

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

**New York State Public Service Commission,
New York Power Authority, Long Island Power
Authority, New York State Energy Research
and Development Authority, City of New York,
Advanced Energy Management Alliance,
and Natural Resources Defense Council**

Docket Nos. EL16-92-____ and

v.

New York Independent System Operator, Inc.

New York Independent System Operator, Inc.

**ER17-996-____
(not consolidated)**

**NOTICE OF COMPLIANCE PLAN AND REQUEST FOR CONDITIONAL WAIVER
OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rule 2008 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”), hereby respectfully submits this notice of its compliance plan in the above captioned proceedings in response to the Commission’s February 20 order in these proceedings (the “February 2020 Order”).² The NYISO is providing notice of its plans solely to avoid any potential confusion given the complex history of the Commission’s rulings in these proceedings. As is explained below, the NYISO will first be able to apply its buyer-side capacity market power mitigation measures (the “BSM

¹ 18 C.F.R. §385.2008 (2019).

² *New York State Public Service Commission, et. al. v. New York Independent System Operator, Inc.*, 170 FERC ¶ 61,120 (2020).

Rules”)³ to new Special Case Resources (“SCRs”)⁴ located in Mitigated Capacity Zones for the May 2020 capability month. The NYISO has confirmed that no new SCR capacity has enrolled for the April 2020 capability month. The NYISO will therefore be in full compliance with the February 2020 Order.

In addition, the NYISO respectfully petitions, in accordance with Commission Rule 207(a)(5),⁵ for a conditional waiver if, and only to the extent that the Commission deems it necessary to authorize the NYISO’s past implementation of the February 2017 Order (the “February 2017 Order”)⁶ prior to Commission action on the NYISO’s compliance filing in Docket No. ER17-996 (the “February 2017 Compliance Filing”).⁷ As discussed below, the conditional waiver request is consistent with the Commission’s waiver precedent.

I. BACKGROUND

The February 2020 Order granted rehearing in part of the February 2017 Order. As relevant here, the February 2020 Order overturned the February 2017 Order’s holding that new SCRs should not be subject to the BSM Rules.⁸ The February 2020 Order rejected the February

³ The BSM Rules are set forth in Attachment H (Section 23) of the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”).

⁴ Capitalized terms that are not otherwise defined herein shall have the meaning specified in the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”).

⁵ 18 C.F.R. §385.207(a)(5) (2019).

⁶ *New York State Public Service Commission, et. al. v. New York Independent System Operator, Inc.*, 158 FERC ¶ 61,137 (2017).

⁷ *New York State Public Service Commission, et. al. v. New York Independent System Operator, Inc.*, Compliance Filing, Docket No. ER17-996-000 (February 17, 2017).

⁸ All SCRs were previously subject to the BSM Rules in the same manner as other resources dating back to the introduction of the BSM Rules in 2008. *See* February 2017 Order at P 3 and n. 8, *citing New York Independent System Operator, Inc.*, 124 FERC ¶ 61,208 (2008).

2017 Compliance Filing as moot and established that that BSM Rules should apply prospectively to all new SCRs.

The February 2017 Order found that “the Complainants have demonstrated that NYISO’s Services Tariff is unjust, unreasonable, unduly discriminatory or preferential, under section 206 of the FPA, because it applies NYISO’s buyer-side market power mitigation rules to SCRs, which have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.”⁹ It further stated that “a blanket exemption from NYISO’s buyer-side market power mitigation rules for SCRs *effective as of the date of this order* allows appropriate flexibility for, and avoids the creation of unnecessary barriers to, the participation of demand response in the wholesale markets.”¹⁰ In addition, a separate order issued concurrently with the February 2017 Order rejected as moot¹¹ the NYISO’s earlier April 2015 Compliance Filing addressing SCR mitigation.¹²

As expressly required by the February 2017 Order, the NYISO immediately stopped applying the BSM Rules to new SCRs. As the February 2017 Compliance Filing indicated, the NYISO began exempting new SCRs as of February 3, 2017 (*i.e.*, the date of the February 2017 Order).

⁹ February 2017 Order at P 30.

¹⁰ February 2017 Order at P 34 (emphasis added).

¹¹ *New York Independent System Operator, Inc.*, 158 FERC ¶ 61,217 (2017) at P 15 (“The determination in the [February 2017 Order] also renders moot NYISO’s April 20, 2015 compliance filing, which was responding to directives that are no longer in force. Accordingly, we will reject NYISO’s compliance filing. In light of the findings being made in the Complaint Order, we are not directing that any replacement tariff filing be submitted in this docket, as this is no longer necessary.”)

¹² *See New York Independent System Operator, Inc.*, Compliance Filing, Docket No. ER10-2371-002 (April 20, 2015) (“April 2015 Compliance Filing”). The NYISO made this filing in response to the Commission’s order in *New York Independent System Operator, Inc.*, 150 FERC ¶ 61,208 (2015). The April 2015 compliance filing had proposed to revise Section 23.4.5.7.5 of the Services Tariff to provide that, unless ruled exempt by Commission order on a request for exemption filed by the state, all rebates and other benefits from state programs must be included in the SCR Offer Floor.

II. NOTICE OF COMPLIANCE PLAN

In response to the February 2020 Order, the NYISO intends to commence applying the BSM Rules to new SCRs beginning with SCRs entering the market in the May 2020 capability month. Because of the unique procedural history of the applicable tariff language, which is the result of changes in the Commission's directives over the last three years, the NYISO is providing notice here to explain exactly which tariff provisions are currently effective and applicable to new SCRs. The NYISO is not seeking any Commission action in response to this description of its compliance plan. It is providing notice to eliminate any potential uncertainty among stakeholders.

Specifically, the currently effective tariff language precedes the tariff language proposed in the April 2015 Compliance Filing that was subsequently rejected in February 2017.

Section 23.4.5.7.5 of the Services Tariff currently provides that:

“A Mitigated Capacity Zone Installed Capacity Supplier that is a Special Case Resource shall be subject to an Offer Floor beginning with the month of its initial offer to supply Installed Capacity, and until its offers of Installed Capacity have been accepted in the ICAP Spot Market Auction at a price at or above its Offer Floor for a total of twelve, not necessarily consecutive, months. A Special Case Resource shall be exempt from the Offer Floor if (a) it is located in a Mitigated Capacity Zone except New York City and is enrolled as a Special Case Resource with the ISO for any month within the Capability Year that includes March 31 in an ICAP Demand Curve Reset Filing Year in which the ISO proposes a New Capacity Zone that includes the location of the Special Case Resource, or (b) the ISO projects that the ICAP Spot Market Auction price will exceed the Special Case Resource's Offer Floor for the first twelve months that the Special Case Resource reasonably anticipated to offer to supply UCAP. . . . The Offer Floor for a Special Case Resource shall be equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resources. The Offer Floor calculation shall include any payment or the value of other benefits that are awarded for offering or supplying Mitigated Capacity Zone Capacity except for payments or the value of other benefits provided under programs administered or approved by New York State or a government instrumentality of New York State.

The NYISO will apply the BSM Rules prospectively to new SCRs that have enrolled and participated in the NYISO's ICAP market starting with the May 2020 capability month. The NYISO is currently working to update its processes and procedures and ensure that the software necessary to implement a SCR Offer floor has been thoroughly retested prior to implementation. The relevant software has not been used or maintained for three years. The NYISO must also ensure that these processes are properly integrated with systems that have changed, or been newly established, subsequent to February 2017. The NYISO expects this work to be complete in advance of the May 2020 capability month.

The NYISO would conduct determinations under the BSM Rules for new SCRs as described above, until such time as the Commission may accept revised tariff rules regarding the treatment of payments or other benefits provided under State programs in the Offer Floor calculations for mitigated SCRs. The February 2020 Order initiated a paper hearing process that may result in such changes.

III. CONDITIONAL WAIVER REQUEST

The NYISO believes that it acted appropriately when it began to exempt new SCRs immediately after the issuance of the February 2017 Order. Implementing the exemption for new SCRs mandated by the February 2017 Order before the Commission addressed the February 2017 Compliance Filing was fully consistent with precedent¹³ and normal practice. The February 2017 Order was legally effective as of the date of its issuance and gave the NYISO an unambiguous directive. The fact that the Commission later overturned this directive

¹³ See, e.g., *Ameren Services Co., Northern Indiana Public Service Co. v. Midwest Independent Transmission System Operator, Inc., et al.*, 155 FERC ¶ 61,073 (2016) ("2016 MISO Order") (confirming that a Commission order that included a clear and specific compliance directive was sufficient to "fix the rate by order" so that it was appropriate for an RTO to implement the Commission's directive before its compliance filing was accepted.)

in the February 2020 Order should not be construed as invalidating NYISO actions taken in compliance with that directive starting in 2017.

Nevertheless, because the Commission ultimately rejected the February 2017 Compliance Filing, it might be claimed that the tariff language that was in effect between February 2017 and February 2020 technically required the application of the BSM Rules to new SCRs. The NYISO therefore seeks a conditional waiver, out of an abundance of caution, to address any potential technical non-compliance with its tariff associated with the exemption of new SCRs for the period between the February 2017 and February 2020 Orders.

Granting this waiver would be consistent with the February 2020 Order's statement that its holding should be applied on a prospective basis.¹⁴ The requested waiver is also consistent with Commission precedent, which traditionally requires a demonstration that: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties."¹⁵ The NYISO respectfully submits that the circumstances here are fully consistent with these criteria.

The NYISO's actions to date have all been undertaken in good faith. In particular, as noted above, the NYISO was obliged to comply with the February 2017 Order which expressly stated that its directive to exempt new SCRs was immediately effective. Upholding earlier mitigation determinations involving SCRs would also not have undesirable consequences. Commission policy, as stated in the February 2017 Order and reiterated in the February 2020

¹⁴ See February 2020 Order at P 21 ("As in the underlying order, the relief directed here is prospective.")

¹⁵ See, e.g., *Citizens Sycamore-Pensaquitos Transmission LLC*, 169 FERC ¶ 61,263 at P 14 (2019).

Order, is that changes to the BSM Rules should be implemented prospectively only and final exemption determinations should not be re-opened.¹⁶ Granting the NYISO's requested waiver would be consistent with that policy and thus cannot reasonably be construed to be harmful to third parties. Clarifying prior determinations under the BSM Rules would also address a concrete problem by eliminating any possible uncertainty associated with the February 2020 Order. Finally, the requested waiver would be limited in scope because it would apply only to new SCRs that entered the market between the dates of the February 2017 Order and the February 2020 Order.

IV. COMMUNICATIONS

Communications regarding this proceeding should be sent to:

Robert E. Fernandez, Executive Vice President &
General Counsel
Karen Georgenson Gach, Deputy General Counsel
Raymond Stalter, Director, Regulatory Affairs
*David Allen, Senior Attorney
10 Krey Boulevard
Rensselaer, NY 12144
Tel: (518) 356-6000
Fax: (518) 356-4702
rfernandez@nyiso.com
kgach@nyiso.com
rstalter@nyiso.com
dallen@nyiso.com

*Ted J. Murphy
Hunton Andrews Kurth, LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Tel: (202) 955-1500
Fax: (202) 778-2201
tmurphy@huntonak.com

*Designated to receive service.

¹⁶ See, e.g., February 2020 Order at P 21.

V. CONCLUSION

In conclusion, the NYISO respectfully submits notice of its compliance plan under the February 2020 Order. In addition, the NYISO requests, to the extent the Commission deems it necessary, that it grant the conditional waiver described above.

Respectfully Submitted,

/s/ David M. Allen

David M. Allen

Senior Attorney

New York Independent System Operator, Inc.

March 11, 2020

cc: Anna Cochrane
James Danly
Jignasa Gadani
Jette Gebhart
Kurt Longo
John C. Miller
David Morenoff
Daniel Nowak
Larry Parkinson
Douglas Roe
Frank Swigonski
Eric Vandenberg
Gary Will

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 11th day of March 2020.

By: /s/ John C. Cutting

John C. Cutting
New York Independent System Operator, Inc.
10 Krey Blvd.
Rensselaer, NY 12144
(518) 356-7521