

150 FERC ¶ 61,139  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
Norman C. Bay, and Colette D. Honorable.

Consolidated Edison Company of New York, Inc.,  
Orange and Rockland Utilities, Inc.,  
New York State Electric and Gas Corp.,  
Rochester Gas and Electric Corp., and  
Central Hudson Gas and Electric Corp.

Docket No. EL15-26-000

v.

New York Independent System Operator, Inc.

ORDER GRANTING COMPLAINT IN PART

(Issued February 26, 2015)

1. On December 4, 2014, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp. (collectively, Complainants) filed a complaint against the New York Independent System Operator, Inc. (NYISO) pursuant to sections 206 and 306 of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's regulations.<sup>2</sup> The Complainants allege that the rules governing buyer-side market power mitigation (buyer-side mitigation rules) in section 23 of NYISO's Market Administration and Control Area Services Tariff (Services Tariff) are unjust, unreasonable, or unduly discriminatory or preferential. The Complainants seek to modify the provisions of the Services Tariff to add a competitive entry exemption to the buyer-

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e (2012).

<sup>2</sup> 18 C.F.R. § 385.206 (2014).

side mitigation rules. In this order, we grant the complaint, in part, and require NYISO to make a compliance filing within 30 days of the date of this order, as discussed below.

2. The original purpose of buyer-side mitigation rules—and minimum offer price rules (MOPR) generally—was to address buyer-side market power, i.e., the market power exhibited by entities seeking to lower capacity market prices for the capacity they buy. However, in the case of NYISO, there is no requirement that the project developer be a net buyer of capacity, and the mitigation rules apply to all new capacity. This broader application has resulted in mitigation of certain resources that can derive no benefit from lower prices but, nonetheless, fail NYISO’s mitigation exemption test as uneconomic resources. However, there still is a concern when buyers or their agents can exercise market power to reduce capacity market prices below competitive levels by paying out-of-market subsidies to support new capacity, and then offer that capacity into the organized capacity market at prices below costs to drive down the market price. Such uneconomic entry can harm competition in the capacity markets, producing unjust and unreasonable wholesale rates by artificially depressing capacity prices.<sup>3</sup> Because the price of capacity is within the Commission’s exclusive jurisdiction, the Commission has jurisdiction to mitigate buyer-side market power within those markets.<sup>4</sup>

3. The Commission has approved various buyer-side market power mitigation tariff provisions as just and reasonable mechanisms to mitigate the potential for uneconomic entry and deter the exercise of buyer-side market power.<sup>5</sup> By mitigating actual buyer-side market power, these tariff provisions can help to ensure markets reflect competitive prices and adequate capacity in the short-run and the long-run. In this order, we find that

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<sup>3</sup> See, e.g., *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at PP 90-91 (2009).

<sup>4</sup> *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 290-91 (D.C. Cir. 2014).

<sup>5</sup> The courts have affirmed the Commission’s authority to require buyer-side mitigation. See, e.g., *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d at 290-91; *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (4th Cir. 2014) (citing *Appalachian Power Co. v. Pub. Serv. Comm'n*, 812 F.2d 898, 904 (4th Cir. 1987) (finding that Maryland’s development of a resource and requirement that the resource to bid into the PJM Interconnection, L.L.C. (PJM) capacity market in a way that “effectively supplants the [capacity price] generated by the auction with an alternative [price] preferred by the state” seeks to “erode[] the effect of the FERC determination and undermine[] FERC’s exclusive jurisdiction”); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014).

NYISO's existing buyer-side mitigation rules mitigate a certain class of resources (i.e., pure merchants who fund their projects without subsidies from entities with buyer-side market power) and, thus, we require NYISO to adopt certain tariff revisions to address this mitigation. Several of the intervenors in this proceeding argue against the adoption of a competitive entry exemption to NYISO's buyer-side mitigation rules, asserting that the exemption would allow the entry of a resource that would otherwise be deemed "uneconomic" by NYISO's existing mitigation exemption test. However, while NYISO's existing buyer-side mitigation rules function to protect against uneconomic entry, we note that whether the exemption test would deem a resource to be "uneconomic" is not the Commission's sole focus. As we have stated previously:

[B]ecause a purely merchant generator places its own capital at risk when it invests in a new resource, any such resource will have a strong incentive to bid its true costs into the auction, and it will clear the market only when it is cost effective. As such, a bid from a merchant project below Net [cost of new entry (CONE)] likely represents the economics of that resource, and if it does not, the resource will not be able to recover its costs. The purpose of the MOPR, however, is not to protect a merchant resource from making a poor investment decision with its own capital.<sup>6</sup>

The focus then is not on whether the resource is economic, but on whether it should be subject to an offer floor otherwise meant to apply to buyers with market power.

4. Our action today also is consistent with our desire to balance two objectives: preventing the exercise of market power to depress capacity prices, and providing flexibility to project developers to implement certain business decisions without inappropriate regulatory restrictions. Here, the Commission is directing modifications to NYISO's buyer-side mitigation rules to allow for private investors, relying solely on market revenues, to enter the capacity market unmitigated upon certifying that they are a purely merchant investment, with no out of market subsidy. Without these modifications, private investors would be unnecessarily mitigated and possibly deterred from entering the market altogether. Such an outcome is unreasonable. Therefore, and as discussed further herein, the modifications we are directing today strike the balance that the Commission is seeking with respect to buyer-side mitigation rules.

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<sup>6</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 57 (2013) (rehearing pending).

## I. Background

5. New York State's Installed Capacity (ICAP) market, which NYISO administers, is designed to send appropriate economic signals to investors to ensure there is sufficient capacity available to satisfy New York's peak demand along with its planning reserve margin. NYISO's ICAP market uses administratively-determined demand curves for each ICAP pricing zone and includes market power mitigation rules in the New York City and G-J Locality zones to prevent the exercise of both buyer and seller market power. These mitigation rules ensure that market clearing capacity prices reflect a competitive outcome even when buyers and sellers may have the ability and incentive to exercise market power.<sup>7</sup> The Commission approved NYISO's market power mitigation plan because it would prevent sellers with market power from artificially raising capacity prices and prevent net purchasers from artificially depressing capacity prices.<sup>8</sup>

6. NYISO's buyer-side mitigation rules provide that, unless exempt from mitigation, new capacity resources enter the New York City or G-J Locality markets at a price at or above the applicable offer floor and continue to meet the offer floor until their capacity clears twelve monthly auctions.<sup>9</sup> A new entrant can be exempted from the offer floor if NYISO determines that it passes either part of the mitigation exemption test.<sup>10</sup> NYISO's Market Monitoring Unit (MMU) describes the Part A test as "compar[ing] a forecast of capacity prices in the first year of an Examined Facility's operation to the Default Offer Floor, which is 75 percent of the net [cost of new entry (CONE)] of the hypothetical unit modeled in the most recent Demand Curve reset," such that a new entrant is exempted "if the price forecast for the first year is higher than the Default Offer Floor." Under the Part B test, NYISO "compares a forecast of capacity prices in the first three years of an Examined Facility's operation to the net CONE of the Examined Facility," such that a new entrant is exempted "if the price forecast for the three years is higher than the net CONE of the Examined Facility."<sup>11</sup>

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<sup>7</sup> *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,217, at P 3 (2013).

<sup>8</sup> *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 1 (2008), *order on reh'g*, 124 FERC ¶ 61,301 (2008), *order on clarification*, 131 FERC ¶ 61,170 (2010).

<sup>9</sup> NYISO, Services Tariff, § 23.4.5.7 (9.0.0).

<sup>10</sup> NYISO, Services Tariff, § 23.4.5.7.2 (9.0.0).

<sup>11</sup> Potomac Economics, *Assessment of the Buyer-Side Mitigation Exemption Test for the Taylor Biomass Energy Project 2* (Mar. 7, 2014), [http://www.nyiso.com/public/webdocs/markets\\_operations/services/market\\_monitoring/ICAP\\_Market\\_Mitigation/Buy](http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Buy)

(continued...)

7. Since the Commission approved NYISO's buyer-side mitigation tariff provisions, both NYISO and the MMU have proposed a competitive entry exemption to NYISO's mitigation exemption test, but NYISO's stakeholders have not approved the proposed changes.<sup>12</sup> NYISO developed proposed tariff revisions incorporating a competitive entry exemption, which its stakeholders discussed at meetings during 2012 and 2013, and on which they voted on May 28, 2014.<sup>13</sup> Specifically, NYISO proposed to exempt projects that have "no direct or indirect (i) contracts with, (ii) financial support from, or (iii) in kind support from any NY electric distribution company, Municipal Utility, or any NY state or local governmental entity, including but not limited to Public Authorities."<sup>14</sup> Only thirty-two percent of the sector-weighted vote of stakeholders supported the proposal, failing to garner the fifty-eight percent support required to enable it to submit the proposal to the Commission pursuant to section 205 of the FPA.<sup>15</sup>

## **II. Notice of Filing and Responsive Pleadings**

8. Notice of the complaint was published in the *Federal Register*, 79 Fed. Reg. 74,719 (2014) with answers, interventions, and comments due on or before

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[er\\_Side\\_Mitigation/Class\\_Year\\_2011/MMU%20Report%20re%20MET%20for%20TBE\\_Final\\_3-7-14.pdf](#).

<sup>12</sup> See, e.g., Potomac Economics, *2012 State of the Market Report for the New York ISO Markets* 23–24 (Apr. 2013), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Studies\\_and\\_Reports/Reports/Market\\_Monitoring\\_Unit\\_Reports/2012/NYISO2012StateofMarketReport.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Studies_and_Reports/Reports/Market_Monitoring_Unit_Reports/2012/NYISO2012StateofMarketReport.pdf).

<sup>13</sup> Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp. December 4, 2014 Complaint (Complaint), Exhibit A, Affidavit of Richard B. Miller ¶ 28 (Miller Aff.); Complaint, Exhibit C, Management Committee Meeting May 28, 2014 Final Motions (Management Committee Motions).

<sup>14</sup> Complaint, Exhibit D, NYISO, *Proposed ICAP Buyer-Side Mitigation Modifications* at 7 (May 28, 2014) (NYISO Presentation).

<sup>15</sup> Management Committee Motions; NYISO, NYISO Agreements, Foundation Agreements, ISO Agreement §§ 7.10, 19.01 (Mar. 5, 2013), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/iso\\_agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/iso_agreement.pdf).

December 24, 2014.<sup>16</sup> Timely motions to intervene were filed by Independent Power Producers of New York, Inc. (IPPNY), Multiple Intervenors, Exelon Corporation, the City of New York (City of NY), Dynegy Marketing and Trade, LLC and Sithe/Independence Power Partners, LP, NRG Power Marketing LLC and GenOn Energy Management, LLC, Electric Power Supply Association (EPSA), TDI USA Holdings Corp. (TDI), Hudson Transmission Partners, LLC, Niagara Mohawk Power Corp. d/b/a National Grid, New York Association of Public Power, TC Ravenswood, LLC, Cogen Technologies Linden Venture, L.P. (Linden Cogen), PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power New York LLC, Entergy Nuclear Power Marketing, LLC (Entergy), Cricket Valley Energy Center LLC (Cricket Valley), the New York Power Authority (NYPA), the Long Island Power Authority and its operating subsidiary, Long Island Lighting Company d/b/a Power Supply Long Island (LIPA), Potomac Economics, as the Market Monitoring Unit for NYISO (MMU), and the New York State Department of State's Utility Intervention Unit. The New York State Public Service Commission (NYPSC) filed a notice of intervention. Brookfield Energy Marketing, LP filed an out-of-time motion to intervene.

9. On January 15, 2015, NYISO filed an answer to the complaint. Cricket Valley, the NYPSC, TDI, NYPA and LIPA (jointly, NYPA/LIPA), the MMU, and the City of NY filed comments. Entergy, Linden Cogen, and IPPNY and EPSA (jointly, IPPNY/EPSA) filed protests.

10. On January 29, 2015, Cricket Valley filed an answer to the comments and protests. On January 30, 2015, the Complainants, NYISO, TDI, Entergy, and IPPNY/EPSA each filed answers to the comments and protests. Entergy and Linden Cogen filed answers to the answers.

### **III. Procedural Matters**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>17</sup> the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>16</sup> On December 11, 2014, IPPNY filed a Motion for a 30-Day Extension of Time to File Comments. The City of NY filed comments in support of IPPNY's Motion. On December 19, 2014, the Commission extended the date for filing comments, interventions, and protests to January 15, 2015.

<sup>17</sup> 18 C.F.R. § 385.214 (2014).

12. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>18</sup> we will grant Brookfield Energy Marketing, LP's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>19</sup> prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We will accept the answers filed by Cricket Valley, the Complainants, NYISO, TDI, Entergy, IPPNY/EPISA, and Linden Cogen because they have provided information that assisted us in our decision-making process.

#### **IV. Discussion**

14. We will grant the complaint, in part. We find that the Complainants have demonstrated that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA without a competitive entry exemption to the buyer-side mitigation rules. We further find that the Complainants' proposed tariff rules, as modified below, are just and reasonable. Accordingly, we grant the Complainants' request that the Commission direct NYISO to add a competitive entry exemption to the rules governing buyer-side mitigation in NYISO's Services Tariff, as modified below. We discuss the merits of the competitive entry exemption first and then turn to the specific tariff revisions necessary to implement the competitive entry exemption.

##### **A. The Merits of a Competitive Entry Exemption**

###### **1. Complainants' Proposal**

15. The Complainants allege that NYISO's current buyer-side mitigation rules are unjust, unreasonable, unduly discriminatory, preferential, and fail to accomplish their intended purpose, because they do not provide for a competitive entry exemption and, as such, are "unnecessarily applied to un-subsidized, competitive entrants who have no incentive to inappropriately suppress capacity market prices."<sup>20</sup> The Complainants explain that NYISO performs the market mitigation exemption test three years before a unit is expected to operate and bases it on tariff-determined market price forecasts for the

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<sup>18</sup> 18 C.F.R. § 385.214(d) (2014).

<sup>19</sup> 18 C.F.R. § 385.213(a)(2) (2014).

<sup>20</sup> Complaint at 2, 8.

time of the unit's entry into the market.<sup>21</sup> The Complainants claim that these tariff-determined forecasts do not adequately factor in the uncertainty of future market conditions and of potential changes in the resource mix after other generating units retire.

16. The Complainants also state that NYISO's tariff-determined forecasts do not properly account for uncertainty in generating unit deactivations. Specifically, the Complainants argue that the current rules assume that any generator that has not submitted a written notice of its intent to retire will remain in operation. The Complainants assert that the amount of mothballing generation in New York demonstrates the inaccuracy of this assumption.<sup>22</sup> According to the Complainants, there is over 21 GW of installed capacity that is over 40 years old in New York and impending environmental regulations that may affect additional generators, such that more mothballing and retirement of generation can be expected in the near future.<sup>23</sup>

17. The Complainants state that, as currently constructed and implemented under the Services Tariff, the buyer-side mitigation rules apply to all new entry even if it has no subsidy that would enable it to artificially depress prices. The Complainants contend that this creates a barrier for new merchant entry that deters competitive investment for new supply in New York.<sup>24</sup> Specifically, the Complainants assert that NYISO's current rules are unjust and unreasonable for two reasons: (1) "they do not permit investors to enter the capacity markets on their own forecasts of market conditions at the time of entry;" and (2) they force investors "to undergo a test as to whether their particular facility is 'economic' even if the investor does not have market power or has [not] received an inappropriate subsidy."<sup>25</sup>

18. The Complainants argue that NYISO's competitive entry exemption should be based on the following principles:

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<sup>21</sup> Complaint at 9 (citing Miller Aff. ¶ 18).

<sup>22</sup> Complaint at 10 (citing Miller Aff. ¶ 20).

<sup>23</sup> Complaint at 10 (citing NYISO, *2013 Load & Capacity Data* (Apr. 2013), [http://www.nyiso.com/public/webdocs/markets\\_operations/services/planning/Documents\\_and\\_Resources/Planning\\_Data\\_and\\_Reference\\_Docs/Data\\_and\\_Reference\\_Docs/2013\\_GoldBook.pdf](http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Planning_Data_and_Reference_Docs/Data_and_Reference_Docs/2013_GoldBook.pdf) and Miller Aff. ¶ 21).

<sup>24</sup> Complaint at 8.

<sup>25</sup> Complaint at 8–9 (citing Miller Aff. ¶ 17).

1. all market-based investment should be allowed without being subject to an economic test because the purpose of [buyer-side mitigation] is to prevent investment only where the intent and purpose of the investment is to depress capacity market prices;
2. a categorical exemption for merchant investment/competitive entry is necessary to eliminate a barrier to entry that currently undermines the NYISO's competitive markets;
3. the competitive entry exemption should permit the use of typical government economic development incentives, such as low cost financing and property tax incentives, because those kinds of economic development incentives are typically available for any market-based investment; and
4. certain utility contracts may be necessary for a generator, such as a gas transportation contract, which can allow for a negotiated rate because of the generator's right to bypass the local utility.<sup>26</sup>

## 2. NYISO's Answer

19. NYISO states that it strongly supports the complaint and supports a competitive entry exemption. NYISO believes that the buyer-side mitigation rules provide necessary protections to the market and that adding a competitive entry exemption would be entirely consistent with their purpose.<sup>27</sup> NYISO argues that uneconomic entry supported by subsidies can result in artificial price suppression. NYISO asserts that capacity market mitigation rules exist to protect capacity markets from this artificial price suppression, not to protect competitive entrants from making investment mistakes that might incidentally result in lower capacity market clearing prices. It argues that competitive entrants should not be prohibited from taking the risk of entry based on their projections of future capacity prices, and thus of whether their projects will be economic.<sup>28</sup> NYISO asserts that the Complainants' proposed competitive entry exemption is very similar to the one that NYISO developed through its stakeholder process. NYISO argues that the core features of the Complainants' proposal are reasonable and are fully supported by the

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<sup>26</sup> Complaint at 13 (citing Miller Aff. ¶ 31).

<sup>27</sup> NYISO January 15, 2015 Answer at 5-6.

<sup>28</sup> NYISO January 15, 2015 Answer at 6.

complaint.<sup>29</sup> NYISO argues that the Commission should approve the complaint because it is meritorious, well-supported, and proposes tariff revisions that will improve the buyer-side mitigation rules.

20. According to NYISO, it has previously described to the Commission that “[n]ew entrants that satisfy specified criteria defining truly competitive entrants are unlikely to serve as vehicles for artificial price suppression.”<sup>30</sup> NYISO contends that creating an exemption for competitive entrants “would allow capacity project developers that have a different view of future market developments than an ISO/RTO forecasts to enter in a competitive market environment.”<sup>31</sup> An exemption could also “establish clear parameters that would allow state-sponsored or state-mandated procurements to not be subject to mitigation rules if it is the result of a procurement that is competitive and nondiscriminatory.”<sup>32</sup>

21. NYISO concludes that adding a competitive entry exemption to the buyer-side mitigation rules is justified even though NYISO is currently pursuing in the stakeholder process improvements that should ameliorate Complainants’ concerns regarding the forecasts used under the buyer-side mitigation rules.<sup>33</sup> According to NYISO, entities that satisfy specified tariff criteria defining competitive entrants should be exempt from offer floor mitigation even after the NYISO’s forecast improvements have been made.

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<sup>29</sup> NYISO January 15, 2015 Answer at 8.

<sup>30</sup> NYISO January 15, 2015 Answer at 7 (citing Post-Technical Conference Comments of the New York Independent System Operator, Inc. at 13, Docket No. AD13-7-000 (filed Jan. 18, 2014) (NYISO Post-Technical Conference Comments)).

<sup>31</sup> NYISO January 15, 2015 Answer at 7 (citing NYISO Post-Technical Conference Comments at 13).

<sup>32</sup> NYISO January 15, 2015 Answer at 7 (citing NYISO Post-Technical Conference Comments at 13).

<sup>33</sup> NYISO January 15, 2015 Answer at 8 (citing NYISO, “Enhancements to the ICAP and Energy Forecasts in the Buyer-Side Mitigation Rules” (Dec. 12, 2014), [http://www.nyiso.com/public/webdocs/markets\\_operations/committees/bic\\_icapwg/meeting\\_materials/2014-12-12/EnhancementsICAPEnergyFrcstBSM\\_ICAPWG\\_12-12-2014.pdf](http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2014-12-12/EnhancementsICAPEnergyFrcstBSM_ICAPWG_12-12-2014.pdf) and Complaint at 9-10).

### 3. Comments and Protests

22. TDI agrees with the Complainants' assertion that NYISO's current buyer-side mitigation rules are unjust and unreasonable because they result in the mitigation of privately-funded merchant projects that have no ability or incentive to artificially distort or depress capacity prices. TDI asserts that mitigation of these privately-funded projects, therefore, only serves to impair competition by circumscribing the ability of competitive entrants to participate fully in NYISO's capacity markets.<sup>34</sup> TDI contends that the Commission has built upon these principles in recognizing that merchant projects should not be mitigated and thus deterred from making investments in resources. TDI argues that, as a matter of economics, cost recovery for a merchant project is markedly different than it is for a project with an out-of-market contract because a merchant project has no incentive or ability to artificially depress capacity prices. TDI argues that the Commission relied on this logic when it approved the competitive entry exemption in PJM.<sup>35</sup> TDI argues that, because the Commission's rationale in the PJM Proceeding rested on basic economic principles, and not on any regionally-specific findings, the Commission should adopt a similar competitive entry exemption for merchant projects in NYISO.

23. Cricket Valley also strongly supports the Complainants' request because Cricket Valley is developing a new, 1,000 MW merchant generator in the Lower Hudson Valley that recently failed both NYISO-administered buyer-side mitigation exemption screens.<sup>36</sup>

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<sup>34</sup> TDI January 15, 2015 Comments at 1-2.

<sup>35</sup> TDI January 15, 2015 Comments at 3-4 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 57). Unlike the rule change proposed by the Complainants, TDI contends that PJM's current buyer-side mitigation rules categorically exempt from mitigation all resources except certain gas-fired facilities. This exemption is by rule; the project does not have to apply for and wait to receive the exemption. The rationale for this broad exemption, according to TDI, is that buyer-side mitigation rules should only "target[] those resources most likely to raise price suppression concerns (i.e., gas-fired resources)." The competitive entry exemption, on the other hand, is available for gas-fired facilities upon application and approval. Regardless, TDI states that the fundamental principles underlying PJM's competitive entry exemption are equally applicable to merchant resources of any type and not exclusive to gas-fired resources. TDI January 15, 2015 Comments at 3-4 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 26, 166-68).

<sup>36</sup> Cricket Valley January 15, 2015 Comments at 2.

Cricket Valley states that the NYISO MMU has consistently warned that NYISO's buyer-side mitigation rules need reform because the current system over-mitigates needed capacity resources.<sup>37</sup> Cricket Valley states that the MMU recommended that NYISO create a market-based investment exemption to allow merchant investors to invest based on their own expectations.<sup>38</sup>

24. Cricket Valley states that the threat of mitigation can compromise a generator's ability to obtain financing, and therefore deter new entry where it is needed most.<sup>39</sup> Cricket Valley states that purely merchant generators have a strong incentive to bid their true costs and to avoid depressing the capacity price because a truly competitive generator cannot economically bid under its costs without negative consequences.<sup>40</sup> Cricket Valley states that the competitive entry exemption balances mitigating the exercise of market power and unfair subsidies while preventing the over-mitigation of needed capacity that is proposed by competitive generators.<sup>41</sup> Cricket Valley states that the buyer-side mitigation rules are applied to all new capacity resources, even when there is no evidence of intent to suppress prices.<sup>42</sup> Cricket Valley asserts that without the competitive entry exemption, new entry is extremely difficult, if not impossible.<sup>43</sup>

25. Cricket Valley maintains that the screens in the current buyer-side mitigation test are fundamentally flawed because they already fail to pass purely competitive merchant generators.<sup>44</sup> Cricket Valley states that each exemption screen relies on erroneous assumptions, such as ignoring retirements and mothballed units, as well as anticipating and including capacity that does not yet exist.<sup>45</sup> Cricket Valley states that the faulty

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<sup>37</sup> Cricket Valley January 15, 2015 Comments at 2.

<sup>38</sup> Cricket Valley January 15, 2015 Comments at 11.

<sup>39</sup> Cricket Valley January 15, 2015 Comments at 15.

<sup>40</sup> Cricket Valley January 15, 2015 Comments at 18.

<sup>41</sup> Cricket Valley January 15, 2015 Comments at 18.

<sup>42</sup> Cricket Valley January 15, 2015 Comments at 2.

<sup>43</sup> Cricket Valley January 15, 2015 Comments at 20.

<sup>44</sup> Cricket Valley January 15, 2015 Comments at 8-9.

<sup>45</sup> Cricket Valley January 15, 2015 Comments at 2.

inputs produce an artificially low ICAP forecast, making it difficult for a new capacity resource to appear economic.<sup>46</sup> Cricket Valley states that with the NYISO's assumptions, the ICAP forecast is likely to: (1) over-estimate the amount of in-service capacity; (2) understate forecasted prices; and (3) lead to over-mitigation of new resources such as Cricket Valley.<sup>47</sup>

26. The City of NY contends that for many years, and in multiple proceedings before the Commission and NYISO, it has argued that NYISO's buyer-side mitigation rules are overbroad and serve more as a barrier to new entry than as a protection against market abuses. Indeed, incumbent generating companies have wielded the mitigation rules against potential competitors to block new entry. The City of NY argues that the Commission recently approved changes in PJM, exempting merchant generation developers from buyer-side mitigation rules. According to the City of NY, the Commission stated that the "exemption will remove an *unnecessary* barrier to entry for merchant projects and other projects that are procured on a competitive basis."<sup>48</sup> The City of NY argues that, while there are differences between regions that militate against adoption of identical market rules by each system operator, on some issues, such as market mitigation, there is no reason to allow wholly inconsistent rules.<sup>49</sup>

27. The City of NY argues that the need for the same relief is demonstrated by two projects. First, in 2011, the City of NY contends that incumbent generators filed a complaint with the Commission against NYISO challenging NYISO's decision to exempt the Bayonne Energy Center (Bayonne) from mitigation.<sup>50</sup> Second, very recently, the City of NY asserts that NYISO determined that the Champlain Hudson Power Express Project being developed by TDI is subject to mitigation in NYISO's in-City capacity market. The City of NY states that, like Bayonne, the Champlain Hudson Power Express Project is a merchant project of the type envisioned by the Commission in Order No. 888, and

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<sup>46</sup> Cricket Valley January 15, 2015 Comments at 2.

<sup>47</sup> Cricket Valley January 15, 2015 Comments at 10 (citing Miller Aff. ¶ 14).

<sup>48</sup> City of NY January 15, 2015 Comments at 4 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 53) (emphasis added by City of NY).

<sup>49</sup> City of NY January 15, 2015 Comments at 8.

<sup>50</sup> City of NY January 15, 2015 Comments at 5 (citing *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, Docket No. EL11-42, Complaint Requesting Fast Track Processing, Emergency, Interim Relief and Shortened Comment Period, filed July 11, 2011).

has investors who see long-term opportunities in New York City and apparently believe that they can cost-effectively compete against other market participants. However, NYISO has determined that this merchant project should not be permitted to compete against the incumbents. The City of NY finds that the fact that this merchant project is even subject to a mitigation determination demonstrates the unreasonableness of and defects in NYISO's rules. The City of NY states that in enacting Order No. 888 and its progeny, the Commission encouraged and welcomed developers like TDI. Further, the Commission has adopted a policy to provide ratemaking incentives to companies that develop new transmission lines.<sup>51</sup> The City of NY finds it wholly inappropriate to allow rules to continue to exist that bar these very same developers from competing in the markets the Commission created.<sup>52</sup>

28. The NYPSC states that buyer-side mitigation rules should only apply surgically to uneconomic resources whose entry actually reflects an unfair exercise of market power.<sup>53</sup> The NYPSC states that the MMU and NYISO have recognized flaws in the buyer-side mitigation rules and recommended changes, including adding a competitive entry exemption.<sup>54</sup> The NYPSC contends that the continued application of the buyer-side mitigation process to merchant entrants will obstruct the free and fair functioning of the NYISO markets, instead of ensuring a free market.<sup>55</sup> The NYPSC states that it intends to seek relief from defects in the current buyer-side mitigation rules in a separate, forthcoming filing to the Commission.<sup>56</sup>

29. NYPA/LIPA argue that adopting a competitive entry exemption would result in a just and reasonable NYISO capacity market. NYPA/LIPA explain that the competitive entry exemption is appropriate, and that it will encourage merchant facilities to enter the

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<sup>51</sup> City of NY January 15, 2015 Comments at 6 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007)).

<sup>52</sup> City of NY January 15, 2015 Comments at 6.

<sup>53</sup> NYPSC January 15, 2015 Protest at 3.

<sup>54</sup> NYPSC January 15, 2015 Protest at 6.

<sup>55</sup> NYPSC January 15, 2015 Protest at 6.

<sup>56</sup> NYPSC January 15, 2015 Protest at 7.

market, increase available supply options, enhance system reliability, and benefit New York ratepayers.<sup>57</sup>

30. The MMU contends that the competitive entry exemption would allow private investors in competitive new supply to avoid being subjected to buyer-side mitigation. Because buyer-side mitigation is aimed at preventing subsidized entry of uneconomic new resources, the MMU argues that such concerns are absent for private investors who will not have contracts that are vehicles for such subsidies. The MMU contends that, without this exemption, the buyer-side mitigation rules may prevent entry of competitive suppliers. The MMU asserts that this situation can arise when competitive entrants have views of future market conditions that are inconsistent with the assumptions NYISO makes when performing its mitigation exemption test. The MMU argues that the test is necessarily deterministic, evaluating whether new entry is economic based on forecasted capacity prices, given known resource additions and retirements. The MMU states that the recent series of generator retirements highlights the need for the buyer-side mitigation rules to function appropriately when the retirement of existing facilities creates profitable opportunities for new investment.<sup>58</sup>

31. IPPNY/EPISA argue that the Complainants fail to meet their section 206 burden to show that the existing buyer-side mitigation rules are unjust and unreasonable.<sup>59</sup> IPPNY/EPISA maintain that the Complainants failed to demonstrate that the buyer-side mitigation rules impede economic facilities from entering the NYISO market or that NYISO's offer floor mitigation under the buyer-side mitigation rules, in fact, under-compensates generators or prevents any potential investors from entering the market.<sup>60</sup> IPPNY/EPISA contend that the Commission should reject the complaint because the Commission already addressed whether to apply the buyer-side mitigation rules only to certain types of entrants in implementing the currently effective rules.<sup>61</sup>

32. IPPNY/EPISA state that because two projects were subject to offer floor mitigation, the buyer-side mitigation rules worked as intended and limited the effects of

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<sup>57</sup> NYPA/LIPA January 15, 2015 Comments at 7.

<sup>58</sup> MMU January 15, 2015 Comments at 4-5.

<sup>59</sup> IPPNY/EPISA January 15, 2015 Protest at 2.

<sup>60</sup> IPPNY/EPISA January 15, 2015 Protest at 9, 12.

<sup>61</sup> IPPNY/EPISA January 15, 2015 Protest at 10.

uneconomic new entry.<sup>62</sup> IPPNY/EPISA contend that, while an offer floor does not preclude a new entrant from offering its capacity into the New York markets, the offer floor does force the new entrant to submit a competitive bid.<sup>63</sup> According to IPPNY/EPISA, a universally applied offer floor can lead to NYISO's eventual reliance on out-of-market contracts to induce new entry.<sup>64</sup>

33. IPPNY/EPISA also assert that the buyer-side mitigation rules protect the market and do not prevent a new entrant from making its own assumptions.<sup>65</sup> IPPNY/EPISA further contend that the affidavit of Mr. Younger proves that NYISO's application of the buyer-side mitigation rules has not impeded economic new entry because the projects have accepted their Class Year cost allocations, indicating that the buyer-side mitigation rules do not prevent a new entrant from going forward based on its own expectations.<sup>66</sup> IPPNY/EPISA argue that the reference to PJM's tariff does not provide any support for the assertion that NYISO's tariff requires such exemption rules. IPPNY/EPISA contend that the Commission accepted PJM's proposed competitive entry exemption under section 205 of the FPA, rather than section 206, which did not require PJM to prove that its existing tariff was unjust and unreasonable. IPPNY/EPISA state that, while PJM operates a forward market, New York has a shorter-term system that does not allow the ICAP market the same ability to show whether a developer's entry will be economic.<sup>67</sup>

34. Linden Cogen argues that the complaint should be rejected for several reasons. As an initial matter, Linden Cogen maintains that the Complainants have not alleged any new facts or change in circumstances to warrant revisiting the Commission's prior orders.<sup>68</sup> Linden Cogen maintains that the currently-effective mitigation exemption test process is just and reasonable, maintains New York City ICAP market prices at economic levels for all resources, and does not prevent new merchants that are confident in their

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<sup>62</sup> IPPNY/EPISA January 15, 2015 Protest at 13.

<sup>63</sup> IPPNY/EPISA January 15, 2015 Protest at 14.

<sup>64</sup> IPPNY/EPISA January 15, 2015 Protest at 15.

<sup>65</sup> IPPNY/EPISA January 15, 2015 Protest at 2.

<sup>66</sup> IPPNY/EPISA January 15, 2015 Protest at 13.

<sup>67</sup> IPPNY/EPISA January 15, 2015 Protest at 17.

<sup>68</sup> Linden Cogen January 15, 2015 Protest at 4.

economics from passing the mitigation exemption test and obtaining an exemption from the buyer-side mitigation rules.<sup>69</sup>

35. Linden Cogen explains that the Commission carefully considered the key inputs in the mitigation exemption test and required NYISO to apply standards that would place merchant projects and subsidized projects on a level basis for the mitigation exemption test.<sup>70</sup> Linden Cogen states that the currently-effective mitigation exemption test process allows developers to demonstrate characteristics that are unique to each project, such as investment in projects that have lower heat rates, lower outage rates, more effective reserve capability, decreased emissions, incremental transmission capacity that creates congestion value, and flexibility within air permit limitations.<sup>71</sup> Linden Cogen argues that Complainants fail to satisfy their section 206 burden of demonstrating that NYISO's currently-effective buyer-side mitigation rules and mitigation exemption test process are unjust and unreasonable and that their proposed alternatives are just and reasonable.<sup>72</sup> Linden Cogen states that the Complainants do not provide evidence that the mitigation exemption test has impeded legitimate, economic entry into the in-City market or that a specific application of the mitigation exemption test impeded economic entry.<sup>73</sup> Linden Cogen also contends that the Complainants fail to show any evidence that the mitigation exemption test has resulted in insufficient capacity in Zone J or that capacity prices have been unjustly high as a result of the mitigation exemption test.<sup>74</sup>

36. According to Linden Cogen, instead of meeting their section 206 burden, the Complainants rely on the Commission's orders approving PJM's competitive entry exemption to support their requested relief.<sup>75</sup> Linden Cogen asserts that there are several differences between the capacity markets in PJM and NYISO, including differences in

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<sup>69</sup> Linden Cogen January 15, 2015 Protest at 5.

<sup>70</sup> Linden Cogen January 15, 2015 Protest at 13.

<sup>71</sup> Linden Cogen January 15, 2015 Protest at 21.

<sup>72</sup> Linden Cogen January 15, 2015 Protest at 4.

<sup>73</sup> Linden Cogen January 15, 2015 Protest at 15.

<sup>74</sup> Linden Cogen January 15, 2015 Protest at 16-17.

<sup>75</sup> Linden Cogen January 15, 2015 Protest at 4.

lead time for procurement, the limited application of PJM's minimum offer price rule, and supply size.<sup>76</sup>

37. Entergy also argues that Complainants fail to meet their section 206 burden to demonstrate that NYISO's existing buyer-side mitigation rules are unjust and unreasonable because they do not cite any evidence that the existing rules have prevented economic merchant entry.<sup>77</sup> Rather, Entergy contends that there is evidence that the current buyer-side mitigation rules have successfully prevented uneconomic entry and that uneconomic resources have been mitigated, but continued to proceed with the project.<sup>78</sup> Entergy states that the proposed competitive entry exemption creates new opportunities to artificially suppress capacity pricing in NYISO where out-of-market interference in the markets is already pervasive.<sup>79</sup> Entergy argues that the proposal is not comparable to PJM because NYISO is a single-state RTO where the state government advocates and implements out-of-market rules and where re-regulation is advocated.<sup>80</sup>

#### 4. Answers

38. The Complainants state that the current buyer-side mitigation rules are unjust and unreasonable because they do not allow investors to enter the markets based on their own forecasts of market conditions at the time of entry, and investors are forced to endure a test even if the investor does not have any market power or inappropriate subsidies.<sup>81</sup> The Complainants state that there is actual new evidence of projects that have been subject to mitigation even though the entrants appear to be competitive and have no incentive to inappropriately suppress capacity market prices.<sup>82</sup> The Complainants argue that NYISO has gained actual market experience with the buyer-side mitigation rules

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<sup>76</sup> Linden Cogen January 15, 2015 Protest at 19.

<sup>77</sup> Entergy January 15, 2015 Protest at 2.

<sup>78</sup> Entergy January 15, 2015 Protest at 9 (citing Potomac Economics, *2013 State of the Market Report for the New York ISO Markets* 23-24 (May 2014)).

<sup>79</sup> Entergy January 15, 2015 Protest at 1.

<sup>80</sup> Entergy January 15, 2015 Protest at 11.

<sup>81</sup> Complainants January 30, 2015 Answer at 6.

<sup>82</sup> Complainants January 30, 2015 Answer at 9.

over the past seven years and has recognized the need to modify them to address over-mitigation of economic entrants.<sup>83</sup>

39. NYISO argues that the complaint more than adequately satisfies the requirement that complaints be supported by “substantial evidence.”<sup>84</sup> NYISO asserts that the complaint more than sufficiently explains why the proposed tariff language implementing a competitive entry exemption should be accepted by the Commission. NYISO argues that the proposed competitive entry exemption rules are an example of an incremental improvement that will protect against over-mitigation without undermining the purpose of the buyer-side mitigation rules. NYISO contends that market improvements are not prohibited simply because certain market participants might prefer that rules not evolve.<sup>85</sup>

40. TDI avers that its Champlain Hudson Express Project is a concrete example of an economic project that has been inappropriately mitigated, and illustrates the exact problem presented by the existing tariff provisions.<sup>86</sup> TDI states that NYISO determined that its Champlain Hudson Express Project is uneconomic, even though it is a merchant transmission project that has no out-of-market contracts and has not received any state subsidies.<sup>87</sup> TDI also adds that, unless the Commission specifically indicates that Class Year 2015 members will be eligible to apply for a competitive entry exemption, TDI will not receive timely relief and will be forced to delay its project.<sup>88</sup>

41. IPPNY/EPSC argue that no party, including the Complainants, has demonstrated that it has sustained or is likely to sustain any special harm that warrants the Commission abandoning the existing buyer-side mitigation rules and directing NYISO to impose a competitive entry exemption in opposition to the clear determination of its stakeholders.<sup>89</sup>

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<sup>83</sup> Complainants January 30, 2015 Answer at 9.

<sup>84</sup> NYISO January 30, 2015 Answer at 4 (citing *La. Pub. Serv. Comm’n v. Entergy Corp.*, 139 FERC ¶ 61,240, at P 106 n.217 (2012), *order on remand*, 144 FERC ¶ 63,021 (2013) (remanding to administrative law judge for additional proceedings).

<sup>85</sup> NYISO January 30, 2015 Answer at 10.

<sup>86</sup> TDI January 30, 2015 Answer at 3.

<sup>87</sup> TDI January 30, 2015 Answer at 3.

<sup>88</sup> TDI January 30, 2015 Answer at 7-8.

<sup>89</sup> IPPNY/EPSC January 30, 2015 Answer at 2.

IPPNY/EPISA also assert that issues with NYISO's mitigation exemption test are outside of the scope of the complaint and should be addressed in the stakeholder process or in a separate complaint.

42. Entergy states that the parties did not provide any actual evidence of economic entry being prevented and did not demonstrate that the existing rate was unjust and unreasonable or unduly discriminatory.<sup>90</sup> Entergy also argues that there is no evidence that any of the recently mitigated projects are economic, but rather only assertions by the project developers themselves. Entergy also finds that the fact that PJM has a competitive entry exemption does not mean NYISO's ICAP market is unjust and unreasonable because it does not have one.<sup>91</sup> Entergy asserts that both the Complainants and the parties supporting a competitive entry exemption are primarily concerned with NYISO's forecasting of future prices, and the assumptions made about unit retirement and mothballing. Entergy contends that a stakeholder solution concerning the forecasts used under the buyer-side mitigation rules is underway and that the Commission should consider the results of the ongoing discussions instead of adopting a competitive entry exemption.<sup>92</sup> Entergy also states that the Complainants' proposed competitive entry exemption was similar to the proposal rejected during the NYISO stakeholder process, but with key changes to make the exemption easier to obtain. Entergy contends that NYISO's version is an improvement over the Complainants proposal, but is still flawed.

43. In response to the Complainants' answer, Entergy rejects the market analysis included in the affidavit of Mr. Michael D. Cadwalader, which the Complainants attached to their answer. According to Entergy, Mr. Cadwalader purports to show that the existing buyer-side mitigation rules prevent economic entry through an examination of summer 2014 clearing prices in the New York City and Lower Hudson Valley zones.<sup>93</sup> Entergy offers the affidavit of Mr. Michael M. Schnitzer to contradict the Complainants' and Mr. Cadwalader's claims. Entergy reiterates that the Complainants fail to support their claim that economic entry is being improperly mitigated by NYISO's existing buyer-side mitigation rules.

44. Linden Cogen reiterates in its answer that the Complainants fail to show that any circumstances have changed since the Commission approved NYISO's existing buyer-

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<sup>90</sup> Entergy January 30, 2015 Answer at 2-3.

<sup>91</sup> Entergy January 30, 2015 Answer at 6.

<sup>92</sup> Entergy January 30, 2015 Answer at 8-9.

<sup>93</sup> Entergy February 18, 2015 Answer at 2.

side mitigation rules, or that uneconomic entry can suppress market prices with or without the intent to do so.<sup>94</sup> Linden Cogen asserts that not only must the rates for new entrants be just and reasonable, but so too must the rates for other market participants be just and reasonable.<sup>95</sup> Linden Cogen further notes that the mitigation exemption test has been consistently applied since it was first adopted in 2008, which serves to maintain predictability.<sup>96</sup>

## 5. Commission Determination

45. We find that NYISO's current buyer-side mitigation rules are unjust and unreasonable because they are unnecessarily applied to unsubsidized, competitive entrants who have no incentive to inappropriately suppress capacity market prices. We also find that the competitive entry exemption to NYISO's tariff rules proposed in the complaint, as modified below, is just and reasonable. We, therefore, grant the complaint, in part, and require NYISO to make a compliance filing, within 30 days of this order, to modify its buyer-side mitigation tariff rules to include a competitive entry exemption, as discussed below, effective as of the date of this order.

46. NYISO concurs with the Complainants and expresses its strong support for a competitive entry exemption because competitive entrants should not be prohibited from taking the risk of entry based on their projections of future capacity prices. In addition to NYISO and the MMU, NYPA/LIPA, the City of NY, the NYPSC, Cricket Valley, and TDI all filed comments in support of creating a competitive entry exemption. These parties all agree that, while the purpose of buyer-side market mitigation is to deter the exercise of buyer-side market power and the resulting price suppression, NYISO's existing buyer-side mitigation rules act as a barrier to entry for merchant resources. We agree. NYISO's current buyer-side mitigation rules should not be applied to competitive unsubsidized merchant resources because these resources do not have the incentive to exercise buyer-side market power.<sup>97</sup> Moreover, subjecting such resources to an offer floor serves no competitive objective or market efficiency, regardless of whether they are judged uneconomic according to NYISO's existing buyer-side mitigation exemption test,

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<sup>94</sup> Linden Cogen February 24, 2015 Answer at 6.

<sup>95</sup> Linden Cogen February 24, 2015 Answer at 3.

<sup>96</sup> Linden Cogen February 24, 2015 Answer at 9.

<sup>97</sup> As used in this order, "merchant" projects are those projects that are funded privately, rather than with subsidies, and that will recover their costs through market revenues.

because customers do not bear the risk or costs of uneconomic entry of such resources. The competitive market process alone is sufficient to discipline competitive unsubsidized merchant entry. Our logic for approving the competitive entry exemption here is similar to the logic applied by the Commission when it approved PJM's competitive entry exemption. Specifically, the Commission found that, "[b]ecause a purely merchant generator places its own capital at risk when it invests in a new resource, any such resource will have a strong incentive to bid its true costs into the auction, and it will clear the market only when it is cost effective."<sup>98</sup> Although Entergy, Linden Cogen, and IPPNY/EPISA each filed protests arguing that the Complainants failed to meet their FPA section 206 burden, we disagree. We find that there is ample evidence presented in this proceeding to demonstrate that NYISO's current buyer-side mitigation rules are unjust and unreasonable because they subject unsubsidized merchant projects, with no incentive to artificially depress market prices, to the mitigation exemption test.

47. IPPNY/EPISA, Linden Cogen, and Entergy all argue that the Commission's approval of a competitive entry exemption in PJM does not support adoption of a competitive entry exemption in NYISO. We are acting in this proceeding solely on the merits of the Complainants' proposal and not based on the Commission's previous action in PJM. As the Commission has stated many times before, we allow for each region to develop rules to address the differing concerns of the regions.<sup>99</sup> That is not to say, however, that principles underlying market design in one region are not applicable to another (i.e., that competitive entrants should not be subject to buyer-side market power mitigation rules).

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<sup>98</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 57.

<sup>99</sup> *See, e.g., Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 559 ("We therefore allow regional flexibility in cost allocation . . ."), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, at P 100 ("This approach will appropriately recognize regional differences in market design . . ."), *reh'g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006), *order on reh'g*, Order No. 681-B, 126 FERC ¶ 61,254 (2009); *PJM Interconnection, LLC*, 112 FERC ¶ 61,031, at P 32 (2005) ("[I]t is not necessary that all RTOs use the same procedures as long as the generators retain options for filing rates with the Commission, as the generators do here."), *order on reh'g*, 114 FERC ¶ 61,302 (2006).

48. Entergy also argues that the phase out of the offer floor and the tariff provision permitting an entrant to demonstrate to NYISO that its costs are lower than the offer floor make a competitive entry exemption unnecessary. Specifically, Entergy argues that, even if a merchant entrant is required to bid at the offer floor, it will be able to clear the market in twelve months, and then be relieved of mitigation.<sup>100</sup> As the Complainants argue, we find that it is unjust and unreasonable for that entrant to have been subjected to mitigation in the first place. Similarly, Entergy argues that the tariff provision permitting individual companies to demonstrate to NYISO that they have lower costs makes the competitive entry exemption unnecessary. Entergy argues that the Commission has found that this type of unit-specific review is a suitable replacement for a broad exemption that may upset the balance between over-mitigation and under-mitigation.<sup>101</sup> Entergy's argument about unit-specific review is unconvincing. From an administrative aspect, creating a generic exemption from having to meet the existing NYISO buyer-side mitigation exemption test eliminates the need for NYISO to engage in detailed reviews of individual projected costs, revenues, capacity levels, and other factors that may lead to litigation before the Commission. Granting the complaint, in part, and directing a generic exemption from the tariff's current buyer-side mitigation rules for entities that should not be subject to mitigation in the first place achieves that result. We conclude that, while the existing unit-specific exemption review process is necessary as a general matter, it is unjust and unreasonable for NYISO to apply the existing buyer-side mitigation test to a merchant resource that has no incentive to artificially suppress capacity market prices.

49. In addition, Linden Cogen argues that the Commission should dismiss the complaint because it is a collateral attack on prior Commission orders approving and implementing NYISO's buyer-side mitigation rules and mitigation exemption test process. Linden Cogen argues the Complainants failed to demonstrate a significant change in circumstances to justify the Commission revisiting prior orders to find that the buyer-side mitigation rules are no longer just and reasonable.<sup>102</sup> Modifying existing tariff provisions under section 206 of the FPA is not barred by the fact that the Commission originally accepted the provisions at issue. We therefore find that the complaint is not a collateral attack on the existing buyer-side mitigation rules, which will continue to apply, as previously approved, to non-merchant projects.

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<sup>100</sup> Entergy January 15, 2015 Protest at 3, 17 n.50 (citing Schnitzer Aff. 4:15-20).

<sup>101</sup> Entergy January 15, 2015 Protest at 20-21.

<sup>102</sup> Linden Cogen January 15, 2015 Protest at 11 (citing *California Electricity Oversight Bd. v. California Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,182, at P 28 (2004) and *Pacific Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 40 (2007)).

50. We note that some of the intervenors in this proceeding, like Entergy, claim that the Commission adopted an “uneconomic entry” standard in NYISO and that such standard is either determinative in or at odds with this case. We further note that the rules that govern and ensure economic entry are pending, in one form or another, before the Commission in several proceedings.<sup>103</sup> Our findings here are not intended to interfere or prejudice the issues raised in those proceedings. Rather, we note that the issue in this proceeding—allowing for the entry of purely competitive entrants—is consistent with the fundamental objective of NYISO’s buyer-side mitigation rules, which is to protect against new entrants that have the ability and incentive to suppress capacity market prices through the exercise of buyer-side market power. Thus, our findings in this proceeding are a supplement to NYISO’s existing rules.

51. Finally, we note that many of the parties argue over the merits of the existing mitigation exemption test. The incumbent generators argue that the test is working as intended, such that uneconomic entry is prevented. The issue in this proceeding is not whether new entrants are properly judged uneconomic according to the calculation methodology underlying NYISO’s existing mitigation exemption test, but, rather, whether the right parties are being subjected to the test in the first place. As we discussed above, merchant resources should not be subjected to the test if they can qualify for the competitive entry exemption. Therefore, our decision to direct NYISO to create a competitive entry exemption is not based on whether there are flaws with the calculation methodology underlying NYISO’s existing mitigation exemption test. Because we are not basing our decision on this argument, any issues regarding the merits of the existing mitigation exemption test are beyond the scope of this proceeding and are more appropriately addressed in any Commission proceeding that follows the ongoing NYISO stakeholder process.<sup>104</sup>

**B. Tariff Revisions Necessary to Implement the Competitive Entry Exemption**

52. The Complainants propose to add a competitive entry exemption to NYISO’s buyer-side market mitigation rules that will exempt a project that has no “non-qualifying contractual relationships” with a “Non-Qualifying Entry Sponsor.”<sup>105</sup> The proposed

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<sup>103</sup> See, e.g., Docket Nos. EL07-39-006 and ER08-695-004 (requesting rehearing of Commission orders on NYISO’s buyer-side mitigation rules).

<sup>104</sup> NYISO January 15, 2015 Answer at 7-8.

<sup>105</sup> Non-qualifying contractual relationships are contracts related to the planning, siting, interconnection, operation, or construction of the project, contracts for the energy

exemption includes a list of otherwise disallowed contracts that are exempted from being non-qualifying contractual relationships, including contracts for payment-in-lieu of taxes or industrial siting incentives, such as tax abatements or financing incentives, and service agreements for natural gas. In conjunction with this list, the Complainants propose a list of certifications the applicant must make that include certifying, for example, that the applicant has not entered into any non-qualifying contractual relationships. The Complainants also propose to include a *de minimis* exception, which allows a project to qualify for the competitive entry exemption with non-qualifying contractual relationships if the “subsidy value” of those contracts is less than five percent of the project’s costs. Under the proposal, NYISO determines the eligibility of the project by reviewing the required certifications, including that the applicant conducted due diligence in identifying potential non-qualifying contractual relationships.

53. Having found that the Complainants satisfied the initial burden under section 206 to show that NYISO’s existing tariff is unjust and unreasonable without a competitive entry exemption, we must determine the just and reasonable replacement rate. Many of the intervenors in this proceeding, including NYISO, the MMU, and the existing generators, offer modifications to the Complainants’ proposed competitive entry exemption. We find the Complainants’ proposed tariff language, in part, to be just and reasonable, as modified below, and direct NYISO to file the rules as outlined in this section.<sup>106</sup> Specifically, as discussed below, we direct NYISO to file, unchanged, the Complainants’ Proposed Services Tariff sections 23.4.5.7.8.1.1-1.2 (describing eligibility for a Competitive Entry Exemption and defining Entry Date, Non-Qualifying Entry Sponsor, and non-qualifying contractual relationship), section 23.4.5.7.8.1.5 (describing NYISO’s review of the competitive entry exemption certifications, in consultation with

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or capacity produced by or delivered from or by the project, or contracts that provide services, financial support, or tangible goods to the project that are entered into with a Non-Qualifying Entry Sponsor. A Non-Qualifying Entry Sponsor is a Transmission Owner, a Public Power Entity, or any other entity with a Transmission District in the New York Control Area, or an agency or instrumentality of New York State, or a political subdivision thereof. *See* Proposed Services Tariff § 23.4.5.7.8.1.

<sup>106</sup> Once the Commission finds that the challenged tariff provisions in a section 206 proceeding are unjust, unreasonable, or unduly discriminatory or preferential, “the Commission shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order.” 16 U.S.C. § 824e(a) (2012); *see also Maryland Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (ruling that the petitioner does not have the burden to propose just and reasonable rates, but rather that the Commission must determine the just and reasonable rate).

the MMU), section 23.4.5.7.8.2.4 (stating the timing for submitting certifications), sections 23.4.5.7.8.3.1-3.3 (outlining the timing for submitting certifications and additional information and for withdrawing a request), and sections 23.4.5.7.8.4.1-4.2 (describing NYISO's and the MMU's posting and reporting requirements). We further direct NYISO to file the changes discussed below to the Complainants' Proposed Services Tariff sections 23.4.5.7.8.1.3-1.4 (listing allowable contracts and describing the *de minimis* exception) and 23.4.5.7.8.2.1 (listing required certifications). We also direct NYISO to include in its compliance filing sections 23.4.5.7.8.2.2-2.3 and sections 23.4.5.7.8.2.5-2.7 (listing additional certifications), as proposed by NYISO in its answer. Finally, we direct NYISO to include the tariff revisions proposed by NYISO in its answer to existing Services Tariff sections 23.4.5.7.2, 30.4.6.2.12, and 30.6.2.2.5, and to existing section 12.4 of NYISO's Open Access Transmission Tariff (OATT), which make the competitive entry exemption operative and implementable.

### **C. De Minimis Exceptions**

#### **1. Complainants' Proposal**

54. The Complainants propose in section 23.4.5.7.8.1.4., which concerns the contracts that are deemed to be excluded, that non-qualifying contractual relationships be allowed only if "the subsidy value, defined as the benefit provided by the Non-Qualifying Entry Sponsor for the commodity or service as compared to an arms-length transaction, does not exceed five percent of the total levelized cost of all capital and fixed operation and maintenance cost of" the proposed new project. This is a modification from the proposal NYISO submitted to its stakeholders, in which NYISO proposed to apply the five percent limit to the "total value" of such contracts, rather than to the "subsidy value," defining "total value" as "the greater of the total payment to the Generator or [Unforced Deliverability Right] project or the fair market value of the contract, collectively." The Complainants assert that the "subsidy value" is more appropriate because "the purpose of the exemption is to deter inappropriate subsidization of new entrants."<sup>107</sup>

#### **2. NYISO's Answer**

55. NYISO argues that the Commission should direct NYISO to include in a compliance filing provisions that were developed in its stakeholder process in place of the Complainants' proposed tariff language. Specifically, NYISO states that it proposed a clear bright-line exception to the prohibition on non-qualifying contractual relationships, under which a *de minimis* amount of non-qualifying contractual relationships would not disqualify an entrant from the competitive entry exemption.

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<sup>107</sup> Complaint at 14 (citing Miller Aff. ¶ 33).

NYISO explains that it proposed to measure the *de minimis* amount by the “total value” of the contracts, rather than the “subsidy value.”<sup>108</sup> Although the Complainants proposed that “the five percent should be focused on the subsidy value of the contract . . . because the purpose of the exemption is to deter inappropriate subsidization of new entrants,” NYISO argues that, even if this were true in principle, the complaint does not specify, and NYISO could not imagine how it could practicably determine, the “subsidy value” of new entrants’ contracts.<sup>109</sup> NYISO contends that the difficulties posed by the Complainants’ proposal would be exacerbated by the number and variety of contracts to be evaluated.

### 3. Comments and Protests

56. The City of NY supports the Complainants’ proposed *de minimis* exception.

57. The MMU disagrees with the Complainants’ proposal. Specifically, the MMU states that the Complainants’ propose to cap the value of any contract *subsidies* at five percent of the project’s costs, rather than to cap the *total value* of the contracts with Non-Qualifying Entry Sponsors at five percent of the project’s cost. The MMU argues that this would substantially weaken the buyer-side mitigation rules because it would grant the competitive exemption to projects that are receiving material subsidies. The MMU contends that even NYISO’s proposal of allowing contracts with non-qualifying entities having a total contract value of less than five percent would potentially allow a material amount of subsidies to be provided to the developer. Hence, the MMU proposes that NYISO’s *de minimis* allowance for non-qualifying contractual relationships be modified so that any such contract be priced at fair-market value or cost-of-service levels, as applicable. The MMU’s concern is that the NYISO criteria could still allow contracts designed to convey material subsidies to the developer.<sup>110</sup>

58. IPPNY/EP SA also argue that the Complainants’ proposal is weaker than NYISO’s because it allows an even greater threshold of contracts with Non-Qualifying Entry Sponsors under the *de minimis* exception before disqualifying entrants for the competitive entry exemption. IPPNY/EP SA assert that the Complainants’ use of the estimated “subsidy value,” as opposed to the “total value” of the contracts, could be difficult. IPPNY/EP SA state that NYISO selected five percent based on the five percent

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<sup>108</sup> NYISO January 15, 2015 Answer at 13.

<sup>109</sup> NYISO January 15, 2015 Answer at 14 (citing Complaint at 14, Miller Aff. ¶ 32, and Complaint Ex. B (Proposed Services Tariff § 23.4.5.7.8.1.4)).

<sup>110</sup> MMU January 15, 2015 Comments at 10.

being derived from the “total value,” defined as the total payment or fair market value of the contract, not based on the “subsidy value;” if the five percent is derived solely from the subsidy value, IPPNY/EP SA assert the five percent goes well beyond a level that could be considered *de minimis*. IPPNY/EP SA argue that no subsidy should be permitted at all, but that, at most, the level should be set at one to two percent.<sup>111</sup>

59. Entergy states that, if the Commission must adopt the competitive entry exemption, it should not adopt the Complainants’ version. Entergy argues that the proposed language modifies NYISO’s previously rejected proposal, and undercuts the buyer-side mitigation rules’ ability to prevent artificial suppression.<sup>112</sup> Entergy states that the Complainants’ proposal changes the threshold for when a prohibited contract will trigger mitigation from five percent, as measured by the total value of the contracts, to five percent, as measured by the subsidy value of the contracts. Entergy argues that this is a lower mitigation threshold, such that it is easier for uneconomic entrants to satisfy the competitive entry exemption.

#### 4. Answers

60. The Complainants state that no party provided any convincing examples or evidence of the type of transactions where it would be difficult to determine the “subsidy value” for purposes of the *de minimis* exception, which is only the difference between the contract value and the fair market value.<sup>113</sup> The Complainants assert that all of the opponents of the competitive entry exemption fail to note that it is the subsidy value for all such contracts that cannot be more than five percent of the capital costs of the project, not just one individual contract.<sup>114</sup> The Complainants explain that their *de minimis* exception proposal would provide sufficient protection against inappropriate subsidization of a project, in light of small legitimate differences that determine fair market value, which would be used to determine the subsidy value.<sup>115</sup> The Complainants also argue that certain utility contracts, such as a gas transportation contract, may be essential for a generator to operate.<sup>116</sup> The Complainants aver that there is no reason to

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<sup>111</sup> IPPNY/EP SA January 15, 2015 Protest at 22.

<sup>112</sup> Entergy January 15, 2015 Protest at 4.

<sup>113</sup> Complainants January 30, 2015 Answer at 19.

<sup>114</sup> Complainants January 30, 2015 Answer at 19.

<sup>115</sup> Complainants January 30, 2015 Answer at 19.

<sup>116</sup> Complainants January 30, 2015 Answer at 18.

preclude an entity that self-supplies or hedges on behalf of its franchised customers from entering into a contract with a new facility as long as the subsidy value of such contract, in combination with all of the other contracts entered into by the developer with a non-qualifying entity, is no greater than five percent of its costs.<sup>117</sup>

61. NYISO states that it takes no position on the MMU's proposal that contracts with Non-Qualifying Entry Sponsors be priced at "fair market value or cost of service levels, as appropriate based on the type of contract."<sup>118</sup> NYISO states that it strongly agrees that competitive entrants should not have any contracts that subsidize entry. NYISO argues that, if the Commission accepts the MMU's recommendations on this issue, it should clarify that the burden would be on the entrant to demonstrate that its contracts were priced at fair market value or cost of service value. NYISO states that it would then review the information submitted to determine its reasonableness, with input from the MMU. NYISO also adds that the Commission should clarify that "fair market value" will not necessarily be a single "correct" value, but rather may be a range of reasonable values.<sup>119</sup>

62. TDI states that the Complainants' proposed tariff language should be accepted, without modification.<sup>120</sup> TDI asserts that, while various other parties have proposed revisions to the proposed tariff language, these proposals would undermine the competitive entry exemption and delay or prevent its timely implementation. TDI states that, with regard to the *de minimis* exception, using the "subsidy value" measurement more appropriately captures the type of harm that the buyer-side mitigation rules are designed to prevent.<sup>121</sup>

63. Cricket Valley supports NYISO's proposed *de minimis* exception. Cricket Valley agrees with NYISO and the MMU that it is unworkable to determine the subsidy value of the diverse contractual relationships that NYISO will need to review to determine

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<sup>117</sup> Complainants January 30, 2015 Answer at 20.

<sup>118</sup> NYISO January 30, 2015 Answer at 11 (citing MMU January 15, 2015 Comments at 6-9).

<sup>119</sup> NYISO January 30, 2015 Answer at 12.

<sup>120</sup> TDI January 30, 2015 Answer at 5.

<sup>121</sup> TDI January 30, 2015 Answer at 6 (citing NYISO January 15, 2015 Answer at 14).

eligibility for the competitive entry exemption.<sup>122</sup> Cricket Valley states that the “subsidy value” criteria proposed creates unnecessary complexity in the buyer-side mitigation process.<sup>123</sup>

## 5. Commission Determination

64. We reject the proposed *de minimis* exception. Permitting any form of a *de minimis* exception contradicts the principle underlying the competitive entry exemption: that unsubsidized entities do not have the incentive to exercise market power to lower capacity market prices. Permitting such subsidies, as part of the competitive entry exemption, may facilitate artificially depressing capacity prices to non-competitive levels because they make it financially possible for a resource to offer a price into the capacity auction that is below its actual costs. No party in this proceeding has provided any reason why permitting any subsidy is a necessary part of the competitive entry exemption. In addition, no party cites to any economic analysis that shows that a subsidy at any level will have a negligible impact on market prices, thus making it truly *de minimis*, let alone establishing that a threshold of five percent is an accurate dividing line between a significant and an insignificant subsidy. As explained by Entergy, a purely private new entrant should be able to recover 100 percent of its costs from market revenues.<sup>124</sup>

### D. Certifications

#### 1. Complainants’ Proposal

65. The Complainants propose a certification process and certification form, which accompanies an application for a competitive entry exemption and requires that the applicant certify that the project does not have any non-qualifying contractual relationships. NYISO will review this certification to determine the applicants’ eligibility for the exemption. The Complainants state that their proposal is a more “streamlined” certification process than what NYISO proposed to its stakeholders.

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<sup>122</sup> Cricket Valley January 29, 2015 Answer at 5.

<sup>123</sup> Cricket Valley January 29, 2015 Answer at 6.

<sup>124</sup> Entergy January 30, 2015 Answer at 13 (citing Schnitzer Aff. 14:4-13).

## 2. NYISO's Answer

66. NYISO argues that the Complainants' proposed certification requirement is narrower and less complete than the version NYISO developed in its stakeholder process. NYISO contends that its version would not impose unreasonable burdens and would better protect the market from the risk that applicants might inappropriately secure competitive entry exemptions. Accordingly, NYISO argues that the Commission should direct NYISO to adopt the certification tariff provisions NYISO proposed in its stakeholder process.<sup>125</sup>

67. Similarly, NYISO states that the Complainants propose to "streamline" the certification form developed by NYISO in its stakeholder process and to require NYISO to incorporate it into the Services Tariff.<sup>126</sup> NYISO argues that this is not warranted under the Commission's "Rule of Reason" precedent.<sup>127</sup> Specifically, NYISO explains that the form's provisions are too far removed from the rates or the terms or conditions of jurisdictional service to necessitate their review by the Commission, and are simply intended to implement the tariff requirements that a generator or Unforced Capacity Deliverability Right (UDR)<sup>128</sup> facility must satisfy to qualify for this exemption initially and through the date of entry.

## 3. Comments and Protests

68. The City of NY supports the Complainants' proposed certification process.

69. The MMU argues that the Commission should reject the Complainants' proposed certification provisions and should adopt NYISO's instead, with two additions.<sup>129</sup> The

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<sup>125</sup> NYISO January 15, 2015 Answer at 17.

<sup>126</sup> NYISO January 15, 2015 Answer at 17 (citing Complaint Ex. B (Proposed Services Tariff § 23.4.5.7.8.2.1)).

<sup>127</sup> NYISO January 15, 2015 Answer at 17-18 (citing *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (1985) and *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244, at P 44 n.57 (2012)).

<sup>128</sup> The Services Tariff defines UDRs as "rights, as measured in MWs, associated with new incremental controllable transmission projects that provide a transmission interface to a Locality." NYISO, Services Tariff, § 2.21 (2.0.0).

<sup>129</sup> The MMU identifies the following six certification statements in NYISO's original proposal that the Complainants would not include: (1) "that the entrant has not

(continued...)

MMU first recommends that the certification state that no unexecuted agreements with a Non-Qualifying Entry Sponsor, written or unwritten, exist that would support the development of the project. The MMU argues that this would prevent a developer from receiving an exemption that otherwise does not technically have a non-qualifying contractual relationship, but does have an understanding that it will receive such a contract upon commencing operation. Second, the MMU proposes to have an entrant certify that none of its suppliers or customers, and no entity in the chain of its contractual relationships with its suppliers or customers, are parties to non-qualifying contractual relationships that are contingent on the project's completion. If such a relationship is found to exist, the consequences would be the same as if the developer itself had such a non-qualifying contractual relationship – i.e., penalties and application of the offer floor to the resource.<sup>130</sup> The MMU states that it is concerned that the NYISO certification requirements for indirect contracts are too weak to ensure that subsidies cannot be indirectly conveyed to the developer. According to the MMU, this liability will ensure the entrant takes all necessary and sufficient steps to avoid subsidies from Non-Qualifying Entry Sponsors, including potentially third-party contract provisions that would deter third-parties from concealing non-qualifying contractual relationships.

70. IPPNY/EPISA assert that relying on a process of self-certification, in which NYISO must trust new entrants to certify that they are not party to any prohibited contracts is insufficient. IPPNY/EPISA contend that there should be additional oversight of the self-certification and a requirement for continued certification.<sup>131</sup> Rather than weakening NYISO's proposed certification process, as the Complainants propose, IPPNY/EPISA argue that any change should be structured to improve it, allowing for more verification of companies' certifications, not less.

71. Entergy states that the certification is an easily bypassed one-time certification that is frozen in time, allowing a new resource to be free to enter into a subsidized contract the

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entered into a direct or indirect non-qualifying contractual relationship at the time of synchronizing to the grid;" (2) "acknowledging exposure to Commission civil penalties;" (3) "committing parent and affiliates to provide information relating to the project;" (4) "acknowledging certifying officer has knowledge of the facts and circumstance involving the request for Competitive Entrant Exemption;" (5) "obliging entrant to notify NYISO if certification ceases to be true or accurate;" and (6) "acknowledging that failure to notify of changes in facts or circumstances would be considered false and misleading."

<sup>130</sup> MMU January 15, 2015 Comments at 11.

<sup>131</sup> IPPNY/EPISA January 15, 2015 Protest at 18, 20.

day after its self-certification; it also shifts the burden to NYISO to detect changed circumstances.<sup>132</sup> Entergy argues that NYISO's proposal already presented loopholes for uneconomic entry and the Complainants' proposal makes them worse.

#### 4. Answers

72. The Complainants answer that NYISO's approach to the certification process was overbearing and sought unnecessary representations.<sup>133</sup> The Complainants argue that a streamlined approach reasonably captures all necessary information, as well as a representation that the applicant has performed the necessary due diligence in support of its application.<sup>134</sup>

73. NYISO asserts that it will not be relying solely on the certification requirement in determining eligibility for the competitive entry exemption. NYISO states that, in fact, under the proposed rule, NYISO will be conducting its own review, in consultation with the MMU, to determine eligibility.<sup>135</sup> NYISO contends that the certification requirement is a critically important and necessary part of the review, but neither NYISO nor the MMU will simply rely on, or accept, certifications without further review. NYISO argues that the certification requirement will help to make the administration of the proposed competitive entry exemption rules feasible. NYISO contends that it had previously argued in a September 2008 proceeding in Docket Nos. EL07-39-002, ER08-695-000, and ER08-695-001 that a net buyer rule would create problematic incentives for "buyers to behave strategically to avoid categorization as net buyers."<sup>136</sup> NYISO states that it was also concerned at that time that contractual relationships designed to circumvent a net buyer rule would be very difficult to identify and evaluate. NYISO asserts that, however, the proposed competitive entry exemption rules in this proceeding avoid these problems by not requiring an evaluation of the nature or objectives of sponsoring entities, but simply prohibit "non-qualifying contractual relationships" with realistically foreseeable sponsors of uneconomic entry.

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<sup>132</sup> Entergy January 15, 2015 Protest at 25.

<sup>133</sup> Complainants January 30, 2015 Answer at 21.

<sup>134</sup> Complainants January 30, 2015 Answer at 21.

<sup>135</sup> NYISO January 30, 2015 Answer at 4 (citing Complaint, Exhibit B (Proposed Services Tariff §§ 23.4.5.7.8.1.5, 23.4.5.7.8.4.2)).

<sup>136</sup> NYISO January 30, 2015 Answer at 8 (citing *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 28 (2008), *order on reh'g*, 131 FERC ¶ 61,170 (2010)).

74. NYISO states that it supports the MMU's proposed certification requirement regarding indirect contracts, in which an entrant is required to "certify that none of its suppliers or customers, and no entity in the chain of its contractual relationships with its suppliers or customers, are parties to non-qualifying contractual relationships that are contingent on the project's completion."<sup>137</sup> NYISO notes, however, that it interprets the reference to the time of a project's "completion" as a reference to non-qualifying contracts that are contingent on a project reaching the "Entry Date."<sup>138</sup> NYISO states that, if the Commission accepts the MMU's recommendation on this point, it should clarify that the NYISO's interpretation is correct. NYISO further states that it has no objection to the MMU's recommendations that applicants be required to certify that they do not have unexecuted agreements or informal understandings with Non-Qualifying Entry Sponsors.<sup>139</sup>

75. TDI argues that the certification debate should avoid delays and not be subject to the stakeholder process.<sup>140</sup> TDI contends that, under both the Complainants' and NYISO's proposed revisions to the Services Tariff, developers must submit the request for exemption, including the certification, by no later than the Class Year start date. Therefore, granting NYISO's request (i.e., issuing an order granting the complaint without approving a form of certification) would effectively ensure that the competitive entry exemption will not be available for Class Year 2015 members.

76. In response to the MMU's suggested additions to the certification, Cricket Valley asserts that NYISO's proposal regarding indirect contractual relationships is appropriate because the developer must certify that it does not have indirect non-qualifying contractual relationships that are limited to one degree removed from the developer.<sup>141</sup> Cricket Valley maintains that it is unreasonable to require a developer to investigate every contractual relationship, no matter how far removed.<sup>142</sup> Cricket Valley

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<sup>137</sup> NYISO January 30, 2015 Answer at 12.

<sup>138</sup> The Complainants propose to define "Entry Date" for purposes of a competitive entry exemption in section 23.4.5.7.8.1 of the Services Tariff as the time at which "the Generator first produces or the UDR project first transmits energy."

<sup>139</sup> NYISO January 30, 2015 Answer at 13 (citing MMU January 15, 2015 Comments at 10-11).

<sup>140</sup> TDI January 30, 2015 Answer at 6.

<sup>141</sup> Cricket Valley January 29, 2015 Answer at 10-11.

<sup>142</sup> Cricket Valley January 29, 2015 Answer at 11.

further asserts that a robust certification is essential, but that the certification should not add a burdensome regulatory requirement, particularly when developers already overcome years of regulatory hurdles. Cricket Valley states that it generally supports NYISO's proposed certification requirements.<sup>143</sup>

77. IPPNY/EP SA argue that the Commission should adopt the MMU's proposal, as augmented by the supplemental provisions discussed by Mr. Younger.<sup>144</sup> IPPNY/EP SA argue that, to rectify flaws with the certification, Mr. Younger proposed increased verification of companies' certifications<sup>145</sup> and an expanded monitoring period.<sup>146</sup>

78. Entergy argues that the certification requirements should be expanded to include applicants' suppliers, customers, and their contracting intermediaries. Entergy asserts that annual continuing certifications should be required until the project begins producing power, should include a commitment not to accept any future subsidies, and should contain an ongoing requirement to report any change in circumstances once commercial operations have commenced.<sup>147</sup>

## 5. Commission Determination

79. We find that NYISO's proposed certification provisions, as further modified below to reflect the suggestions by the MMU, are just and reasonable. We will direct NYISO to revise its tariff accordingly, and further require that NYISO include the certification form in the Services Tariff. We find that the Complainants' proposal, which includes fewer requirements than NYISO's, is significantly weaker than the oversight provisions NYISO proposed. Because NYISO will be relying in large part on the certifications to determine a new entrant's eligibility for the competitive entry exemption, a more stringent certification requirement—one that requires additional important certifications regarding, for example, direct and indirect contracts, exposure to civil penalties, and parent and affiliate obligations—is reasonable because it provides for

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<sup>143</sup> Cricket Valley January 29, 2015 Answer at 7.

<sup>144</sup> IPPNY/EP SA January 30, 2015 Answer at 8.

<sup>145</sup> IPPNY/EP SA January 30, 2015 Answer at 8 (citing Younger Aff. ¶ 49).

<sup>146</sup> IPPNY/EP SA January 30, 2015 Answer at 8 (citing Younger Aff. ¶ 57).

<sup>147</sup> Entergy January 30, 2015 Answer at 15 (citing IPPNY/EP SA January 15, 2015 Protest, Ex. A (Younger Aff. ¶ 57)).

greater assurance that the applicant meets the criteria for obtaining a competitive entry exemption.

80. NYISO's proposal requires a duly authorized officer, with knowledge of the facts and circumstances, to certify the entity has not entered into any non-qualifying contractual relationships, either directly or indirectly, that it is not, and is not an affiliate of, a Non-Qualifying Entry Sponsor, that it will be subject to civil penalties under section 316A of the FPA if it submits false, misleading or inaccurate information, and that it, its parents, and its affiliates will cooperate with NYISO. Such certification must be submitted concurrent with the request for an exemption and each time NYISO requests a resubmittal until the project enters into service. NYISO's proposal also requires that the applicant update NYISO if the information in the request is no longer true. NYISO's certification requirements are not unreasonably burdensome on the new entrant and provide more specificity and transparency both for a resource to determine whether it has a non-qualifying contractual relationship and for NYISO to determine eligibility. Moreover, NYISO's proposal to require notification to NYISO if information in the certification ceases to be true properly places the burden on the project developer, rather than on NYISO, to ensure no contracts are executed with Non-Qualifying Entry Sponsors after the certification is completed.

81. We also require NYISO to include in section 23.4.5.7.8.2.1 the first of the MMU's additional requirements for the certification—that no unexecuted agreements with a non-qualifying entity, written or unwritten, exist that would support the development of the project. As the MMU explains, without this added safeguard, a project developer could receive subsidies through contracts that are contingent on the project's completion, so have not yet been executed. IPPNY/EP SA complain in their protest that an entrant's self-certification ceases as soon as it begins providing power, such that a new entrant could simply wait until the unit has entered the market to sign an out-of-market contract. IPPNY/EP SA and Entergy suggest requiring continued annual certifications. We believe that an applicant certifying that it has no unexecuted agreements, combined with the existing requirement that NYISO refer to the Commission's Office of Enforcement if an applicant provides false, misleading, or inaccurate information, will prevent applicants from negotiating contracts with Non-Qualifying Entry Sponsors that are contingent on the project receiving a competitive entry exemption. Moreover, NYISO explained in its answer that it will not only be conducting its own review of the certifications, in consultation with the MMU, but its oversight and review will not cease when an entrant begins operating; rather, NYISO states that it and the MMU will scrutinize contracts entered into with a Non-Qualifying Entry Sponsor after the entrant begins operating and will notify the Commission's Office of Enforcement where necessary.<sup>148</sup> NYISO also

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<sup>148</sup> NYISO January 30, 2015 Answer at 7, 9.

notes that it is highly unlikely that a prospective entrant would be able to obtain financing by misrepresenting itself as a competitive entrant to NYISO, while actually intending to enter into subsidized contracts once operating.

82. We reject the MMU's second suggested addition to the certification—that none of a developer's suppliers or customers, and no entity in the chain of its contractual relationships with its suppliers or customers, are parties to non-qualifying contractual relationships that are contingent on the project's completion. Certifying the inputs and financing of the entire supply chain for complex generation and transmission facilities is too burdensome on developers and insufficiently supported by the MMU or any other participant.

83. With regard to the certification form, although NYISO argues that it should not be required to incorporate the certification form into its tariff, we direct NYISO to include a certification form in its Services Tariff because the certification requirements contained in the form are subject to Commission approval and should not be changed by NYISO without Commission approval. The form's provisions are not, as NYISO claims, too far removed from the rates or terms or conditions of jurisdictional service to necessitate Commission review. In addition, as TDI points out,<sup>149</sup> by requiring that the certification form be included in the tariff, the form will be available for use by those entering the Class Year 2015, rather than requiring entrants to wait for NYISO to develop the form.

## **E. Penalties**

### **1. NYISO's Answer**

84. In addition to modifying the *de minimis* exception and the certification provisions that NYISO proposed to its stakeholders, NYISO states that the Complainants did not include in their proposal the penalties for the submission of false, misleading, or inaccurate information. NYISO believes that such penalties are necessary to deter misuse of the exemption and to protect the ICAP market from uncompetitive entry and argues that the Commission should reinstate them.<sup>150</sup> Under NYISO's proposal, if a project provides false, misleading, or inaccurate information as part of its certification, NYISO would revoke its exemption and impose a financial penalty unless NYISO determines that it would have granted the exemption even if the applicant had submitted complete and accurate information. NYISO states that the financial penalty would be equal to 1.5 times the maximum capacity revenue that the project would have earned in the ICAP spot

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<sup>149</sup> TDI January 30, 2015 Answer at 6.

<sup>150</sup> NYISO January 15, 2015 Answer at 15.

market auction for the capacity it transacted in NYISO's market. NYISO asserts that this formula is similar to the currently-effective formula used to calculate penalties under another part of the buyer-side mitigation rules.<sup>151</sup> According to NYISO, the potential market harm of uneconomic entry can be very significant and difficult to remedy after it occurs. NYISO contends that the misuse of the competitive entry exemption could result in uneconomic entry in a mitigated capacity zone, which could inflict serious and long-lasting damage on the market. NYISO explains that: "if an exemption were granted based on false information capacity payments to all capacity resources could be depressed. The result would be distorted long-term market signals that would undermine market efficiency and, ultimately, hurt consumers."<sup>152</sup>

## 2. Comments and Protests

85. IPPNY/EP SA agree that there should be penalties, but argue that NYISO's proposed penalty structure is inadequate because it proposes only 150 percent of the maximum ICAP revenue the project could have earned in each month, up to three years, and therefore underestimates the damage inflicted on the markets by uneconomic entry.<sup>153</sup> IPPNY/EP SA state that the penalty should be applied to any uneconomic project during every month, without limit, as well as jointly and severally to the Non-Qualifying Entry Sponsor benefitting from the suppression of prices in the capacity market.<sup>154</sup>

## 3. Answers

86. IPPNY/EP SA argue that NYISO's proposed penalty structure is flawed. To rectify these flaws, IPPNY/EP SA point out that Mr. Younger proposed higher penalties for violators.<sup>155</sup>

87. Entergy asserts that penalties should be applied for every month that an uneconomic project harms the ICAP market by selling into it without mitigation, and

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<sup>151</sup> NYISO January 15, 2015 Answer at 15 (citing NYISO, Services Tariff, § 23.4.3.3.2 and Mukerji Aff. ¶ 16).

<sup>152</sup> NYISO January 15, 2015 Answer at 16 (citing Mukerji Aff. ¶ 13).

<sup>153</sup> IPPNY/EP SA January 15, 2015 Protest at 20.

<sup>154</sup> IPPNY/EP SA January 15, 2015 Protest at 20-21.

<sup>155</sup> IPPNY/EP SA January 30, 2015 Answer at 8 (citing Younger Aff. ¶ 52-55).

such penalties should be assessed from the beginning of the violation, not from when it is uncovered.<sup>156</sup> Moreover, Entergy asserts that the applicant's suppliers, customers, and their contracting intermediaries should also be subject to penalties if NYISO detects that they have provided an inappropriate subsidy to the applicant.

#### 4. Commission Determination

88. We will not adopt NYISO's proposed penalty structure because allowing NYISO to impose financial penalties for this type of behavior is not consistent with Commission rules and relevant precedent. However, we will require NYISO to propose revocation provisions that achieve similar objectives to those provisions used by PJM.<sup>157</sup>

89. While penalties serve as a deterrent, the Commission's regulations already prohibit market participants from submitting false or misleading information, or omitting material information, in communications with an RTO/ISO<sup>158</sup> and require the MMU to refer such actions to the Commission's Office of Enforcement.<sup>159</sup> These requirements were already incorporated into NYISO's tariff.<sup>160</sup> Moreover, the Commission only permits an RTO/ISO to administer its own penalties with respect to behaviors that meet the following criteria: (1) "the activity must be expressly set forth in the tariff;" (2) "the activity must involve objectively identifiable behavior;" and (3) "the activity does not subject the actor to sanctions or consequences other than those expressly approved by the Commission and set forth in the tariff, with the right of appeal to the Commission."<sup>161</sup>

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<sup>156</sup> Entergy January 30, 2015 Answer at 15.

<sup>157</sup> PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT, Attachment DD, § 5.14(h)(10) (17.0.0).

<sup>158</sup> See 18 C.F.R. § 35.41(b) (2014).

<sup>159</sup> See 18 C.F.R. § 35.28(g)(3)(iv)(A) (2014).

<sup>160</sup> See NYISO, Services Tariff, § 4.1.7 (stating that violating FERC's orders, rules, and regulations also constitutes a violation of the Services Tariff); NYISO, Services Tariff, § 30.2 (defining "market violation" as a tariff violation, a violation of a Commission order, rule, or regulation, market manipulation, or inappropriate dispatch), § 30.4.5.3.1 (stating that the MMU must submit a non-public referral to the Commission when it believes a market violation has occurred and cease its own investigation unless directed to continue).

<sup>161</sup> *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,164, at P 98 (2009), *order on reh'g*, 131 FERC ¶ 61,114 (2010).

We do not find that NYISO's proposed penalty structure satisfies the "objectively identifiable behavior" criterion; therefore, pursuant to existing tariff rules and Commission regulations, NYISO or the MMU should refer such matters to the Commission's Office of Enforcement for investigation and potential sanctions beyond revocation of the exemption.<sup>162</sup>

90. Although we reject NYISO's proposed penalty structure, we direct NYISO to propose procedures for responding to submissions of false, misleading, or inaccurate information in connection with an application for a competitive entry exemption that achieve the same objective as those adopted in PJM. PJM has two options when it "reasonably believes" an application for a competitive entry exemption that was granted contains fraudulent or material misrepresentations or omissions and the exemption would not have been granted had the application not contained those misrepresentations or omissions. First, if PJM provides written notice to the entity at least thirty days prior to the commencement of the offer period for the auction for which the seller submitted the fraudulent exemption request, PJM can revoke the exemption for that auction and make any filings with the Commission it deems necessary. If, however, PJM does not provide at least thirty days' notice, PJM cannot revoke the exemption absent the Commission's approval. In either case, before PJM revokes the exemption or makes a submission to the Commission, PJM must, to the extent practicable, provide the entity an opportunity to explain the alleged misrepresentation or omission.<sup>163</sup> We believe that it is appropriate for NYISO to have a mechanism to remedy the submission of false, misleading, or inaccurate information internally before making a referral to the Commission. This need, however, must be balanced with the need of the exempted entity to be given notice and an opportunity to explain its actions. PJM's tariff provisions achieve this balance, whereas NYISO's proposed penalty provisions do not.

91. Based upon the foregoing, we will direct NYISO to propose tariff provisions in its compliance filing that establish such an internal mechanism with similar features to those adopted in PJM. In particular, NYISO should include an option to revoke the exemption

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<sup>162</sup> See *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267, at P 5 (2005) ("The Commission will act in cases where market participants' behavior falls outside of the limited area of objectively identifiable . . ."); *California Independent System Operator Corp.*, 106 FERC ¶ 61,179, at PP 14-16, *order on reh'g*, 107 FERC ¶ 61,118 (2004) (discussing the role of the MMU); see also 18 C.F.R. § 35.28(g)(3)(iv)(A) (2014).

<sup>163</sup> PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT, Attachment DD, § 5.14(h)(10) (17.0.0).

without obtaining Commission approval first when it provides sufficient notice to the entrant, but should in all cases, to the extent practicable, provide the entrant with an opportunity to explain. NYISO's provisions should also require that non-public referrals be made to the Commission, pursuant to the Commission's regulations.<sup>164</sup>

## **F. Allowable Contracts**

### **1. Complainants' Proposal**

92. The Complainants propose to include in section 23.4.5.7.8.1.3 a list of contracts that are allowed under the competitive entry exemption—specifically, contracts with Non-Qualifying Entry Sponsors that are not considered non-qualifying contractual relationships under the competitive entry exemption. The list includes interconnection agreements, agreements for the construction or use of interconnection facilities or transmission or distribution facilities, contracts for the sale or lease of real property at or above fair market value, easements or licenses to use real property, contracts for generally available payment-in-lieu of tax (PILOT) agreements or industrial siting incentives, and service agreements for natural gas, among others.

### **2. Comments and Protests**

93. The City of NY explains that the exceptions to the non-qualifying contracts proposed in section 23.4.5.7.8.1.3(vi) provides that the PILOT agreements must be “generally available to industrial entities.” The City of NY requests that this language be changed to read “generally available to industrial or commercial entities.” The City of NY explains that, in some areas of New York, such as New York City, there are very few industrial entities, and the industrial development agencies' programs are focused on or limited to commercial buildings.<sup>165</sup>

94. The MMU proposes to add a requirement to section 23.4.5.7.8.1.3 that any allowable contract listed be transacted at fair market value or cost-of-service prices, as applicable. The MMU argues that this will ensure that these contracts, even though they may be subject to state regulatory oversight and transparency, do not result in subsidies

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<sup>164</sup> See 18 C.F.R. § 35.28(g)(3)(iv)(A) (2014).

<sup>165</sup> City of NY January 15, 2015 Comments at 11. The City of NY notes that there are specific provisions in the law applicable to New York City regarding property tax abatements for electric generating facilities. City of NY January 15, 2015 Comments at 11 (citing New York Real Property Tax Law §§ 489-489-aaaaaa, *et seq.* and *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,170, at PP 41-43 (2011)).

or other favorable treatment that provides a subsidy. The one type of contract that the MMU does not believe should be exempted, but was included in the Complainants' proposal, is any contract providing financial hedges with Non-Qualifying Entry Sponsors. The MMU argues that it is not clear why this may be justifiable.

95. IPPNY/EPISA argue that the Complainants' definition of Non-Qualifying Entry Sponsor, as originally drafted by NYISO, would permit far too broad a range of entities to secure an exemption—for example, it would permit an exemption to Hydro-Quebec, which is owned by a Canadian governmental province.

96. Entergy agrees with IPPNY/EPISA that all public funding should be prohibited, including all state-backed and foreign governmental entities.

### 3. Answers

97. NYISO contends that the definition of “non-qualifying contractual relationships” is intentionally broad to capture the whole range of possible subsidy arrangements, and exceptions to the definition are intentionally limited and specific. NYISO states that an entrant seeking an exemption has the obligation to review its own arrangements and then certify that it does not have prohibited contractual relationships, and faces serious compliance risks if it provides false, misleading, or inaccurate information.<sup>166</sup> NYISO further states that it has no objection to the MMU's recommendation that those contracts providing a short term financial hedge of up to one year with Non-Qualifying Entry Sponsors be removed from the list of permissible contracts in section 23.4.5.7.8.1.3.<sup>167</sup> NYISO also asserts that it has no objection to the City of NY's proposal that section 23.4.5.7.8.1(vi) be changed to read “generally available to industrial or commercial entities.” NYISO also agrees that the deleted language related to gas transportation agreements from section 23.4.5.7.8.1.3(viii) and (x), which appears with redlined strikethrough in Exhibit B to the complaint, should not be included in the tariff rule.<sup>168</sup>

98. TDI states that the definition of Non-Qualifying Entry Sponsor appropriately targets New York entities, and appropriately excludes out-of-market entities. TDI

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<sup>166</sup> NYISO January 30, 2015 Answer at 8.

<sup>167</sup> NYISO January 30, 2015 Answer at 13 (citing MMU January 15, 2015 Comments at 10-11).

<sup>168</sup> NYISO January 30, 2015 Answer at 14. We note that NYISO inadvertently listed (vii) instead of (viii).

responds that IPPNY/EPISA do not explain how an out-of-state entity potentially selling energy and capacity would benefit from price suppression in New York; rather, including entities outside of New York, they argue, would be over-inclusive and discriminatory.<sup>169</sup>

99. Cricket Valley supports NYISO's proposed categorical exclusions from the definition of non-qualifying contractual relationships, as adopted by the Complainants. Cricket Valley also contends that excluding certain types of common contracts, such as interconnection agreements and development incentives, from the list of non-qualifying contractual relationships is appropriate because they are standard and essential contracts that do not reflect any intent or ability to unfairly subsidize a project.<sup>170</sup>

100. Entergy asserts that only purely private investment should be able to apply for the exemption. Entergy argues that the concept of a "non-qualifying contractual relationship" should be expanded beyond contracts, agreements, arrangements, and relationships to ensure that all forms of subsidy are covered, including those achieved via special tariff treatment or discriminatory tax credits.<sup>171</sup>

#### 4. Commission Determination

101. While we reject the *de minimis* exception above, we will adopt a modified version of the Complainants' proposed list of contracts in section 23.4.5.7.8.1.3 that are not considered non-qualifying contractual relationships under the competitive entry exemption. We find the inclusion of this list of allowable contracts to be just and reasonable because these contracts are related more to economic development than to an attempt to subsidize a resource's entry into the market. Accordingly, we direct NYISO to revise its Services Tariff to include the Complainants' proposed section 23.4.5.7.8.1.3, with the modifications discussed below.

102. The City of NY proposes to revise section 23.4.5.7.8.1.3(vi), which concerns PILOT agreements, such that it requires that those agreements be "generally available to industrial *or commercial* entities."<sup>172</sup> As the City of NY states, this is necessary because in some areas of New York the industrial development agencies' programs are focused

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<sup>169</sup> TDI January 30, 2015 Answer at 4.

<sup>170</sup> Cricket Valley January 29, 2015 Answer at 6.

<sup>171</sup> Entergy January 30, 2015 Answer at 16.

<sup>172</sup> The italicized words represent the language that the City of NY seeks to add to the Complainants' proposal. See City of NY January 15, 2015 Comments at 11.

on or limited to commercial buildings. We agree and note that no party objects to this proposed change. Accordingly, we direct NYISO to include such change in its compliance filing.

103. We also adopt the MMU's suggestion that we remove from that same list of contracts those contracts providing financial hedges with Non-Qualifying Entry Sponsors. We agree with the MMU that there is no justification for its inclusion. NYISO's compliance filing must reflect this determination.

104. However, we will not adopt the MMU's proposed requirement that the contracts in this list be transacted at fair market value or cost-of-service prices, as applicable, in order to be exempted. We find this provision to be unnecessary given that these contracts are focused on general economic development, rather than on subsidizing a project. We further find that adding this requirement would unnecessarily increase NYISO's administrative burden.

105. Finally, we order NYISO to remove from the list of allowable contracts reliability-must-run contracts. Specifically, the proposed list includes:

a contract that provides for *payments to prevent or delay the mothballing or retirement of an existing* Generator or UDR project at the time of the certification to address a reliability need recognized by the NYISO, as long as (A) the value of such reliability payments will not increase because of the entry of the new Generator or UDR project, and (B) the contract does not exceed the shorter of (1) the time to develop the permanent solution selected to address the reliability need or (2) seven years.<sup>173</sup>

We note that this issue was not raised in any of the comments or protests. However, we find that this provision is unnecessary. Given that NYISO's existing buyer-side mitigation rules apply only to new generating resources and thus do not apply to reliability-must-run contracts, which are established for existing generation units that have proposed to mothball or retire, we find this provision has no practical effect at this time and is thus unnecessary.<sup>174</sup> Accordingly, we direct NYISO to exclude this category from the list of contracts that are not considered non-qualifying contractual relationships.

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<sup>173</sup> See Proposed Services Tariff § 23.4.5.7.8.1.3(vii) (emphasis added).

<sup>174</sup> The Independent Power Producers of New York, Inc. filed a complaint in Docket No. EL13-62-000, arguing that NYISO's buyer-side mitigation rules are unjust and unreasonable because they do not apply to capacity offers from resources operating

(continued...)

106. With regard to IPPNY/EPISA's and Entergy's arguments that NYISO's proposed definition of Non-Qualifying Entry Sponsor is too narrow, we agree with TDI that including entities outside of New York could be over-inclusive and discriminate against owners of generation supply who have no reason or ability to depress prices in New York. We also find that expanding the list of Non-Qualifying Entry Sponsors to include entities outside of New York is unnecessary given the lack of support for the notion that such entities would benefit from low prices in New York.

### **G. Other NYISO-Proposed Provisions**

107. NYISO explains that the Complainants' proposal did not include various additional provisions that NYISO developed through the stakeholder process, which are necessary for the competitive entry exemption to be clearly operative and implementable. NYISO states that the omitted language addresses implementation details, clarifies the relationship between the competitive entry exemption and other tariff provisions, and provides for consistency with other buyer-side determinations.<sup>175</sup> First, NYISO states that its revision to section 23.4.5.7.2 expressly authorizes NYISO to exempt competitive entrants from the offer floor if they qualify for the competitive entry exemption. Without this language, NYISO states that it would not have a clear tariff basis for implementing the proposed competitive entry exemption. In addition, NYISO requests that the Commission approve: (1) a change to section 30.4.6.2.12 to reflect the addition of the competitive entry exemption provisions in tariff language governing reports prepared by the MMU; (2) changes to section 30.6.2.2.5 to allow NYISO to request information needed to determine the availability of the competitive entry exemption; and (3) an addition to section 12.4 of its OATT to clarify that information disclosures authorized under the competitive entry exemption provisions are consistent with OATT rules regarding the disclosure of confidential information.<sup>176</sup>

### **Commission Determination**

108. We adopt the changes NYISO proposes in its answer to section 23.4.5.7.2, section 30.4.6.2.12, and section 30.6.2.2.5 of the Services Tariff, and section 12.4 of the OATT, and direct NYISO to include those revisions in its compliance filing. We agree with NYISO that these provisions are necessary both to provide NYISO with a clear tariff

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under reliability-must-run contracts. This complaint is currently pending before the Commission.

<sup>175</sup> NYISO January 15, 2015 Answer at 18.

<sup>176</sup> NYISO January 15, 2015 Answer at 19.

basis for implementing the competitive entry exemption and to make the competitive entry exemption operative and implementable. We, therefore, find them to be just and reasonable.

## **H. Vintaging**

### **1. Comments and Protests**

109. NYPA/LIPA argue that the competitive entry exemption should include a vintaging rule to avoid impacting currently mitigated units.<sup>177</sup> NYPA/LIPA assert that the rules must be designed so that mitigated projects continue to be judged against the system they entered, without regard to projects exempted after mitigated projects' entry.<sup>178</sup> NYPA/LIPA contend that some resources were mitigated without the availability of a competitive entry exemption, even if they might have been eligible for the competitive entry exemption, had one existed at their time of entry, and should not be placed in a permanent class of disadvantaged projects.<sup>179</sup> NYPA/LIPA state that an exemption process cannot unfairly infringe upon previously mitigated projects' reasonable expectation that with load growth, retirements, and CONE inflation, they can emerge from mitigation.<sup>180</sup> NYPA/LIPA argue that it would be inappropriate to allow projects that are advantaged by a competitive entry exemption to move the bar and preclude existing mitigated projects from emerging from mitigation.<sup>181</sup>

### **2. Answers**

110. NYISO argues that it does not support NYPA/LIPA's vintaging at this time. NYISO argues that, under the currently effective rules, entrants that have previously been mitigated are not treated any differently when a subsequent entrant obtains an exemption or receives a lower offer floor. NYISO contends that the Commission has held that

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<sup>177</sup> NYPA/LIPA January 15, 2015 Comments at 4.

<sup>178</sup> NYPA/LIPA January 15, 2015 Comments at 9.

<sup>179</sup> NYPA/LIPA January 15, 2015 Comments at 10.

<sup>180</sup> NYPA/LIPA January 15, 2015 Comments at 9.

<sup>181</sup> NYPA/LIPA January 15, 2015 Comments at 9.

entrants that are subject to an offer floor should cease to be mitigated to the extent that their capacity cleared the market for twelve, not necessarily consecutive, months.<sup>182</sup>

111. IPPNY/EP SA argue that NYPA/LIPA's vintaging proposal is a collateral attack on the Commission's order accepting NYISO's proposal to remove the provision from the buyer-side mitigation rules that applied offer floor mitigation to an uneconomic project for only three years, whether or not the project actually became economic by the end of that three year period.<sup>183</sup>

112. According to Entergy, NYPA/LIPA's proposed vintaging rule would unnecessarily rescue uneconomic entrants from their own uneconomic entry and therefore allow uneconomic resources to suppress prices.<sup>184</sup>

### **3. Commission Determination**

113. We reject NYPA/LIPA's vintaging proposal. Under existing rules, if a resource does not obtain an exemption from the buyer-side mitigation rules in advance of operation based on NYISO's forecast of future revenues, buyer-side mitigation continues until it is demonstrated that the resource is needed in the market by clearing in twelve, not-necessarily-consecutive, monthly auctions. We see no reason why mitigation should be lifted from such a resource based on its ability to clear a hypothetical auction that excludes one or more categories of supply that have actually offered into the auction. Excluding any actual supply would not accurately test whether the resource is needed. Further, this proceeding concerns the need for a new exemption based on the type of project developer, i.e., an unsubsidized merchant with no incentive to add excess capacity to the market in order to lower prices. The vintaging proposal challenges the existing mitigation exemption calculation methodology, which is not at issue here, and which will continue to apply to non-merchant projects.

#### **I. Requests for Other Exemptions**

114. The City of NY argues that the adoption of the competitive entry exemption is not sufficient, on its own, to address all of the problems with the buyer-side mitigation rules. Other concerns pertain to entities that seek self-supply and the treatment of renewable sources of supply. The City of NY argues that, due to their operating constraints, most

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<sup>182</sup> NYISO January 30, 2015 Answer at 15.

<sup>183</sup> IPPNY/EP SA January 30, 2015 Answer at 5.

<sup>184</sup> Entergy January 30, 2015 Answer at 12.

renewable resources could not be used to exercise monopsony power, and there is no evidentiary or other basis for the Commission to find renewable resources are being developed to manipulate the capacity markets.<sup>185</sup>

### **Commission Determination**

115. We find the City of NY's arguments concerning self-supply and renewable resources are beyond the scope of this proceeding, which, as noted above, is focused only on whether it is appropriate for a merchant resource to be exempted from NYISO's buyer-side mitigation rules, and not whether other exemptions should also be implemented.

#### **J. Miscellaneous Issues**

116. We direct NYISO to address several additional items in the compliance filing to be submitted within 30 days of the issuance of this order. First, NYISO is directed to correct the first sentence of proposed Services Tariff section 23.4.5.7.8.1.2 to refer to section 23.4.5.7.8 in both instances, rather than to section 23.4.5.7.6. Second, in that same section, NYISO is directed to change the word "Sponsors" in the second sentence so that the sentence reads, in pertinent part: "if the third party has a non-qualifying contractual relationship with a Non-Qualifying Entry Sponsor, the recital . . . ." In its compliance filing, we direct NYISO to revise these and any additional typographical errors as necessary.

#### **V. Extension of Notification Deadline**

117. To ensure that any entrant seeking to enter Class Year 2015 and apply for the competitive entry exemption has enough time to consider the requirements of the exemption, we *sua sponte* waive the requirement in OATT section 25.5.9 that an entrant notify NYISO "within five (5) Business Days of the Class Year Start Date."<sup>186</sup> Thus, we direct NYISO to extend this deadline by five additional business days. This means that, instead of the deadline for submitting notice to NYISO being March 6, 2015, the deadline will be March 13, 2015.

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<sup>185</sup> City of NY January 15, 2015 Comments at 9.

<sup>186</sup> NYISO, OATT, § 25.5.9 (4.0.0).

The Commission orders:

(A) The complaint is hereby granted, in part, as discussed in the body of this order.

(B) We hereby waive the notice requirement in OATT section 25.5.9, and extend the deadline for submitting notice to NYISO, as discussed in the body of this order.

(C) NYISO is hereby directed to submit a compliance filing within 30 days of the date of this order, to be effective the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.