

151 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System
Operator, Inc.

Docket No. ER14-2518-002

ORDER CONDITIONALLY ACCEPTING IN PART AND REJECTING IN PART
PROPOSED TARIFF CHANGES AND DIRECTING COMPLIANCE FILING

(Issued April 30, 2015)

1. On July 28, 2014, as amended on September 16, 2014 and February 12, 2015, the New York Independent System Operator, Inc. (NYISO) submitted proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) and Open Access Transmission Tariff (OATT), pursuant to section 205 of the Federal Power Act (FPA),¹ to define certain types of generator outage states and their associated requirements and calculations. We conditionally accept in part and reject in part NYISO's proposed tariff revisions, with the conditionally accepted revisions to become effective May 1, 2015, as requested, subject to a compliance filing, as discussed in the body of this order. We direct NYISO to submit the compliance filing within 30 days of the date of this order.

I. Summary of NYISO's Proposal

2. Certain generator outage states, or conditions, which NYISO currently recognizes, are not defined in NYISO's existing Services Tariff or OATT. NYISO's tariffs also do not define how long a generator may remain in certain types of outages or at what point such generators become ineligible to participate in the Installed Capacity (ICAP) market. NYISO states that, with this filing, it proposes to: (1) clarify market rules surrounding outage states by defining certain outage states in its tariffs, limiting the length of time a generator may remain in those outage states, and clearly indicating whether generators in

¹ 16 U.S.C. § 824d (2012).

those outage states are eligible to participate in the ICAP market; (2) provide that generators on outage respond to reliability needs, either by returning to service or by making their interconnection points available while they remain on outage, thereby improving flexibility in responding to “reliability issues quickly and efficiently;” and (3) establish a new Equivalent Demand Forced Outage Rate (EFORd) calculation for units returning to service from an outage.² According to NYISO, these changes will incentivize units in forced outages to repair quickly and return to the market and allow for informed decision making when planning system reinforcements, expansions, and new additions.³ NYISO attached to its filing an affidavit of Dr. David B. Patton, NYISO’s Market Monitor, generally endorsing the proposed revisions.

3. More specifically, NYISO proposes to add, and define, the following new terms in the Services Tariff: “Forced Outage;” “Inactive Reserves;” “ICAP Ineligible Forced Outage;” “Mothball Outage;” “Retired;” “Commenced Repair;” “Credible Repair Plan;” “Repair Plan;” “Gap Solution;” “New York State Bulk Power Transmission Facility;” and “Notice of Intent to Return.” These terms will also be in the OATT with cross-references to the definitions in the Services Tariff. NYISO also proposes to add the defined acronym “ICAP” to the existing term “Installed Capacity” in the Services Tariff.

4. Pursuant to the proposed definition of “Forced Outage,” a market participant with a generator in a Forced Outage may retain its eligibility to participate in the ICAP market with that unit for only six months unless it satisfies the definition of “Commenced Repair.” NYISO proposes to define a new outage state, an “ICAP Ineligible Forced Outage,” which begins either after the six-month expiration of a generator’s Forced Outage if the generator owner has not Commenced Repair, or voluntarily at any time 60 or more days following a Forced Outage. ICAP Ineligible Forced Outage also applies to units that have taken substantial actions that are inconsistent with an intention to operate the generator in the energy market. A generator in this outage state is not eligible for, and may not participate in, the ICAP market. NYISO’s proposed definition of “Inactive Reserves” applies to generators taking outages for non-equipment related reasons; it can continue for no more than six months. These units are also ineligible to participate in the ICAP market. “Mothball Outage,” as defined, involves units voluntarily removed from service for reasons not related to equipment failure; these units are also ineligible to participate in the ICAP market. The newly defined term “Retired” refers to generators who have permanently ceased operating after the effective date of the new tariff revisions by virtue of either a notice from the generator to that effect or

² NYISO July 28, 2014 Transmittal Letter at 2 (NYISO Transmittal Letter).

³ NYISO Transmittal Letter at 3.

because the generator's ICAP Ineligible Forced Outage or Mothball Outage has expired. An ICAP Ineligible Forced Outage or Mothball Outage expires when a unit's Capacity Resource Interconnection Service (CRIS) expires or, if it has no CRIS, when the unit has been in the outage for 36 consecutive months, unless the expiration is tolled because of a Commenced Repair determination.

5. NYISO also proposes to amend its Services Tariff to exclude from calculations of the Unforced Capacity that Installed Capacity Suppliers are permitted to sell in the ICAP market, monthly operating data for any month, or Capability Period, as applicable, during which the unit was in an outage state that precluded its eligibility to participate in the ICAP market. According to NYISO, these amendments allow for a more accurate estimate of a generator's forced outage rate by basing it on its own operating history rather than a class average, while preserving incentives to return from such an outage as soon as possible to maximize Unforced Capacity available for sale. NYISO provides exceptions in proposed Services Tariff section 5.12.6.1.1.

6. NYISO's proposed Services Tariff revisions also state that units in ICAP Ineligible Forced Outage or Mothball Outage, if selected as a Gap Solution or identified as the solution to a reliability issue on the non-bulk power system, must make a timely return to service to address the reliability issue or provide temporary use of its interconnection point. The unit is only required to make a timely return to service after a compensation mechanism is established by an appropriate regulatory agency, but may be subject to financial consequences if it does not return to service on time. The unit owner is not compensated for allowing a Transmission Owner to temporarily use its interconnection point to meet a reliability need, but the Transmission Owner must make the interconnection point available on six months' "Notice of Intent to Return," as defined. The Transmission Owner must use reasonable efforts to reconnect the generator on time. NYISO also proposes to amend its OATT to require certain changes to the existing process of evaluating Gap Solutions or alternative Gap Solutions when such have been submitted following NYISO's determination that one is necessary.

7. With regard to Market Power Mitigation Measures, NYISO proposes to exempt from the Physical Withholding Test⁴ units that have experienced a "Catastrophic Failure," defined as damage that would reasonably require at least 270 days to repair. NYISO also seeks to require the audit and review when a unit in a Mitigated Capacity

⁴ The Physical Withholding Test is used to determine, through an audit and review process, whether the removal of a resource from the ICAP market has a legitimate economic justification or is motivated by a desire to physically withhold capacity to raise prices.

Zone is removed from the market as a result of being reclassified from a Forced Outage to an ICAP Ineligible Forced Outage, with the same exemption just noted. NYISO further provides that, if the unit's damage renders the data needed for the audit and review unavailable before the expiration of the Forced Outage, the test will be delayed until the data is available; this requires a finding of "Exceptional Circumstances." NYISO proposes to amend the Services Tariff sections concerning its Market Monitor to describe the coordination between NYISO and its Market Monitor with respect to the audit or review. The Services Tariff will also include a provision that describes the penalties applicable to findings of physical withholding.

8. In addition, NYISO proposes to amend the OATT sections describing Minimum Interconnection Standard and the tests for determining deliverability. Units in Mothball Outages, ICAP Ineligible Forced Outages, and Inactive Reserves states will not be removed from, and will be modeled as in, the Existing System Representation used for studies performed under the Minimum Interconnection Standard. Also, the CRIS for each facility will be modeled in Deliverability Studies for the Class Year, regardless of the facility's outage state, unless the CRIS will expire prior to the scheduled completion of the applicable Class Year study or the CRIS is associated with a Retired facility that cannot transfer its rights prior to the CRIS expiration. Also, the three-year termination of CRIS will recognize the tolling available, as discussed further below.

9. NYISO also proposes to amend its Large Generator Interconnection Procedures and Small Generator Interconnection Procedures to explicitly state that a Developer (or Interconnection Customer) seeking to return a facility to operation after it is Retired must submit a new Interconnection Request. However, the Developer (or Interconnection Customer) would not have to submit a new Interconnection Request if it seeks to return the facility to operation before the end of its ICAP Ineligible Forced Outage or Mothball Outage. In addition, NYISO proposes to add the definition of the term "Retired" to its *pro forma* Large Generator Interconnection Agreement and Small Generator Interconnection Agreement, and to amend the termination provisions of those agreements to provide that NYISO and the Transmission Owner can terminate the agreement when the unit is Retired.

10. On January 29, 2015, Commission staff issued a letter to NYISO notifying NYISO that its filing was deficient and requesting additional information. On February 12, 2015, NYISO filed a response (Deficiency Letter Response), as further detailed below. In its Deficiency Letter Response, NYISO changed its requested effective date to May 1, 2015.

II. Notice of Filing and Responsive Pleadings

11. Notice of NYISO's July 28, 2014 filing in Docket No. ER14-2518-000 was published in the *Federal Register*, 79 Fed. Reg. 45,439, with interventions and protests due on or before August 18, 2014. On August 1, 2014, the Independent Power Producers

of New York, Inc. (IPPNY) filed a Motion for a 15-Day Extension of Time to File Comments, and the Commission granted the extension with interventions and protests due on or before September 2, 2014.

12. IPPNY, Multiple Intervenors, the City of New York, Exelon Corporation, the PSEG Companies,⁵ the NRG Companies,⁶ the Entergy Companies,⁷ the New York Transmission Owners (NYTOs),⁸ and Astoria Generating Company, L.P. (Astoria) filed timely motions to intervene. The New York State Public Service Commission (New York Commission) filed a notice of intervention. Astoria and IPPNY each filed protests.⁹ NYTOs filed comments generally supporting NYISO's proposed revisions, as well as an answer to IPPNY's protest. NYISO filed an answer to both Astoria's and IPPNY's protests.

13. On September 16, 2014, in Docket No. ER14-2518-001, NYISO refiled its proposed tariff amendments with a revised proposed effective date of February 1, 2015.¹⁰ Notice of NYISO's September 16, 2014 filing was published in the *Federal Register*, 79 Fed. Reg. 56,797, with interventions and protests due on or before October 7, 2014.

⁵ The PSEG Companies consist of PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power New York LLC.

⁶ The NRG Companies consist of NRG Power Marketing LLC and GenOn Energy Management, LLC.

⁷ The Entergy Companies consist of Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Power Marketing, LLC.

⁸ The NYTOs consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Power Supply Long Island, Inc., New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

⁹ Astoria generally supports the protest made by IPPNY.

¹⁰ NYISO stated that, due to the iterative nature of proposing these revisions to its stakeholders, it concluded that it would need more time to present revisions to its operating and procedural manuals to its stakeholders before the proposed tariff revisions become effective. As such, NYISO proposed to change the proposed effective date from November 1, 2014, as requested in the July 28, 2014, filing, to February 1, 2015.

On October 7, 2014, the New York Commission timely filed comments on NYISO's September 16, 2014 filing. IPPNY filed an answer to both NYISO's answer and the New York Commission's comments.

14. Notice of the Deficiency Letter Response in Docket No. ER14-2518-002 was published in the *Federal Register*, 80 Fed. Reg. 10,082, with interventions and protests due on or before March 5, 2015.¹¹ IPPNY filed a timely protest.

III. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹² the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Rule 213(a)(2) of the Commission's regulations prohibits an answer to a protest unless otherwise ordered by the decisional authority.¹³ We accept NYTOs', NYISO's, and IPPNY's answers because they have provided information that assisted us in our decision making process.

IV. Substantive Matters

17. We conditionally accept in part and reject in part NYISO's proposed changes to its Services Tariff and OATT, with the conditionally accepted revisions to become effective May 1, 2015, as requested, subject to a compliance filing. We find that, in general, NYISO's proposal to formally define various outage states, with related changes, will help increase predictability and transparency, and help ensure that the only units participating in the ICAP market are those that reasonably expect to be able to provide capacity during the delivery period. We note that, although protesting parties take issue with various aspects of the proposal, they acknowledge that NYISO's proposal is, in large part, beneficial to NYISO's markets. However, we reject NYISO's proposal to require certain generators experiencing an outage that fail to return to service in the time required to pay costs incurred to install an alternative reliability solution. We address NYISO's filing in further detail below.

¹¹ The filing of the Deficiency Letter Response closed Docket Nos. ER14-2518-000 and ER14-2518-001.

¹² 18 C.F.R. § 385.214 (2014).

¹³ 18 C.F.R. § 385.213(a)(2).

A. Expiration of a Forced Outage and ICAP Ineligible Forced Outage

1. NYISO's Proposal

18. NYISO proposes to define a “Forced Outage” as “[a]n unscheduled inability of a [generator] to produce [e]nergy that does not meet the notification criteria to be classified as a scheduled outage or de-rate as established in ISO procedures.”¹⁴ Under its proposal, a resource undergoing a Forced Outage will be moved to an “ICAP Ineligible Forced Outage” state, and will thereby be restricted from participating in the ICAP market, if: (1) the market participant has not “Commenced Repair”¹⁵ following the six-month expiration of a generator’s Forced Outage; (2) the market participant volunteers at any time 60 or more days following a Forced Outage; or (3) the unit has taken substantial actions inconsistent with an intention to operate in the energy market, such as disabling essential equipment.¹⁶

19. Under NYISO’s proposal, an ICAP Ineligible Forced Outage would expire—and the unit would then be designated as “Retired”¹⁷—when the unit’s CRIS rights¹⁸ expire, or, if it had no CRIS rights, when the unit has been in that outage for 36 consecutive months.¹⁹ Under the proposal, if the unit has “Commenced Repair” and provided a reasonable return date,²⁰ the unit can toll the ICAP Ineligible Forced Outage expiration

¹⁴ NYISO Transmittal Letter at 4 (referencing proposed revisions to section 2.9 of the Services Tariff).

¹⁵ The proposed Commenced Repair test is defined in section 5.18.1.3 of the Services Tariff.

¹⁶ NYISO’s proposed definition of ICAP Ineligible Forced Outage is in section 5.18.1.2 of the Services Tariff. The process for moving between these states is proposed in section 5.18.1.7 of the Services Tariff.

¹⁷ NYISO proposes to define “Retired” as “A Generator that has permanently ceased operating on or after the effective date of Section 5.18 of this Services Tariff either: i) pursuant to applicable notice; or ii) as a result of the expiration of its Mothball Outage or its ICAP Ineligible Forced Outage.” Proposed Services Tariff § 2.18.

¹⁸ See NYISO, OATT, Attachment S, § 25.1.2 (2.0.0).

¹⁹ Proposed Services Tariff § 5.18.2.3.

²⁰ Proposed Services Tariff § 5.18.1.2.

until: (1) 120 days from when the outage would have expired; or (2) NYISO determines that the market participant has ceased or unreasonably delayed the repair of its generator. NYISO also proposes related changes to the *pro forma* Large Generator Interconnection Agreement and Small Generator Interconnection Agreement (the Interconnection Agreements) to provide that NYISO (and, in the case of the Large Generator Interconnection Agreement, the Transmission Owner) may terminate the agreement when the generator is “Retired.”

2. Responsive Pleadings

20. In its protest, IPPNY argues that NYISO’s proposed 120-day tolling period of the expiration of an ICAP Ineligible Forced Outage is unjust and unreasonable because it would unnecessarily burden market participants faced with major repairs or difficulties unforeseen in their repair plans. IPPNY states that generators facing such difficulties would be forced to jump through the administrative hurdle of applying for a waiver to avoid the loss of their CRIS rights. IPPNY contends that tolling the expiration of such generators’ CRIS rights for the duration of reasonable and credible repair efforts would more appropriately accommodate the uncertainties involved in bringing a generator back to service, which would better serve both market participants and their customers.²¹ IPPNY argues that NYISO’s proposed tolling period invites a waiver request for every project that meets a contingency, which creates an administrative burden for NYISO and the Commission. IPPNY requests that the Commission require NYISO to change the tolling period to run as long as the generator continues to make reasonable and credible repair efforts.

21. IPPNY further argues that NYISO’s definition of “Retired” needs to be modified to make it clear that NYISO (not only the generator) will be able to deem that a facility has permanently ceased operations. IPPNY challenges aspects of the proposed definition under which NYISO may deem that the facility has permanently ceased operations, asserting that such a provision can have implications beyond NYISO’s outage state proposal and, for example, trigger rights and obligations under various agreements such as loan covenants. IPPNY argues that NYISO should therefore be required to amend its proposed definition of “Retired” to avoid such outcomes.²²

²¹ IPPNY September 2, 2014 Comments and Protest at 8 (IPPNY Protest) (citing NYISO Transmittal Letter at 8).

²² IPPNY proposes to revise the definition of Retired to state: “A Generator that has permanently ceased operating on or after the effective date of Section 5.18 of this Services Tariff pursuant to applicable notice *that the Generator has issued or a*

(continued...)

22. IPPNY also argues that NYISO's proposal to add the definition of "Retired" to both the Large and Small Generator *pro forma* Interconnection Agreements, and thereby allow it and a Transmission Owner to unilaterally terminate a generator's interconnection rights after expiration of its ICAP Ineligible Forced Outage or Mothball outage, cannot apply to existing interconnection agreements. IPPNY asserts that, although NYISO states that its proposed retirement provisions would apply to entities executing the standardized agreements after the effective date of the tariff revisions, it is unclear whether NYISO intends its proposal to apply to generators with existing interconnection agreements.²³ IPPNY states that NYISO's proposal to amend the termination provisions of NYISO's interconnection agreements should not apply to interconnection agreements executed before the proposal's effective date. IPPNY asserts that, if applied to existing interconnection agreements, the tariff provisions would conflict with agreements that do not permit either NYISO or a connecting Transmission Owner to terminate an interconnection agreement unilaterally. IPPNY points to U.S. Supreme Court precedent to argue that the proposed revisions should not be effectuated in a way that impermissibly modifies agreements that have been executed and accepted by the Commission, and on which parties have reasonably relied in making long-term business decisions involving considerable risk.²⁴ IPPNY asserts that NYISO is legally required to make separate filings pursuant to section 205 of the FPA, demonstrating that the proposed changes are just and reasonable with respect to each of the existing interconnection agreements.

23. Finally, IPPNY asserts that, if NYISO's proposed retirement provisions are nevertheless applied to generators with existing interconnection agreements, the forced termination of those generators' interconnection rights would constitute a taking without just compensation under the Fifth Amendment to the U.S. Constitution. Thus, IPPNY requests that the Commission either clarify that the proposed revisions do not apply to generators with interconnection agreements executed before the effective date of the revisions or, if they do apply, then clarify that the generators must receive just compensation for the taking of their interconnection rights.

Generator that the NYISO has deemed to have permanently ceased operating on or after the effective date of Section 5.18 of this Services Tariff as a result of the expiration of its Mothball Outage or of its ICAP Ineligible Forced Outage." IPPNY Protest at 10 (emphasis added).

²³ IPPNY Protest at 10 (citing NYISO Transmittal Letter at 28).

²⁴ IPPNY Protest at 12 (citing *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968) (*Permian Basin*)).

3. NYISO's Answer and Deficiency Letter Response

24. NYISO contends that IPPNY's proposal to toll the expiration of an ICAP Ineligible Forced Outage for as long as the generator continues to make repairs is unnecessary and could encourage generators to delay repairs in order to extend their outage state indefinitely and leave unresolved the market uncertainty created by indefinite outages. NYISO reiterates that clearly defining the extension period facilitates both economic and reliability planning. NYISO contends its proposal provides new flexibility for generators facing the expiration of Mothball or ICAP Ineligible Forced Outages if they cannot complete repairs in time. NYISO states that, under its proposal, generators that have Commenced Repair before the outage and related CRIS rights expire, but that cannot complete those repairs before the three-year period would otherwise close, have an additional 120 days to complete those repairs. NYISO further contends that, in the rare and extraordinary event a generator may need to continue to repair beyond the proposed 120-day period, it would be more appropriate for the generator to seek a tariff waiver than to indefinitely extend all Mothball²⁵ or ICAP Ineligible Outages while repairs continue.

25. NYISO argues that its proposal to designate a generator with an expired Mothball or ICAP Ineligible Forced Outage as Retired assures that NYISO, Transmission Owners, and developers have accurate information about a generator's future availability, which NYISO posits is essential to plan for and maintain a reliable transmission system. NYISO further contends that IPPNY's proposed revision to NYISO's definition of Retired is unnecessary and incomplete because it fails to clarify whether, and under what circumstances, NYISO could pursue its planning activities by assuming a unit would not be returning to service. NYISO states that its proposed tariff provisions merely build on the existing Services Tariff, specifically OATT section 25.9.3.1, which provides that generation units will lose their CRIS rights if they do not participate in the ICAP market for more than three years. Additionally, NYISO states that its existing procedures already require units on certain extended outages to go through NYISO's interconnection process before re-entering the market.

26. In both its answer and Deficiency Letter Response, NYISO addresses the issue of whether its proposed tariff definition of "Retired" would modify the terms of, or terminate, any existing interconnection agreements. In its answer, NYISO states that, although its proposal may inform the Commission's future interpretation of certain interconnection agreement provisions related to unit retirement, any modification to, or termination of, an existing interconnection agreement, even after the effective date of the

²⁵ See Proposed Services Tariff § 2.13.

proposed tariff revisions, will continue to be subject to the terms and conditions of the underlying interconnection agreements. In the Deficiency Letter Response, NYISO clarifies that, while it seeks to apply its proposed tariff definition of “Retired” to generators with existing interconnection agreements, whether the designation of a generating unit with an existing interconnection agreement as “Retired” would allow NYISO or the connecting Transmission Owner to unilaterally terminate the interconnection agreement depends on whether the agreement is a two-party agreement between the generator and the connecting Transmission Owner or a three-party, NYISO *pro forma* Interconnection Agreement.²⁶ For a two-party agreement, NYISO explains that termination of the agreement is governed by the terms and conditions of that particular agreement, such that determining whether designating the relevant unit as “Retired” triggers the termination provisions must be made on a case-by-case basis. NYISO states that, consistent with existing requirements, the party seeking termination under a two-party agreement would make a filing with the Commission at least 60 days prior to the proposed termination date.²⁷ On the other hand, for existing three-party, NYISO *pro forma* Interconnection Agreements, NYISO contends that designating a unit “Retired” under the proposed tariff amendments would be grounds for termination of the Interconnection Agreement. NYISO states that if it designates a unit “Retired,” NYISO will file a notice of termination with the Commission, as applicable.

27. NYISO further states that where NYISO or the connecting Transmission Owner terminate an interconnection agreement, access to the relevant point of interconnection will be made available to proposed projects on a non-discriminatory basis through the generally applicable interconnection or transmission expansion processes; thus, a “Retired” generator must submit a new Interconnection Request to return to service, and seek access to the point of interconnection through the same interconnection process as other projects. NYISO further states that where the termination provisions of the agreement are not triggered by the “Retired” designation, generally only in the case of two-party agreements, the “Retired” generator would still need to submit a new Interconnection Request and go through the interconnection study process to return to commercial operations; however, the generator would retain its right to the specific point of interconnection and access to the point would not be available to new projects, except in the case of the temporary use provisions proposed in this proceeding. NYISO explains that this outcome is consistent with NYISO’s current procedures, which require a

²⁶ NYISO February 12, 2015 Response to Deficiency Letter at 1 (NYISO Deficiency Letter Response) (citing NYISO, OATT, §§ 30 (Attachment X), 32 (Attachment Y)).

²⁷ NYISO Deficiency Letter Response at 1 (citing 18 C.F.R. § 35.15 (2014)).

generator to submit a new Interconnection Request if the generator has, for three or more years, been retired, in a mothball outage, or on standby, reserves shutdown, or in protective layup.²⁸ NYISO also notes that the “Retired” generator would be required to satisfy the applicable interconnection requirements to obtain and retain its CRIS,²⁹ which NYISO states is consistent with existing NYISO tariff provisions providing that a generator will lose its CRIS if it does not participate in the ICAP market for more than three years.³⁰

28. NYISO explains that its retirement provisions are necessary for NYISO, Transmission Owners, and project developers to have accurate information about the future availability of generators. Moreover, NYISO states that this information is essential to planning and maintaining a reliable transmission system, and provides further transparency of the consequences of long-term outages.

4. Protest to Deficiency Letter Response

29. In its protest to the Deficiency Letter Response, IPPNY asserts that NYISO seeks to impermissibly undercut a generator’s rights under interconnection agreements that have been executed and accepted by the Commission and on which the parties thereto have reasonably relied in making long-term business decisions involving considerable risk. Although NYISO states in its Deficiency Letter Response that NYISO procedures already require that a generator submit a new Interconnection Request after being in an outage state for more than three years, IPPNY responds that NYISO cites to its Transmission Expansion and Interconnection Manual for authority, which does not have

²⁸ NYISO Deficiency Letter Response at 2 (citing NYISO, *Transmission Expansion and Interconnection Manual*, § 3.3.4.A.3 (Nov. 2012), http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Planning/tei_mnl.pdf).

²⁹ NYISO Deficiency Letter Response at 3 (citing NYISO, OATT, §§ 25.6, 25.7).

³⁰ NYISO Deficiency Letter Response at 3 (citing NYISO, OATT, § 25.9.3.1).

the force and effect of its tariffs.³¹ IPPNY notes that NYISO does cite to specific tariff provisions concerning the duration of CRIS rights.³²

5. Discussion

a. 120-Day Tolling Provision

30. We find that NYISO's proposed 120-day tolling period for the expiration of an ICAP Ineligible Forced Outage is just and reasonable and reject IPPNY's challenges. Although IPPNY contends that it is an unreasonable administrative burden to require generators to request a waiver if they need more than 120 days, we agree with NYISO that the circumstances under which a generator will need to maintain outage status beyond the proposed 120-day tolling period – notably after the generator's CRIS rights have expired, or the unit has been in that outage for 36 consecutive months – will likely be infrequent. We expect such situations to be rare and are not persuaded to outright extend all Mothball or ICAP Ineligible Forced Outages indefinitely. A specific tolling period provides market certainty as well as a proper incentive for a generator to not unreasonably delay repairs. Accordingly, we find NYISO's proposal on this issue to be just and reasonable.

b. IPPNY's Proposed Change to the Definition of "Retired"

31. IPPNY argues that NYISO's proposed definition of "Retired" adds what IPPNY characterizes as a unilateral right of NYISO to "deem" that a facility has retired when its Mothball or ICAP Ineligible Forced Outage expires without explicitly stating that NYISO has deemed a retirement to have occurred. This provision, it asserts, could potentially trigger rights and obligations under other agreements, such as loan agreements. However, IPPNY does not explain what rights or obligations may be triggered or how it would be harmed. We find IPPNY's concerns on this issue to be speculative.

³¹ IPPNY March 4, 2015 Protest at 2–4 (IPPNY Protest to Deficiency Letter Response) (citing NYISO Deficiency Letter Response at 2 n.5 and *Erie Power, LLC*, 148 FERC ¶ 61,038, at P 1 n.1 (2014)).

³² IPPNY Protest to Deficiency Letter Response at 3 n.9 (citing NYISO Deficiency Letter Response at 3 n.8).

32. NYISO proposes to amend its *pro forma* Interconnection Agreements to insert the words “is Retired or” into the existing termination provisions.³³ However, NYISO’s proposal renders the provision unclear in one respect. Because NYISO proposes to define “Retired,” in pertinent part, as “A Generator that has permanently ceased operating . . . i) pursuant to applicable notice; or ii) as the result of the expiration of its Mothball Outage or its ICAP Ineligible Forced Outage,” it is unclear why the termination provision of the *pro forma* Interconnection Agreements still refers to a facility that “permanently ceases Commercial Operations” as an alternate to being “Retired” as a basis for NYISO or Transmission Owner termination of the agreement. We direct NYISO to submit a compliance filing, removing the language referring to “permanently ceases Commercial Operations.”

c. **Application of Proposed “Retired” Provisions to Existing Interconnection Agreements**

33. As to IPPNY’s contention that the proposed tariff revisions inappropriately modify or abrogate existing interconnection agreements, we disagree. As an initial matter, NYISO is not proposing to amend existing interconnection agreements to add the term “Retired” or its proposed definition to the termination provisions of any interconnection agreement. Thus, contrary to IPPNY’s assertion, the revisions here do not require NYISO to file under section 205 to amend existing agreements. However, compliance with NYISO’s tariffs, *as amended from time to time*, is an explicit condition in NYISO’s current *pro forma* Interconnection Agreements.³⁴ Thus, while the existing *pro forma*

³³ NYISO proposes to revise section 2.3.1 of Attachment X to state: “This Agreement may be terminated by the Developer after giving the NYISO and Connecting Transmission Owner ninety (90) Calendar Days advance written notice, or by the NYISO and Connecting Transmission Owner notifying FERC after the Large Generating Facility *is Retired or* permanently ceases Commercial Operations.” (emphasis added to reflect NYISO’s proposed revision).

³⁴ See NYISO, OATT, Attachment X, § 30.14 (3.0.0), app. 6, § 29.4 (requiring parties to a Large Generator Interconnection Agreement to comply with “Applicable Laws and Regulations, Applicable Reliability Standards, the NYISO OATT and Good Utility Practice”); NYISO, OATT, Attachment Z, § 32.5 (3.0.0), app. 9, §§ 1.5.1, 12.1 (same requirements for parties to a Small Generator Interconnection Agreement); see also NYISO, OATT, Attachment X, § 30.14 (3.0.0), app. 6, § 29.3 (providing the rule of interpretation that “reference to any agreement . . . , document, instrument or tariff means such agreement, document, instrument or tariff as amended or modified and in effect from time to time”); NYISO, OATT, Attachment Z, § 32.5 (3.0.0), app. 9, attachment 1

(continued...)

Interconnection Agreements themselves are not being modified, we agree with NYISO that, pursuant to the terms of existing *pro forma* Interconnection Agreements, generators are subject to the amended NYISO tariff provisions accepted by this order, effective May 1, 2015. We note that, under the proposed tariff revisions, when NYISO designates a unit that has an existing conforming *pro forma* Interconnection Agreement “Retired,” it must file a notice of termination with the Commission.³⁵

34. As to non-conforming existing interconnection agreements, while generators that are party to such agreements must also generally comply with NYISO’s tariffs, as applicable, we agree with NYISO that the termination provisions of each non-conforming existing interconnection agreement should govern whether designating a unit “Retired” will trigger termination.³⁶ Thus, each non-conforming existing interconnection agreement would be analyzed individually. We note, however, that any non-conforming existing interconnection agreement that incorporates a provision requiring compliance with NYISO’s tariffs, as they may change from time to time, and that in that respect tracks the above-noted terms of existing NYISO *pro forma* Interconnection Agreements, may be subject to the new termination provisions the same as a conforming *pro forma* Interconnection Agreement.

35. Having stated the foregoing, we find that application of the proposed tariff provisions to both existing *pro forma* and non-conforming interconnection agreements requires clarification. Accordingly, we conditionally accept the proposed tariff revisions, subject to NYISO submitting revised tariff language in the compliance filing clearly delineating the application of the new tariff provisions, including the new retirement provisions, to existing interconnection agreements, in accordance with the discussion above.

36. IPPNY’s assertion that applying NYISO’s proposed termination provisions to existing interconnection agreements effects an unconstitutional taking without just compensation under the Fifth Amendment to the U.S. Constitution is discussed below in section IV.C.

(defining “Tariff” as “NYISO’s Open Access Transmission Tariff, as filed with the FERC, and as amended or supplemented from time to time, or any successor tariff”).

³⁵ 18 C.F.R. § 35.15 (2014).

³⁶ NYISO Deficiency Letter Response at 1.

B. Outages and Reliability Need**1. NYISO's Proposal**

37. Under NYISO's proposal, generators in an outage state that are needed to meet reliability needs must either return to service or make their interconnection points available for the length of the outage, unless the unit makes a timely return to service.³⁷ More specifically, NYISO proposes that Transmission Owners³⁸ be allowed to use an interconnection point on a temporary basis if a transmission project using that point has been identified as a Gap Solution³⁹ or to resolve a reliability issue arising on the non-bulk power system. Under the proposal, the generator will not be compensated for this use, but the Transmission Owner must make the interconnection point available to the generator on six months' notice of intent to return to service.

38. Instead of making their interconnection points available, generators may instead agree to return to service to correct reliability problems that have arisen after their outages began. Under this option, generators incur an obligation to return to service before a certain date after negotiating compensation for returning to service and receiving an order from an appropriate regulatory agency enacting this compensation mechanism. A generator that fails to return to service within the required time frame may be subject to financial consequences.⁴⁰

2. Responsive Pleadings

39. IPPNY contends that the use of a generator's interconnection point should only be allowed if the Transmission Owner has demonstrated that its use is the last resort to meet a reliability need or, at a minimum, is the most efficient and cost-effective reliability

³⁷ See Proposed Services Tariff §§ 5.18.4, 5.18.5.

³⁸ See NYISO, OATT, § 1.20 (3.0.0).

³⁹ Section 31.2.10 of the NYISO OATT states that a Gap Solution may be necessary when neither market-based nor regulated proposals can satisfy a reliability need in a timely manner, and that a responsible Transmission Owner will propose a solution as soon as reasonably possible for consideration by NYISO and the New York Department of Public Service.

⁴⁰ See *infra* section IV.D (discussing the financial consequences of not making a timely return to service).

solution. IPPNY states that, without this requirement, the proposal is overly broad and inconsistent with Commission Order No. 1000.⁴¹

40. IPPNY states that NYISO's proposed authorization to require generators in an outage state to return to service does not specify which agency has the authority to issue the required order for compensation and does not allow a generator to file a rate based on its full cost of service with the Commission under section 205 of the FPA. IPPNY argues that the Commission clearly has jurisdiction, but that NYISO's proposed language could incorrectly be interpreted to allow the New York Commission to issue the compensation order. Furthermore, IPPNY points out that the Commission recently held that allowing an Independent System Operator to unilaterally file a rate limits the Commission's ability to provide the appropriate level of relief to the generator owner.⁴² IPPNY argues that it would therefore be consistent with Commission precedent to direct NYISO to include language in its tariff specifically providing a generator owner with the right to file proposed rates with the Commission if the generator is required to operate to meet a reliability need.⁴³

3. Answers

41. NYTOs suggest that NYISO's proposal is clearly defined, such that a narrow set of circumstances limit when a Transmission Owner may use an interconnection point to address a reliability need. NYTOs indicate that a Transmission Owner may do so where NYISO has selected the reliability solution pursuant to its procedures, or where the New York Commission has selected the reliability solution pursuant to its 2005 order.⁴⁴ NYTOs suggest that the Commission has already ruled that generators lack the

⁴¹ IPPNY Protest at 16 (citing *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 (2013), *order on reh'g*, 148 FERC ¶ 61,044 (2014)).

⁴² IPPNY Protest at 19–20 (citing *PJM Interconnection, L.L.C., Open Access Transmission Tariff, Part V, § 113.2* and *AmerenEnergy Resources Generating Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at P 92 (2014) (*AmerenEnergy*)).

⁴³ IPPNY Protest at 20 (citing *AmerenEnergy*, 148 FERC ¶ 61,057 at P 92).

⁴⁴ NYTOs September 19, 2014 Request for Leave to Answer and Answer at 6 (NYTOs Answer) (citing *Order Adopting Notice Requirements for Generation Unit Retirements*, New York Public Service Commission, Case 05-E-0889 (Dec. 20, 2005) at 20).

unqualified right to use their interconnection points, and has recognized that maintaining reliability is vital to the public interest.⁴⁵

42. NYTOs suggest that adequate incentives and enforcement methods are available to NYISO to ensure that an interconnection point is made available to a generator returning in a timely manner.⁴⁶ NYTOs argue that compensating a generator for lost opportunity costs for interconnection rights would send the wrong economic signal. NYTOs contend that NYISO's proposal addresses a situation where the generator has created a need for the Transmission Owner to use the interconnection point to meet a reliability need. NYTOs state that when the generator is ready to return to service, the Transmission Owner must use reasonable efforts to restore the interconnection in a timely manner.⁴⁷

43. NYISO requests that the Commission reject IPPNY's proposal to require a Transmission Owner to demonstrate that use of the interconnection point is "the most efficient and cost-effective reliability solution." NYISO indicates that its OATT already requires that, in these circumstances, a Gap Solution selected by NYISO is subject to review by the jurisdictional governmental agency.⁴⁸

44. NYISO further contends that applying Order No. 1000 principles to the Gap Solutions process is unreasonable and not practicable. NYISO indicates that it has filed tariff provisions to evaluate and select the most efficient or cost effective solution to transmission needs, but does so only in the normal course of its expanded two-year planning process.⁴⁹ NYISO asserts that it is not practicable to apply the same evaluation and selection process to obtaining Gap Solutions to resolve an imminent reliability need. NYISO notes that its tariff requires immediate action by NYISO for Gap Solutions, after

⁴⁵ NYTOs Answer at 6 (citing *New York Indep. Sys. Operator, Inc.*, 123 FERC ¶ 61,093, at P 46 (2008) and *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,104, at P 19 (2007)).

⁴⁶ NYTOs September 2, 2014 Comments at 4 (NYTOs Comments) (citing NYISO Transmittal Letter at 24).

⁴⁷ NYTOs Comments at 7.

⁴⁸ NYISO September 29, 2014 Request for Leave to Answer and Answer at 15 (NYISO Answer) (citing NYISO, OATT, § 31.2.10).

⁴⁹ NYISO Answer at 15 (citing NYISO, OATT, § 31.2.6.5.2).

consultation with the New York Department of Public Service, and by Transmission Owners to maintain bulk power system reliability.⁵⁰

45. NYISO also contends that the Commission should reject as unnecessary IPPNY's proposal to require NYISO to amend its proposal to clarify that the "compensation order" that triggers the obligation to return to service under proposed section 5.18.4.1 of the Services Tariff must be issued by the Commission, as well as IPPNY's proposal to require NYISO to include language specifying a generator's right to file proposed rates under FPA section 205 if the generator is required to operate to meet a reliability need.⁵¹ NYISO asserts that its proposal does not add or detract either from any filing right the generator has, or from the Commission's authority.⁵²

46. In its comments, the New York Commission suggests that it has the authority to review generator retirements and to take action where needed for reliability. The New York Commission contends that it has established authority to select a generation facility as either a Gap Solution or to address a non-bulk transmission system need, and to issue a compensation order that ensures the recovery of the associated costs.⁵³ The New York Commission contends that its jurisdiction does not conflict with the FPA or FERC's jurisdiction. The New York Commission also states that FERC does not possess the power to require generators to run.

47. In its answer, IPPNY contends that the New York Commission misconstrues its arguments. IPPNY contends that it seeks to resolve whether the New York Commission can determine a generator's compensation after the generator is selected as the Gap Solution.⁵⁴ IPPNY argues that court precedent and FERC's own rulings make clear that the New York Commission does not have jurisdiction over wholesale rates, terms, and

⁵⁰ NYISO Answer at 15 (citing NYISO, OATT, §§ 31.2.10.2, 31.2.10.3).

⁵¹ NYISO Answer at 16.

⁵² NYISO Answer at 16.

⁵³ New York Public Service Commission October 7, 2014 Comments at 5 (New York Commission Comments) (citing NY PSL §§ 65-66, 150-173 (Article 10) and New York Commission Case 12-E-0136, *Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements*, Order Deciding Reliability Need Issues and Addressing Cost Allocation And Recovery (issued May 20, 2013)).

⁵⁴ See NYISO, OATT, Attachment Y, § 31.2.10.4 (5.0.0).

conditions and the New York Commission cannot establish a rate for a generator to provide wholesale service.⁵⁵

4. Discussion

48. We find NYISO's proposed Services Tariff revisions requiring generators in an outage state to respond to reliability needs either by returning to service or by making their interconnection points available while they remain on outage to be just and reasonable. We find that the proposed revisions will help resolve imminent reliability issues. We discuss challenges to this particular provision below.

a. IPPNY's Proposed Revisions to the Temporary Use Provisions

49. We deny IPPNY's request to clarify or amend NYISO's proposal to require generators in an outage state to make their interconnection points available only if the Transmission Owner has demonstrated that use of the interconnection point is the last resort to meet a reliability need or is the most efficient and cost-effective reliability solution. We find that IPPNY's suggestions are unnecessary given that the OATT already contains provisions regarding the identification and selection of either a Gap Solution or a solution that resolves a reliability issue on the non-bulk power system. Specifically, the OATT requires that, when selecting a Gap Solution involving a transmission project that uses an unused interconnection point, NYISO must report to the governmental agency with jurisdiction over the implementation or siting of Gap Solutions on whether any or all of the Gap Solutions proposed meet the imminent reliability need before NYISO chooses to use the interconnection point.⁵⁶ We are not persuaded that the potential inclusion or use of an interconnection point should require standards and criteria different from those that already exist. Furthermore, any question of whether the existing procedures for selecting reliability solutions are deficient or unjust and unreasonable is beyond the scope of this section 205 proceeding.

⁵⁵ IPPNY October 15, 2014 Motion for Leave to Answer and Answer at 5 (IPPNY Answer) (citing *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372, 408 (D.N.J. 2013), *aff'd sub nom. PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330, 13-4501, 2014 WL 4454999 (3d Cir. Sept. 11, 2014) and *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014)).

⁵⁶ NYISO Answer at 15 (citing NYISO, OATT, § 31.2.10).

50. We are also not persuaded by IPPNY's claims that NYISO's proposal is overly broad and inconsistent with Order No. 1000.⁵⁷ We do not think it is appropriate or practical to apply the same evaluation and selection process used to obtain Gap Solutions needed to maintain reliability in the Comprehensive Reliability Plan⁵⁸ to mitigate an imminent threat to reliability. We also note that NYISO's tariff requires that, after NYISO has consulted with the New York Department of Public Service, Transmission Owners must propose a solution to maintain bulk power system reliability as soon as possible.⁵⁹

b. IPPNY's Proposed Revisions to the Return to Service Provisions

51. We will, as IPPNY requests, require NYISO to revise its proposed return to service provisions to delete the reference to "appropriate regulatory agency" and to instead identify this Commission as the only agency with jurisdiction to issue a "compensation order" that triggers the return to service provisions. The Commission has exclusive jurisdiction over the rates, terms, and conditions of jurisdictional service.⁶⁰ The payment provided under the "compensation order" provided for in NYISO's proposed return to service provisions relates to a generator's provision of jurisdictional service, and so falls within the Commission's exclusive jurisdiction. While the New York Commission asserts in its comments that it has the authority to review generator retirements and to take action where needed for reliability, we agree with IPPNY that the New York Commission misconstrues IPPNY's request, which is focused only on the compensation order. We clarify here that the "appropriate regulatory agency" to establish compensation is the Commission.⁶¹ We direct NYISO to include tariff language

⁵⁷ IPPNY Protest at 16 (citing *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 (2013), *order on reh'g*, 148 FERC ¶ 61,044 (2014)).

⁵⁸ See NYISO, OATT, § 31.2.6 (5.0.0).

⁵⁹ NYISO Answer at 15 (citing NYISO, OATT, §§ 31.2.10.2, 31.2.10.3).

⁶⁰ See 16 U.S.C. § 824(b)(1) (2012) (The FPA gives the Commission jurisdiction over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce").

⁶¹ On February 19, 2015, the Commission issued an order instituting a section 206 proceeding and directing NYISO to establish reliability must run tariff provisions. Specifically, the Commission stated that NYISO is "the appropriate entity to assess the potential impacts [reliability must run] agreements may have on its markets in New York" and, therefore, "should be the entity that administers [reliability must run]

(continued...)

in its compliance filing that clearly identifies the Commission as the “appropriate regulatory agency” to issue a compensation order under its proposed return to service provisions.

52. As to IPPNY’s request to modify NYISO’s tariff to imbue a generator with FPA section 205 filing rights, we further direct NYISO to include tariff language in its compliance filing providing that: (1) in instances where NYISO and the generator owner cannot agree on compensation,⁶² the generator owner may submit an FPA section 205 filing for the compensation; and (2) NYISO will be required to file an unexecuted compensation agreement that includes only the non-rate terms and conditions, within a clearly specified timeframe after NYISO and the generator owner determine that they are at an impasse regarding the appropriate level of compensation.⁶³ We find this change necessary to allow the Commission to establish the appropriate level of compensation where the parties cannot otherwise agree.

C. IPPNY’s Fifth Amendment Claims

1. Responsive Pleadings

53. IPPNY argues that NYISO’s proposals to “unilaterally terminate” existing interconnection agreements⁶⁴ and to authorize NYISO to require generators in an outage

service in New York, and should do so pursuant to the provisions of its Commission-jurisdictional Tariff . . .” *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at PP 3, 9 (2015). The Commission also required that NYISO’s proposed tariff provisions “provide authorization for a generator to file, for Commission review, an [reliability must run] agreement under FPA section 205 . . . containing cost-based rates (and provisions for filings to change such rates) . . .” *Id.* P 18. The Commission explained that reliability must run “agreements are for Commission jurisdictional services . . .” *Id.* P 17.

⁶² Proposed Services Tariff section 5.18.4.1 already provides for negotiations with the Transmission Owner to effectuate the return to service.

⁶³ See *AmerenEnergy*, 148 FERC ¶ 61,057 at PP 92–93 (requiring similar provisions in Midcontinent Independent System Operator, Inc.).

⁶⁴ IPPNY refers to NYISO’s proposed revisions to its OATT, Attachment X, section 30.3.1, and Attachment Z, section 32.1.3, and to the *pro forma* Large and Small Generator Interconnection Agreements, sections 2.3 and 3.3, respectively, insofar as the revisions would require a developer or interconnection customer to submit a new Interconnection Request when returning a generator to Commercial Operation after it is Retired, as defined in Proposed Services Tariff section 2.18.

state to respond to reliability needs “by making their interconnection points available while they remain in outage”⁶⁵ would constitute a “compulsion to yield to the physical use of a generator’s right of access,” which would rise to the level of a taking under the Fifth Amendment and is, therefore, impermissible unless justly compensated.⁶⁶ The “Takings Clause” of the Fifth Amendment to the U.S. Constitution provides: “nor shall private property be taken for public use, without just compensation.”⁶⁷ IPPNY contends that the Commission has recognized that “a generator has a property interest in its interconnection point,” holding that “the interconnection component conveys a right to access the transmission provider’s system at the receipt point.”⁶⁸ IPPNY argues that the right is secured through an interconnection agreement, which assures the generator physical access to the system at the point of interconnection up to its network capacity.⁶⁹

54. According to IPPNY, an action constitutes a taking if the aggrieved party has a “recognized property interest in the subject matter being taken” and demonstrates that its interest was in fact taken.⁷⁰ IPPNY asserts that, when the government authorizes a “permanent physical occupation,” which it asserts involves “a substantial interference with property rights,” the law recognizes a *per se* taking “regardless of the economic impact on the owner or the magnitude of public interests.”⁷¹ IPPNY asserts that whether

⁶⁵ IPPNY refers to NYISO’s proposed revisions to Services Tariff sections 5.18.4 and 5.18.5, under which a generation unit in an outage state must either make a timely return to service or permit temporary use of its interconnection point by the Transmission Owner when a transmission solution using the generator’s interconnection point has been selected as either a Gap Solution or to resolve a reliability issue arising during the generator’s outage.

⁶⁶ IPPNY Protest at 16 & n.50 (citing IPPNY Protest at 13–14 & n.36–42).

⁶⁷ U.S. Const. amend. V.

⁶⁸ IPPNY Protest at 13–14 (citing *Entergy Servs., Inc.*, 91 FERC ¶ 61,234, at 61,855 (2000) (citation omitted)).

⁶⁹ IPPNY Protest at 14 (citing *Southern Co. Servs., Inc.*, 95 FERC ¶ 61,307, at 62,049 (2001)).

⁷⁰ IPPNY Protest at 13 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (*Penn Central*)).

⁷¹ IPPNY Protest at 13 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (*Loretto*)).

a physical occupation is “permanent” under the Fifth Amendment “refers to the nature of the intrusion, not its temporal duration.”⁷² Thus, IPPNY argues that temporarily giving access to a generator’s interconnection point, or permanently terminating its access rights in the case of retirement, constitutes a taking under the Fifth Amendment, and, as such, requires just compensation.⁷³

55. Accordingly, IPPNY requests that the Commission require compensation to a generator that either temporarily gives access to its interconnection point, or has its access rights permanently terminated in the case of retirement. Alternatively, in the case of a termination of access rights under an existing interconnection agreement, IPPNY asserts that the Commission should order NYISO to clarify that its proposed provision does not apply to generators with interconnection agreements executed prior to the effective date of the subject tariff proposals. IPPNY suggests that compensation “could take the form of a cost-based payment” for the “use of any of the facilities at or beyond the interconnection point during the time that the interconnection point is used for the reliability solution,” which IPPNY states would be consistent with reimbursements for “Headroom” provided for in Attachment S to the OATT.⁷⁴

56. In their answer to IPPNY’s Protest, NYTOs argue that the property interest required for a takings claim is absent here where the Commission has recognized there is no unqualified property right.⁷⁵

57. In its answer to IPPNY’s protest, NYISO disagrees that any of its proposed tariff revisions constitute a taking under the Fifth Amendment of the U.S. Constitution.⁷⁶ According to NYISO, a Transmission Owner, not a generator, owns the physical facilities that allow a generator to access the grid; interconnection agreements merely provide the

⁷² IPPNY Protest at 13 (citing *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (citation omitted)).

⁷³ IPPNY Protest at 13 (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

⁷⁴ IPPNY Protest at 16–17 (citing *Younger Aff.* ¶ 8).

⁷⁵ NYTOs Answer at 6–8 (citing *New York Indep. Sys. Operator, Inc.*, 123 FERC ¶ 61,093 at P 46 and *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,104 at P 19).

⁷⁶ NYISO Answer at 8.

generator with access, not ownership.⁷⁷ Although IPPNY claims that the Commission recognized a generator's property interest in its interconnection, NYISO counters that recent Commission precedent "indicate[s] that the issue of whether interconnection rights are 'properly viewed as 'property rights'' has not been resolved by the Commission."⁷⁸ NYISO contends that, even if a generator had property rights, IPPNY's argument that there is a taking via "physical occupation is implausible given that Transmission Owners own the physical interconnection points," so the only possible route to find a taking would be through a regulatory takings analysis.⁷⁹

58. NYISO then asserts that federal court precedent establishes the framework for a regulatory takings analysis, which occurs when "a government regulation is 'so onerous that its effect is tantamount to a direct appropriation or ouster.'"⁸⁰ Such a taking occurs, NYISO explains, when the regulation results in a total deprivation of the value of the property at issue,⁸¹ or, when there is less than a total deprivation, when the following factors weigh in favor of a taking: "the regulation's economic effect on the [property owner], the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."⁸² In weighing these factors, NYISO continues, courts look to the purpose of the Takings Clause, which is to avoid

⁷⁷ NYISO Answer at 10 (citing NYISO Transmittal Letter at 23). In the Transmittal Letter, NYISO asserts that a generator "does not own facilities that comprise the Point of Interconnection" and "do not typically own even the portion of the Attachment Facilities that connect directly into the Point of Interconnection." NYISO Transmittal Letter at 23.

⁷⁸ NYISO Answer at 10 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,079, at P 53 (2012)).

⁷⁹ NYISO Answer at 11 (citing IPPNY Protest at 13 & n.39, 14, 16 (citing *Loretto*, 458 U.S. at 434–35)).

⁸⁰ NYISO Answer at 11 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (*Lingle*)).

⁸¹ NYISO Answer at 11 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (*Lucas*)).

⁸² NYISO Answer at 11 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001) and *Penn Central*, 438 U.S. at 124).

imposing “public burdens” on some citizens, ““which, in all fairness and justice, should be borne by the public as a whole.””⁸³

59. According to NYISO, IPPNY could not establish a regulatory taking. First, NYISO asserts that “there would be no ‘total deprivation of value’ . . . given the potentially temporary and limited nature of the loss of access.”⁸⁴ NYISO explains that its tariff amendment does not misappropriate anything because it only requires generators experiencing an outage to provide temporary use of their interconnection point for reliability purposes and requires Transmission Owners to reconnect those generators upon request.⁸⁵ Second, NYISO argues that there is no regulatory taking because “temporary use of an interconnection point by a Transmission Owner does not destroy its future value to the generator nor permanently deprive it of future use.”⁸⁶ Moreover, NYISO points out that “it is ultimately the generator’s own decision to keep its unit in an outage state instead of taking steps to timely return to service.”⁸⁷ Looking to the purpose of the Takings Clause, NYISO asserts that the circumstances surrounding temporary use of a generator’s interconnection point should not “raise any concern about generators being forced to unfairly bear burdens that ought to be borne by the public as a whole.”⁸⁸

60. The New York Commission agrees with IPPNY that “appropriating a generator’s contractual right would require just compensation” since “contract rights are a type of property right.”⁸⁹ However, the New York Commission contends that compensation is only justified when the government receives the benefits of the contractual right, while the actual owner “is prevented from exercising the right.”⁹⁰ In this case, the New York Commission explains that NYISO’s standard Large Generator Interconnection

⁸³ NYISO Answer at 11–12 (quoting *Palazzolo*, 533 U.S. at 617–18).

⁸⁴ NYISO Answer at 12.

⁸⁵ NYISO Answer at 12 (citing Proposed Services Tariff § 5.18.5.2).

⁸⁶ NYISO Answer at 12.

⁸⁷ NYISO Answer at 12.

⁸⁸ NYISO Answer at 13.

⁸⁹ New York Commission Comments at 10–11.

⁹⁰ New York Commission Comments at 11 (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) (*Omnia*)).

Agreement neither conveys a physical property interest in the generator's interconnection point, nor exclusive control over that point, but rather conveys only a right of access.⁹¹ According to the New York Commission, temporary use of the interconnection point would not interfere with this right of access because the generator can resume its use of the interconnection point when it is no longer in an outage state.⁹² Even if there is a delay in returning the generator to service, the New York Commission continues, compensation is unnecessary because this merely frustrates the generator's right, rather than completely appropriating that right.⁹³ According to the New York Commission, "interference with a property right for a reasonable period of time during the pendency of a regulatory process is not a taking requiring compensation."⁹⁴

61. In further response to NYISO and the New York Commission, IPPNY states that "long-settled legal precedent" establishes that contract rights are property rights under the Fifth Amendment.⁹⁵ IPPNY argues that NYISO's proposal constitutes a physical taking of a generator's contractual right because it diverts that right, just as courts have found a physical taking "when the government appropriates the ownership of contractual rights to use or access property owned by another entity."⁹⁶ As to the New York Commission's quote from section 9.6.2 of NYISO's Large Generator Interconnection Agreement, IPPNY argues that the New York Commission ignored that the transmission owner's

⁹¹ New York Commission Comments at 11 (citing NYISO, OATT, Attachment X, app. 6, § 9.6.2 (allowing a Transmission Owner to interrupt a generator's access if "necessary to safely and reliably operate and maintain the New York State Transmission System"))).

⁹² New York Commission Comments at 11–12.

⁹³ New York Commission Comments at 12.

⁹⁴ New York Commission Comments at 12–13 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (*Tahoe-Sierra*)).

⁹⁵ IPPNY Answer at 9 (citing *Omnia*, 261 U.S. at 508, *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912) and *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977)).

⁹⁶ IPPNY Answer at 10 (citing *Dugan v. Rank*, 372 U.S. 609, 625–26 (1963) (finding a taking where the government diverted water at a dam from downstream owners of water-rights for public purposes) and *Int'l Paper Co. v. United States*, 282 U.S. 399, 407–08 (1931) (finding a taking where the government ordered diversion of water from the owners of water-rights for use in government power production)).

right to interrupt a generator's service is limited to situations in which "production of electricity could adversely affect the ability of NYISO and Connecting Transmission Owner to perform such activities as are necessary to safely and reliably operate and maintain the New York State Transmission System."⁹⁷ IPPNY also asserts that interference with a generator's right under NYISO's proposal does not occur only when a generator is in an outage state, as NYISO and the New York Commission claim. IPPNY states that the Transmission Owner has up to six months after a generator requests reconnection to occupy the interconnection point (and potentially longer due to the lack of penalties for failure to reconnect on time).⁹⁸ IPPNY states that a generator may be in an outage state for economic reasons (i.e., Mothball Outage), but will not be able to "return to service immediately in response to favorable market prices signals" under NYISO's proposal.⁹⁹ According to IPPNY, this is an interference with a generator's reasonable investment-backed expectations.¹⁰⁰ Finally, IPPNY responds to the New York Commission's claim that compensation is only required when the benefit of an appropriated contractual right goes to the government rather than to the right-holder. IPPNY states that, unlike the factual premise in *Omnia*, where the right-holder could not purchase steel because the government requisitioned the steel itself,¹⁰¹ here, the effect of NYISO's proposal on the generator does not result in mere "consequential loss or injury," but rather is a direct taking of the generator's right to access its interconnection point.¹⁰²

2. Discussion

62. We find that NYISO's proposed tariff provisions concerning the termination of existing interconnection agreements and the requirement that a generator's interconnection points can be temporarily used by the Transmission Owner during an outage do not constitute takings under the Fifth Amendment to the U.S. Constitution and, therefore, do not require "just compensation" to affected generators.

⁹⁷ IPPNY Answer at 10–11 (quoting NYISO, OATT, Attachment X, app. 6, § 9.6.2).

⁹⁸ IPPNY Answer at 11 (citing New York Commission Comments at 10–11, NYISO Answer at 13, Patton Aff. ¶¶ 34–35, and Proposed Services Tariff § 5.18.5.2).

⁹⁹ IPPNY Answer at 11.

¹⁰⁰ IPPNY Answer at 12.

¹⁰¹ IPPNY Answer at 13 (citing *Omnia*, 261 U.S. at 507).

¹⁰² IPPNY Answer at 13 (citing *Omnia*, 261 U.S. at 510).

63. The Commission has held that, in the context of setting rates, terms, and conditions for jurisdictional service, what is found to be just and reasonable is not a taking.¹⁰³ In undertaking whether to accept a provision as just and reasonable, the Commission balances the respective rights and obligations of the parties—including whether compensation is due.¹⁰⁴ As discussed above, we find NYISO’s proposed tariff revisions concerning termination of existing interconnection agreements and temporary use of a generator’s interconnection point to be just and reasonable; therefore, there can be no taking. Because generators that execute *pro forma* Interconnection Agreements must comply with NYISO’s tariffs in effect when the Interconnection Agreement is executed, and as they may change in the future,¹⁰⁵ applying Commission-accepted tariff provisions does not result in a “taking” of any right from the generator because the generator agreed to be subject to those conditions, as they may change from time to time. With regard to non-conforming interconnection agreements, as discussed above, if those agreements contain a similar provision to NYISO’s *pro forma* Interconnection Agreement that the parties are subject to NYISO’s tariffs, as they may change, those agreements are subject to the tariff provisions we approve here and in the future, and there is no taking for the same reason just given. As for non-conforming interconnection agreements that do not contain such a provision, as we stated earlier, the effect of designating a unit “Retired” on those agreements will be determined on a case-by-case basis based on the termination provisions in those agreements. Therefore, because there is no change to the agreements, there is no taking.

¹⁰³ See *Midwest Indep. Trans. Sys. Operator, Inc.*, 109 FERC ¶ 61,157, at P 143 (2004), *order on clarification*, 111 FERC ¶ 61,367 (2005) (citing *FPC v. Texaco Inc.*, 417 U.S. 380, 391–92 (1974), *Permian Basin*, 390 U.S. at 770, and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600–01 (1944)) (“[W]e reject their concern about regulatory takings and investment-backed expectations. We have approved the FTR provisions of the tariff as just and reasonable, and what is just and reasonable is not a taking.”); see also *Southern Co. Servs., Inc.*, 57 FERC ¶ 61,093, at 61,341 (1991).

¹⁰⁴ See generally *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1191 (D.C. Cir. 1987) (*en banc*) (Starr, J., concurring) (“Unlike garden-variety takings, the requirements of the Takings Clause are satisfied in the rate regulatory setting when justice is done, that is to say the striking of a reasonable balance between competing interests.”).

¹⁰⁵ See *supra* note 34 (listing the relevant provisions of the *pro forma* Interconnection Agreements).

64. Even apart from the justness and reasonableness of NYISO's proposal, its acceptance does not result in a Fifth Amendment taking under relevant case law. A "regulatory takings" analysis under Fifth Amendment precedent involves determining whether a "categorical" or *per se* taking has occurred, and, if it has not, whether a case-specific weighing of the factors as described in *Penn Central Transportation Co. v. City of New York* demonstrates a taking.¹⁰⁶ Because the categorical or *per se* analysis has only been applied in the context of tangible property rights,¹⁰⁷ as opposed to the intangible rights generators have in their interconnection points,¹⁰⁸ we focus our analysis on the *Penn Central* factors. Even if we were to assume that the intangible interconnection rights at issue here are private property rights as contemplated by the Takings Clause, we find that there would be no taking under *Penn Central*.

¹⁰⁶ 438 U.S. at 124; *see also Palazzolo*, 533 U.S. at 617–18 (explaining Takings Clause jurisprudence and remanding for consideration of the claim using the *Penn Central* factors).

¹⁰⁷ *See, e.g., A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151–52 (Fed. Cir. 2014) ("The Supreme Court has mainly applied the categorical test to regulatory takings of real property. . . . As the Claims Court recognized, other circuits view the *Lucas* test as applying only to land. . . . We have applied the categorical test to personal property on occasion. . . . But those cases involved only tangible property. . . . We have not had occasion to address whether the categorical takings test applies to takings of intangible property such as contract rights. We decline to decide the issue at this stage of the litigation since the issue has not been briefed by the parties."); *Hawkeye Commodity Promotions, Inc. v. Vlisack*, 486 F.3d 430, 441 (8th Cir. 2007) ("Thus, it appears that *Lucas* protects real property only.").

¹⁰⁸ Contrary to IPPNY's assertion, IPPNY Protest at 13–14 (citing *Entergy Servs., Inc.*, 91 FERC ¶ 61,234 at 61,855 and *Southern Co. Servs., Inc.*, 95 FERC ¶ 61,307 at 62,049), the Commission has not ruled that a generator's interconnection rights constitute a "property right." Neither cited order describes the generator's access rights to the transmission receipt point as a "property right." The issue addressed in the cited orders was that the generator's interconnection rights did not include a right of access to the transmission system delivery point. *See also Midwest Indep. Transmission Sys. Op., Inc.*, 122 FERC ¶ 61,127, at P 33 (2008) (finding no property interest in regional transmission projects, and therefore no Fifth Amendment taking with respect to those projects notwithstanding entity's financial contribution to projects). Similarly, we make no finding here on whether a generator's interconnection rights under an interconnection agreement are property rights under the Takings Clause.

65. *Penn Central* requires consideration of: “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;” and “the character of the governmental action.”¹⁰⁹ We find that NYISO’s proposed provisions regarding retirement and use of the interconnection rights do not result in a significant detrimental economic impact on a generator or significant interference with reasonable investment-backed expectations. A reasonable investor would expect that a failure to return to service after a substantial period of inactivity (three years) could result in a termination of rights accorded under the interconnection agreement and tariff. Indeed, the existing tariff provisions contemplate that Transmission Owners may interrupt a generator’s access for reliability reasons.¹¹⁰ And units lose their CRIS rights after three years of not participating in the ICAP market.¹¹¹ Moreover, the proposed provisions add new protections that allow for a generator to avoid termination of its interconnection rights by commencing repairs and tolling the outage expiration.¹¹²

66. Likewise, NYISO’s proposed temporary use provisions do not have a significant detrimental economic impact on a generator or significantly interfere with reasonable investment-backed expectations. A generator cannot physically use the interconnection point while the generator is in an outage state. Further, generator owners should expect that, when they invest in a generator and obtain CRIS rights, they will have access to the transmission grid only when their generators are operating. NYISO proposes to make temporary use of a generator’s interconnection point only when a generator cannot actually use its interconnection rights anyway. The generator can be reconnected at its interconnection point by giving notice to the Transmission Owner of its desire to resume service.¹¹³

¹⁰⁹ *Penn Central*, 438 U.S. at 124.

¹¹⁰ *See, e.g.*, NYISO, OATT, Attachment X, § 30.14 (3.0.0), app. 6, § 9.6.2.

¹¹¹ NYISO Transmittal Letter at 17 (citing NYISO, OATT, § 25.9.3.1); NYISO Deficiency Letter Response at 2–3. Deeming a unit “Retired” pursuant to NYISO’s proposed tariff revisions only occurs after a unit “has not participated in the Energy or Capacity markets for at least three years, nor is it engaged in activity necessary to make such a return possible.” NYISO Answer at 7 n.21.

¹¹² Proposed Services Tariff § 5.18.2.3.2.

¹¹³ Proposed Services Tariff § 5.18.5. Although the reconnection may not occur until after the stated return date that the generator proposes, NYISO explains that the Transmission Owner must make the same reasonable efforts to reconnect the generator it

(continued...)

67. *Penn Central* also requires consideration of the character of the government action at issue in a regulatory takings claim.¹¹⁴ We agree with NYISO's explanation that its proposed retirement provisions "will improve existing incentives for forced out units to repair quickly and return to the market [and . . .] will better inform decision-making by the NYISO, Transmission Owners, and generation developers when planning system reinforcements, expansions and new additions."¹¹⁵ As for NYISO's proposal to require a generator to grant a Transmission Owner temporary access to its interconnection point to resolve an imminent reliability issue, we find a significant "common good" underlying the proposal. As NYISO explains, this option "will increase the flexibility of NYISO and the Transmission Owners to resolve reliability issues quickly and efficiently."¹¹⁶ Moreover, Dr. Patton, NYISO's Market Monitor, noted that, "[t]o the extent this might allow for a lower cost solution, this would reduce the cost of maintaining reliability and potentially reduce the overall market effect of an out-of-market intervention to maintain reliability."¹¹⁷

68. Examining all of these factors together, we find that IPPNY has not supported its claim of a "regulatory taking" under the Fifth Amendment to the U.S. Constitution. Accordingly, we need not address IPPNY's request that the Commission establish a cost-based payment to compensate generators for temporary use of their interconnection point.

would make to connect a new unit and, if the Transmission Owner delays reconnection beyond the generator's stated return date, the outage and CRIS expiration dates are tolled. NYISO Transmittal Letter at 24.

¹¹⁴ The Court in *Penn Central* explained that, unlike in the case of a physical invasion of real property, a government action that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good" is less likely to be considered a taking. *Penn Central*, 438 U.S. at 124 (citing *United States v. Causby*, 328 U.S. 256 (1946)).

¹¹⁵ NYISO Transmittal Letter at 3. Consistent with *Tahoe-Sierra*, 535 U.S. at 340, to which the New York Commission cites, where the Supreme Court found that the strong interest in protecting a regional planning agency's process supported a finding of no regulatory taking, we find that NYISO's strong interest in protecting its interconnection process in order to maintain the reliability of its system likewise supports a finding of no regulatory taking.

¹¹⁶ NYISO Transmittal Letter at 3.

¹¹⁷ Patton Aff. ¶ 33.

D. Replacement Facilities**1. NYISO's Proposal**

69. Under NYISO's proposal, a generator experiencing an outage will be required to pay costs that the Transmission Owner incurred to install a reliability solution at the interconnection point when the generator: (1) is at an interconnection point selected to address a reliability issue; (2) agreed to return to service, but failed to do so in the time required; and (3) subsequently sought to return to service before the expiration of its outage.¹¹⁸

2. Responsive Pleadings

70. IPPNY argues that requiring a generator to pay the full costs of a reliability solution when it fails to make a timely return to service unfairly overcharges a generator. IPPNY points out that if the generator had returned to service on schedule, customers would still have had to pay for the unit's return to service. IPPNY requests that the Commission require NYISO to instead require a generator to pay the difference between the cost of the reliability solution and the amount customers would have paid if the generator had returned to service on time. IPPNY states that the proposed higher penalty will likely deprive New York's energy markets of suppliers unwilling to take on such a high degree of regulatory risk.¹¹⁹

3. Answers

71. NYISO states that the generator's obligation to pay the full cost of the reliability solution is designed to encourage generators on outage to return to service when needed to resolve a reliability issue. NYISO argues that this proposal is just and reasonable because it establishes an appropriate, quantifiable financial deterrent to a generator failing to return to service when needed, and the generator has an opportunity to avoid the costs by returning to service or by seeking a waiver if the generator is unable to do so due to extraordinary circumstances. NYISO also states that adopting IPPNY's cost proposal could completely undermine the incentive the provision is intended to establish.¹²⁰

¹¹⁸ Proposed Services Tariff § 5.18.4.3.

¹¹⁹ IPPNY Protest at 21.

¹²⁰ NYISO Answer at 17–18.

72. NYTOs state that IPPNY inaccurately claims that NYISO's proposal would require a generator failing to return to service to pay the "full cost" of the alternative reliability solution. NYTOs explain that the tariff would require Transmission Owners to mitigate losses by finding other uses for the equipment used to achieve the reliability solution, and would require generators to only pay the unmitigated costs. Furthermore, NYTOs state that IPPNY's alternative cost proposal requires an accurate determination of what the generator would have been paid had it returned to service. NYTOs assert that because, in reality, there may not be any way to accurately determine this amount, generators should be obligated to pay the full cost of the reliability solution, as proposed by NYISO. Finally, NYTOs argue that NYISO's proposed revision is just and reasonable because it provides generators with the right economic incentives to meet reliability needs.¹²¹

4. Discussion

73. While we recognize that a penalty structure may be appropriate to provide an incentive for a generator to return to service according to the terms of its compensation agreement, we reject NYISO's proposed tariff revisions on this issue. We find that imposing the full cost of the alternative reliability solution on the generator is not just and reasonable because NYISO has not demonstrated that requiring a generator to pay the full cost provides a reasonable penalty for a generator not returning to service on the agreed-upon date. We note that NYISO may work with its stakeholders to determine the appropriate amount to allocate to the generator, as NYISO requested;¹²² any such changes would need to be submitted in a new section 205 filing. Based upon the foregoing, NYISO's compliance filing submitted pursuant to this order must reflect removal of Proposed Services Tariff section 5.18.4.3, which we reject here.

E. Withholding and Catastrophic Failure

1. NYISO's Proposal

74. Under NYISO's current rules, a generator is removed from the ICAP market at the resource owner's discretion, at which point it is subject to a Physical Withholding Test.¹²³ NYISO's proposed rules require that a generator determined by NYISO to be in an ICAP Ineligible Forced Outage in a Mitigated Capacity Zone be subject to a Physical

¹²¹ NYTOs Answer at 9–10.

¹²² NYISO Answer at 18.

¹²³ See NYISO, Services Tariff, Attachment H, § 23.4.5.6 (9.0.0).

Withholding Test, unless the generator has suffered a “Catastrophic Failure.” NYISO proposes to define “Catastrophic Failure” as one where the generator requires repairs that are reasonably expected to take 270 days or longer.¹²⁴ According to NYISO, repairs that would take at least 270 days reasonably indicate that damage is so severe that a physical withholding determination is either unlikely or very difficult to make because of uncertain information. As Dr. Patton explained:

[I]f a repair requires more than nine months, it is more likely that the costs of repair and the revenues the generator would earn following the repair would be uncertain, making the evaluation of whether the decision had a legitimate economic justification overly speculative. Furthermore, if a repair requires more than nine months, it is more likely that the generator would be unable to return to service by the next summer peak conditions.¹²⁵

75. NYISO states that, pursuant to Services Tariff section 23.4.5.6.2.3, it will establish in its manuals specific timelines for making determinations of Catastrophic Failure and Exceptional Circumstances, a finding which delays a Physical Withholding Test.¹²⁶

2. Responsive Pleadings

76. IPPNY states that, under the proposal, NYISO can unilaterally determine that a resource cannot participate in the ICAP market, and subsequently penalize the resource for not participating in the ICAP market.¹²⁷ In testimony attached to IPPNY’s protest, Mr. Younger argues that NYISO and a generator may have different estimates on key elements of the Physical Withholding Test, such as future revenues or projected repair costs. Mr. Younger points out that these differing assumptions may lead to NYISO determining that a resource was withholding for economic reasons, when the generator may have determined that the future revenues do not make the cost of repairs economically legitimate.¹²⁸ IPPNY requests that the Commission require NYISO to

¹²⁴ Proposed Services Tariff § 23.2.1.

¹²⁵ Patton Aff. ¶ 26.

¹²⁶ NYISO Transmittal Letter at 26.

¹²⁷ IPPNY Protest at 22.

¹²⁸ Younger Aff. ¶¶ 10–11.

shorten the period associated with a Catastrophic Failure from nine months to six months. IPPNY argues that using six months would align the threshold for a Catastrophic Failure with the threshold NYISO uses to investigate whether physical withholding has taken place, increasing the likelihood that expensive failures are excluded from the Physical Withholding Test. Alternatively, IPPNY requests that NYISO be required to guarantee cost recovery for any generator forced to return to the market to avoid a physical withholding penalty. IPPNY also notes that NYISO proposes to establish specific timelines for making Catastrophic Failure and Exceptional Circumstances determinations in its manuals; since these mechanisms serve as exemptions from a physical withholding analysis, IPPNY contends the deadlines should be incorporated into the Services Tariff.¹²⁹

77. In addition, IPPNY requests that NYISO be required to adopt criteria laid out by Dr. Patton to determine if a generator has a legitimate economic justification for not repairing a unit.¹³⁰ IPPNY argues that including this criteria helps to provide a clear and transparent understanding of the application of NYISO's withholding test.

3. Answers

78. In its answer, NYISO states that the purpose of the Physical Withholding Test is to determine whether the unit owner is intentionally avoiding repair of its unit to raise ICAP prices or if it has a legitimate economic justification for its actions. NYISO explains that the underlying rationale for applying the Physical Withholding Test when a unit enters an ICAP Ineligible Force Outage is to ensure that the ICAP market performs competitively when existing suppliers might otherwise withhold capacity.¹³¹ NYISO requests that the

¹²⁹ IPPNY Protest at 22 n.68 (citing NYISO Transmittal Letter at 26).

¹³⁰ IPPNY quotes Dr. Patton: "In general, the decision to not repair a generator would have a legitimate economic justification if the cost of repair, including the risk-adjusted cost of capital, could not be recouped over the reasonably anticipated remaining life of the generator given:

- The duration of the repair;
- The anticipated prices for capacity, energy, and ancillary services;
- The costs of operating the generator following the repair; and
- Any benefits that would be foregone from using the site for another purpose (e.g., repowering)."

IPPNY Protest at 23 (quoting Patton Aff. ¶ 24).

¹³¹ NYISO Answer at 19.

Commission reject IPPNY's proposal to shorten the period for a "Catastrophic Failure" because NYISO's proposal is reasonable and appropriately identifies those units that should receive this broad exemption. NYISO contends that defining "Catastrophic Failure" as damage that would require at least 270 days to repair appropriately exempts from the Physical Withholding Test only those units that experience such severe damage that it is very unlikely that an owner might be intentionally seeking to remove capacity from the market.¹³²

79. NYISO suggests that IPPNY's concern that NYISO and the Market Monitor are incapable of fairly determining whether the cost of a repair is economic is unfounded. NYISO argues that IPPNY fails to recognize that a unit owner may request a finding of "Exceptional Circumstances," which would delay a Physical Withholding Test until complete information can be acquired, or it may avoid the test by commencing repair.¹³³

80. NYISO asks that the Commission reject IPPNY's request to modify the NYISO tariff to include criteria for its Physical Withholding Test. NYISO asserts that, although Dr. Patton included in his affidavit a representative list of the factors that go into a physical withholding determination, he did not intend to indicate he would be ignoring any additional factors that may be particularly relevant in specific circumstances, factors that could, actually, benefit the generator. NYISO contends that it has already posted many documents to its website that provide transparency and a comprehensive level of detail on how NYISO will perform the Physical Withholding Test.¹³⁴

4. Discussion

81. We find NYISO's proposed revisions requiring that a generator determined by NYISO to be in an ICAP Ineligible Forced Outage in a Mitigated Capacity Zone be subject to a Physical Withholding Test, unless the generator has suffered a Catastrophic Failure, to be just and reasonable. The proposed revisions should prevent the exercise of market power in cases where a supplier would otherwise have incentives to physically withhold capacity by not making repairs that would clearly be economic for a competitive supplier. Furthermore, exempting from audit and review capacity suppliers that have issued notice of retirement of a generation facility or that have experienced a

¹³² NYISO Answer at 19–20 (citing Patton Aff. ¶ 26).

¹³³ NYISO Answer at 20 (citing Proposed Services Tariff § 23.2.1).

¹³⁴ NYISO Answer at 21 (citing NYISO, *Market Monitoring*, http://www.nyiso.com/public/markets_operations/services/market_monitoring/index.jsp (last visited Apr. 16, 2015)).

Catastrophic Failure of that facility reasonably exempts resources that are unlikely to be removed from the market for the purpose of physical withholding.

82. We deny IPPNY's request to amend NYISO's proposal to shorten the period associated with a Catastrophic Failure from nine months to six months. IPPNY contends that this proposed tariff amendment would increase the likelihood that expensive failures are excluded from a Physical Withholding Test. Under the FPA, if we find that NYISO has successfully supported the justness and reasonableness of its filing, we must approve it, and need not consider alternative proposals.¹³⁵ In this case, NYISO has successfully supported the justness and reasonableness of its filing. As Dr. Patton explained, the nine-month threshold increases the probability that "overly speculative" evaluations of whether a decision had a legitimate economic justification are avoided,¹³⁶ as such analyses do not indicate whether the unit owner is intentionally avoiding repair to raise ICAP prices. Moreover, we agree with NYISO that repairs that take longer than 270 days include such severe damage that it is very unlikely that the unit owner is intentionally removing the capacity from the market.

83. We agree with IPPNY that NYISO should incorporate into its tariff criteria it will use to make physical withholding determinations, as they do affect the rates, terms, and conditions of service, and would provide clarity and transparency. We therefore require NYISO to incorporate into its tariff criteria that it will use to make physical withholding determinations. NYISO should include those provisions in the compliance filing. However, we also agree with NYISO that the specific criteria in the tariff should not preclude the consideration of additional factors that may be relevant in specific circumstances. Therefore, a statement to that effect should also be included.

84. We also agree with IPPNY's suggestion that NYISO should incorporate into its Services Tariff specific timelines for making Catastrophic Failure and Exceptional Circumstances determinations, rather than in its manuals. Since these timelines determine whether a generator is exempted from a Physical Withholding Test, and is potentially subject to charges, they are appropriately part of NYISO's Services Tariff. As such, we direct NYISO to include in the compliance filing tariff provisions establishing

¹³⁵ See *ISO New England Inc.*, 114 FERC ¶ 61,315, at P 33 (2006) (citing *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984)); see also *California Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,150, at P 254 (2009) (citation omitted), *order on reh'g*, 129 FERC ¶ 61,144 (2009).

¹³⁶ Patton Aff. ¶ 26.

timelines for making Catastrophic Failure and Exceptional Circumstances determinations.

F. ICAP Must Bid Requirement

1. NYISO's Proposal

85. NYISO's proposal includes rules for when a resource restricted from participating in the ICAP market due to its outage state once again becomes eligible to participate.¹³⁷ NYISO acknowledges that these rules may be interpreted to conflict with requirements that Pivotal Suppliers¹³⁸ must bid any unsold capacity into the market.¹³⁹ To resolve these conflicts, NYISO proposes to develop ISO procedures surrounding the month for which the generator is first eligible to participate in the ICAP market. NYISO states that it intends for this transition to be consistent with other relevant market rules.¹⁴⁰

2. Responsive Pleadings

86. IPPNY argues that under the proposed rules, a generator in a Mitigated Capacity Zone seeking to return to service must either wait until the beginning of the next month, or risk facing penalties for failure to bid its full capacity into the previous month's spot market auction. IPPNY requests that NYISO be required to clarify that a facility returning from an outage for which it was ineligible to sell capacity will not incur penalties for the partial month in which it returns to selling in the energy market.

87. In its answer, NYISO reiterates that it has committed to developing procedures that would provide consistency between a unit's qualification to participate as a supplier and the determination that the unit is a Pivotal Supplier. NYISO states that this change will address IPPNY's concern without the need to introduce a specific exception.

3. Discussion

88. We find NYISO's proposed rules that will apply when a resource restricted from participating in the ICAP market due to its outage state once again becomes eligible to

¹³⁷ See Proposed Services Tariff § 5.18.2.2.

¹³⁸ NYISO, Services Tariff, Attachment H, § 23.4.5 (9.0.0).

¹³⁹ NYISO Transmittal Letter at 11 n.15.

¹⁴⁰ NYISO Transmittal Letter at 11.

participate to be just and reasonable. As discussed above, it is important for NYISO's tariff to include rules for resources that are unable to provide energy or capacity either temporarily or permanently. The tariff should therefore also contain rules for a resource to return to the capacity and energy markets. The rules as proposed are just and reasonable as they provide generators with the ability to return to these markets in a timely manner.

89. IPPNY argues, and NYISO concedes, that the current proposal creates a risk that resources looking to return to service in the middle of a month may face withholding penalties. Although such risk may incent a generator to defer its return to service to the beginning of the next month to avoid risking these penalties, we do not find that the risk will create a reliability problem. Indeed, as discussed above, we find that NYISO's proposal as a whole will be beneficial to NYISO's markets. However, we acknowledge IPPNY's concern that a generator could face a potential short-term economic issue, and we expect NYISO to abide by its commitment to work with its stakeholders to address this issue; any such changes would need to be submitted in a new section 205 filing.

The Commission orders:

(A) NYISO's proposed tariff revisions are hereby conditionally accepted in part and rejected in part, with the conditionally accepted revisions to become effective on May 1, 2015, as requested, subject to a compliance filing, as discussed in the body of this order.

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary