takings analysis involves multiple factors, most importantly "[t]he economic impact of the regulation on the claimant and,

without paying just compensation and so violated the Fifth and Fourteenth Amendments."); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585, 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense").

⁴⁷ See NRG Protest at 5.

⁴⁸ See, e.g., *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151–52 (Fed. Cir. 2014) (noting that the "per se" takings test is generally only applied to permanent confiscation of real property).

particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action.”⁴⁹ In general, a regulatory taking will be found to have occurred only when property is deprived of all, or practically all, value and actions that result in merely temporary reductions in value are not regulatory takings.⁵⁰

When it applied the *Penn Central* standard in a recent NYISO case, the Commission focused on whether an action would “result in a significant detrimental economic impact on a generator or significant interference with reasonable investment-backed expectations.”⁵¹ The possibility that a generator might suffer some short-term losses during the NYISO’s proposed notice period, which would likely be relatively small when viewed over the generator’s operating life, simply do not constitute a “significant detrimental economic impact” that would disrupt a reasonable investor’s expectations. It is not the responsibility of the Commission or the NYISO to insulate Generators that participate in markets from losses. In the words of the Supreme Court, just and reasonable rates need not “ensure values or . . . restore values that have been lost by the operation of economic forces.”⁵² The fact that generators may experience some losses in complying with market rules established to protect reliable electric services does not defeat investor expectations, appropriate private property, or undermine their financial stability.⁵³

There is likewise no doubt that the “character of the governmental action” involved, *i.e.*, the Commission’s acceptance of the proposed notice period, is both legitimate and reasonable.

⁴⁹ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

⁵⁰ See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁵¹ *New York Independent System Operator, Inc.*, 151 FERC ¶ 61,075 at P 65 (2015) (rejecting a takings claim by generators regarding a NYISO proposal to allow for the temporary use of generator interconnection rights).

⁵² *Market St. v. Railway Comm’n of California*, 324 U.S. 548, 567 (1945), *reh’g denied*, 324 U.S. 890 (1945).

⁵³ *Federal Power Comm’n v. Hope Natural Gas*, 320 U.S. 591 (1944).

In the recent NYISO takings decision noted above, the Commission applied *Penn Central*'s holding that an action that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good" is less likely to be considered a taking.⁵⁴ Because the NYISO's proposal in that proceeding was meant to address an "imminent reliability need" the Commission found that it served a significant common good and thus did not constitute a taking. The Compliance Filing and this Answer both explain in detail why a 365 day notice period is appropriate and necessary in New York. Of course the entire purpose of the Compliance Filing is to address reliability needs. The Commission therefore should not find that the notice period constitutes an impermissible taking.

Finally, courts and the Commission have recognized that "the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."⁵⁵ And the FPA has often been described as primarily a "consumer protection" statute.⁵⁶ NRG's unreasonable demand for "immediate" full cost-of-service compensation during the proposed notice period simply cannot be sustained under such a legal framework.

4. Paying Generators Full Cost-of-Service During the Notice Period Will Discourage Generators from Providing Advance Notice or Assisting Efforts to Plan for an Orderly Deactivation

NRG, Entergy and IPPNY argue that if a Generator is not permitted to deactivate immediately after the NYISO completes a Generator Deactivation Assessment because the

⁵⁴ *New York Independent System Operator, Inc.*, 151 FERC ¶ 61,075 at P 67; citing *Penn Central*, 438 U.S. at 124 (citing *United States v. Causby*, 328 U.S. 256 (1946)).

⁵⁵ See, e.g., *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591,602-03 (1944).

⁵⁶ See, e.g., *Public Systems v. FERC*, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979) ("Both the Natural Gas Act and the Federal Power Act aim to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable, and nondiscriminatory . . ."); *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955) (the Natural Gas Act's "primary aim" is "to guard the consumer against excessive rates"; numerous other court decisions hold that the NGA and the FPA are to be interpreted consistently).

assessment indicates that the Generator's deactivation presents a Reliability Need that the NYISO, affected Transmission Owners and interested stakeholders must plan to address, then the Generator should be paid its full cost-of-service until it is permitted to deactivate.⁵⁷ The Commission should reject this proposal. Requiring the NYISO to pay a full cost-of-service rate to a deactivating Generator before the NYISO has the opportunity to consider alternatives to executing an RMR Agreement with that Generator will send the wrong economic signal to Generators that can reasonably anticipate or know⁵⁸ that their deactivation will result in a Reliability Need. Paying these Generators a full cost-of-service rate during the notice period will encourage surprises, and reward delay.

Ideally, the NYISO wants Generators that are close to the end of their operating lives to continue operating while they are profitable and to cease operation when they no longer expect to be profitable.⁵⁹ The NYISO's Tariff rules are intended to incentivize Generators to submit a Generator Deactivation Notice sufficiently in advance of an expected deactivation to permit the NYISO, affected Transmission Owners and interested stakeholders to plan for the noticed Generator's orderly deactivation.⁶⁰

⁵⁷ See IPPNY Protest at 6, 7, 8-15; NRG Protest at 4-12; Entergy Protest at 3-4, 22, 39-42, 47-49.

⁵⁸ Generators can pay for the NYISO to perform an additional reliability study before a Generator Deactivation Notice is submitted. See Reliability Planning Process Manual, Attachment E, Request for Additional Reliability Study, and Attachment F, Agreements for Additional Reliability Studies; *available at*: http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Planning/rpp_mnl.pdf.

⁵⁹ As explained in Section IV.A.5 of this Answer, expected revenues from the NYISO's capacity market are reasonably predictable, and it is appropriate for generation owners to bear the risk of the business decisions they make.

⁶⁰ The Tariff rules that the NYISO proposed to the Commission in its Compliance Filing require the owner of a Generator to bear any losses that may occur during the 365 day notice period. This gives the owner an appropriate financial incentive to submit a Generator Deactivation Notice in advance, and to deactivate the Generator when its operation ceases to be profitable. The NYISO's proposed rules give the

Requiring the NYISO to pay a deactivating Generator its full cost-of-service as soon as the Generator Deactivation Assessment is completed⁶¹ will not encourage owners to submit a Generator Deactivation Notice sufficiently in advance to permit the NYISO, affected Transmission Owners and interested stakeholders to plan for the Generator's orderly deactivation. To the contrary, if an owner knows or expects that its Generator will be needed for reliability, at least temporarily, it will be able to maximize its profits by operating the Generator until it is no longer expected to be profitable and, only then, submitting a Generator Deactivation Notice.⁶² If the NYISO pays the owner a full cost-of-service rate, the owner will not care that the Generator's operation is not profitable during the notice period. Instead, loads that had no say in when the Generator Deactivation Notice was submitted will absorb the losses that the Generator sustains during the notice period, while the owner receives a full cost-of-service rate. The result proposed in the protests would not be just or reasonable.

The owner might even be able to extend the period over which it is paid a full cost-of-service rate for its Generator by being dilatory in providing needed information to the NYISO in order to delay the NYISO's efforts to determine the least-cost solution to the identified Reliability Need.

The Commission should reject the proposal to require the NYISO to pay Generators that are required to continue operating after the NYISO completes its Generator Deactivation Assessment a full cost-of-service rate during the notice period. Doing so would incentivize

owner up to a full year after the conclusion of the 365 day notice period to decide to deactivate the Generator. *See* proposed OATT Section 31.2.11.14.

⁶¹ This would require cost-of-service payments to commence before the NYISO has the opportunity to solicit or consider alternatives to executing an RMR Agreement with the deactivating Generator.

⁶² This would potentially delay the submission of a Generator Deactivation Notice by 365 days. The owner of a Generator that is not expected to be needed for reliability will not have the same incentive.

inappropriate behavior. The Tariff revisions included in the Compliance Filing provide appropriate financial incentives to deactivating Generators.

However, if the Commission determines that it is necessary to protect a Generator that is not permitted to deactivate for more than 180 days after submitting its Generator Deactivation Notice from sustaining losses during the remainder of the notice period, then the Commission should instruct the NYISO to develop tariff provisions that would allow the NYISO to begin paying applicable avoidable costs, including variable operating costs, commencing on the 181st day of the notice period, under certain circumstance. An avoidable cost based payment structure, without any additional incentive amounts, should protect the Generator from sustaining losses during the remainder of the notice period, but should not provide a financial incentive for owners to delay the submission of Generator Deactivation Notices.

5. Generator Owners Should be Financially Responsible for Deciding when to Submit a Generator Deactivation Notice

The NYISO's proposed 365 day notice period⁶³ does *not* prevent Generators from deactivating at the time of their choosing. The proposed rule merely requires a Generator to submit advance notice of its deactivation to provide the NYISO, affected Transmission Owners and interested stakeholders sufficient time to plan for the Generator's orderly deactivation. As long as a Generator submits its Generator Deactivation Notice sufficiently in advance, it can deactivate on the date it chooses. If a Generator Deactivation Notice is submitted to the NYISO fewer than 375 days⁶⁴ in advance of the desired deactivation date, the Generator will run the risk

⁶³ See proposed OATT Section 31.2.11.2.1.

⁶⁴ This period includes up to ten days for the NYISO to determine that the notice is complete, plus the 365 day notice period.

of not being able to deactivate on its preferred date *if* its deactivation results in the identification of a Reliability Need.⁶⁵

IPPNY, NRG and Entergy argue that because New York does not have a forward capacity market, capacity revenues are so unpredictable that requiring 365 days advance notice could force Generators to unexpectedly run at a loss for a significant period of time.⁶⁶ The protests argue that volatile and unpredictable capacity prices prevent Generators from confidently forecasting their revenue stream over the next 365 days. The protests do not provide quantitative support for their claim that capacity prices are too volatile and unpredictable to confidently forecast capacity revenues 365 days in advance.

The protests all argue that the monthly nature of the NYISO's capacity market impedes efforts to forecast capacity revenues. However, the NYISO offers a six month capacity product (*i.e.* the Strip auction) that offers Generators a single capacity price for six months and can reduce the volatility of Generator revenues. The NYISO's analysis shows that average capacity prices in the Strip auction are statistically indistinguishable from average capacity prices in the monthly Spot auction for the NYCA and all Localities.⁶⁷ The fact that average Strip and Spot Auction prices are closely aligned suggests that capacity prices are not as impossible to predict as the protests claim.

⁶⁵ As explained in greater detail in Part IV.C of this Answer, if a Generator's deactivation does not result in a Reliability Need, then the NYISO does not object to revising its rules to allow a Generator to deactivate in 91 days, after the NYISO's reliability determination is complete.

⁶⁶ See IPPNY Protest at 12-13 and M. Younger Affidavit at PP 15-17; NRG Protest at 9-10; Entergy Protest, Roy J. Shanker Affidavit at p. 30.

⁶⁷ The NYISO calculated a t-statistic to compare Strip auction prices with Spot auction prices. A t-statistic greater than 1.65 would allow the NYISO to state that the difference between Strip and Spot prices is statistically significantly different at a 90% confidence interval. Using capacity price data from May 2006 (May 2014 for GHI) through August 2015, the NYISO calculated the following t-statistics: 1.37 (NYCA), 0.04 (NYC), 1.58 (LI), 0.37 (GHI). The NYISO cannot conclude Strip and Spot auction prices are statistically significantly different for the NYCA or for any Locality.

The NYISO makes information available that can be used to assess the potential downside capacity market price risk that a NYCA Generator faces. The NYISO's capacity market is based on a three year cycle. The NYISO establishes its Demand Curves in the 18 months prior to each three year cycle. During each three year cycle, the applicable set of Demand Curves, the level of demand, and the total quantity of installed capacity determine capacity market prices. The applicable Demand Curve is known at least 12 months in advance. The NYISO's load forecast, which looks forward more than 12 months,⁶⁸ can be used to estimate changes in demand.

Once the Demand Curve is known and expected demand is determined using the NYISO's load forecast, the somewhat more difficult task of estimating changes in supply remains. However, the NYISO makes tools available that can help owners of NYCA Generators develop reasonable estimates and expectations. The NYISO's Interconnection Queue provides information on new Generation that will be entering the market. It identifies the milestones that have been met and provides an estimated in-service date. Mothballed capacity is listed in the NYISO's Gold Book. This information can be used to identify the capacity that could return to service. In addition, it is possible to use Gold Book and other publicly available information to determine what the Capacity price was at the time a mothballed Generator left the market. It may be reasonable to assume that a mothballed Generator will not return to the market until the price of capacity exceeds the level it was at when a Generator deactivated. All of this information can be used by owners to make informed business decisions regarding the downside risk they may face to their Generator's revenues.

⁶⁸ The NYISO's Gold Book contains forward-looking load forecasts covering 10 years.

Implementing a 365 day Generator Deactivation Notice requirement may *improve* the ability of Generators to forecast capacity price increases. This notice requirement may help Generators to better forecast the amount of generation that will leave the market within the next 365 days. This will enable Generators to more confidently forecast their “upside” risk from large capacity price increases due to a large number of megawatts of capacity entering a Mothball Outage or being Retired.

The NYISO’s market structure allows Generators to enter into contracts to supply capacity instead of directly participating in the NYISO’s capacity auctions. These contracts can provide Generators with greater revenue certainty for the duration of the contract. NYISO analysis indicates that arrangements for capacity outside the NYISO’s auctions represented 42% of all capacity transacted from May 2014 through April 2015.⁶⁹ Generators frequently negotiate capacity supply agreements that suit their needs, which may include reducing the volatility of a Generator’s capacity revenues.

Capacity market prices are not perfectly predictable. However, owners of NYCA Generators should be regularly assessing when a potential decrease in capacity prices represents a sufficient risk to a Generator’s profitability that a Generator Deactivation Notice should be timely submitted in order to mitigate that risk. Timely submitting a Generator Deactivation Notice could require the repayment of study costs if the Generator does not, in fact, deactivate within the time allowed. It is up to the owner to weigh the facts and make a wise business decision. It is not unreasonable for the NYISO to expect owners of NYCA Generators to spend money in order to mitigate their business risk.

⁶⁹ An average of 38,722 MW of UCAP cleared in each month from May 2014 through April 2015. Of this capacity, an average of 22,489 MW of UCAP were transacted in the NYISO Strip, Monthly and Spot auctions. The simple average of these numbers is 58%, indicating that the remaining 42% was transacted outside the NYISO auctions.

Capacity prices in New York are reasonably predictable and capacity price hedging mechanisms are available to reduce the impact of capacity market volatility. Significant reductions in capacity prices can occur following the entry of a new, sizable Generator into the market, or the return of a mothballed Generator, but new entry is not difficult to predict. If a Generator runs at a loss during the notice period, it will occur because the Generator's owner did not hedge its risks or decide to more timely submit a Generator Deactivation Notice, and accepted a business risk. The Commission should reject arguments that it is impossible to proactively plan for and provide adequate advance notice of Generator deactivations.

6. RMR Agreements Should Not be Permitted to Take Effect Prior to a Generator's Requested Deactivation Date

The NYISO should not be required to enter into RMR Agreements with Generators that takes effect prior to the deactivation date specified in a Generator Deactivation Notice. RMR Agreements should be used (if at all) to retain Generators *after* their desired deactivation date, not before.

For the past decade Generators in New York that are 80 MW or larger have been required to provide at least 180 days prior notice to the New York Public Service Commission before they are permitted to deactivate.⁷⁰ The NYISO should not be required to provide above-market compensation to a Generator that is not capable of exiting its market due to a long-standing State regulatory requirement.

⁷⁰ See NYPSC Case No. 05-E-889, *Order Adopting Notice Requirements for Generation Unit Retirements* (December 20, 2005). This order requires 180 days prior notice before Generators that are 80 MW or larger may deactivate. In one case (Dunkirk), the NYPSC waived the notice requirement and permitted a rate to take effect 170 days after a notice of deactivation was submitted. See NYPSC Case No. 12-E-0136, *Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery* (August 16, 2012).

If, in response to the IPPNY, Entergy and NRG protests, the Commission decides that the NYISO should be required to make avoidable cost-based payments during the notice period, then the Commission should also instruct the NYISO to implement the following additional rules:

- a. Non-market payments to the Generator that submitted a Generator Deactivation Notice should not commence until the deactivation date specified in the Notice, at the very earliest;
- b. Generators that submit a Generator Deactivation Notice should be required to specify a particular deactivation date in their Notice and to deactivate by that date if the NYISO does not identify a Reliability Need. If a Generator does not deactivate by the date it specifies in its Generator Deactivation Notice, the Commission should require the Generator to repay to the NYISO and the Transmission Owners the cost of any and all studies performed to assess the noticed deactivation, and to perform the notice process again from the beginning if it subsequently proposes to deactivate;
- c. During the notice period the Commission should instruct the NYISO to pay the Generator its avoidable costs, including variable costs, without the opportunity for additional incentives; and
- d. The Commission should instruct the NYISO to develop rules – including possible claw-back provisions and a potential minimum term for Mothball Outages – to address Generators that are compensated at non-market rates during the notice period, but that do not deactivate consistent with the relevant Generator Deactivation Notice, or that briefly deactivate but then quickly return to the market.

Without these additional requirements, Generators that intend to deactivate will have an incentive to specify an unrealistically prompt deactivation date in the Generator Deactivation

Notice in order to improve their prospects of obtaining an RMR Agreement with the NYISO. In addition, without these changes owners that reasonably expect or know that their Generator will be needed for reliability may have an incentive to submit an unnecessary Generator Deactivation Notice in order to receive above-market compensation during the notice period.

Tariff revisions would be necessary to implement the additional rules the NYISO described above. Such rules are only necessary if the Commission abbreviates the 365 day notice period proposed in the Compliance Filing or instructs the NYISO to compensate Generators at a non-market rate during the notice period, while the NYISO is still in the process of evaluating alternative solutions to an identified Reliability Need.

7. The Commission Should Not Adopt Changes to the Time Frames for the NYISO's Completion of Tasks Within the 365 Day Period.

While the NYPSC supports the 365 day notice period, it argues that the time allowed for the performance of its responsibilities in the Gap Solution process is inadequate.⁷¹ Specifically, the NYPSC states that it will have a maximum of four months within the 365 day period for its identification of non-generation alternatives to meet a Reliability Need, and that its time to act is further reduced if a cost recovery filing must be made with and approved by the Commission within the notice period.⁷² Accordingly, the NYPSC proposes alternative, expedited NYISO time frames within the notice period to provide the NYPSC with additional time to perform its responsibilities.⁷³ For the reasons discussed below, the Commission should not adopt the NYPSC's proposed revisions.

⁷¹ NYPSC Comments at 10-12.

⁷² *Id.* at 10-11.

⁷³ *Id.* at 10-12. The NYPSC proposes that the NYISO carry out its duties in shorter time periods, such as assessing whether a generator deactivation would cause a Reliability Need in 75 days rather than 90 days (OATT § 31.2.11.2.4) and completing its viability and sufficiency analysis in 60 days rather than 120 days (OATT § 31.2.11.2.6). *Id.* at 11-12.

The NYISO requires the full time periods specified in Section 31.2.11 to perform its responsibilities. In establishing these time periods, the NYISO reviewed its past experience in performing reliability studies and related planning and market monitoring activities and determined the minimal, reasonable period of time necessary to perform the different Gap Solution process steps. The NYPSC specifically proposes to reduce the time period for the NYISO to perform its Generator Deactivation Assessment from 90 to 75 days,⁷⁴ even though 90 days is the minimum time in which the NYISO can commit to feasibly conduct the reliability analysis based on its experience in conducting similar analysis. Similarly, the NYPSC proposes to significantly reduce the time period in which the NYISO can perform its viability and sufficiency assessment from 120 to 60 days.⁷⁵ Given the potential number and complexity of solutions that the NYISO could receive, it would not be possible for the NYISO to commit to complete this analysis in less than 120 days. The Commission should not adopt the NYPSC's reduced dates, for which the NYPSC has provided no support other than a general intent to expedite the process.

In developing the revised Gap Solution process, the NYISO was cognizant that the NYPSC would require time to perform its own responsibilities and provided certain mechanisms within the process to provide the NYPSC with significant flexibility in performing its responsibilities to provide for well more than the four months indicated by the NYPSC in its comments. The NYPSC may initiate its own process at any time and in parallel with the early stages of the NYISO's Gap Solution process. The NYPSC need not wait to begin its analysis until the NYISO has completed its viability and sufficiency analysis of potential Gap Solutions. Pursuant to Section 31.2.11.5, the NYISO will submit to the NYPSC, at the request of NYDPS,

⁷⁴ *Id.* at 11.

⁷⁵ *Id.* at 11-12.

the information that the NYISO receives from Developers for their proposed Gap Solutions as soon as the NYISO receives it (*i.e.*, at approximately Day 120 of the Gap Solution process).⁷⁶ In addition, the NYISO will also provide the NYPSC, at the NYDPS's request, the information the NYISO receives from Initiating Generators and other deactivated generators for comparison purposes. The NYISO included this provision to enable the NYPSC to begin its consideration of non-generator alternatives related to a Generator Deactivation Notice 120 days into the 365 day notice period.⁷⁷ This provision allows the NYPSC at least four additional months to perform its evaluation of potential non-generation Gap Solutions in parallel with the NYISO's analysis.

In the event the NYPSC is not able to make a determination as the end of the 365 day notice period nears, the NYISO has the authority under its proposed revisions to enter into an RMR Agreement to provide that a Reliability Need will be satisfied.⁷⁸ However, the NYISO can always terminate this RMR Agreement if the NYPSC subsequently identifies a Gap Solution to address the Reliability Need.⁷⁹ Specifically, Section 31.2.11.10.1 provides that:

If, subsequent to the ISO's execution of an RMR Agreement to satisfy in whole or in part the Reliability Need, the NYPSC (or other agency or authority with jurisdiction over the implementation or siting of Gap Solutions) identifies non-

⁷⁶ At day 120, the NYISO will have performed its determination as to whether a Reliability Need exists and would have solicited and received any alternative Gap Solutions to satisfy an identified Reliability Need. Proposed OATT Sections 31.2.11.2.4, and 31.2.11.3.

⁷⁷ The 120 days include allowing 90 days for determination of a Reliability Need under OATT Section 31.2.11.2.4 and 30 days for Developer submission of non-Generator Gap Solutions under OATT Section 31.2.11.2.3.

⁷⁸ Proposed OATT Section 31.2.11.10.1 contemplates this specific scenario, indicating that the NYISO will consider whether the NYPSC has identified a non-generation Gap Solution when determining whether to proceed to enter into an RMR Agreement. Moreover, the NYPSC's time to act is not abbreviated by the time frame for Commission action, because the proposed tariff does not require Commission approval of rate recovery within the 365 day notice period.

⁷⁹ There is no deadline for the NYPSC to determine "which, if any, of the non-generation Viable and Sufficient Gap Solutions submitted by the ISO will be implemented to address the identified Reliability Need." Proposed OATT Section 31.2.11.9.

generation Gap Solution(s) that would satisfy in whole or in part the Reliability Need, the ISO may withdraw its filing of, or terminate, the RMR Agreement.⁸⁰

For the reasons stated above and in the Compliance Filing, the Commission should accept the NYISO's proposed time frames for its tasks within the 365 day notice period without change.

B. The Commission Should Reject Protests Regarding the Scope and Timing of the Information Submission Requirements for Initiating Generators

The Commission should reject IPPNY's, NRG's, and Entergy's protests regarding the scope and timing of the information submission requirements for an Initiating Generator.⁸¹ As described below, the NYISO requires that an Initiating Generator provide the cost, revenue, and other information set forth in Appendix F (Section 31.9) of Attachment Y of the OATT when it submits its Generator Deactivation Notice to enable the NYISO to timely perform its required analysis of the Generator proposing to deactivate. The information required by Appendix F is consistent with the information that the NYISO currently requests from deactivating Generators to analyze market power considerations.⁸²

The NYISO requires the information set forth in Appendix F for two, separate purposes: (i) to perform its analysis of the impact of the Initiating Generator's proposed deactivation consistent with the NYISO's responsibility to continuously monitor the ISO-Administered Markets and competitive market behavior,⁸³ and (ii) to calculate the Availability and Performance Rate ("APR") for the Initiating Generator. The NYISO's ability to timely perform its responsibilities as required within the limited 365 day notice period would be significantly

⁸⁰ Similarly, proposed OATT Section 31.2.11.17.4 provides that the NYISO may terminate the RMR Agreement because "the Reliability Need is resolved sooner than expected."

⁸¹ See IPPNY Protest at 16-17; NRG Protest at 22-23; Entergy Protest at 49-50.

⁸² See Services Tariff, Attachment O, Sections 30.3.3, 30.6.2.

⁸³ See, e.g., Services Tariff, Attachment H Sections 23.1.2, 23.2.3, 23.2.4, 23.4.5.1 and 23.4.5.6; Services Tariff Attachment O Sections 30.1.1, 30.5.1.2 and 30.6.2.

impeded if it were unable to obtain the information required by Appendix F at the start of the process.

The NYISO will begin performing its analysis regarding whether a Generator's proposed deactivation raises market power concerns or constitutes conduct inconsistent with competitive behavior promptly following a Generator's submission of its completed Generator Deactivation Notice.⁸⁴ The NYISO is responsible for performing this analysis, regardless of whether the Generator has indicated an intent to continue to operate as a Gap Solution and regardless of whether the Generator's proposed deactivation could result in a Reliability Need.⁸⁵ This analysis must be performed at the start of the process to provide transparency regarding potential penalties that the Generator could be subject to if it were to deactivate and to enable the NYISO to address any market power concerns.⁸⁶

IPPNY, Entergy and NRG's protests are internally inconsistent. They argue that deactivating Generators should not be required to submit the data set forth in Appendix F along with a Generator Deactivation Notice,⁸⁷ while simultaneously arguing that the NYISO should be

⁸⁴ In its protest, IPPNY asserts that the NYISO will not conduct such analysis until the second 120 day period of the Gap Solution process. The NYISO believes that IPPNY's misunderstanding as to the timing of the NYISO's analysis is the result of ambiguous language on page 16 of the Compliance Filing. The NYISO clarifies here that it will begin performing its analysis of the Initiating Generator's proposed deactivation promptly following the Generator's submission of its completed Generator Deactivation Notice.

⁸⁵ The NYISO is responsible for reviewing whether a Generator's decision to deactivate is conducted consistent with competitive behavior and is not an attempt to exercise market power, regardless of whether the Generator has elected not to take the required administrative or regulatory actions that would enable it to extend its permitted operation. For this reason, the NYISO will require that a Generator submit the information set forth in Appendix F in the scenario described by Entergy in its protest in which a nuclear unit has not timely filed to renew its operating license. Entergy Protest at pp 49-50.

⁸⁶ As described in Part IV.C of this Answer, the NYISO does not object to revising its tariff to enable a Generator to deactivate once the NYISO determines that its deactivation will not result in a Reliability Need. This potentially expedited deactivation schedule is one more reason the NYISO will need a Generator's information at the start of the process.

⁸⁷ See IPPNY Protest at 16-17; NRG Protest at 22-23; Entergy Protest at 49-50.

required to enter into an RMR Agreement as soon as the NYISO completes a Generator Deactivation Assessment and identifies a Reliability Need.⁸⁸ The NYISO, however, could not determine appropriate compensation for the Generators within 90 days after a Generator Deactivation Notice is submitted without receiving at the start of the process, and having time to assess, the required financial information.

With regards to the specific categories of project information required under Appendix F, the Commission should deny IPPNY's request to reject the requirement in Section 31.9.2.1 that Initiating Generators submit all "proposals" pertaining to the cost of opportunities that would be foregone if the Generator is not retired.⁸⁹ The NYISO requires this information to determine whether a Generator's deactivation would be consistent with competitive behavior. It is not only the operating economics of the current facility, but also the business opportunities that would be lost, that factor into the decision to remove the Generator, as well as the avoided costs that should be compensated to the resource.

Finally, IPPNY argues that the requirement in Section 31.9.2.1(g) that Initiating Generators submit "all agreements that contain a cost, premium, or fee for termination of all or a portion thereof" is overbroad.⁹⁰ IPPNY proposes alternative tariff language to Sections 31.9.2.1(g) and 31.9.6 by which the Generator will initially provide the NYISO with a list of certain agreements that have a value in excess of \$200,000 (or \$500,000 for nuclear facilities).⁹¹ In developing this information requirement, the NYISO sought to achieve a balance between its need to obtain the information it requires early in its process to perform the required analysis and

⁸⁸ See IPPNY Protest at 6--15; NRG Protest at 4-12; Entergy Protest at 3-4, 22, 39-42, 47-49.

⁸⁹ IPPNY Protest at 42-44 (referencing Proposed OATT, Attachment Y Section 31.9.2.1(g)).

⁹⁰ *Id.*

⁹¹ *Id.*

the Generator's ability to timely provide such information. IPPNY's proposed revisions to this requirement are too limiting in, for example, excluding many of the agreements that the NYISO would require for its analysis. However, the NYISO would not object to the Commission directing it to make the following more narrowly tailored revisions to Sections 31.9.1.2 and 31.9.6 to address certain of IPPNY's concerns.

Section 31.9.2.1:

(g) If the Generator Deactivation Notice is for the Generator to be Retired, (a) a list of all existing agreements and proposals pertaining to the cost of opportunities that would be foregone if the Generator is not retired, such agreements being for the reuse, repurposing, or distribution of the real property of or on which the unit is located, its personal property or appurtenances; and (b) a list of all agreements that contain a cost, premium, or fee for (i) termination of all or a portion thereof, or (ii) that would be incurred or would continue to be incurred if the Generator would be Retired. Such lists will indicate the value of such contracts, the costs, premiums, and fees, and the circumstances under which they would be incurred; the accuracy of which is certified by an officer to be provided during the 90-day Reliability Needs Determination period; Contracts that have a value of less than \$200,000 (or \$500,000 for nuclear-power facilities) may be presented in aggregate by contract type or as an estimate in such lists;

Section 31.9.6:

For each cost identified under Subsections (a), (b), (d) and (e) of Sections 31.9.2.1, 31.9.3.1, 31.9.3.4, or 31.9.3.5, or Subsections (a), (b) and (d) of Section 31.9.3.3, the Market Party shall provide a detailed plan specifying the schedule and timing of the planned action and expenditure, and if it is an existing Resource, an explanation and supporting documentation of how that plan compares to the Market Party's past similar expenditures, actions, and protocols. The Market Party shall also specify the terms in any contracts associated with (a) avoidable capital expenses, normal maintenance, extraordinary maintenance and repairs, or variable costs that have a value in excess of \$200,000 (or \$500,000 for nuclear-power facilities) and that contain a cost, premium, and/or fee for (i) termination of the agreement in whole or for a portion thereof, or (ii) that would be incurred or would continue to be incurred if the Generator would be Retired, and shall provide a copy of the contract and documents pertinent to the calculation of the early termination premium, cost, and fee, and (b) revenues, and shall provide a copy of the contract and documents pertinent to the calculation of the revenues, and the historic revenues.

C. The NYISO Does Not Object to Generators that Have Indicated an Intent to Deactivate Early Doing So If No Reliability Need Is Identified

Several entities argue that a Generator should be permitted to deactivate as soon as the NYISO's Generator Deactivation Assessment determines that the Generator is not required to satisfy a Reliability Need.⁹² The NYISO's proposed revisions allow a Generator to indicate in its Generator Deactivation Notice that it is interested in deactivating earlier than the completion of the 365 day notice period if the requirements for early deactivation are met.⁹³ Specifically, if the Generator Deactivation Assessment concludes that a Reliability Need will not result from the Generator's deactivation, the NYISO has proposed that a Generator could deactivate early upon a date indicated by the NYISO, which date would be no earlier than day 120 of the Gap Solution process.⁹⁴ The 120 day period was submitted to allow a 30 day period for the orderly deactivation of the Generator considering the administrative processes needed to remove a Generator from the NYISO's markets. Upon further consideration, the NYISO does not object to a tariff revision permitting a Generator to commence the deactivation process pursuant to NYISO procedures as soon as the NYISO makes a determination that the Generator's deactivation will not result in a Reliability Need.⁹⁵ However, to be eligible for this early deactivation opportunity, the Generator must still inform the NYISO in its Generator Deactivation Notice of its interest in deactivating earlier than the conclusion of the 365 day

⁹² IPPNY Protest at pp 15-16; NRG Protest at pp 21-22; Entergy Protest at p 49; UIU Comments at pp 5-6 (Montalvo Affidavit at 12-13).

⁹³ Proposed OATT Section 31.8.4.5.

⁹⁴ Proposed OATT Section 31.2.11.2.5.

⁹⁵ From a practical perspective, this change may have little impact on when a Generator will be able to leave the market. The Generator will still be separately responsible for satisfying any state law or regulatory requirements and timelines concerning its deactivation, which as required by the NYPSC is 180 days for Generators larger than 80 MW.

period.⁹⁶ In addition, the Generator would still be subject to any shortfall and/or buy-out settlements associated with financial commitments taken in the ISO-Administered Markets.

D. The NYISO’s Proposed “Distinctly Higher Net Present Value” Standard Is Reasonable

Certain comments and protests raise issues concerning the NYISO’s proposed use of a “distinctly higher net present value” standard to identify viable and sufficient non-generation solutions. Sierra claims that the proposal would unjustifiably discriminate against non-generation Gap Solutions and that the NYISO “should select non-generation Gap Solution with any value higher than a Generator solution.”⁹⁷ IPPNY similarly argues that the proposal is “skewed in favor of defaulting to an RMR Agreement.”⁹⁸ UIU contends that the NYISO has proposed an “unbounded” criterion that is not clear or reliable and that leaves too much to the NYISO’s discretion.⁹⁹ Entergy makes a similar claim that the proposed language is “unworkable” because of its allegedly excessive subjectivity.¹⁰⁰ The NYTOs request clarification that the comparison of the net present value for a Generator and an alternative solution will be determined using an equivalent time horizon.¹⁰¹

These arguments mischaracterize the Compliance Filing’s proposal. The “distinctly higher” standard is appropriate because project cost and revenue estimates inherently have substantial error bounds. It is therefore reasonable to use a “distinctly higher” standard in order to account for the anticipated margin of error in cost and revenue estimates for both a proposed

⁹⁶ See Proposed OATT Section 31.8.4.5.

⁹⁷ Sierra Comments at 4.

⁹⁸ IPPNY Protest at 21, 26.

⁹⁹ UIU Comments at 4-5.

¹⁰⁰ Entergy Protest at 5-6, 52–55.

¹⁰¹ NYTO Comments at 9.

RMR generator and a non-generation solution. As an example, assume the cost estimate for a transmission project be \$100 and have a +/-40% margin of error,¹⁰² and further assume the estimate for the Generator be \$105 and have a +/-10% margin of error. In this example, the Generator project has only a 56% chance of being more expensive than the transmission project, and it would be unreasonable to require the Generator to participate in the capacity market at an Offer Price if the transmission solution is not selected. The fact that the “distinctly higher” standard accounts for these uncertainties does not create a conflict with Commission precedent requiring that RMR Agreements only be entered into as a “last resort.” By contrast, it is unreasonable for Sierra, IPPNY, and Entergy to essentially call on the NYISO to ignore uncertainty factors and default to non-generation solutions when they may not be as economic as a generation solution.

UIU’s and Entergy’s concerns about the NYISO allegedly having too much discretion are likewise unfounded. It would be impracticable to establish the kind of formulaic standards that UIU envisions, *e.g.*, specific criteria for weighing the impact of “unquantifiable” factors. Entergy’s demand that the NYISO provide “transparent or objective criteria” to further define the meaning of the word “reasonable” runs contrary to decades of precedent in Commission proceedings, and centuries of common law experience more generally, recognizing that defining what is “reasonable” must be a matter of judgment. Given that the purpose of the “distinctly higher” standard is clear, and given the need to allow the NYISO to exercise independent and

¹⁰² This stylized example assumes 80% confidence that the actual costs will fall inside the margin of error, and that the probability distribution of actual costs follows a symmetrical normal distribution centered about the estimate. In reality, the probability distribution function for actual costs is likely skewed toward the risk of higher costs, which reinforces the reasonableness of a “distinctly higher” standard.

impartial judgment in this area, there is no reason for concern that the NYISO will wield undue discretionary authority.

E. The NYISO's Requirements for Identifying Gap Solutions Are Consistent with the Existing Gap Solution Process Accepted by the Commission, As Modified to Address the Directives of the RMR Order

The Commission should reject the protests and comments requesting changes to the carefully drawn division of responsibilities between the NYISO and the NYPSC concerning the identification of Gap Solutions to be implemented to address a Reliability Need. Specifically, NRG, IPPNY, Entergy, and Sierra argue that the NYISO, rather than the NYPSC, should identify whether a non-generation Gap Solution should be implemented to satisfy a Reliability Need.¹⁰³ By contrast, the NYPSC argues that it, rather than the NYISO, should identify any available Generator alternatives to the Initiating Generator, on the grounds that it has jurisdiction over generation and resource adequacy.¹⁰⁴

The Commission should accept the requirements for identifying the Gap Solution to be implemented without modification. In developing its tariff revisions, the NYISO built upon its pre-existing Gap Solution process, pursuant to which the NYPSC is responsible for identifying the Gap Solution to be implemented, regardless of resource type. The Gap Solution component of the NYISO's reliability planning process, including the NYPSC's role in identifying Gap Solutions, was initially accepted by the Commission in 2004.¹⁰⁵ The Commission has subsequently accepted the NYISO's reliability planning process as compliant with the principals of Order No. 890 and Order No. 1000, without modification to the NYPSC's role in the Gap

¹⁰³ NRG Protest at 12-15; IPPNY Protest at 21-25; Entergy Protests at 4-5, 42-49; Sierra Comments at 4-5.

¹⁰⁴ NYPSC Comments at 8-10.

¹⁰⁵ *New York Independent System Operator, Inc.*, Order Accepting in Part and Rejecting in Part Tariff Amendments, 109 FERC ¶ 61,372 (2004), Order on Rehearing and Compliance, 111 FERC ¶ 61,182 (2005).

Solution process. The sole change the NYISO proposed in the Compliance Filing to the existing responsibilities for identifying a Gap Solution have been to comply with the directives of the RMR Order requiring that the NYISO identify the specific Generator needed to enter into an RMR Agreement. Specifically, the RMR Order directed that “the NYISO must be the entity that makes the determination whether a specific generator is needed to ensure reliable transmission service and thus whether the facility is designated an RMR unit.”¹⁰⁶ Consistent with this directive, the NYISO has revised its Gap Solution process to provide that it will be the entity responsible for identifying whether to enter into an RMR Agreement with a Generator as the Gap Solution. This revision has not disturbed the NYPSC’s remaining role to identify any non-generation Gap Solutions to be implemented.

The NYISO’s revised Gap Solution process is consistent with the RMR Order’s directive that the NYISO describe the process that it will use to evaluate alternatives to an RMR Agreement to address a Reliability Need and that the process consider all types of RMR alternatives in an open and transparent matter.¹⁰⁷ Specifically, the NYISO’s Gap Solution process provides for the NYISO’s solicitation and evaluation of proposed Gap Solutions of all resources types.¹⁰⁸ The NYISO’s assessment of the viability and sufficiency of the proposed Gap Solutions will be presented to its stakeholders.¹⁰⁹ The NYPSC’s evaluation and identification of any non-generation Gap Solutions will draw on the results of the NYISO’s assessment.

¹⁰⁶ RMR Order at P 14.

¹⁰⁷ *Id.* at P 16.

¹⁰⁸ *See* Proposed OATT Sections 31.2.11.3 and 31.2.11.6.

¹⁰⁹ *See* Proposed OATT Section 31.2.11.6.

F. The NYISO Does Not Object to Certain Requested Clarifications Regarding the Interaction Between its RMR and Planning Requirements

The NYTOs request clarification of how the NYISO reflects their Local Transmission Plan (“LTP”) projects in the base case used to assess the reliability impacts of a Generator’s proposed deactivation.¹¹⁰ Specifically, the NYTOs request that the Commission clarify that while their LTP projects on the New York State Bulk Power Transmission Facilities (“BPTF”) will be included in the base case if they are firm projects expected to be in service within three years, the NYISO will include in the base case LTP projects that the NYTOs report as firm¹¹¹ transmission plans to be implemented on non-BPTF facilities at any time during the ten-year Study Period.¹¹² The NYISO does not object to this clarification because it reflects current practice memorialized in Section 3.1.1 of its Reliability Planning Process Manual, which states that NYTO LTPs “for non-bulk transmission facilities and NYPA transmission plans for non-bulk power facilities which are reported to the NYISO as firm transmission plans will be included.”¹¹³ The NYISO will continue to independently review all NYTO LTPs as they relate to the BPTFs to determine whether they will be implemented and the extent to which they address the Reliability Need.¹¹⁴

¹¹⁰ NYTO Comments at 7-8.

¹¹¹ As described in the NYISO’s 2015 Load and Capacity Data Report (“Gold Book”), “[f]irm projects are those which have been reported by TOs as being sufficiently firm, have an Operating Committee approved System Impact Study (if applicable) and, for projects subject to Article VII, have a determination from New York Public Service Commission that the Article VII application is in compliance with Public Service Law § 122.”

¹¹² NYTO Comments at 7-8.

¹¹³ NYISO Reliability Planning Process Manual (December 2014), Section 3.1, *available at*: http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Planning/rpp_mnl.pdf. The NYISO will update its Manual to reflect changes to the Reliability Planning Process in the Compliance Filing.

¹¹⁴ OATT Section 31.2.2.4.2.

The NYTOs further request clarification that the NYISO has the discretion to complete a non-generation solution identified to meet a Reliability Need if a Generator rescinds its Generator Deactivation Notice.¹¹⁵ The Gap Solution process does not provide for the halting of non-generation projects identified to be implemented to address a Reliability Need.¹¹⁶ There are circumstances when it would be reasonable for a non-generation solution to be completed even if a Generator rescinds its Generator Deactivation Notice. For example, in cases where a transmission solution is substantially complete at the time the Generator rescinds its notice, completion of the solution is likely appropriate.¹¹⁷ Accordingly, the NYISO does not object to being directed to develop tariff revisions that clarify this requirement.

UIU requests clarification regarding the NYISO's treatment of an RMR Generator in the base case of its reliability planning process if it remains in service upon the expiration of the term of an RMR Agreement.¹¹⁸ The NYISO clarifies that it would treat a Generator that satisfies all of the requirements to return to service like any other existing Generator that participates in the NYISO-administered markets and would include it in the base case for the NYISO's reliability planning process.¹¹⁹

¹¹⁵ NYTO Comments at 8.

¹¹⁶ *Cf.* OATT Section 31.2.11.9 (providing for the NYISO to halt transmission projects under certain circumstances under its long-term reliability planning process).

¹¹⁷ An Initiating Generator may decide not to deactivate up to 365 days following the expiration of the 365-day notice period. Proposed OATT Section 31.2.11.14.

¹¹⁸ UIU Comments at 2-3. UIU separately requests clarification of how a Generator's return to service would impact the construction of an alternative solution. As described above, the NYISO believes that a non-generation project that has been identified by the NYPSC and that has met certain milestones should be completed to ensure reliability, regardless of whether a Generator decides to rescind its Generator Deactivation Notice or to return to merchant status after entering into an RMR Agreement. As stated above, the NYISO requests that the Commission direct it to filed conforming tariff amendments on this point in a further compliance filing.

¹¹⁹ Such Generator would not be able to deactivate again without proceeding anew through the Generator Deactivation Notice process.

Existing Generators are included in the base case for the NYISO's reliability planning process, unless they are removed as provided for in the NYISO's OATT or in the Reliability Planning Process Manual. The manual provides that:

Generator retirements and mothballed units will be removed from the base case subject to, and in accordance with, the effective dates in notices provided to the NYDPS and the NYISO and subject to the results of reliability studies performed by the NYISO and the local TO and presented to the NYDPS. Units requesting mothball status, but remaining in service based upon existing or executed agreements financially supporting their continued operations, will be modeled in service for the duration of that agreement.¹²⁰

In addition, if a Generator is operating under an RMR Agreement, the NYISO will not include that RMR Generator in the base case of the NYISO's reliability planning process.¹²¹ These exclusion requirements allow the NYISO to plan for the long-term reliability of the New York State Transmission System without the RMR Generator's participation consistent with the RMR Generator's stated interest in deactivating.

V. RMR COMPENSATION REQUIREMENTS

The NYTOs' request clarification of how the NYISO intends to incorporate bilateral contracts that pre-date the execution of an RMR Agreement into its determination of RMR Avoidable Costs.¹²² In response to the NYTOs' question, the NYISO clarifies that it intends to implement proposed OATT Section 31.2.11.8.1.4.1 as follows. If a pre-existing bilateral

¹²⁰ Reliability Planning Process Manual § 3.1.1 (at p 3-2). Section 3.1.1 of the Reliability Planning Process Manual currently states that generators that remain in service based upon "existing or executed agreements financially supporting their continued operations, will be modeled in service for the duration of that agreement." The NYISO will propose in the stakeholder process revisions to its Reliability Planning Process Manual to be consistent with its proposed revisions to Section 31.2.2.3.2 of the OATT before it initiates the next cycle of its reliability planning process in April 2016.

¹²¹ Proposed OATT Section 31.2.2.3.2. Also, if the RMR Generator is planning to return to service, it can always offer itself as a market-based solution to any Reliability Need identified in the NYISO's reliability planning process.

¹²² NYTO Comments at 9-10.

contract will not terminate and will continue to impose a financial obligation even after the Generator retires or enters a Mothball Outage, then the NYISO does not intend to treat the contract revenues as avoidable. If the pre-existing bilateral contract would terminate and would not continue to impose a financial obligation if the Generator retires or enters a Mothball Outage, then NYISO will treat the contract revenues as avoidable. The NYISO is prepared to add further detail to OATT Section 31.2.11.8.1.4.1 if the Commission determines that additional detail is necessary.

The NYTOs also request clarification of whether payments to RMR Generators for Voltage Support Service (“VSS”) or Restoration Service (“Blackstart”) under the NYISO’s proposed APR would be allowed to the extent they cause payments to the RMR Generators to exceed the costs the RMR Generators would have avoided if the Generator entered a Mothball Outage or Retired.¹²³ The NYISO clarifies that RMR Generators that accept an APR will be permitted to retain VSS and/or Blackstart payments even if VSS and/or Blackstart revenues will cause the total payments to the RMR Generator to exceed the costs the RMR Generator would have avoided if it had entered a Mothball Outage or Retired.

The NYISO’s proposal could leave an RMR Generator slightly better off than it would have been if the Generator had entered a Mothball Outage or Retired. The NYISO’s proposal to give RMR Generators that accept an APR the opportunity to earn Availability Incentives and/or Performance Incentives could produce the same result. In 2014 Blackstart payments were approximately 0.69% of the NYISO’s total market volume. In 2014 VSS payments were 0.15% of the NYISO’s total market volume. Given the extremely small component of total market

¹²³ *Id.* at 10-11.

compensation these cost-based payments represent, the NYISO determined it was not worth developing a complex and unique set of rules to apply to RMR Generators.

VI. RMR PARTICIPATION IN NYISO CAPACITY MARKET

IPPNY objects to several aspects of the NYISO's RMR Offer Floor proposal. First, it asks the Commission to "reject the NYISO's proposal to only apply an RMR Offer Floor if 'there is a Viable and Sufficient transmission or demand response gap solution that has an estimated net present value that is *distinctly* higher than [the Generator].'"¹²⁴ IPPNY complains that the NYISO would impose an Offer Floor only if it were "absolutely clear that the non-generation Viable and Sufficient Gap Solution was a lower-cost solution by some substantial proportion."¹²⁵ IPPNY contends that the NYISO should instead impose an RMR Offer Floor "unless the estimated net present value of all of the non-generation Viable and Sufficient Gap Solutions is distinctly lower than the estimated net present value of the RMR Generator, *i.e.*, impose an RMR Offer Floor unless all the non-generation solutions are distinctly more expensive than the RMR Generator."¹²⁶ Second IPPNY opposes setting the RMR Offer Floor at the RMR Generator's RMR Avoidable Costs, net of likely projected annual Energy and Ancillary Services revenues. It argues that the RMR Offer Floor should "be set based upon the final RMR Agreement rate less expected energy and ancillary services revenues."¹²⁷ Entergy makes similar claims on both points.¹²⁸

The Commission should reject IPPNY's arguments. The "distinctly higher" trigger avoids imposing an Offer Floor when it is not clear that a more economic non-Generator Viable

¹²⁴ IPPNY Protest at 35 (emphasis added by IPPNY).

¹²⁵ *Id.* at 35.

¹²⁶ *Id.* at 35-36.

¹²⁷ *Id.* at 36.

¹²⁸ Entergy Protest at 5-6, 50-58.

and Sufficient Gap Solution exists.¹²⁹ IPPNY's alternative approach would impose mitigation too readily. As discussed in the Compliance Filing, the NYISO's use of the "distinctly higher" standard will also allow the NYISO to provide appropriate signals to stakeholders and the NYPSC regarding potential needs to select non-Generator solutions.¹³⁰ It will enable them to discern when an Offer Floor is likely to be imposed and to plan accordingly.

IPPNY also has not justified its proposal to base RMR Offer Floors on contract prices. The Compliance Filing explained why it is necessary to use an RMR Generator's RMR Avoidable Costs. Nothing in IPPNY's arguments invalidates that explanation.

IPPNY also claims that the Compliance Filing does not do enough to discourage certain "arrangements that would cause the retention or repowering of an, or the establishment of a new, uneconomic Generator" without triggering the RMR process.¹³¹ It proposes that the NYISO be "required to impose an RMR Offer Floor on the UCAP bids of a Generator that was not selected by the NYISO as an RMR Generator and is retained, repowered, or developed to satisfy a Reliability Need through a compensation arrangement whose costs are recovered from electric customers in New York through any form of non-bypassable charge or are assessed to customers that do not have an effective alternative to the service."¹³²

IPPNY's proposal is outside the scope of this proceeding, which is confined to the NYISO's RMR compliance proposal and does not encompass non-RMR arrangements. It is also an unnecessary solution in search of a problem given the RMR Order's directive that the NYISO

¹²⁹ Compliance Filing at 27.

¹³⁰ *See id.*

¹³¹ IPPNY Protest at 40.

¹³² *Id.* (footnote omitted).

be a party to all future RMR agreements in New York State.¹³³ It seems very unlikely that the Commission would accept a future pseudo-RMR arrangement that did not include the NYISO as a party. In addition, the NYISO has recently proposed that the Commission consider the merits of an approach under which it would screen, monitor for, and refer suspicious behavior associated with potential uneconomic retention and repowering.¹³⁴ This approach would address the kinds of behavior that IPPNY has identified and obviate the need for further action in this docket.

NRG claims that the Compliance Filing's proposals regarding RMR Generator participation in the wholesale markets will somehow "harm their integrity."¹³⁵ It contends that allowing resources retained for needs unrelated to bulk resource adequacy, *e.g.*, RMRs resulting from transmission security reliability needs, to bid as price takers would "artificially suppress market clearing prices and [deny] competing generators a reasonable opportunity to recover their fixed costs."¹³⁶ NRG's argument is based on a fundamentally flawed economic theory that has already been rejected by the Commission in Docket No. EL13-62-000.¹³⁷ As the NYISO explained in that proceeding, when a constraint is not priced into the markets, as in the case of transmission security needs, then it would be unreasonable to mitigate offers since that would be tantamount to pricing the need for a resource into the market (which would send an inefficient

¹³³ See, *e.g.*, RMR Order at P 3.

¹³⁴ See *New York Independent System Operator, Inc.*, Response to Information Request, EL13-62-002 (December 16, 2015).

¹³⁵ NRG Protest at 15.

¹³⁶ *Id.*

¹³⁷ *Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.*, 150 FERC ¶ 61,214 at P 66 (2014).

price signal).¹³⁸ The Compliance Filing was designed to result in RMR Agreements being entered into at the least cost offered; *i.e.*, the least cost of the resources that submit offers to provide RMR service. The fact that a generator might have sought to exit the market because it would have operated below its going forward costs over some period of time does not mean that an RMR Agreement is an “uneconomic solution” to the Reliability Need.

VII. THE FORM OF RELIABILITY MUST RUN AGREEMENT

A. Termination/Survival Provisions

Section 2.2.1 of the NYISO’s proposed *pro forma* RMR Agreement permits the NYISO to terminate an RMR Agreement after providing 90 days written notice to the owner of the RMR Generator when the Generator is no longer needed to meet the Reliability Need. NRG argues that the termination provision in Section 2.2.1 is inappropriate because NRG is concerned that the proposed 90 day notice period is too short, and the NYISO is not providing an adequate opportunity for the Generator to recover its costs of providing RMR service.¹³⁹ NRG’s protest should be rejected because its legitimate concerns are already addressed in the RMR Agreement.

Section 4.8 of the agreement states as follows:

4.8 Wind-Down Costs.

If the ISO terminates this Agreement early due to the conclusion of the Reliability Need prior to the end of the Term of this Agreement (*see* Section 2.2.1 above), then the ISO shall pay any demonstrated, actual additional wind-down costs that Owner must incur to place an RMR Generator in a Mothballed Outage or Retired state at the conclusion of this Agreement because the ISO terminated the Agreement early, in accordance with Sections 31.2.11.17.4 and 31.2.11.17.5 of the OATT. The ISO shall not pay such costs if a (former) RMR Generator continues to participate in the ISO Administered Markets following the

¹³⁸ *See Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, Docket No. EL13-62-000 at 4-6 (June 28, 2013); *Answer of the New York Independent System Operator, Inc.*, Docket No. EL13-62-000 at 11-13 (May 30, 2013).

¹³⁹ NRG Protest at 16-18.

conclusion of this Agreement. If Owner does not agree with the ISO's determination of the actual additional costs it had to incur due to the ISO's early termination of this Agreement, then Owner may submit a filing to FERC under Section 205 of the FPA seeking recovery of additional costs it will incur due to the ISO's early termination of this Agreement. The ISO may pay wind-down fees after the termination of this Agreement pursuant to Services Tariff Rate Schedule 8 and recover them from the (former) RMR LSEs under OATT Rate Schedule 14.

Section 4.8 provides the owner of an RMR Generator an adequate opportunity to recover costs that it must incur because the NYISO terminates an RMR Agreement prior to the conclusion of its full term. In addition to permitting recovery of wind-down costs, Section 4.3.2.6 of the agreement authorizes the NYISO to reimburse the owner of an RMR Generator for the cost of Capital Expenditures that are started, but not completed because an RMR Agreement is terminated early.

4.3.2.6 Reimbursement of costs of Capital Expenditures that are not completed....
...If this Agreement is terminated early for an RMR Generator for reasons other than Owner's default or the RMR Generator's failure to satisfy one of the Minimum Operating Standards set forth in Section 7.3 of this Agreement, then the ISO shall reimburse the cost of Capital Expenditures that Owner was working to complete, subject to the requirements of Sections 31.2.11.17.4 and 31.2.11.17.5 of the OATT.

The NYISO's obligation to compensate an RMR Generator is appropriately limited to (1) the Commission-accepted APR or Owner Developed Rate, plus (2) any Additional Costs or Capital Expenditures for which cost recovery is allowed under proposed Sections 31.2.11.16 and 31.2.11.17 of the OATT, plus (3) any Wind-Down Costs that are allowed to be recovered in accordance with Section 4.8 of the RMR Agreement. The NYISO does not agree with NRG's suggestion that it should assume a Tariff obligation to reimburse RMR Generators for costs that do not qualify for recovery under any of the three categories listed in this paragraph.

B. Treatment of Owner Developed Rate

The NYISO's RMR proposal gives generators the opportunity to choose between (a) accepting a NYISO developed APR, which only provides for recovery of a Generator's

going-forward costs, or (b) proposing an Owner-Developed Rate to the Commission that will permit the Generator to recover up to its full cost-of-service. NRG argues that Generators that reject the NYISO's APR and instead elect to present an Owner Developed Rate to the Commission should receive all of the benefits of the NYISO's proposed APR, and should also be eligible to seek full cost-of-service recovery from the Commission.¹⁴⁰ NRG's arguments should be rejected for the reasons set forth below.

In Section 15.8.5 of proposed Rate Schedule 8 to its Services Tariff, the NYISO proposes to limit the total penalties, sanctions and deficiency charges that can be assessed to an RMR Generator that is providing service under an APR to the cumulative amount of Availability Incentives and Performance Incentives that the RMR Generator has earned. The purpose of this limitation is to ensure that RMR Generators that accept the APR are not assessed penalties that cause the RMR Generator to recover less than its Avoidable Costs. The goal is to provide owners of RMR Generators that accept an APR some assurance that the decision to provide RMR service will not leave the owner in a worse position than it would have been in if its Generator had deactivated.

It is not necessary or appropriate to provide similar protection from penalties and sanctions that are assessed because a Generator does not follow the NYISO's market rules to an RMR Generator that is being compensated pursuant to an Owner Developed Rate.¹⁴¹ Although NRG argues that an owner might reject the NYISO's APR, and instead submit a rate to the

¹⁴⁰ NRG Protest at 18-19.

¹⁴¹ There are also practical implementation problems with NRG's proposal. An RMR Generator that operates pursuant to an Owner Developed Rate is expected to recover revenues that exceed its Avoidable Costs, but its revenues in excess of its Avoidable Costs probably will not be (almost exclusively) in the form of an Availability Incentive or a Performance Incentive. Unless the Commission also determines the Generator's RMR Avoidable Costs (even though the Generator is being compensated under a different rate), it will not be possible for the NYISO to identify the revenues in excess of RMR Avoidable Costs against which Tariff-mandated penalties and sanctions can be assessed.

Commission that is designed to recover less than its Generator's full cost-of-service, the NYISO considers that prospect unlikely. The NYISO expects that an Owner Developed Rate will (1) require it to pay greater compensation than the Generator expects to earn by participating in the ISO-Administered Markets or by accepting an APR, and (2) include both a return of and a return on the owner's investment. It would not be just or reasonable to insulate the owner of an RMR Generator that is being compensated at a level that *exceeds* market compensation, and that is being paid a return on its investment, from the obligation to pay the same penalties that *all* Generators that participate in the ISO-Administered Markets at market-based rates must pay when they break a Tariff rule.

The Commission should reject NRG's protest and only allow the NYISO's proposed limitation on penalties and sanctions to apply to Generators that provide RMR service under an APR avoidable cost rate. If the Commission determines that providing RMR Generators that are paid an APR a limited exemption from penalties unduly discriminates against RMR Generators that elect to be compensated pursuant to an Owner Developer Rate, then the NYISO request that the Commission reject the proposed limitation on penalties that applies to Generators operating pursuant to an APR.¹⁴² The NYISO does not support extending protection from financial penalties and sanctions for operating an RMR Generator in a manner that violates the NYISO's Tariffs to Generators that are being compensated pursuant to an Owner Developed Rate.

NRG next argues that Generators that reject the APR and file an Owner Developed Rate should also be eligible to receive an Availability Incentive and a Performance Incentive, so long as the Generator's total cost recovery is capped at its full cost-of-service.¹⁴³ NRG's protest does not explain how it expects the NYISO will ensure that the Availability Incentives and/or

¹⁴² See proposed Services Tariff, Rate Schedule 8, Section 15.8.5.

¹⁴³ NRG Protest at pp 18-19.

Performance Incentives the NYISO pays to a Generator as part of its Owner Developed Rate will not cause that Generator to receive compensation that exceeds its full cost-of-service. As the NYISO explained in the Compliance Filing, it has limited flexibility in implementing RMR compensation rules and is not capable of implementing *ad hoc* rates for each RMR Generator.¹⁴⁴ NRG's proposal should be rejected.

Finally, NRG argues that the NYISO should be authorized to allow RMR Generators with Owner Developed Rates to recover Substantiated Additional Costs that are Capital Expenditures of up to \$10 million on the same basis as RMR Generators that accept a NYISO-developed APR can recover these costs.¹⁴⁵ The reason the NYISO proposes to require RMR Generators with Owner Developed Rates to obtain Commission approval in order to recover Additional Costs is because the NYISO may not be able to determine whether all or a portion of the requested additional costs are already being recovered under the RMR Generator's Owner Developed Rate. The NYISO will know all of the components of an APR that it develops. The NYISO will not have a similar depth of understanding of the cost components that are used to construct an Owner Developed Rate. If the Commission determines that the NYISO's concerns about the potential for a double-recovery of costs are unfounded, then the NYISO is willing to change proposed Section 31.2.11.16.3 of its OATT to apply to both APR and Owner Developed Rates in a compliance filing.¹⁴⁶

¹⁴⁴ Compliance Filing at pp 10-11.

¹⁴⁵ NRG Protest at p 19; *see* proposed OATT Section 31.2.11.16.3.

¹⁴⁶ Other conforming changes may also be necessary.

C. Additional Costs

NRG incorrectly states that Capital Expenditures cannot qualify as Additional Costs.¹⁴⁷ Proposed Sections 31.2.11.16.3, 31.2.11.16.4 and 31.2.11.17.2 of the OATT specifically authorize the NYISO to pay Additional Costs that are Capital Expenditures.¹⁴⁸

NRG next argues that the NYISO's proposal to require RMR Generators to absorb unanticipated repair costs that are less than the lesser of \$250,000 or 5% of the Generator's annual RMR Avoidable Costs excluding Capital Expenditures¹⁴⁹ denies RMR Generators the opportunity to recover *all* of their legitimately-incurred costs of providing reliability service, and is especially unfair to Generators under an APR when the rate is only covering going forward costs.

As explained previously, the NYISO expects that an Owner Developed Rate will (1) require it to pay greater compensation than the Generator expects to earn by participating in the ISO-Administered Markets or by accepting an APR, and (2) include both a return of and a return on the owner's investment. It would not be just or reasonable to insulate the owner of an RMR Generator that is being compensated at a level that exceeds market compensation, and that is being paid a return on its investment, from *any and all risk* of operating its Generator, no matter how small. The NYISO's proposal adequately ensures that RMR Generators operating

¹⁴⁷ NRG Protest at p 20.

¹⁴⁸ NRG mistakenly cites Sections 4.3.2 and 7.2.4 of the proposed *pro forma* RMR Agreement. Section 4.3.2 of the *pro forma* RMR Agreement does not address Additional Costs (unexpected costs that arise during the term of an RMR Agreement), its purpose is to explain how to develop an initial rate. Section 4.3.3 of the *pro forma* RMR Agreement addresses Additional Costs and states that Capital Expenditures can be Additional Costs in some circumstances. Section 7.2.4(b) of the *pro forma* RMR Agreement discusses Capital Expenditures in the context of setting a floor on the smallest amount of costs that may be recovered as Additional Costs. It provides an opportunity for small RMR Generators to recover Additional Costs that are less than \$250,000.

¹⁴⁹ See proposed OATT Section 31.2.11.16.1.1.

pursuant to a sensibly designed Owner Developed Rate will, at minimum, recover their avoidable costs.

With regard to an RMR Generator that is operating under an APR, while it may be possible to further reduce the minimum expenditure that may be submitted to the NYISO for recovery as an Additional Cost, the lower the minimum repair or Capital Expenditure costs that can be recovered as an Additional Cost is set, the more difficult it will become for the NYISO to determine if the costs that a Generator is seeking to recover are already being recovered as a component of the Generator's APR (as allowed routine maintenance costs, or part of an approved Capital Expenditure project) or if they are Additional Costs that are eligible for recovery. The NYISO does not want RMR Generators delaying minor repairs while they wait for a decision from the NYISO on cost recovery.

D. Self-Scheduling of RMR Generators

NRG presents a series of arguments that all point toward a common goal of obtaining increased authority to self-schedule an RMR Generator without obtaining the NYISO's permission to do so.¹⁵⁰ Several of the bases on which NRG seeks authority to self-schedule an RMR Generator are extremely vague.¹⁵¹ Others can be achieved by bidding appropriately.¹⁵² The NYISO does not agree with or support NRG's proposal.

The NYISO's proposed RMR rules give the NYISO the authority it requires to accommodate the specific, demonstrated needs of RMR Generators. The NYISO's proposed Energy Market Participation Rules allow the NYISO to develop reference levels that take into

¹⁵⁰ NRG Protest at pp 20-21.

¹⁵¹ *E.g.*, “for diagnostic purposes,” “to remain a net generator of power over a month,” “or as otherwise required by plant management health, safety, environmental or operational reasons.”

¹⁵² Operating consistent with a RMR Generator's minimum run time, for example.

account environmental¹⁵³ and other operating restrictions,¹⁵⁴ and to authorize the self-scheduling of RMR Generators.¹⁵⁵ The NYISO may authorize the self-scheduling of an RMR Generator for a broad range of reasons including “operational and maintenance considerations, including required testing or for fuel management purposes.”¹⁵⁶

The reason prior approval is required for RMR Generators to self-schedule is because RMR Generators are compensated at their reference level for all Energy they are scheduled to produce. If an RMR Generator self-schedules and operates at times when LBMPs are low and the Generator would not be economically committed based on its marginal costs, the Generator’s operation will increase the subsidy that loads must pay to keep the RMR Generator in service. NRG’s efforts to obtain broader authority for RMR Generators to self-schedule should be rejected.

VIII. TRANSMISSION SECURITY COST ALLOCATION

The NYTOs support “allocating costs to the load that contributes to a transmission security violation as consistent with the Commission’s beneficiary-pays principle” and applying this costs allocation methodology to transmission security violations on the Bulk Power Transmission Facilities.¹⁵⁷ They express concern, however, about the “lack of a defined process” “for identifying new BPTF facilities” and “reserve their rights, individually and collectively, to address this issue in the future.”¹⁵⁸ The definition section of the NYISO’s planning process define “New York State Bulk Power Transmission Facilities” as “[t]he facilities identified as the

¹⁵³ See proposed Services Tariff Sections 23.6.2.2, 23.6.2.2.1, 23.6.2.3.1.

¹⁵⁴ See, e.g., proposed Services Tariff Sections 23.6.1.1.3, 23.6.2.2.1, 23.6.2.3.1 and 23.6.2.3.5.

¹⁵⁵ See proposed Services Tariff Section 23.6.1.5.

¹⁵⁶ See proposed *pro forma* RMR Agreement Section 3.9.

¹⁵⁷ NYTO Comments at 4-5.

¹⁵⁸ *Id.* at 5.

New York State Bulk Power Transmission Facilities in an annual Area Transmission Review submitted to the NPCC by the ISO pursuant to NPCC requirements.”¹⁵⁹ Nothing in the Compliance Filing changes this definition or how it is applied to planning for the reliability of the BPTF and non-BPTF facilities in the event of a generator deactivation, or in any of the NYISO’s other planning processes. The NYISO works with the NYTOs each year to evaluate whether new transmission facilities should be added to the BPTF list in the annual Area Transmission Review.

IX. OTHER MATTERS

The NYISO proposed in the Compliance Filing that an RMR Generator that seeks to return from an RMR Agreement to merchant status must first repay Capital Expenditure costs reimbursed by the NYISO, less depreciation.¹⁶⁰ NYC/MI does not oppose this claw-back requirement, but argues that an RMR Generator returning to merchant status should also be responsible for re-paying interest on the Capital Expenditure costs.¹⁶¹ NYC/MI argues that the absence of an interest requirement weakens the anti-toggling purpose of this claw-back requirement by essentially providing Generators with interest-free financing.¹⁶² The NYISO agrees that the proposed Capital Expenditure re-payment requirements in Section 15.8.6 of the Services Tariff do not clearly specify that Capital Expenditure costs must be repaid with interest. The NYISO further agrees with NYC/MI that it is appropriate for interest to be included with

¹⁵⁹ OATT Section 31.1.1.

¹⁶⁰ See proposed Services Tariff Section 15.8.6. The Capital Expenditure requirements provide appropriate accelerated cost recovery for Capital Expenditures that are determined to be necessary to an RMR Generator’s operation during the term of an RMR Agreement. The NYISO’s requirements for clawing-back these costs if a Generator seeks to return to a merchant status are intended to safeguard consumer interests and discourage Generator’s toggling between an RMR Agreement and market rates.

¹⁶¹ NYC/MI Comments at 6-8.

¹⁶² *Id.*

those Capital Expenditure costs to be re-paid, which requirement is consistent with the purposes of the claw-back requirement to protect consumers and to minimize incentives for a Generator to toggle between an RMR Agreement and market rates. For these reasons, the NYISO does not object to the Commission directing it to develop tariff revisions to include an interest requirement for Capital Expenditures that are required to be re-paid.

X. CONCLUSION

WHEREFORE, the New York Independent System Operator, Inc. respectfully requests that the Commission accept this Answer and accept the Compliance Filing in the above-referenced docket with only the limited clarifications described above.

Respectfully submitted,

By: /s/ Alex M. Schnell

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CERTIFICATE OF SERVICE

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

Dated at Rensselaer, NY this 21st day of December 2015.

/s/ Joy A. Zimmerlin

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