

153 FERC ¶ 61,022  
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 Public Service Commission,  
New York Power Authority, and  
New York State Energy Research and  
Development Authority

Docket No. EL15-64-000

v.

New York Independent System Operator, Inc.

ORDER ON COMPLAINT AND DIRECTING COMPLIANCE FILING

(Issued October 9, 2015)

1. On May 8, 2015, the New York Public Service Commission (NYPSC), the New York Power Authority (NYPA), and the New York State Energy Research and Development Authority (NYSERDA) (collectively, Complainants) filed a complaint against the New York Independent System Operator, Inc. (NYISO) pursuant to sections 206 and 306 of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's regulations.<sup>2</sup> The Complainants allege that the buyer-side market power mitigation rules in section 23 of NYISO's Market Administration and Control Area Services Tariff (Services Tariff) are unjust, unreasonable, or unduly discriminatory or preferential. The Complainants seek to (1) limit the application of the buyer-side market power mitigation rules to only new gas- or oil-fired simple and combined-cycle units that are 20 megawatts (MW) or greater, so that the rules would no longer apply to renewable resources, transmission assets coupled with unforced capacity deliverability rights (i.e., controllable transmission lines), nuclear resources, and Special Case Resources such as

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

<sup>2</sup> 18 C.F.R. § 385.206 (2015).

demand response resources; and (2) add exemptions to those rules for self-supply resources, resources needed for reliability, and repowered resources.

2. In this order, we grant in part and deny in part the complaint, finding that it is unjust, unreasonable, or unduly discriminatory or preferential to apply NYISO's buyer-side market power mitigation rules to certain narrowly defined renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. We also require NYISO to make a compliance filing within 90 days of the date of this order, as discussed below.

## **I. Background**

3. NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new capacity resources must enter the New York City or G-J Locality<sup>3</sup> Installed Capacity (ICAP) markets (mitigated capacity zones) at a price at or above the applicable offer floor and continue to meet the offer floor until their capacity clears twelve monthly auctions.<sup>4</sup> A new entrant can be exempted from the offer floor if NYISO determines that it passes either "Part A" or "Part B" of the mitigation exemption test.<sup>5</sup> NYISO's Market Monitoring Unit (MMU) describes Part A as "compar[ing] a forecast of capacity prices in the first year of an Examined Facility's operation to the Default Offer Floor, which is 75 percent of the net [cost of new entry (CONE)] of the hypothetical unit modeled in the most recent Demand Curve reset," such that a new entrant is exempted "if the price forecast for the first year is higher than the Default Offer Floor." Under Part B, NYISO "compares a forecast of capacity prices in the first three years of an Examined Facility's operation to the net CONE of the Examined Facility," such that a new entrant is exempted "if the price forecast for the three years is higher than the net CONE of the Examined Facility."<sup>6</sup>

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<sup>3</sup> The G-J Locality consists of Load Zones G, H, I, and J, which are zones "within which a minimum level of Installed Capacity must be maintained." NYISO, Services Tariff, § 2.12 (4.0.0).

<sup>4</sup> *Id.* § 23.4.5.7 (14.0.0).

<sup>5</sup> *Id.* § 23.4.5.7.2 (14.0.0).

<sup>6</sup> Potomac Economics, *Assessment of the Buyer-Side Mitigation Exemption Test for the Taylor Biomass Energy Project 2* (Mar. 7, 2014), available at [http://www.nyiso.com/public/webdocs/markets\\_operations/services/market\\_monitoring/ICAP\\_Market\\_Mitigation/Buy](http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Buy)

4. On February 26, 2015, the Commission issued an order granting in part the complaint filed by Consolidated Edison Company of New York, Inc. (ConEd), *et al.*, against NYISO to add a competitive entry exemption to the buyer-side market power mitigation rules.<sup>7</sup> In the ConEd Complaint Order, the Commission found that NYISO's Services Tariff was unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA because it applied the buyer-side market power mitigation rules to unsubsidized, competitive entrants that have no incentive to suppress capacity market prices.<sup>8</sup> The Commission also found that the complainants' proposed tariff provisions for a competitive entry exemption to the buyer-side market power mitigation rules in NYISO's Services Tariff, as modified in the ConEd Complaint Order, were just and reasonable.<sup>9</sup> On April 13, 2015, NYISO submitted compliance revisions to its Services Tariff and Open Access Transmission Tariff (OATT) to add a competitive entry exemption to the buyer-side market power mitigation rules, to become effective for the Class Year 2015, as required in the ConEd Complaint Order. On August 4, 2015, the Commission conditionally accepted NYISO's compliance filing, subject to a further compliance filing.<sup>10</sup>

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

5. Notice of the complaint was published in the *Federal Register*, 80 Fed. Reg. 27,942 (2015), with answers, interventions, and comments due on or before May 28, 2015.<sup>11</sup> The Maryland Public Service Commission filed a notice of intervention.

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

<sup>7</sup> *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at PP 1, 14 (ConEd Complaint Order), *order on reh'g, clarification, & compliance*, 152 FERC ¶ 61,110 (2015).

<sup>8</sup> *Id.* P 45.

<sup>9</sup> *Id.*

<sup>10</sup> *Consol. Edison Co.*, 152 FERC ¶ 61,110 at P 4.

<sup>11</sup> On May 13, 2015, the Independent Power Producers of New York, Inc. filed a Motion for a 30-Day Extension of Comment Date on the complaint. On May 19, 2015, the Commission granted the Motion and extended the date for filing comments, interventions, and protests to June 29, 2015.

Numerous parties filed motions to intervene.<sup>12</sup> Brookfield Energy Marketing, LP filed an out-of-time motion to intervene. Of the parties that filed motions to intervene, the following parties filed comments: American Public Power Association (APPA); American Wind Energy Association and Alliance for Clean Energy, Inc. (collectively, AWEA); the City of New York, Multiple Intervenors,<sup>13</sup> the New York State Department of State Utility Intervention Unit, and the Natural Resources Defense Council (collectively, the Consumers); Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp. (collectively, the Indicated TOs); the Large Public Power Council (LPPC); the New York Association of Public Power (NYAPP); TDI USA Holdings Corp. (TDI); and MMU. The following parties filed protests: Entergy Nuclear Power Marketing, LLC (Entergy); Astoria Generating Company, L.P., TC Ravenswood, LLC, NRG Power Marketing LLC, GenOn Energy Management, LLC, and Cogen Technologies Linden Venture, L.P. (collectively, the Indicated Suppliers); Independent Power Producers of New York, Inc. and the Electric Power Supply Association (jointly, IPPNY/EPSA); and Niagara Mohawk Power Corp. d/b/a National Grid USA (National Grid).

6. On June 29, 2015, NYISO filed an answer to the complaint. On July 13, 2015, TDI filed an answer. On July 14, 2015, Entergy filed an answer. On July 27, 2015, the Complainants filed an answer.

### **III. Procedural Matters**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>14</sup> the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>15</sup> we will grant Brookfield Energy Marketing, LP's late-filed motion to intervene given its

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<sup>12</sup> See Appendix A.

<sup>13</sup> Multiple Intervenors is an unincorporated association of over 60 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

<sup>14</sup> 18 C.F.R. § 385.214 (2015).

<sup>15</sup> *Id.* § 385.214(d).

interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>16</sup> prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We will accept the answers filed by TDI, Entergy, and the Complainants because they have provided information that assisted us in our decision-making process.

#### **IV. Discussion**

10. We will grant the complaint, in part. We find that the Complainants have demonstrated that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential, pursuant to section 206 of the FPA, because it applies buyer-side market power mitigation to certain renewable and self-supply resources that have limited or no incentive and ability to artificially suppress ICAP market prices. This finding is consistent with the Commission's generally-applied minimum offer price rule policy; specifically, that buyer-side market power mitigation rules are intended to address market power exhibited by certain entities seeking to lower capacity market prices.<sup>17</sup> As explained in greater detail in the following section, we find that NYISO's existing buyer-side market power mitigation rules are in select cases unnecessarily applied to certain renewable resources and self-supply resources, and thus, can result in the unnecessary mitigation of resources that derive limited or no benefit from lower prices. Accordingly, we grant the complaint, in part, and direct NYISO to make a compliance filing, within 90 days of the date of this order, to revise its buyer-side market power mitigation rules to exempt a narrowly defined set of renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices, as described below, effective as of the date of this order.<sup>18</sup> We expect NYISO to work with its stakeholders in developing this compliance filing. As for the other proposed exemptions, we deny the complaint for the reasons discussed below.

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<sup>16</sup> *Id.* § 385.213(a)(2).

<sup>17</sup> ConEd Complaint Order, 150 FERC ¶ 61,139 at P 2.

<sup>18</sup> Once the Commission finds that the challenged tariff provisions in a section 206 proceeding are unjust, unreasonable, or unduly discriminatory or preferential, "the Commission shall determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a) (2012).

## A. Buyer-Side Market Power Mitigation Rules

### 1. The Complaint

11. The Complainants argue that NYISO's buyer-side market power mitigation rules are unjust, unreasonable, or unduly discriminatory or preferential because: (1) they are imposed in an overbroad manner on all new entrants in mitigated capacity zone markets, regardless of whether the new entrant has the intention, incentive, and ability to suppress prices below a competitive level in those markets; and (2) the test used to determine whether a new entrant is economic, and can therefore bid into a mitigated capacity zone market without an offer floor, is fundamentally flawed and results in over-mitigation.<sup>19</sup> The Complainants contend that this results in protecting incumbents from competition to the detriment of New York consumers and to the state's ability to meet public policy goals and requirements in a reasonable manner. The Complainants state that it is difficult to discern how many projects have not been built due to the potential for over-mitigation, how many investors have been deterred from participating in the mitigated capacity zone markets, or the dollar impact of the unjust and unreasonable buyer-side market power mitigation rules in New York.<sup>20</sup>

12. The Complainants contend that market power mitigation measures involve two important considerations: (1) whether acting in an anti-competitive manner is in a market participant's interest; and (2) whether a market participant's incentive to act in an anti-competitive manner can be forecast with the precision sufficient to justify mitigating that participant.<sup>21</sup> The Complainants contend that the purpose of buyer-side market power mitigation is to address the first issue while providing "flexibility to project developers to implement certain business decisions without inappropriate regulatory restrictions."<sup>22</sup> The Complainants assert that the Commission has repeatedly emphasized the need to balance over-mitigation and under-mitigation.<sup>23</sup> Given these principles, the

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<sup>19</sup> Complaint at 2, 5, 13.

<sup>20</sup> *Id.* at 21, 37 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,157, at P 239 (2004), *order on clarification*, 111 FERC ¶ 61,367 (2005)).

<sup>21</sup> *Id.* at 14.

<sup>22</sup> *Id.* at 15 (quoting *ConEd Complaint Order*, 150 FERC ¶ 61,139 at P 4).

<sup>23</sup> *Id.* (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 26 (2013); *Midwest Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,043, at P 78 (2005); *New England Power Pool & ISO New England Inc.*, 101 FERC ¶ 61,344, at P 28 (2002); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005)).

Complainants assert that NYISO's buyer-side market power mitigation rules are not properly designed and are overly broad because they indiscriminately encompass all types of new entry in mitigated capacity zones, regardless of whether any individual developer intends to and is able to suppress market prices.<sup>24</sup>

13. Although the Commission recently required NYISO to adopt a competitive entry exemption to the buyer-side market power mitigation rules, the Complainants contend that the mitigation rules remain unjust and unreasonable because they will continue to over-mitigate.<sup>25</sup> The Complainants assert that the competitive entry exemption may make it more difficult for renewable resources, transmission assets coupled with unforced capacity deliverability rights, and self-supply resources to avoid mitigation.<sup>26</sup> According to the Complainants, developers of projects exempted by the competitive entry exemption can wait to construct those projects until market rates are favorable, meaning their presence in NYISO's tests may be speculative, driving the resulting forecasts further away from an accurate depiction of future circumstances.<sup>27</sup> Therefore, the Complainants state that their proposed modifications to the buyer-side market power mitigation rules are necessary for these rules to achieve their intended effect.

14. In addition, the Complainants contend that there are five main flaws with the existing mitigation exemption test. First, they assert that the ICAP price forecasts assume that all mothballed generators, as well as generators that must transfer their capacity resource interconnection service rights before a new unit can offer deliverable capacity, will be in service and sell capacity, which, according to the Complainants, is unrealistic and unjustified by past experience.<sup>28</sup> According to the Complainants, this flaw results in depressed forecasts of ICAP prices, net energy, and ancillary services revenue, and therefore in over-mitigation.<sup>29</sup> Second, the Complainants assert that the mitigation

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<sup>24</sup> *Id.* at 16 (citing *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at PP 101, 106, *order on reh'g*, 124 FERC ¶ 61,301 (2008), *order on reh'g*, 131 FERC ¶ 61,170 (2010), *order on reh'g*, 150 FERC ¶ 61,208 (2015)).

<sup>25</sup> *Id.* at 2, 5.

<sup>26</sup> *Id.* at 2-3, 28.

<sup>27</sup> *Id.* at 28.

<sup>28</sup> *Id.* at 16-17 (citing Cadwalader Aff. ¶ 29; Potomac Economics, Ltd., *Assessment of the Buyer-Side Mitigation Exemption Tests for the Class Year 2012 Projects* (Jan. 13, 2015); ConEd Complaint Order, 150 FERC ¶ 61,139 at P 16).

<sup>29</sup> *Id.* at 17 (citing Cadwalader Aff. ¶ 29; Evans Aff. ¶¶ 16-17).

exemption test is flawed because NYISO assumes unrealistic entry dates and understates the effects of delay in applying its test.<sup>30</sup> Third, the Complainants contend that Part B is flawed because it considers only the three-year mitigation study period, which they state is far shorter than the lifespan of a new generating resource.<sup>31</sup> Fourth, the Complainants contend that the uncertainty inherent in the complex calculations, assumptions, and forecasts used in applying the mitigation exemption test can result in a project developer making reasonable assumptions that are different from NYISO's and, without any intent to unjustly suppress market prices or ability to do so, being mitigated.<sup>32</sup> Finally, the Complainants state that the mitigation exemption test fails to consider obligations under New York law, such as providing safe and adequate service at just and reasonable rates, while preserving environmental values and conserving natural resources.<sup>33</sup>

15. Finally, the Complainants acknowledge that the stakeholder process is normally the first step in revising NYISO's tariffs, but they state that the stakeholder process is overburdened and therefore not a viable option.<sup>34</sup> Moreover, the Complainants contend that the stakeholder process would result in a piecemeal approach to addressing NYISO's buyer-side market power mitigation rules, whereas the Complainants seek a "fundamental shift in the design" of these rules.<sup>35</sup> The Complainants ask the Commission to direct NYISO to make a compliance filing within 90 days of an order granting their complaint, after consulting with stakeholders, that limits the application of the buyer-side market power mitigation rules to only new gas- or oil-fired simple and combined-cycle units that are 20 MW or greater, and that adds exemptions to those rules for self-supply resources, resources needed for reliability, and repowered resources.<sup>36</sup> Alternatively, the Complainants suggest that the Commission set the matter for hearing

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<sup>30</sup> *Id.* (citing Cadwalader Aff. ¶ 30; Evans Aff. ¶¶ 14-15).

<sup>31</sup> *Id.* at 17-18 (citing Cadwalader Aff. ¶ 24).

<sup>32</sup> *Id.* at 18 (citing Cadwalader Aff. ¶ 32; Evans Aff. ¶¶ 12-13).

<sup>33</sup> *Id.* (citing N.Y. Pub. Serv. Law § 5(2) (2015)).

<sup>34</sup> *Id.* at 3, 36.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 36.

and settlement judge procedures.<sup>37</sup> In either case, the Complainants ask that the Commission act promptly.<sup>38</sup>

## 2. NYISO's Answer

16. NYISO states that its buyer-side market power mitigation rules “have generally functioned well” and “do not appear to have discouraged efficient investments and have resulted in the mitigation of both existing resources and new entrants when mitigation was warranted.”<sup>39</sup> At the same time, NYISO states that it recognizes that there are opportunities to improve the buyer-side market power mitigation rules and, “in principle, supports many of the general concepts for changing the [buyer-side market power mitigation rules] that are discussed in the Complaint.”<sup>40</sup>

17. According to NYISO, it has actively pursued various enhancements to the buyer-side market power mitigation rules and to its ICAP market design. For example, NYISO states that, starting in 2012, it initiated a stakeholder process to consider a renewable resources exemption, a competitive entry exemption, a repowering exemption, and a self-supply exemption to the buyer-side market power mitigation rules.<sup>41</sup> According to NYISO, none of these proposals were ultimately approved by the requisite stakeholder super-majority to authorize NYISO to make a FPA section 205<sup>42</sup> filing, but NYISO notes that stakeholders voted on them as a package, so the lack of a super-majority does not necessarily indicate that certain individual proposals lacked broad support.<sup>43</sup>

18. NYISO states that it believes that a section 205 filing developed through the stakeholder process is the best route for identifying issues, interdependencies, and

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<sup>37</sup> *Id.* at 4, 36-37.

<sup>38</sup> *Id.* at 35-37.

<sup>39</sup> NYISO June 29, 2015 Answer at 3 (quoting NYISO, Written Statement of Emilie Nelson, Vice President – Market Operations, Docket No. AD14-18-000, at 27 (filed Nov. 3, 2014)).

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.* at 3-4.

<sup>42</sup> 16 U.S.C. § 824d (2012).

<sup>43</sup> NYISO June 29, 2015 Answer at 3-4 & n.7.

potential implications of proposed tariff changes, and for developing the details of market rules that can be administered clearly, transparently, and objectively, but notes that when stakeholders put “pocketbook” concerns ahead of reliability and long-term economic efficiency, NYISO may act unilaterally to amend its tariff. NYISO contends that its stakeholder process is not so overburdened, as the Complainants assert, that it could not comply with a Commission directive to address the Complainants’ proposals or to address new issues that may arise in the future. However, NYISO indicates that it seems unlikely that its stakeholders will be able to reach a consensus on additional buyer-side market power mitigation enhancements.<sup>44</sup> NYISO therefore has no objection to a further compliance filing or a hearing and settlement judge procedures if the Commission agrees that some of the concepts proposed in the complaint are necessary.<sup>45</sup>

### 3. Comments and Protests

19. The Consumers contend that the complaint provides an opportunity for the Commission to take comprehensive action, as it did in PJM Interconnection, L.L.C. (PJM), to limit the application of NYISO’s buyer-side market power mitigation rules to only those types of generating facilities that could be used to exercise market power.<sup>46</sup>

20. Entergy, the Indicated Suppliers, IPPNY/EPSCA, and MMU contend that the Complainants failed to meet their burden of showing that the existing buyer-side market power mitigation rules are unjust and unreasonable and ask that the Commission deny the complaint. First, Entergy, the Indicated Suppliers, and IPPNY/EPSCA assert that the complaint seeks to solve the same issues the competitive entry exemption purported to solve; they state that the competitive entry exemption will encourage economic new entry, regardless of the entrant’s intent.<sup>47</sup> According to the Indicated Suppliers, all that a new entrant must do to be exempt from mitigation pursuant to the competitive entry exemption is to show that the new entrant is competitive, is not subsidized, and is “basing its investment success on market pricing and revenues.”<sup>48</sup>

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<sup>44</sup> *Id.* at 14.

<sup>45</sup> *Id.* at 2, 13-14.

<sup>46</sup> Consumers June 29, 2015 Comments at 3-4, 10 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 2, 53, 166-67).

<sup>47</sup> Entergy June 29, 2015 Protest at 2-3; Indicated Suppliers June 29, 2015 Protest at 14-16 (citing Complaint at 24); IPPNY/EPSCA June 29, 2015 Protest at 33.

<sup>48</sup> Indicated Suppliers June 29, 2015 Protest at 15 (quoting Shanker Aff. at 23).

21. Next, Entergy and IPPNY/EPISA contend that the Complainants cannot identify a single case of economic entry being mitigated or deterred from entering the market by the threat of mitigation (i.e., actual harm to the New York markets of the existing buyer-side market power mitigation rules). According to Entergy, the buyer-side market power mitigation rules have not prevented new entry, but rather have mitigated some subsidized new entrants until they have become economic to prevent artificial price suppression. Entergy states that market evidence shows that the rules allow economic entry and have largely prevented uneconomic entry from disrupting market price signals.<sup>49</sup> The Indicated Suppliers state that the Commission has long recognized that uneconomic entry at a low or zero price may seem to be good for customers in the short-run, but can inhibit new entry, and thereby raise prices and harm reliability, in the long-run, and that this is particularly true in small markets like New York City. Entergy believes that the existing buyer-side market power mitigation rules are balanced, and, if anything, lean toward under-mitigation. Entergy also notes that the Complainants fail to mention the option for developers to have their offer floor set at their unit-specific Net CONE.<sup>50</sup>

22. Entergy, the Indicated Suppliers, and IPPNY/EPISA state that the buyer-side market power mitigation rules do not need to focus on intent to suppress market prices. According to Entergy, a project's effect on the market causes harm, not its intent.<sup>51</sup> The Indicated Suppliers note that the Commission has found that "all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address."<sup>52</sup> IPPNY/EPISA explain that the Commission has consistently held that the standard to measure whether mitigation is necessary is whether the potential to exercise market power exists, not the intent to do so.<sup>53</sup> Furthermore, Entergy argues that it is difficult to detect intent. Entergy also claims that New York actively seeks out-of-market interventions, noting that the state has

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<sup>49</sup> Entergy June 29, 2015 Protest at 22-23.

<sup>50</sup> *Id.* at 16.

<sup>51</sup> *Id.* at 13 (citing *ISO New England Inc.*, 135 FERC ¶ 61,029, at P 170 (2011), *order on reh'g*, 138 FERC ¶ 61,027 (2012)).

<sup>52</sup> Indicated Suppliers June 29, 2015 Protest at 9 (citing *Paynter Aff.* at 16:5-6; *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 29).

<sup>53</sup> IPPNY/EPISA June 29, 2015 Protest at 32.

supported a project that was much more expensive than other alternatives and that was projected to significantly suppress ICAP prices.<sup>54</sup>

23. In addition, Entergy and the Indicated Suppliers argue that this complaint is not the proper vehicle through which to raise criticisms of the mitigation exemption test; rather, the Commission has made clear that broader market design questions are best addressed through the stakeholder process.<sup>55</sup> Entergy and IPPNY/EPISA point out that the Commission found in the ConEd Complaint Order that issues regarding the merits of the mitigation exemption test were more appropriately addressed in any Commission proceeding following the ongoing NYISO stakeholder process.<sup>56</sup> Further, according to Entergy, any flaws that the Complainants assert need to be addressed, such as the treatment of mothballed generators, are already being addressed.<sup>57</sup> According to Entergy, the assumptions in the test are not unreasonable simply because other reasonable assumptions may also exist.<sup>58</sup>

24. MMU explains that the buyer-side market power mitigation rules must balance two objectives: “maximiz[ing] their effectiveness in deterring uneconomic investment while minimizing the potential for them to deter economic investment.”<sup>59</sup> MMU notes that, although the existing buyer-side market power mitigation rules are not perfect in this regard, they have generally functioned in a manner that has promoted competition and effectively deterred uneconomic entry.<sup>60</sup> MMU asserts that, to the extent incremental enhancements to the buyer-side market power mitigation rules have been identified, these enhancements do not support a finding that the existing rules are unjust and unreasonable and should instead be vetted through the stakeholder process. For example, MMU has

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<sup>54</sup> Entergy June 29, 2015 Protest at 14-15.

<sup>55</sup> Indicated Suppliers June 29, 2015 Protest at 6, 8 (citing Complaint at 3; *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208 at P 30).

<sup>56</sup> Entergy June 29, 2015 Protest at 21 (citing ConEd Complaint Order, 150 FERC ¶ 61,139 at P 51); IPPNY/EPISA June 29, 2015 Protest at 28.

<sup>57</sup> Entergy June 29, 2015 Protest at 19.

<sup>58</sup> *Id.* at 20.

<sup>59</sup> MMU June 29, 2015 Comments at 3.

<sup>60</sup> *Id.* at 4.

identified two improvements that are being discussed in the stakeholder process.<sup>61</sup> First, MMU recommends modifying the assumption that mothballed units will sell capacity in the future when forecasting capacity prices for Part A and Part B. MMU explains that this assumption was found to be unrealistic in some cases, tends to lower prices, and increases the likelihood that a project will appear to be uneconomic. Second, MMU recommends modifying the Starting Capability Period, or the assumed entry date, for Part A and Part B to more realistically correspond to the date a project is likely to begin selling capacity.

25. Entergy challenges the Complainants' argument that it is problematic that the buyer-side market power mitigation rules fail to consider New York laws promoting environmental values and conserving natural resources; in Entergy's view, the ICAP market is supposed to be agnostic with respect to such considerations. The Indicated Suppliers state that the Commission has emphasized the importance of preventing subsidized entry supported at the state level from disrupting the competitive price signals that the wholesale capacity markets rely on to attract sufficient capacity.<sup>62</sup> The Indicated Suppliers disagree with the Complainants' argument that it is beneficial for certain otherwise economic resources to be pushed out of the market in order to advance "legitimate public policy goals," and to "make[] room for the interconnection of new, more efficient, lower emission resources."<sup>63</sup> The Indicated Suppliers contend that this presupposes that certain resources are more "worthy" (and should therefore be paid more) than other resources, but the Commission has explicitly rejected the argument that it would be appropriate to have prices formed in such a manner so as to discriminate between new entrants and existing capacity.<sup>64</sup>

26. Further, Entergy and IPPNY/EPSC contend that, as the Complainants' criticisms should have been raised when the test was adopted or later refined, the complaint is a collateral attack on previous Commission orders approving the test.<sup>65</sup> They reiterate that

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<sup>61</sup> *Id.* at 4-5.

<sup>62</sup> Indicated Suppliers June 29, 2015 Protest at 19 (*PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 54).

<sup>63</sup> *Id.* at 26 (citing Paynter Aff. at 18:20).

<sup>64</sup> *Id.* (citing Shanker Aff. at 7).

<sup>65</sup> Entergy June 29, 2015 Protest at 20; IPPNY/EPSC June 29, 2015 Protest at 7.

the Complainants bear the burden of demonstrating a change in circumstances justifying the relitigation of prior orders.<sup>66</sup>

27. Moreover, the Indicated Suppliers argue that the Complainants cannot rely on orders accepting similar exemptions under section 205 to satisfy their burden of proof under section 206 because showing a tariff provision to be just and reasonable does not indicate that the tariff was unjust and unreasonable without that provision, as the Complainants must demonstrate here. As an example, the Indicated Suppliers and IPPNY/EPISA note that the Commission approved a renewable resources exemption proposed by ISO New England Inc. (ISO-NE) under section 205, while it had previously rejected a renewable resources exemption proposed under section 206, noting that “the Commission found that complainants failed to show that the existing Tariff without an exemption was unjust and unreasonable.”<sup>67</sup> IPPNY/EPISA point out that, rather than seeking a blanket exemption, the Commission held that project developers should seek case-specific exemptions if they can show that their project is an exception to the generally-applied assumptions about financing.<sup>68</sup> The Indicated Suppliers also assert that relying on exemptions in PJM or ISO-NE to justify similar exemptions in NYISO is misplaced because each market should be developed individually through its stakeholder process, particularly when the risk of state-subsidized uneconomic entry is greater in a single-state independent system operator (ISO) like NYISO.<sup>69</sup>

28. Additionally, the Indicated Suppliers assert that allowing new uneconomic entry to force out existing resources would represent a dereliction of the Fifth Amendment to the U.S. Constitution’s prohibition against confiscatory ratemaking and the FPA’s requirement that rates be “just and reasonable.”<sup>70</sup> The Indicated Suppliers explain that the U.S. Supreme Court has emphasized that, in order to pass muster under the Fifth Amendment and the FPA, rates must be set at levels that provide “enough revenue not only for operating expenses but also for the capital costs of the business” and must be

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<sup>66</sup> Entergy June 29, 2015 Protest at 20-21.

<sup>67</sup> Indicated Suppliers June 29, 2015 Protest at 12-13 (citing *ISO New England Inc.*, 147 FERC ¶ 61,173, at P 86 (2014), *order on clarification*, 150 FERC ¶ 61,065 (2015)).

<sup>68</sup> IPPNY/EPISA June 29, 2015 Protest at 22-23.

<sup>69</sup> Indicated Suppliers June 29, 2015 Protest at 13-14.

<sup>70</sup> *Id.* at 27 (citing U.S. Const. amend V, cl. 3; 16 U.S.C. §§ 824d(a), 824e (2012); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 607 (1944)).

sufficient for the public utility to “maintain its credit and to attract capital.”<sup>71</sup> The Indicated Suppliers point out that the Commission has acknowledged that it is statutorily mandated to protect against the effects of below-cost entry, and argue that depriving suppliers of the opportunity to recover their investment results in unlawful and unconstitutional taking.<sup>72</sup>

29. National Grid asks that the Commission allow for the issues raised in the complaint to be addressed in the stakeholder process. Further, National Grid argues that the Complainants’ request to direct NYISO to revise the existing buyer-side market power mitigation rules through a compliance filing within 90 days of the order, after consultation with interested stakeholders, should be denied. National Grid contends that the issues raised in this proceeding are complex and deeply intertwined with other aspects of the markets.<sup>73</sup>

#### **4. Answers to Comments and Protests**

30. In its answer, Entergy supports MMU’s finding that, although there are potential improvements to the buyer-side market power mitigation rules, this does not mean that the existing rules are unjust and unreasonable.<sup>74</sup> With respect to comparisons made by the Consumers to PJM’s buyer-side market power mitigation rules, Entergy argues that the Commission has previously found that the multi-state PJM markets are distinguishable from the New York markets due to the allocation of benefits to ratepayers.<sup>75</sup> Further, Entergy states that it is unjust and unreasonable for the application of the buyer-side market power mitigation rules to turn on the intent of a project and not the project’s effects on capacity prices.<sup>76</sup> Entergy also argues that the Complainants’ proposed exemptions are unjust and unreasonable because they would give certain resources unfair advantages and would go against the purpose of NYISO’s ICAP market.

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<sup>71</sup> *Id.* at 27-28 (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. at 603).

<sup>72</sup> *Id.* at 28 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 143, *order on reh’g*, 137 FERC ¶ 61,145 (2011)).

<sup>73</sup> National Grid June 29, 2015 Protest at 5.

<sup>74</sup> Entergy July 14, 2015 Answer at 3 (citing MMU June 29, 2015 Comments at 5).

<sup>75</sup> *Id.* at 4 (citing Consumers June 29, 2015 Comments at 3, 10; *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 37).

<sup>76</sup> *Id.* at 5-6.

In addition, Entergy states that the proposed exemptions would allow subsidized and uneconomic resources to submit offers that do not reflect their actual economics and would result in more efficient but non-exempt resources failing to clear the market.<sup>77</sup>

31. According to the Complainants, the protesters and NYISO misunderstand the purpose of the buyer-side market power mitigation rules, which is to prevent market manipulation. The Complainants state that the protesters essentially argue that the buyer-side market power mitigation rules establish a bright-line test for market power by asserting that a developer's intent is irrelevant; however, the Commission has rejected similar arguments, finding that uneconomic new entry must not be permitted to artificially suppress prices, regardless of intent.<sup>78</sup> The Complainants assert that it is incorrect to assume, as many commenters have done, that a contract that disqualifies a new entrant from the competitive entry exemption must constitute a subsidy or that a new entrant must be considered "uneconomic" simply because it fails to qualify for the competitive entry exemption.<sup>79</sup> The Complainants assert that the Commission has previously rejected unsupported assumptions similar to these.<sup>80</sup> The Complainants argue that, without further changes to the buyer-side market power mitigation rules, there will be disputes and uncertainty about whether projects that utilize favorable state or federal policies are receiving an inappropriate out-of-market subsidy, which will impede the development of renewable resources. The Complainants also argue that unit-specific review is an inadequate remedy for the overly-broad buyer-side market power mitigation rules.<sup>81</sup>

32. The Complainants agree with NYISO that it seems unlikely that a voluntary consensus will be reached anytime soon on enhancements to the buyer-side market power mitigation rules in the stakeholder process; therefore, dismissing or denying the complaint would further delay urgently needed reforms. Furthermore, the Complainants

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<sup>77</sup> *Id.* at 6.

<sup>78</sup> Complainants July 27, 2015 Answer at 4 (citing ConEd Complaint Order, 150 FERC ¶ 61,139 at P 50 ("The fundamental objective of NYISO's [buyer-side market power mitigation] rules . . . is to protect against new entrants that have the ability and incentive to suppress capacity market prices through the exercise of buyer-side market power.")) (emphasis added)).

<sup>79</sup> *Id.* at 5-6 (citing Indicated Supplies June 29, 2015 Protest at 14-16).

<sup>80</sup> *Id.* at 6 (citing ConEd Complaint Order, 150 FERC ¶ 61,139 at P 46).

<sup>81</sup> *Id.* at 7-8.

contend, it is difficult to see how the parties could reach a consensus on the buyer-side market power mitigation rules since they disagree on the purpose of the buyer-side market power mitigation rules. The Complainants note that the underlying buyer-side market power mitigation rules at issue were adopted as a direct result of Commission proceedings, and not through stakeholder consensus.<sup>82</sup>

33. The Complainants claim that they have met their section 206 burden by describing how the current buyer-side market power mitigation rules are unjust and unreasonable because they are overbroad and the mitigation exemption test relies on flawed assumptions. In addition, the Complainants assert that they rely on sworn affidavits showing how broad mitigation measures cause substantial deviation from the competitive equilibrium, reducing social welfare. Moreover, they discuss a variety of problems associated with the assumptions used in applying the existing buyer-side market power mitigation rules. The Complainants argue that this support is at least equal to, if not greater than, the support provided in the ConEd Complaint proceeding, which resulted in the Commission requiring NYISO to adopt the competitive entry exemption.<sup>83</sup> In response to MMU's assertion that its recommendations for improvements to the buyer-side market power mitigation rules cannot reasonably be the basis for the Commission to find that the current rules are unjust and unreasonable, the Complainants note that the Commission has relied on recommendations of MMU in the past to find that tariff provisions are unjust and unreasonable.<sup>84</sup>

34. The Complainants argue that the complaint is not a collateral attack on prior Commission orders. Indeed, they contend, the Commission recognizes that the modification of tariff provisions is not prevented by the fact that the Commission originally accepted the provisions. According to the Complainants, the Commission found that re-examination of the buyer-side market power mitigation rules was warranted when it granted the complaint seeking the competitive entry exemption.<sup>85</sup>

35. In response to protestors' arguments that the complaint presupposes that certain resources are more "worthy" than others, the Complainants state that it is not their intent to debate the semantics of which resources are more "worthy." The Complainants argue that, if a market participant is willing to pay more for a resource with benefits such as low

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<sup>82</sup> *Id.* at 8.

<sup>83</sup> *Id.* at 9-10.

<sup>84</sup> *Id.* at 10.

<sup>85</sup> *Id.* at 10-11.

emissions, beyond a contribution to the ICAP resource adequacy metric, those resources should not be mitigated because they have been pursued without manipulative intent. The Complainants emphasize their belief that appropriately tailored buyer-side market power mitigation rules would permit states to fulfill their regulatory responsibility to select the type of generation built and where to build it.<sup>86</sup>

## 5. Commission Determination

36. We find that the Complainants have demonstrated that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA because it applies NYISO's buyer-side market power mitigation rules to certain renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. IPPNY/EPSC contend that the Commission has consistently held that the standard to measure whether mitigation is necessary is whether the potential to exercise market power exists, not the intent to do so.<sup>87</sup> We remain concerned, however, with both the incentive *and* ability to exercise market power and we consider both in making the findings in this order (i.e., whether certain limited exemptions are necessary).<sup>88</sup> Accordingly, we grant the Complainants' complaint, in part, and direct NYISO to revise its buyer-side market power mitigation rules to exempt a narrowly-defined set of renewable and self-supply resources, as discussed below. We deny the remainder of the complaint.

37. Although the Complainants argue that the mitigation exemption test is, as a general matter, fundamentally flawed, we do not grant the complaint on that basis because the Complainants have submitted insufficient supporting evidence. Instead, our findings here rely on the argument that certain renewable resources and self-supply resources when narrowly defined, as described below, should not be subjected to the test and thus arguments regarding the sufficiency or adequacy of the mitigation exemption test are irrelevant to our findings here. This is similar to the Commission's findings in the ConEd Complaint Order when it approved the competitive entry exemption in NYISO. In that order, the Commission did not base its decision on the alleged flaws of the mitigation exemption test, and instead found that issues regarding the merits of the mitigation exemption test are more appropriately addressed in any Commission

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<sup>86</sup> *Id.* at 11-12.

<sup>87</sup> IPPNY/EPSC June 29, 2015 Protest at 32.

<sup>88</sup> ConEd Complaint Order, 150 FERC ¶ 61,139 at PP 3, 45-46.

proceeding that follows the ongoing NYISO stakeholder process.<sup>89</sup> Here we similarly encourage the Complainants and commenters to use NYISO's stakeholder process as a means to address their concerns regarding potential flaws in the mitigation exemption test.

38. The Complainants point to the fact that the Commission accepted PJM's proposal to limit the buyer-side market power mitigation rules to only new gas-fired units and, thus, the Complainants have made a similar request here.<sup>90</sup> The comparison is inapposite. PJM's proposal was the product of a stakeholder-forged compromise and was filed under section 205, whereas this is a section 206 complaint proceeding that is subject to a different standard of review. Moreover, PJM's and NYISO's capacity markets are fundamentally different. NYISO's capacity market is short-term in nature—with auctions for spot, monthly, and three month (strip) capacity—whereas PJM's auction occurs three years in advance awarding a year-long capacity obligation. In addition, there are other significant differences between the two markets; for instance, as identified by Indicated Suppliers, NYISO is a single-state ISO while PJM is a multi-state (and the District of Columbia) regional transmission organization (RTO).<sup>91</sup> PJM's peak demand is therefore much higher than NYISO's peak demand. Whether the Commission has found certain exemptions from buyer-side market power mitigation in PJM or any other region to be just and reasonable is not dispositive of whether the Commission should find NYISO's buyer-side market power mitigation rules to be unjust and unreasonable absent similar exemptions.<sup>92</sup> Here, we address whether NYISO's buyer-side market power mitigation rules are unjust, unreasonable, or unduly discriminatory or preferential absent exemptions for certain resources, in the context of NYISO's ICAP market design.

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<sup>89</sup> ConEd Complaint Order, 150 FERC ¶ 61,139 at P 51.

<sup>90</sup> See *ISO New England Inc.*, 147 FERC ¶ 61,173 at PP 81-88 (renewables exemption); *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 19 (application of the buyer-side market power mitigation rules to a limited set of resources; self-supply exemption).

<sup>91</sup> Indicated Suppliers June 29, 2015 Protest at 13-14.

<sup>92</sup> See ConEd Complaint Order, 150 FERC ¶ 61,139 at P 47 (“[W]e allow for each region to develop rules to address the differing concerns of the regions.”) (citations omitted).

39. Some protesters contend that the Complainants' arguments are collateral attacks on prior Commission orders.<sup>93</sup> However, "modifying existing tariff provisions under section 206 of the FPA is not barred by the fact that the Commission originally accepted the provisions at issue."<sup>94</sup> We therefore find that the complaint is not a collateral attack on NYISO's existing buyer-side market power mitigation rules. We next turn to each of the Complainants' requested exemptions, starting with the exemptions we are granting for a narrowly-defined set of renewable and self-supply resources.

## **B. Renewable Resources Exemption**

### **1. The Complaint**

40. The Complainants propose to exempt renewable resources from NYISO's buyer-side market power mitigation rules. The Complainants assert that these resources are particularly inefficient tools for exercising buyer-side market power because, compared to other available resources, they typically involve long development lead times and incur much higher development costs. According to the Complainants, renewable resources usually operate intermittently, resulting in a lower than average capacity factor and making it highly unlikely that a buyer could use such resources to drive down the capacity market price sufficient to recover the substantial associated development costs.<sup>95</sup> The Complainants further assert that renewable resources are essential to meeting other public policy goals and environmental initiatives, and are not subject to mitigation rules in other ISO/RTO capacity markets.<sup>96</sup>

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

41. NYISO states that it supports exempting certain categories of renewable resources from the buyer-side market power mitigation rules.<sup>97</sup> Specifically, NYISO states that it

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<sup>93</sup> IPPNY/EPISA June 29, 2015 Protest at 7; Indicated Suppliers June 29, 2015 Protest at 6-10.

<sup>94</sup> ConEd Complaint Order, 150 FERC ¶ 61,139 at P 49.

<sup>95</sup> Complaint at 19-20, 24-25 (citing Paynter Aff. at 18:1-5).

<sup>96</sup> *Id.* (citing PJM, OATT, Attachment DD, § 5.14(h)(2) (20.0.0); ISO New England Inc., Transmission, Markets and Services Tariff, § III.13.1.1.1.7 (36.0.0)).

<sup>97</sup> NYISO June 29, 2015 Answer at 7-8 (citing PJM, OATT, Attachment DD, § 5.14(h)(2) (20.0.0); ISO New England Inc., Transmission, Markets and Services Tariff, § III.13.2.3.2(a)(iv) (36.0.0)).

supports exempting purely intermittent renewable resources, including wind and solar technologies, because their low capacity factors and high fixed installation costs make them ineffective at suppressing capacity prices. Additionally, NYISO states that it supports capping the exemption at a particular quantity of renewable resources (e.g., 50 MW) and limiting the exemption to those resources eligible for New York's Renewable Portfolio Standard.<sup>98</sup>

### 3. Comments and Protests

42. AWEA, the Consumers, the Indicated TOs, and LPPC support exempting renewable resources from the buyer-side market power mitigation rules. AWEA asserts that renewable energy resources fall into the category of resources without any incentive, intent, and ability to exert market power, and should therefore be exempted from the buyer-side market power mitigation rules. AWEA contends that the buyer-side market power mitigation rules should not impede legitimate state public policies and that a more targeted approach to buyer-side market power mitigation, limited to resources that a rational market participant might use to suppress prices, is appropriate and has been supported by the Commission.<sup>99</sup> In addition to state renewable portfolio standards, AWEA states that the proposed Clean Power Plan from the Environmental Protection Agency identifies renewable resources as a means for states to achieve compliance with the ultimate rule.<sup>100</sup> The Consumers assert that the development of renewable resources is driven by federal, state, and local public policy initiatives and there is no record that entities are constructing renewable resources to exercise market power; in addition, renewable resources cannot effectively be used to profitably exercise market power.<sup>101</sup> The Indicated TOs request that the Commission require that the renewable resources exemption be developed in the stakeholder process.<sup>102</sup>

43. MMU states that granting such an exemption may be reasonable because renewable resources are unlikely to be effective means of depressing capacity prices.

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<sup>98</sup> *Id.* at 7 & n.16.

<sup>99</sup> AWEA June 29, 2015 Comments at 3-4 (citing *ISO New England Inc.*, 135 FERC ¶ 61,029 at P 20; 61,206 (Comm'rs C. LaFleur and J. Wellinghoff, concurring)).

<sup>100</sup> *Id.* at 4.

<sup>101</sup> Consumers June 29, 2015 Comments at 9-10.

<sup>102</sup> Indicated TOs June 29, 2015 Comments at 5.

However, MMU does not believe that it is unreasonable to apply the existing buyer-side market power mitigation rules to renewable resources. MMU states that most of the financial benefits of owning renewable resources are captured in the existing mitigation exemption test.<sup>103</sup>

44. Entergy, the Indicated Suppliers, and IPPNY/EPSCA oppose the renewable resources exemption. Entergy claims that the fact that some renewable resources are expensive to build may make them more likely to be used to suppress prices because a state can use the savings from price suppression to defray costs of the projects it favors. Entergy asserts that, regardless of whether renewable resources are a preferred tool for price suppression, renewable resources whose costs exceed the market price but are permitted to submit a zero bid would reduce capacity prices.<sup>104</sup> Entergy notes that the Commission previously recognized that “[e]xempting renewables whose costs exceed the market price would result in the uneconomic entry of renewables and thereby reduce capacity prices.”<sup>105</sup> Entergy claims that it is difficult to reconcile that holding with the Complainants’ claim that renewable resources cannot raise price suppression concerns. Entergy notes that the Commission approved a renewable resources exemption in ISO-NE as part of a comprehensive package of reforms under FPA section 205, and these reforms included elements intended to limit the exemption’s price-suppressive effects, including a megawatt cap and measures to help prevent all of the exempted renewable resources from being located in one zone. In contrast, Entergy asserts that the Complainants’ proposal here places no limits on the renewable resources exemption and even fails to define the resources that would qualify for the exemption.<sup>106</sup>

45. The Indicated Suppliers state that the regional demand curves in the NYISO ICAP market are very steep, and that even in the Rest of State, which has arguably the lowest

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<sup>103</sup> MMU June 29, 2015 Comments at 5-6. According to MMU, Part B of the mitigation exemption test explicitly considers “federal tax credits, federal loan guarantees, state incentives for renewable energy, tipping fees for waste materials, and the sale of byproducts from the process of generating electricity from waste materials,” in addition to considering “the expected benefits of zero-emissions resources that result from New York’s participation in the Regional Greenhouse Gas Initiative.” *Id.* at 6. These benefits are incorporated as reductions to the unit-specific Net CONE.

<sup>104</sup> Entergy June 29, 2015 Protest at 49.

<sup>105</sup> *Id.* at 48 (citing *New Eng. States Comm. on Electricity v. ISO New England Inc.*, 142 FERC ¶ 61,108, at P 35 (2013), *order on reh’g*, 151 FERC ¶ 61,056 (2015)).

<sup>106</sup> *Id.* at 49.

cost of entry, 100 MW of new entry would have reduced capacity prices and associated payments by \$46.5 million. The Indicated Suppliers explain that NYSERDA has already supported over 2,000 MW of renewable capacity in New York, which would translate to approximately 200 MW of unforced capacity, or twice the amount used in the Rest of State example. The Indicated Suppliers therefore conclude that a renewable resources exemption has the potential to artificially shift hundreds of millions of dollars a year from suppliers to customers, adversely affecting the competitive market.<sup>107</sup> IPPNY/EP SA argue that a renewable resources exemption is unwarranted because New York State can satisfy its policy objectives through market-based mechanisms.<sup>108</sup> IPPNY/EP SA also suggest that New York State should work with NYISO's stakeholders to determine how to allow all capacity resource suppliers to receive a non-discriminatory market clearing price that reflects broader public policy objectives.<sup>109</sup>

#### 4. Answers to Comments and Protests

46. In response to arguments by the Consumers and the Indicated TOs that renewable resources are unlikely to be used for price suppression because they operate intermittently and have low capacity values, Entergy states that the proposed exemption is not limited to intermittent renewable resources and could instead be interpreted to include resources with high capacity factors, such as large-scale hydro projects.<sup>110</sup> Further, Entergy responds to AWEA's arguments that renewable resources would be a poor option for state officials to intentionally suppress prices, contending that, although price suppression can cause short-term savings for ratepayers regardless of the technology choice, price suppression represents an uneconomic transfer of wealth from existing capacity suppliers to ratepayers.<sup>111</sup> Therefore, Entergy asserts that the negative effects of price suppression far outweigh any short-term price savings experienced by ratepayers.<sup>112</sup> In response to arguments by the Consumers that there is no record evidence that entities are constructing renewable resources to exercise market power, Entergy argues that renewable resources are not currently being used to suppress ICAP market prices because they are subject to

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<sup>107</sup> Indicated Suppliers June 29, 2015 Protest at 21 (citing Shanker Aff. at 14-18).

<sup>108</sup> IPPNY/EP SA June 29, 2015 Protest at 51.

<sup>109</sup> *Id.*

<sup>110</sup> Entergy July 14, 2015 Answer at 13-14.

<sup>111</sup> *Id.* at 14.

<sup>112</sup> *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 103).

the buyer-side market power mitigation rules in the mitigated capacity zones. Entergy explains that, if renewable resources were exempt from the buyer-side market power mitigation rules, these resources would become an attractive vehicle to suppress prices.<sup>113</sup> Entergy also asserts that a renewables exemption is not needed to promote renewable policies, pointing to New York's existing renewable portfolio standard program that has resulted in the development of over 1,000 MW of wind generation in New York.<sup>114</sup>

## 5. Commission Determination

47. We find that applying NYISO's buyer-side market power mitigation rules to certain renewable resources up to a megawatt cap, as defined below, is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA because such resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. Consistent with the Commission's findings in previous orders,<sup>115</sup> we find that intermittent renewable resources<sup>116</sup> with low capacity factors and high development costs, including many wind

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<sup>113</sup> *Id.* at 15.

<sup>114</sup> *Id.* at 15-16.

<sup>115</sup> See *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 153 (“[W]ind and solar resources are a poor choice if a developer’s primary purpose is to suppress capacity market prices. Due to the intermittent energy output of wind and solar resources, the capacity value of these resources is only a fraction of the nameplate capacity.”); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 110 (“[T]he dependable amount of capacity that can be counted on for capacity market purposes, and thus, the amount of capacity that can be sold into the capacity market, is typically much lower than the maximum potential output of the wind and solar resource. As a result, these resources are a poor choice for any entity attempting to suppress capacity prices.”); *ISO New England Inc.*, 150 FERC ¶ 61,065 at P 26 (“[R]enewable resources are not similarly situated to other types of resources in that they are unlikely to be used for price suppression.”).

<sup>116</sup> The NYISO OATT defines “Intermittent Power Resource” as: “A device for the production of electricity that is characterized by an energy source that: (1) is renewable; (2) cannot be stored by the facility owner or operator; and (3) has variability that is beyond the control of the facility owner or operator. In New York, resources that depend upon wind, or solar energy or landfill gas for their fuel have been classified as Intermittent Power Resources. Each Intermittent Power Resource that depends on wind as its fuel shall include all turbines metered at a single scheduling point identifier

(continued ...)

and solar resources, narrowly defined, provide their developer with limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.<sup>117</sup> In addition, in an effort to further limit any risk of artificial price suppression, we find that NYISO should limit the total amount of these renewable resources—in the form of a megawatt cap—that may receive the renewable resources exemption required herein. We address each of these elements below.

48. Although MMU contends that Part B of the mitigation exemption test already considers the state and federal incentives for owning renewable resources,<sup>118</sup> we reiterate that intermittent renewable resources should not be subject to the mitigation exemption test in the first place. With that said, we agree with MMU that, for those renewable resources that are still subject to the mitigation exemption test, due to the narrow construction of the exemption approved in this order, the mitigation exemption test already takes into account certain incentives for owning renewable resources by reducing the unit-specific Net CONE. Under Part B of the mitigation exemption test, NYISO compares forecasted capacity prices in the first three years of a resource's operation to the unit-specific Net CONE, and if the forecasted capacity prices are higher than the unit-specific Net CONE, the resource is exempted from mitigation.<sup>119</sup> Therefore, reducing a renewable resource's unit-specific Net CONE means that the resource is less likely to be subject to mitigation.

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(PTID).” NYISO, OATT, § 1.9 (6.0.0). Consistent with NYISO's OATT definition, when we use the term “intermittent renewable resource” for purposes of the renewable resources exemption, we refer to a resource that “is renewable,” “cannot be stored by the facility owner or operator,” and “has variability that is beyond the control of the facility owner or operator.” *See also Integration of Variable Energy Resources*, Order No. 764, FERC Stats. & Regs. ¶ 31,331, at 1 n.1 (defining Variable Energy Resource with these same characteristics), *order on reh'g and clarification*, Order No. 764-A, 141 FERC ¶ 61,232 (2012), *order on clarification and reh'g*, Order No. 764-B, 144 FERC ¶ 61,222 (2013).

<sup>117</sup> AWEA June 29, 2015 Comments at 3-4; Consumers June 29, 2015 Comments at 9-10 & nn.20-21 (stating that, “[w]hile the cost of renewable resources is declining, the construction cost of wind, solar, and hydro can be three to four times, or more, higher than the cost of a gas-fired generating facility”); Indicated TOs June 29, 2015 Comments at 4; LPPC June 29, 2015 Comments at 5-6; MMU June 29, 2015 Comments at 5-6.

<sup>118</sup> MMU June 29, 2015 Comments at 5-6.

<sup>119</sup> NYISO, Services Tariff, § 23.4.5.7 (14.0.0).

49. Some protestors express concerns about granting a renewable resources exemption to encourage state policy.<sup>120</sup> However, our conclusion that a narrowly defined renewable resources exemption is just and reasonable is based on our finding that intermittent renewable resources with low capacity factors and high development costs, with a cap on the amount of megawatts eligible for the exemption, will have limited or no incentive and ability to exercise market power to artificially suppress ICAP prices in NYISO. As the Commission found in ISO-NE,<sup>121</sup> an exemption for renewable resources must be narrowly tailored. In order to ensure that the exemption is limited to only renewable resources with limited or no incentive and ability to exercise market power to artificially suppress ICAP market prices, we will require NYISO to define the exemption using the parameters provided herein and make a compliance filing within 90 days of the date of this order to implement the exemption. We find that limiting the type and amount of renewable resources that may qualify for the exemption addresses concerns raised by the commenters about the potential for artificial price suppression.<sup>122</sup>

50. As to whether additional types of renewable resources (e.g., ones that are not intermittent) should qualify for this exemption, we are not persuaded that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA because its buyer-side market power mitigation rules would continue to apply to other types of renewable resources. The Complainants have not demonstrated that these resources similarly present limited or no incentive and ability to exercise market power to artificially suppress ICAP prices in NYISO. NYISO states that it supports exempting purely intermittent renewable resources, including wind and solar technology, up to a megawatt cap, that are eligible for New York's Renewable Portfolio Standard. However, NYISO notes that, when developing the exemption, it must consider the potential size and capacity factor of exempted projects, the future evolution of renewable technology, the potential for intermittent resources to have high capacity factors (e.g., offshore wind resources), and how to apply the exemption to a plant that will only partially be powered by a renewable energy source.<sup>123</sup> While the specifics of the renewable resources exemption are best worked out through the stakeholder process,

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<sup>120</sup> IPPNY/EPISA June 29, 2015 Protest at 51-52; Entergy June 29, 2015 Protest at 50.

<sup>121</sup> See *ISO New England Inc.*, 147 FERC ¶ 61,173 at PP 81-88.

<sup>122</sup> E.g., Indicated Suppliers June 29, 2015 Protest at 21; Entergy June 29, 2015 Protest at 48-50.

<sup>123</sup> NYISO June 29, 2015 Answer at 7 & n.16.

which we expect NYISO to use in developing its compliance filing, we provide some parameters for NYISO to use in developing proposed tariff language.

51. In determining which renewable resources should receive the renewable resources exemption as set forth in this order, NYISO may consider which resources are designated as renewable resources under New York’s Renewable Portfolio Standard. We emphasize, however, that whether a resource qualifies for New York’s Renewable Portfolio Standard is not dispositive of whether it should be exempt from buyer-side market power mitigation under NYISO’s Services Tariff. We agree with NYISO that a renewable resources exemption in NYISO should be limited to renewable resources that are both purely intermittent and that have relatively low capacity factors and high development costs because these resources have limited or no incentive and ability to artificially suppress capacity prices. In addition, the exemption should limit the total amount of such renewable resources—in the form of a megawatt cap—that may receive the exemption, to further limit any risk that these exempted resources will impact NYISO’s ICAP market prices. For example, in ISO-NE, the Commission approved a 200 megawatt cap for the renewable resources exemption tied to load growth, such that the “entry of renewable resources will, in most cases, only displace the new entry required to meet load growth.”<sup>124</sup> With a limited exemption in place the market “would likely clear near net CONE and attract merchant entry to meet resource retirement in ISO-NE, thus helping to mitigate any price suppressive effect of a renewable resource exemption.”<sup>125</sup> ISO-NE committed to revisit this megawatt cap “should the entry of Renewable Technology Resources exceed load growth.”<sup>126</sup> We reference ISO-NE’s cap only as an example; we expect NYISO to work with its stakeholders to develop a proposed cap on the total amount of renewable resources eligible for the exemption based on NYISO’s mitigated capacity zones, and to provide similar support for this proposed limitation. Finally, NYISO should also consider the location of renewable resources to determine whether eligibility for the renewable resources exemption should be capped by zone or for the entire region, and whether the location of the resource (i.e., within NYISO as a region or within a particular zone) is a prerequisite for eligibility.

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<sup>124</sup> *ISO New England Inc.*, 147 FERC ¶ 61,173 at P 83.

<sup>125</sup> *Id.*

<sup>126</sup> *ISO New England Inc.*, 150 FERC ¶ 61,065 at P 22.

## C. Self-Supply Exemption

### 1. The Complaint

52. The Complainants propose a self-supply exemption to NYISO's buyer-side market power mitigation rules that would permit a load serving entity to build or contract for capacity resources, within specific limits, in order to meet its own reasonably anticipated ICAP obligations. According to the Complainants, this would allow load serving entities to make their own decisions on the purchase of the capacity that best meets their needs and to hedge their exposure to future ICAP obligations.<sup>127</sup> The Complainants note that the Commission approved a self-supply exemption in PJM.<sup>128</sup>

### 2. NYISO's Answer

53. NYISO states that it is not opposed, in principle, to a self-supply exemption for load serving entities that continue to possess substantial capacity resources (e.g., generation) to serve their current load. NYISO states that any self-supply exemption also must include rules addressing the self-supplying load serving entity's bilateral power purchase agreements, and must define limitations so that a load serving entity does not receive an exemption for more resources than its expected load. NYISO makes clear that it does not support the self-supply exemption for load serving entities that have divested substantially all of their capacity resources.<sup>129</sup>

### 3. Comments and Protests

54. APPA, LPPC, and NYAPP support the proposed self-supply exemption. APPA argues that load serving entities can best determine the specific resource needs of the communities they serve, incorporate policy preferences like the need to comply with changing environmental regulations or to balance greater levels of variable resources, and understand the changing nature of the load, such as the increased levels of distributed generation.<sup>130</sup> LPPC argues that the opportunity to self-supply capacity is particularly important to municipal utilities because they have an ongoing need for long-term capacity

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<sup>127</sup> Complaint at 29.

<sup>128</sup> *Id.* at 34-35 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 108).

<sup>129</sup> NYISO June 29, 2015 Answer at 11-12 (citing Complaint at 31-33; Cadwalader Aff. ¶ 42, *et seq.*).

<sup>130</sup> APPA June 29, 2015 Comments at 5-6.

investment to serve load, which the Commission has recognized as an important part of the competitive market.<sup>131</sup> LPPC contends that the buyer-side market power mitigation rules put municipal entities' investments at risk of being priced out of the market, which could require self-supplying utilities to pay twice for capacity, thereby suppressing investment. LPPC therefore urges the Commission to bring NYISO's approach to buyer-side market power mitigation more closely into line with PJM's approach.<sup>132</sup>

55. MMU, Entergy, the Indicated Suppliers, and IPPNY/EPISA oppose the proposed self-supply exemption. MMU argues that a self-supply exemption is not necessary and that there is no basis for such an exemption. MMU contends that, if surplus capacity exists, the existing mitigation measures should allow load serving entities to procure capacity at lower costs rather than self-supply by building a new unit. MMU argues that a blanket exemption for self-supply resources would allow for uneconomic self-supply investment and depressed capacity prices.<sup>133</sup> Entergy asserts that the Commission has found that "any new self-supplied capacity that clears (through a zero-price offer rather than at full net entry cost) would distort the market clearing price" and has rejected this exemption in ISO-NE.<sup>134</sup> Entergy and the Indicated Suppliers likewise do not find any support in the Commission's acceptance of PJM's self-supply exemption, arguing instead that PJM's self-supply exemption is permitting clearly uneconomic entry.<sup>135</sup> In addition to PJM's exemption being vetted in the stakeholder process and being proposed under section 205, the Indicated Suppliers note that PJM also "carefully reviewed confidential portfolio information and confirmed that, at the proposed net-short levels, [load serving entities] were acting within the ordinary course of business."<sup>136</sup>

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<sup>131</sup> LPPC June 29, 2015 Comments at 6 (citing *Wholesale Competition in Regions With Organized Electric Markets*, Notice of Proposed Rulemaking, 122 FERC ¶ 61,167, at P 130 (2008)).

<sup>132</sup> *Id.*

<sup>133</sup> MMU June 29, 2015 Comments at 8.

<sup>134</sup> Entergy June 29, 2015 Protest at 30 (citing *ISO New England Inc.*, 151 FERC ¶ 61,055, at P 4 (2015); *ISO New England Inc.*, 138 FERC ¶ 61,027 at P 60).

<sup>135</sup> *Id.*; Indicated Suppliers June 29, 2015 Protest at 22-23 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 227).

<sup>136</sup> Indicated Suppliers June 29, 2015 Protest at 22-23 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 227).

56. Entergy, the Indicated Suppliers, and IPPNY/EPISA argue that the circumstance of any particular load serving entity is not relevant where it is a state entity acting for the collective interests of load or where a load serving entity is allowed to recover the costs of sponsoring uneconomic new entry through a non-bypassable charge.<sup>137</sup> The parties argue that a state could direct a load serving entity to sponsor an uneconomic project to suppress prices state-wide.<sup>138</sup> Entergy points out that the exemption would be broad enough to encompass at least NYPA and the Long Island Power Authority, which is concerning because of NYPA's history of subsidizing the uneconomic Astoria Energy II and the Hudson Transmission Partners' projects.<sup>139</sup> IPPNY/EPISA claim that the Complainants' proposed self-supply exemption would provide NYPA with the ability to suppress the clearing prices as much as it chose by gaming the proposed net-long and net-short thresholds.<sup>140</sup>

57. Entergy also points out specific concerns with the Complainants' proposed self-supply exemption. First, Entergy claims that the exemption is poorly defined. For instance, Entergy asserts that Mr. Cadwalader fails to explain what "entities with a history of self-supplying" means or how the self-supply exemption would be limited to those entities. Second, Entergy raises concerns with respect to when a load serving entity's net-short position would be calculated, and states that the degree to which a load serving entity is net-short at the time it contracts for a new unit should also be taken into account. Entergy also argues that there are numerous ways to game the proposed exemption.<sup>141</sup> For instance, Entergy claims that a load serving entity that exceeds Mr. Cadwalader's proposed maximum net-short threshold could contract to build a unit, receive the price-suppressive effects of doing so, and avoid mitigation by contracting bilaterally during the period prior to the new facility's in-service date for additional long-term capacity commitments. According to Entergy, this would allow it to fill in its net-short position at capacity prices that will reflect the long-term price-suppressive effects of the new entrant.<sup>142</sup>

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<sup>137</sup> Entergy June 29, 2015 Protest at 30-33; Indicated Suppliers June 29, 2015 Protest at 22-23; IPPNY/EPISA June 29, 2015 Protest at 49.

<sup>138</sup> IPPNY/EPISA June 29, 2015 Protest at 49.

<sup>139</sup> Entergy June 29, 2015 Protest at 30-33.

<sup>140</sup> IPPNY/EPISA June 29, 2015 Protest at 49.

<sup>141</sup> Entergy June 29, 2015 Protest at 32-33.

<sup>142</sup> *Id.* at 33 (citing Schnitzer Aff. at 15).

#### 4. Answers to Comments and Protests

58. Entergy asserts that the proposed self-supply exemption would disrupt competitive market outcomes by favoring the procurement of more expensive self-supply over less expensive capacity.<sup>143</sup> In response to arguments that the buyer-side market power mitigation rules put self-supplying utilities at risk of effectively paying twice for capacity, Entergy notes that NYISO's tariff mandates that the mitigation determination is made early in a project's development cycle so a developer has this information before it expends a substantial portion of the project's costs. In response to NYISO's position that it is not opposed to a self-supply exemption for load serving entities that continue to possess substantial capacity resources to serve their current load, Entergy argues that this proposal would allow state power authorities such as NYPA and the Long Island Power Authority to be eligible for the self-supply exemption.<sup>144</sup> According to Entergy, state power authorities serve as vehicles to artificially suppress prices.<sup>145</sup> In response to NYISO's contention that a self-supply exemption would need to address bilateral power purchase agreements and define limitations, Entergy argues that NYISO's proposal would not prevent NYPA from engaging "in a series of new builds where, after the exemption is secured, it spins the project to another load serving entity thereby freeing up its portfolio to execute additional projects."<sup>146</sup>

59. The Complainants disagree with assertions that there is no need for a self-supply exemption because the competitive entry exemption has removed "any barrier to individual entry based on individual expectations."<sup>147</sup> The Complainants assert that not all resources ineligible for the competitive entry exemption will be subsidized or uneconomic. Furthermore, there are a limited number of potential suppliers and most of the entities that may be interested in developing resources or entering into contracts with developers are Non-Qualifying Entry Sponsors. According to the Complainants, if the absence of a self-supply exemption precludes the development of generation by this

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<sup>143</sup> Entergy July 14, 2015 Answer at 7.

<sup>144</sup> *Id.* at 9.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 9 n.34.

<sup>147</sup> Complainants July 27, 2015 Answer at 14 (citing Shanker Aff. at 33).

group of market participants, it is unreasonable to think that another market participant will always be available to offer the same benefits when needed.<sup>148</sup>

60. In response to assertions that a self-supply exemption would allow NYPA to add more than 420 MW of new capacity to the New York City market and suppress ICAP market prices, the Complainants respond that this calculation relies on an incorrect net-long threshold. Specifically, the Complainants assert that Mr. Younger, on behalf of IPPNY, uses a 250 MW net-long threshold for New York City instead of the 200 MW proposed in the complaint. Second, the Complainants contend that Mr. Younger makes the unreasonable assumption that supply is completely inelastic, such that the entry of new capacity will not prompt any other capacity to leave the market. To the extent supply is elastic, the Complainants argue, the impact of entry on prices is mitigated, reducing the ability of the self-supply exemption to be used as a tool of price suppression. Finally, the Complainants state that any needed changes to the self-supply exemption to prevent its abuse can be made in a compliance filing or adopted in settlement procedures.<sup>149</sup>

## 5. Commission Determination

61. We find that applying NYISO's buyer-side market power mitigation rules to certain self-supply resources would be unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA, because such resources, narrowly defined, have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices. As the Commission previously found, a "self-supply [load serving entity] that owns or contracts for a large portion of the capacity needed to meet its load has no reason to finance uneconomic entry given that such a strategy would not be profitable."<sup>150</sup> In other words, if a load serving entity, such as a municipality, cooperative, or single customer entity, self-supplies the majority of its needed capacity, the amount of capacity it procures from the ICAP markets will be relatively small. Therefore, uneconomic entry would reduce the cost of procuring this portion by less than the cost of financing the uneconomic entry in the first place. In addition, as the Complainants contend, a self-supply exemption would serve to enable load serving entities to make decisions on the purchase of capacity that best meets their needs and to hedge their exposure to future ICAP obligations based on their reasonable

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 15.

<sup>150</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 25.

expectations for the future.<sup>151</sup> This is important because NYISO's ICAP markets—in comparison to PJM's and ISO-NE's—offer a capacity product that is shorter in duration. We recognize the need for certain load serving entities to plan on a long-term basis. A well-formulated self-supply exemption will allow a load serving entity to procure a portfolio that best allows it to manage its assessment of the risks it faces and, as LPPC contends, eliminates the risk of effectively requiring load serving entities to pay twice for capacity in the event that a self-supplied resource does not clear the capacity market.<sup>152</sup>

62. In light of the foregoing, we direct NYISO to include in the compliance filing directed here tariff revisions that provide an exemption from its buyer-side market power mitigation rules for certain self-supply resources, as described in this order. The self-supply exemption we direct here must be limited to load serving entities whose ICAP portfolios are consistent with reasonably anticipated levels of their future ICAP obligations. In order to implement this limit on the self-supply exemption, the Complainants propose net-short and net-long thresholds, similar to those the Commission approved in PJM.<sup>153</sup> Although there are important distinctions between NYISO's and PJM's markets, as discussed above, we find that the net-short and net-long threshold approach used in PJM is an effective means of narrowly tailoring a just and reasonable self-supply exemption.<sup>154</sup> Net-short and net-long thresholds will avoid exempting from NYISO's buyer-side market power mitigation rules self-supply resources that “buy” substantially more capacity in NYISO's ICAP markets than they clear or sell (i.e., that are significantly “net-short”) or that, conversely, clear or sell substantially more capacity than they “buy” (i.e., that are significantly “net-long”). Adopting net-short and net-long thresholds will ensure that a load serving entity seeking to use the self-supply exemption

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<sup>151</sup> Complaint at 29-33.

<sup>152</sup> LPPC June 29, 2015 Comments at 6.

<sup>153</sup> Complaint at 29-33; *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 25 (“[W]e agree that with properly-calibrated thresholds measuring an entity's net-short and net-long positions, PJM's self-supply exemption will operate to identify those self-supply entities lacking the incentive to exercise buyer-side market power.”).

<sup>154</sup> We note that we refer to PJM's “net-short and net-long thresholds” as a shorthand for the rules that PJM established to qualify for the self-supply exemption. PJM's rules governing the exemption go beyond the thresholds and include, among other things, a certification process. While we expect NYISO to pattern the design of the self-supply exemption on the parameters established under the PJM self-supply exemption, NYISO may also propose rules unique to the New York capacity market and its participants.

does not have the incentive and ability to artificially suppress ICAP market prices; specifically, the net-short and net-long thresholds should be tight enough to prevent a load serving entity from being able to deliberately overpay for a resource in an attempt to manipulate ICAP market prices in a way that benefits the load serving entity's other purchases from the ICAP market. As the Commission found in PJM, we find here that net-short and net-long thresholds will, "in principle, adequately protect the market from the price effects attributable to uneconomic new self-supply."<sup>155</sup> We therefore require NYISO to include in its proposed tariff language implementing a self-supply exemption appropriate net-short and net-long thresholds. We also require NYISO to include an obligation to review and revise those thresholds, as necessary, on a periodic basis.

63. Additionally, given concerns regarding the state's ability to artificially suppress prices by channeling uneconomic entry through an exempted load serving entity,<sup>156</sup> NYISO should consider the impacts of state decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity. In addition, NYISO should consider other appropriate limitations to the self-supply exemption, including barring from the exemption a "project that has cost or revenue advantages 'that are irregular or anomalous, that do not reflect arms-length transactions, or that are not in the ordinary course of the self-supply [load serving entity's] business,'" and excluding from eligibility a load serving entity that "has an arrangement for any payments or subsidies that are specifically tied to the [load serving entity] clearing its project in [NYISO's ICAP market], or to the construction of its project."<sup>157</sup>

64. MMU contends that there is no basis for the self-supply exemption because, in a competitive market, load serving entities would procure capacity to meet their needs at the lowest cost; therefore, if surplus capacity exists in the market at a lower cost than building a new unit, the load serving entity would purchase that capacity rather than self-supplying with a new unit.<sup>158</sup> However, as stated above, the Commission agrees with the Complainants that allowing select load serving entities (those who self-supply a majority of their needed capacity) to procure a supply portfolio to better meet their needs and hedge against future fuel or capacity market prices can be appropriate. There may be a higher degree of cost certainty in the construction of a new generator or in a long-term

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<sup>155</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 107.

<sup>156</sup> Indicated Suppliers June 29, 2015 Protest at 22-23; IPPNY/EPISA June 29, 2015 Protest at 49-50; Entergy June 29, 2015 Protest at 31.

<sup>157</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 66.

<sup>158</sup> MMU June 29, 2015 Comments at 8.

power purchase agreement than there is in ICAP market price forecasts, so the short-term ICAP product and a long-term energy investment are not perfect substitutes for each other. Therefore, a well-formulated self-supply exemption can provide an important protection against potential ICAP market volatility. Also, by entering into long-term commitments to serve their own load, these select entities can provide better price stability for their customers and make decisions that may be more uniquely tailored to their needs than the broader market will allow.

65. NYISO states that it is not opposed to a self-supply exemption for load serving entities that continue to possess substantial capacity resources to serve their current load, but not for load serving entities that have divested substantially all of their capacity resources.<sup>159</sup> NYISO also notes that a self-supply exemption would need to include rules addressing bilateral power purchase agreements. We agree and, as noted above, we are providing some parameters for NYISO to use in developing the self-supply exemption, but acknowledge that NYISO may develop rules and parameters that recognize the unique characteristics of NYISO's capacity market. We will therefore allow NYISO flexibility to address these concerns, as well as concerns with the structure of the self-supply exemption raised by other commenters, in the stakeholder discussions that we expect NYISO to lead in developing the compliance filing ordered here. To the extent that issues concerning the structure of the self-supply exemption are not resolved during NYISO's crafting of the tariff language, in consultation with stakeholders, these issues will be discussed when we rule on NYISO's compliance filing.

#### **D. Gas- or Oil-Fired Generators of 20 MW or Less Exemption**

##### **1. The Complaint**

66. The Complainants recognize that the intent to exercise buyer-side market power can be difficult to detect; however, they contend that it is not difficult to infer that certain types of capacity projects are not or could not be effective tools to artificially suppress market prices. For this reason, the Complainants argue that a just and reasonable mitigation program should exclude: renewable resources; transmission assets coupled with unforced capacity deliverability rights (i.e., controllable transmission lines); repowered facilities; and nuclear resources.<sup>160</sup> The Complainants also contend that Special Case Resources, such as demand response resources, do not raise price suppression concerns.<sup>161</sup> Therefore, the Complainants argue that NYISO's buyer-side

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<sup>159</sup> NYISO June 29, 2015 Answer at 11-12.

<sup>160</sup> Complaint at 24-27.

<sup>161</sup> *Id.* at 12, 22.

mitigation rules should only apply to large (20 MW or greater) new gas- or oil-fired generating units because these units are the only realistic option a net buyer with an incentive to exercise buyer-side market power could successfully deploy to achieve market price suppression.<sup>162</sup> This is because these types of generating units can be built relatively quickly and are large enough, relative to the size of the market, to be effective tools for exercising buyer-side market power.<sup>163</sup>

67. The Complainants point out that, until recently, PJM applied its buyer-side market power mitigation rules to all resource types; however, they explain that the Commission agreed with PJM's argument that its rules should only apply to gas-fired combustion turbines, combined-cycle, and integrated gasification combined-cycle resources because these resources are most likely to raise price suppression concerns. The Complainants state that the Commission agreed with PJM and approved its request to apply its buyer-side market power mitigation rules to this limited set of resources because those resources "have the shortest development time" and "low construction costs."<sup>164</sup>

## 2. NYISO's Answer

68. NYISO asks that, if the Commission concludes that the buyer-side market power mitigation rules should be changed, it require certain adjustments to the Complainants' proposals.<sup>165</sup> NYISO supports the principle of narrowing the buyer-side market power mitigation rules to address certain resource types that have the greatest practical ability to suppress prices. NYISO states that focusing on resources that could effectively and practically be used to suppress prices would, in principle, preserve the ability to guard against uneconomic entry and artificial price suppression without unnecessarily impacting projects with no cost-effective ability to suppress prices. NYISO also states that this approach would simplify the structure of the buyer-side market power mitigation rules.<sup>166</sup>

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<sup>162</sup> *Id.* at 12.

<sup>163</sup> *Id.* at 22-23 & n.49.

<sup>164</sup> *Id.* at 34 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 166-67).

<sup>165</sup> NYISO June 29, 2015 Answer at 1-2.

<sup>166</sup> *Id.* at 5-6.

69. However, NYISO emphasizes the importance of properly identifying the resource types that should remain subject to the buyer-side market power mitigation rules. NYISO agrees that combined cycle or combustion turbine units powered by natural gas or oil should remain subject to the buyer-side market power mitigation rules, but does not believe the Complainants support the proposal to exempt units of 20 MW or less. NYISO also notes that the Complainants fail to address the fact that more than one unit can be built at a single station.<sup>167</sup>

### 3. Comments and Protests

70. LPPC supports the Complainants' core contention that the buyer-side market power mitigation rules in NYISO's Services Tariff are overly broad and target resources that have little incentive or ability to artificially suppress ICAP market prices.<sup>168</sup> LPPC notes that the Commission recently granted a complaint aimed at exempting new unsubsidized entrants from NYISO's buyer-side market power mitigation rules because they have no incentive to suppress market prices, and made a similar determination in PJM with respect to entities choosing to self-supply their capacity resources as well as all generating units other than gas-fired combustion turbines, combined cycle units, and integrated gasification combined cycle plants.<sup>169</sup> LPPC argues that these decisions support the Complainants' proposal to exempt large, costly units with long lead times, renewable resources, and self-supply resources.

71. TDI likewise does not oppose the changes requested by the Complainants that mirror the buyer-side market power mitigation rules in PJM because they appropriately balance the need for mitigation of buyer-side market power against the risk of over-mitigation. TDI states that the competitive entry exemption will help address the harm of over-mitigation, but that further tailoring the buyer-side market power mitigation rules will have three benefits: (1) it will remove any investor uncertainty regarding the potential mitigation of certain resources; (2) it will reduce the burden on NYISO associated with administering the buyer-side market power mitigation rules; and (3) it will further harmonize the buyer-side market power mitigation rules of two important and

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<sup>167</sup> *Id.* at 6.

<sup>168</sup> LPPC June 29, 2015 Comments at 2.

<sup>169</sup> *Id.* at 4-5 (citing ConEd Complaint Order, 150 FERC ¶ 61,139; *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090).

adjacent markets, ensuring that investors can make decisions on new projects in the broader region based on their economic merits, not the existence of regulatory barriers.<sup>170</sup>

72. In contrast, Entergy and IPPNY/EPISA argue that all of the non-competitive resources that the Complainants seek to broadly exempt from the buyer-side market power mitigation rules can be used to suppress prices.<sup>171</sup> IPPNY/EPISA point out that, since NYISO has implemented a competitive entry exemption, only those entrants that will not forgo state-sponsored support are subject to mitigation.<sup>172</sup> Entergy and IPPNY/EPISA argue that allowing subsidized new entry to bid below its costs in capacity markets will undermine price signals needed to attract and retain the efficient level of merchant generation needed to meet NYISO's ICAP requirements, which will threaten long-term system reliability.<sup>173</sup> Furthermore, Entergy argues that the existence of the exemptions could have a chilling effect on merchant investment because this will be calculated into expectations of future prices.<sup>174</sup> Entergy has no objection to a state promoting public policies, but states that it is neither just nor reasonable to jeopardize the ICAP market and system reliability in the process. As support, Entergy quotes the Commission's statement in the context of PJM that the capacity market "has no feature to explicitly recognize, for example, environmental or technological goals, nor does it contemplate reliability concerns beyond a three-year forecast."<sup>175</sup> Entergy argues that the ICAP market is designed to be agnostic to such considerations, and IPPNY/EPISA add that the buyer-side market power mitigation rules impose no requirements on state agencies with respect to local power supply policy.<sup>176</sup> IPPNY/EPISA contend that the standard to measure whether mitigation is necessary is whether there exists the potential to exercise market power, not the intent to do so; nevertheless, New York State, they

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<sup>170</sup> TDI June 29, 2015 Comments at 3-4.

<sup>171</sup> Entergy June 29, 2015 Protest at 41; IPPNY/EPISA June 29, 2015 Protest at 31.

<sup>172</sup> IPPNY/EPISA June 29, 2015 Protest at 32.

<sup>173</sup> Entergy June 29, 2015 Protest at 24; IPPNY/EPISA June 29, 2015 Protest at 43-44.

<sup>174</sup> Entergy June 29, 2015 Protest at 24; *see also* IPPNY/EPISA June 29, 2015 Protest at 45-46.

<sup>175</sup> Entergy June 29, 2015 Protest at 26 (citing *PJM Interconnection L.L.C.*, 137 FERC ¶ 61,145 at P 90).

<sup>176</sup> Entergy June 29, 2015 Protest at 26; IPPNY/EPISA June 29, 2015 Protest at 24.

argue, has openly demonstrated its intent to suppress ICAP market prices by supporting uneconomic entry.<sup>177</sup>

73. According to Entergy and IPPNY/EPISA, the Complainants' reliance on similar rules in PJM as a basis for implementing a number of the proposed changes in NYISO is misplaced. Entergy and IPPNY/EPISA assert that there are fundamental differences between the PJM and NYISO markets that invalidate the claims that NYISO should adopt proposals simply because PJM has done so. Further, they argue that the Commission recognizes that there can be more than one just and reasonable set of rules, and that regional differences may require different approaches.<sup>178</sup> For example, Entergy and IPPNY/EPISA point out that NYISO is a single-state ISO, rather than a vast multi-state RTO, like PJM, where the localization of costs and dispersion of benefits serve to counter a state's ability to suppress prices.<sup>179</sup> In addition, they note that PJM's buyer-side market power mitigation rules apply across the entire region, whereas NYISO's buyer-side market power mitigation rules only apply to two intra-state zones, such that small amounts of uneconomic entry can have substantial impacts within NYISO.<sup>180</sup> Finally, Entergy points out that stakeholders in PJM overwhelmingly supported its exemptions as part of a broad package of reforms, filed under FPA section 205. Entergy notes that the Commission has regularly stated its preference for narrowly tailored exemptions and stated that categorical changes to buyer-side market power mitigation rules should be established through full stakeholder review.<sup>181</sup>

74. LPPC and NYAPP support limiting application of NYISO's buyer-side market power mitigation rules to new gas- or oil-fired simple cycle and combined cycle units.<sup>182</sup> On the other hand, Entergy disagrees with the Complainants that a gas plant subject to mitigation is a more likely tool for price suppression than a non-gas plant exempt from

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<sup>177</sup> IPPNY/EPISA June 29, 2015 Protest at 32, 38.

<sup>178</sup> Entergy June 29, 2015 Protest at 26; IPPNY/EPISA June 29, 2015 Protest at 40.

<sup>179</sup> Entergy June 29, 2015 Protest at 27; IPPNY/EPISA June 29, 2015 Protest at 39-40.

<sup>180</sup> Entergy June 29, 2015 Protest at 27-28; IPPNY/EPISA June 29, 2015 Protest at 43.

<sup>181</sup> Entergy June 29, 2015 Protest at 29 n.106 (citing *ISO New England Inc.*, 138 FERC ¶ 61,027 at P 91).

<sup>182</sup> LPPC June 29, 2015 Comments at 5; NYAPP June 29, 2015 Comments at 6-7.

mitigation. Entergy asserts that certain types of generation, such as renewable resources, may become preferable tools for price suppression, given that developers will have the opportunity to mask intent to suppress prices with the “acceptable” intent to pursue one of New York’s public policies.<sup>183</sup> Entergy disagrees with the Complainants’ argument that the market response following entry of a non-gas unit is likely to eliminate a developer’s ability to benefit from long-term price suppression. Entergy argues that the Complainants’ predicted market response, which envisions existing resources prematurely retiring to make room for a new uneconomic market entrant, would not be a justification for uneconomic entry, but rather a demonstration of its harmful impact on market efficiency.<sup>184</sup> Entergy further contends that, following the uneconomic entry of Astoria Energy II, prices returned to pre-entry levels only after two units were mothballed due to “one-off events;” absent those events, it may have taken many years for prices to rise to pre-entry levels. Finally, Entergy asserts that price suppression harms the market regardless of whether the project that causes the price suppression successfully profits from its behavior.<sup>185</sup>

75. The Indicated Suppliers and IPPNY/EPISA oppose exempting units that are 20 MW or less, noting that a company could propose to install a mix of small generating units, which would not be subject to mitigation if each were under 20 MW, but that would have a significant collective impact on ICAP prices because of the steep demand curve.<sup>186</sup> The Indicated Suppliers also point out that the Commission has rejected exemptions for small load serving entities in PJM because the demand curve in PJM is very steep and even small amounts of supply can affect prices.<sup>187</sup>

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<sup>183</sup> Entergy June 29, 2015 Protest at 38.

<sup>184</sup> *Id.* at 39.

<sup>185</sup> *Id.* at 40.

<sup>186</sup> Indicated Suppliers June 29, 2015 Protest at 20; IPPNY/EPISA June 29, 2015 Protest at 52-53. For example, the Indicated Suppliers state that ConEd has submitted a proposal to install a mix of small units, totaling 203 MW, of subsidized new entry that would be exempt under the Complainants’ proposal, but nonetheless could have significant price impacts in the relatively small New York City Locality.

<sup>187</sup> Indicated Suppliers June 29, 2015 Protest at 20 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 196).

#### **4. Answers to Comments and Protests**

76. Entergy agrees with NYISO that the Complainants have not supported their proposal to exempt combined cycle or combustion turbine units powered by natural gas or oil below 20 MW.

77. With respect to protestors' and commenters' concerns regarding the proposed limitation on units over 20 MW in size, the Complainants support adding reasonable conditions to the 20 MW threshold, such as a limit of one unit per site, to ensure that the exemption could not be used to subvert the complaint's intent. The Complainants assert that such conditions could be implemented in a compliance filing, or developed through the settlement process.<sup>188</sup>

#### **5. Commission Determination**

78. We reject the Complainants' proposal that only large (20 MW or greater) combined cycle or combustion turbine units powered by natural gas or oil should be subject to the buyer-side market power mitigation rules. We find that the Complainants have failed to demonstrate that, absent this limitation on the application of NYISO's buyer-side mitigation rules, NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA. The proposed 20 MW cut-off would exempt several types of projects that may have the incentive and ability to exercise buyer-side market power to artificially suppress capacity prices, as discussed in detail below. We recognize that the Commission accepted PJM's proposal, pursuant to a section 205 filing, to apply its mitigation rules only to resources powered by natural gas and oil. However, the Commission "has recognized that market design and rules need not be identical among the regions and may instead reflect the unique characteristics of the markets as necessary."<sup>189</sup> PJM's markets are fundamentally different from NYISO's, such that what may be appropriate for PJM is not necessarily appropriate for NYISO.<sup>190</sup>

79. As for the size limit, we find that the cumulative effect of several 20 MW units at a single station could have a significant impact on ICAP market prices.<sup>191</sup> While the Complainants state in their answer that they support adding conditions to the 20 MW

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<sup>188</sup> Complainants July 27, 2015 Answer at 12.

<sup>189</sup> *ISO New England Inc.*, 150 FERC ¶ 61,065 at P 18 (citations omitted).

<sup>190</sup> *See supra* P 38.

<sup>191</sup> NYISO June 29, 2015 Answer at 6; IPPNY/EPISA June 29, 2015 Protest at 52.

threshold, such as a limit of one unit per site, they have not shown that applying NYISO's buyer-side market power mitigation rules to a resource below this threshold is unjust and unreasonable.<sup>192</sup> While we acknowledge that a small amount of additional uneconomic capacity can have market impacts,<sup>193</sup> in setting the just and reasonable rate that exempts intermittent renewable resources with low capacity factors, subject to a cap, we are defining the exemption narrowly, recognizing that these resources have limited capacity factors and are therefore a poor choice to suppress market prices.<sup>194</sup> In contrast, we find that small amounts of gas- and oil-fired generation (even a single 20 MW unit at one site) should not be exempted, because of their relatively higher capacity factors and associated ability to artificially suppress ICAP market prices. For all of the exemptions we deny here, we note that, if a resource is subject to an offer floor, pursuant to NYISO's buyer-side market power mitigation rules, that floor is only set at the lower of (1) 75 percent of the default Net CONE, or (2) 100 percent of the unit-specific Net CONE, values that reasonably reflect a competitive at-risk offer.<sup>195</sup>

## **E. Controllable Transmission Lines Exemption**

### **1. The Complaint**

80. The Complainants propose to exempt transmission lines coupled with unforced capacity deliverability rights (i.e., controllable transmission lines) from NYISO's buyer-side market power mitigation rules. The Complainants argue that these resources are unlikely to be used to exercise buyer-side market power because they have long development times, such that other market participants could take into account the transmission investment in adjusting the location and timing of their projects.<sup>196</sup> The Complainants note that these resources are not subject to mitigation in other ISO/RTO capacity markets.<sup>197</sup>

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<sup>192</sup> Complainants July 27, 2015 Answer at 12.

<sup>193</sup> IPPNY/EPISA June 29, 2015 Protest at 52; Entergy June 29, 2015 Protest at 52-53.

<sup>194</sup> We are also narrowly defining the self-supply exemption to address commenters' concerns, as discussed above.

<sup>195</sup> NYISO, Services Tariff, § 23.4.5.7 (9.0.0).

<sup>196</sup> Complaint at 25-26 (citing Paynter Aff. at 18:5-9).

<sup>197</sup> *Id.* at 26 (citing PJM, OATT, Attachment DD, § 5.14(h)(2) (20.0.0)).

## 2. NYISO's Answer

81. NYISO opposes exempting controllable transmission lines because the Complainants fail to demonstrate why a facility's construction time reduces its effectiveness for suppressing prices.<sup>198</sup> NYISO is concerned that controllable transmission facilities have the potential to suppress prices and asserts that there is no basis to depart from Commission precedent in NYISO that "[c]ontrollable transmission and generating capacity should be subject to the same mitigation."<sup>199</sup>

## 3. Comments and Protests

82. TDI supports the Complainants' request that controllable transmission lines be exempt from NYISO's buyer-side market power mitigation rules because investment in transmission projects is neither an efficient nor effective mechanism to suppress capacity market prices due to the long lead-time and greater financial resources required to develop, permit, and commercialize such projects.<sup>200</sup> TDI states that it has invested over \$60 million in private capital over the last seven years to fund the development of its 333-mile underground and underwater high-voltage direct-current transmission line and that construction of the project will require at least three additional years. TDI notes that the Commission has already recognized that a project with these characteristics does not pose a risk of exercising buyer-side market power.<sup>201</sup>

83. However, Entergy, MMU, and IPPNY/EPISA oppose this proposed exemption. Entergy contends that the uneconomic, unmitigated entry of controllable transmission lines in New York's markets would have catastrophic consequences because most of the proposed controllable transmission line projects in New York have been very large, and the mitigated capacity zones have a limited locational installed capacity requirement and relatively steep demand curves.<sup>202</sup> Entergy further argues that the Complainants' reliance on longer lead times to support their proposed exemption is not persuasive given NYISO's carefully-structured mitigation exemption test provisions. MMU asserts that controllable transmission lines can be used to artificially suppress ICAP prices and,

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<sup>198</sup> NYISO June 29, 2015 Answer at 8-9.

<sup>199</sup> *Id.* at 9 (quoting *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 121).

<sup>200</sup> TDI June 29, 2015 Comments at 2-3.

<sup>201</sup> *Id.* at 3 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 155).

<sup>202</sup> Entergy June 29, 2015 Protest at 45.

therefore, should not be exempted without an economic evaluation under the mitigation rules.<sup>203</sup> IPPNY/EPISA state that the Commission has already rejected arguments that the buyer-side market power mitigation rules should not be applied to controllable transmission lines and that the Complainants have not shown any changed circumstances to justify a reversal of the Commission's prior ruling. Moreover, IPPNY/EPISA contend that developers of controllable transmission lines can apply for the competitive entry exemption.<sup>204</sup>

#### **4. Answers to Comments and Protests**

84. TDI reiterates in its answer its support for an exemption for controllable transmission lines, arguing that long-lead time projects incur substantial development costs at an earlier stage than other types of projects, and, thus, are not effective vehicles for exercising buyer-side market power and cannot be an effective means to artificially suppress ICAP prices.<sup>205</sup> TDI disagrees with IPPNY/EPISA that long-lead time projects in New York do not incur substantial investments prior to NYISO performing the mitigation exemption test.<sup>206</sup> TDI contends that, while the availability of a competitive entry exemption is a critical improvement to NYISO's buyer-side market power mitigation rules, further refinements are needed to remove barriers to entry at the outset. TDI explains that the Complainants' proposal to reform NYISO's buyer-side market power mitigation rules will eliminate any uncertainty regarding the prospect of needless mitigation and will reduce NYISO's administrative burdens, as well as harmonize mitigation rules across interconnected markets.<sup>207</sup>

85. In response to IPPNY's argument that project lead-time is not a relevant factor because controllable transmission line projects do not incur substantial costs before NYISO performs the mitigation exemption test, the Complainants contend that this

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<sup>203</sup> MMU June 29, 2015 Comments at 10-11 (arguing that the fact that transmission lines take a long time to develop does not mean that they could not be used effectively to artificially suppress prices).

<sup>204</sup> IPPNY/EPISA June 29, 2015 Protest at 48.

<sup>205</sup> TDI July 13, 2015 Answer at 6.

<sup>206</sup> *Id.* at 8.

<sup>207</sup> *Id.*

argument is contrary to the actual experience of transmission developers that participate in the market.<sup>208</sup>

## 5. Commission Determination

86. With regard to controllable transmission lines, we deny the Complainants' proposed exemption. We find that the Complainants have failed to demonstrate that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA because it does not exempt controllable transmission lines from its buyer-side market power mitigation rules. As the Commission previously stated when it approved NYISO's buyer-side market power mitigation rules in 2008, "[B]ecause both transmission and generating capacity are paid based on the same principle of making capacity available in-City, there should be no special exemption. Controllable transmission and generating capacity should be subject to the same mitigation."<sup>209</sup> The record does not reflect any changed circumstances that would warrant a departure from this precedent.<sup>210</sup> Moreover, in addition to the option to use unit-specific Net CONE to pass the mitigation exemption test if a controllable transmission line is economic, developers of controllable transmission lines can now apply for the competitive entry exemption if they forego state subsidies. Although TDI contends that the competitive entry exemption is not enough to eliminate uncertainty for investors regarding mitigation,<sup>211</sup> we disagree; if a developer of a controllable transmission line foregoes state subsidies, it can qualify for the competitive entry exemption and avoid mitigation. Moreover, if such a resource is subsidized, it will not be subject to mitigation if it passes the mitigation exemption test. Finally, as noted above, if it is subject to an offer floor, that floor is only set at the lower of (1) 75 percent of the

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<sup>208</sup> As an example, the Complainants state that TDI incurred approximately \$60 million in costs before entering Class Year 2015. Complainants July 27, 2015 Answer at 13.

<sup>209</sup> *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 121.

<sup>210</sup> See, e.g., *EPIC Merchant Energy NJ/PA, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130, at P 20 (2010) (dismissing a complaint because it "merely seeks to re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances").

<sup>211</sup> TDI July 13, 2015 Answer at 8.

default Net CONE, or (2) 100 percent of the unit-specific Net CONE, values that reasonably reflect a competitive at-risk offer.<sup>212</sup>

## **F. Repowering Exemption**

### **1. The Complaint**

87. The Complainants request an exemption for repowered facilities from NYISO's buyer-side market power mitigation rules. The Complainants contend that facility repowerings that do not change the quantity of capacity available to the system do not raise price suppression concerns because this capacity is already recognized in the market. According to the Complainants, a repowering provides important, desirable benefits, including fuel diversity and environmental improvements. The Complainants assert that the Commission recently directed NYISO to conduct a stakeholder process to determine whether resources under repowering agreements have the characteristics of new rather than existing resources, such that the buyer-side market power mitigation rules should apply.<sup>213</sup>

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

88. NYISO believes that an appropriately structured repowering exemption can be developed, but notes that, under certain circumstances, repowering a unit can result in the market having more capacity than it otherwise would have, which would warrant an evaluation of the repowering facility under the buyer-side market power mitigation rules. NYISO further notes that the issue of a repowering exemption intersects with issues being considered in other pending proceedings and NYISO intends to address mitigation issues related to repowering projects in those proceedings.<sup>214</sup>

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<sup>212</sup> NYISO, Services Tariff, § 23.4.5.7 (9.0.0).

<sup>213</sup> Complaint at 26 & n.56 (citing Paynter Aff. at 22:8-15; *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, at P 71 (2015)).

<sup>214</sup> NYISO June 29, 2015 Answer at 9-10 (citing *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) (concerning reliability-must-run units); *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015) (concerning repowering agreements not principally driven by reliability needs)).

### 3. Comments and Protests

89. The Consumers support the proposed repowering exemption. However, the Consumers argue that, if the owner of an existing resource wants to repower its facility with a higher capacity rating than the existing plant, then the incremental capacity should be subject to NYISO's mitigation exemption test. The Consumers assert that there is virtually no likelihood that a repowering exemption could be developed in the stakeholder process due to various perspectives and positions held by stakeholders.

90. MMU acknowledges that the existing buyer-side market power mitigation rules may act as a barrier to repowering investments, but that Part B allows NYISO to explicitly incorporate the cost advantages of repowering into the calculation of a unit's Net CONE.<sup>215</sup> On the other hand, MMU notes that if a supplier transfers interconnection rights from an older resource to a new resource, the mitigation exemption test treats both resources as being in service simultaneously, making the new project appear less economic. MMU states that it has recommended tariff revisions that, if implemented, would make an exemption for repowered resources unnecessary.

91. Entergy, the Indicated Suppliers, the Indicated TOs, and IPPNY/EPISA oppose the proposed repowering exemption. Entergy and the Indicated TOs argue that repowering projects that are economic and rely on market revenues to cover their capital and operating costs can already use the competitive entry exemption or their unit-specific Net CONE.<sup>216</sup> According to Entergy, a subsidized repowering project that cannot take advantage of either of those options should be subject to mitigation because its below-entry cost could suppress prices and harm the market.<sup>217</sup> Entergy also asserts that the Complainants go too far when generalizing that a repowered facility typically does not add new capacity because repowered facilities can have greater capacities than the original plant.<sup>218</sup>

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<sup>215</sup> MMU June 29, 2015 Comments at 7.

<sup>216</sup> Entergy June 29, 2015 Protest at 46; Indicated TOs June 29, 2015 Comments at 3 n.6.

<sup>217</sup> Entergy June 29, 2015 Protest at 46.

<sup>218</sup> *Id.* at 47.

#### 4. Answers to Comments and Protests

92. Entergy responds to the Consumers' arguments regarding the proposed repowering exemption, reiterating concerns from NYISO and MMU that repowering a resource can result in the market having more capacity than it otherwise would have, which can occur when the existing resource is uneconomic and should otherwise retire.<sup>219</sup> Entergy supports NYISO's proposed solution to this concern, namely, an economic viability test. In response to concerns from the Consumers that the mitigation exemption test relies on assumptions that could vary from a resource owner's views, Entergy notes that using independent, transparent assumptions reduces the ability of resource owners to game the system. In addition, Entergy continues, an economic repowering resource does not need a new exemption; rather, the resource can make use of the existing competitive entry exemption or the unit-specific Net CONE under Part B.<sup>220</sup>

#### 5. Commission Determination

93. As for the Complainants' proposal to exempt repowering projects,<sup>221</sup> NYISO states that it intends to address mitigation issues related to repowering projects needed for reliability as part of its compliance filing in Docket No. EL15-37-000.<sup>222</sup> With regard to repowering projects not needed for reliability, NYISO states that, in Docket Nos. EL13-62-001 and -002, it requested that the Commission permit it to file a further report in January 2016 addressing repowering projects pursuant to agreements that are not principally driven by reliability needs.<sup>223</sup> The Complainants acknowledge the ongoing

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<sup>219</sup> Entergy July 14, 2015 Answer at 12 (citing MMU June 29, 2015 Comments at 8; NYISO June 29, 2015 Answer at 9).

<sup>220</sup> *Id.* at 12-13.

<sup>221</sup> Complaint at 22, 26.

<sup>222</sup> NYISO June 29, 2015 Answer at 10, 12-13; *see also N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015).

<sup>223</sup> NYISO June 29, 2015 Answer at 10; *see also Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015) (recognizing potential price suppressive impacts of repowering agreements and directing NYISO to establish a stakeholder process to consider whether mitigation measures are needed to address those concerns). NYISO stated in its compliance report that "it would be premature for the Commission to address [the potential market effects of uneconomic retention and repowering] prior to the NYISO's submission of its compliance filing . . . in Docket

(continued ...)

proceeding in Docket Nos. EL13-62-001 and -002 and state that they are participating in that stakeholder process.<sup>224</sup> We find that issues relating to repowering projects needed for reliability are best addressed in Docket No. EL15-37-000 and that issues related to repowering projects not needed for reliability are best addressed in Docket Nos. EL13-62-001 and -002. We will not prejudge the outcome of those proceedings here.<sup>225</sup>

## **G. Reliability Exemption**

### **1. The Complaint**

94. The Complainants propose to exempt new gas- or oil-fired generating units that are developed as a solution to a reliability need identified by NYISO under its reliability planning process in Attachment Y to the NYISO OATT because such resources do not “implicate any suspect motive to manipulate the market.”<sup>226</sup> Therefore, they argue that subjecting such resources to the buyer-side market power mitigation rules will deter developers from offering generation solutions in the planning process and potentially deprive ratepayers of cost-effective alternatives.

### **2. NYISO’s Answer**

95. NYISO supports, in principle, a reliability exemption. However, NYISO states that reliability solutions should only be eligible for an exemption to the extent that they are actually necessary to address a reliability need (i.e., they are the “right” size, are viable, and are the least cost way to address the need), and that it would be inappropriate to exempt new capacity that is not needed for reliability. NYISO notes that it is considering issues associated with the proposed reliability exemption as it develops its

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No. EL15-37-000 . . . .” NYISO, Compliance Report, Docket No. EL13-62-002 (filed June 17, 2015).

<sup>224</sup> Complaint at 26 n.56.

<sup>225</sup> See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524-25 (1978) (confirming that agencies have discretion to develop their own procedures); *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) (“The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem.”); *Richmond Power & Light v. FERC*, 574 F.2d 610, 624 (D.C. Cir. 1978) (“Agencies have wide leeway in controlling their calendars . . . .”).

<sup>226</sup> Complaint at 33.

compliance filing in Docket No. EL15-37-000, in which the Commission directed NYISO to submit tariff revisions governing the retention of and compensation to generating units wishing to deactivate but that are needed for reliability.<sup>227</sup>

### **3. Comments and Protests**

96. The Consumers and NYAPP support the requested reliability exemption. According to the Consumers, a resource selected by NYISO to address a reliability need is not developed with intent to exercise market power.<sup>228</sup>

97. In contrast, Entergy, MMU, and IPPNY/EPSCA oppose the exemption. In particular, Entergy argues that a reliability exemption is counterproductive, lacks detail, and fails to address the underlying causes of the reliability needs (i.e., the need to build a backstop reliability project is a symptom of market flaws). According to Entergy, the proposed reliability exemption may result in the need for more uneconomic backstop projects because price suppression caused by earlier backstop projects makes merchant projects not viable.<sup>229</sup>

98. MMU states that it understands the Complainants' concerns, but asserts that a blanket exemption for projects that satisfy an identified reliability need would be inappropriate because it would allow for over-sized or otherwise uneconomic reliability investments to artificially suppress ICAP market prices. MMU contends that the buyer-side market power mitigation rules need to be harmonized with NYISO's reliability planning process to ensure that the selected reliability solution is the most economic, such as by comparing the proposal to alternative solutions that are smaller and would have a smaller market impact.<sup>230</sup>

### **4. Commission Determination**

99. We reject the Complainants' proposed reliability exemption. We find that the Complainants have failed to demonstrate that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA

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<sup>227</sup> NYISO June 29, 2015 Answer at 12-13; *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 at PP 1-4.

<sup>228</sup> Consumers June 29, 2015 Comments at 11-12.

<sup>229</sup> Entergy June 29, 2015 Protest at 34-36.

<sup>230</sup> MMU June 29, 2015 Comments at 7.

because it does not currently exempt new gas- or oil-fired generating units that are developed as a solution to a reliability need identified by NYISO under its reliability planning process in Attachment Y to the NYISO OATT. Thus, we will not require the exemption at this time.<sup>231</sup>

## **H. Nuclear Resources Exemption**

### **1. The Complaint**

100. The Complainants contend that nuclear resources should not be subject to the buyer-side market power mitigation rules because the cost of a nuclear resource is so substantial that it would be virtually impossible to recover those costs through lower ICAP prices even if the resource successfully lowered those prices.<sup>232</sup>

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

101. MMU states that, although nuclear resources are unlikely to serve as a mechanism for exercising buyer-side market power, this issue should be fully evaluated by stakeholders.<sup>233</sup>

### **3. Commission Determination**

102. The Complainants argue that nuclear resources should be exempted from the buyer-side market power mitigation rules because of their substantial costs.<sup>234</sup> However, the fact that a particular unit may have high, upfront development costs does not mean they should be exempt from mitigation. The high capacity factor and relative size of nuclear resources means that the uneconomic entry of a nuclear resource could result in significant price suppression, and the potential for this harm outweighs any risk of over-mitigation. Moreover, although PJM does not apply its buyer-side market power mitigation rules to nuclear resources, PJM's capacity market is different from the NYISO

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<sup>231</sup> We note that NYISO stated in its answer that it is considering issues associated with a reliability exemption to the buyer-side market power mitigation rules as it develops its compliance filing in Docket No. EL15-37-000. NYISO June 29, 2015 Answer at 12-13.

<sup>232</sup> Complaint at 26-27.

<sup>233</sup> MMU June 29, 2015 Comments at 7.

<sup>234</sup> Complaint at 26-27.

capacity market in a number of respects, as explained above.<sup>235</sup> Thus, an exemption for a nuclear unit could have a deleterious impact on resource adequacy in these zones. Therefore, we are not persuaded that NYISO's Services Tariff is unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA because its buyer-side market power mitigation rules may apply to nuclear resources.

## **I. Demand Response Resources Exemption**

### **1. The Complaint**

103. The Complainants contend that Special Case Resources, such as demand response resources, do not raise price suppression concerns, so should be exempted from the buyer-side market power mitigation rules.<sup>236</sup>

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

104. The Indicated TOs support exempting demand response resources, arguing that the high development costs and intermittent nature of these resources make them an unlikely source of market power.<sup>237</sup> On the contrary, Entergy and IPPNY/EPISA oppose an exemption for demand response resources. Entergy claims that Special Case Resources, as consumers of electricity, have obvious motives to suppress capacity clearing prices and, other than stating that Special Case Resources have no intent to suppress prices, the complaint offers no further basis for the exemption. Entergy points out that the Commission recently held that it had no "inten[t] to grant a blanket exemption for all state programs that subsidize demand response," but left open the possibility for a state to make a "specific request" for the costs of a particular state program to be excluded from such calculations with the support of a developed record on the matter.<sup>238</sup> In addition, Entergy argues that ordering an exemption for demand response would be premature, as the U.S. Supreme Court has not yet ruled on whether the Commission has jurisdiction over demand response.<sup>239</sup> IPPNY/EPISA argue that the Complainants' assertion was

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<sup>235</sup> See *supra* P 38 (discussing differences between PJM's and NYISO's markets).

<sup>236</sup> Complaint at 12, 22.

<sup>237</sup> Indicated TOs June 29, 2015 Comments at 5.

<sup>238</sup> Entergy June 29, 2015 Protest at 51 (citing *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208 at P 30).

<sup>239</sup> *Id.* at 52.

rejected when the Commission ordered NYISO to subject Special Case Resources to mitigation.<sup>240</sup>

### 3. Commission Determination

105. We find that the Complainants have failed to demonstrate that the continued application of NYISO's buyer-side market power mitigation rules to Special Case Resources renders NYISO's Services Tariff unjust, unreasonable, or unduly discriminatory or preferential pursuant to section 206 of the FPA. The Commission has previously found that Special Case Resources, such as demand response resources, should be subject to the same buyer-side market power mitigation rules as all other market participants.<sup>241</sup> The Commission has since clarified that: (1) it did not "intend to grant a blanket exemption for all state programs that subsidize demand response" in determining the offer floor for Special Case Resources subject to mitigation; and (2) a state may "seek an exemption from the Commission pursuant to section 206 if it believes that the inclusion in the [Special Case Resource] Offer Floor of rebates and other benefits under a state program interferes with a legitimate state objective."<sup>242</sup> Because the Complainants request a blanket waiver for demand response resources and have not adequately supported that exemption, we reject the blanket exemption requested by the Complainants for demand response resources, consistent with Commission precedent.

#### J. Miscellaneous

106. NYAPP explains that its members currently meet their ICAP requirements primarily through bilateral contracts rather than through the NYISO ICAP market. NYAPP asks that this "flexible" market feature remain in place.<sup>243</sup> This issue is outside of the scope of this proceeding because it is not related to NYISO's buyer-side market power mitigation rules or exemptions from them.

107. NYAPP asks that the Commission not use this proceeding as a vehicle to extend NYISO's buyer-side market power mitigation rules to the Rest of State ICAP market.<sup>244</sup>

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<sup>240</sup> IPPNY/EP SA June 29, 2015 Protest at 55.

<sup>241</sup> *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 41.

<sup>242</sup> *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208 at P 30.

<sup>243</sup> NYAPP June 29, 2015 Comments at 3-5.

<sup>244</sup> *Id.* at 5-6.

As NYAPP correctly notes, the issue of whether NYISO's buyer-side market power mitigation rules should be applied in the Rest of State is at issue in Docket Nos. EL13-62-001 and -002.<sup>245</sup> This issue is outside of the scope of this complaint proceeding and remains pending before the Commission in Docket Nos. EL13-62-001 and -002.

108. NYAPP requests that the Commission order NYISO to adopt an exemption on the buyer side for small entities, as is done on the supplier side in only applying those mitigation rules to Pivotal Suppliers that are above 500 MW.<sup>246</sup> We do not find that this proposed exemption has been adequately supported. We are not persuaded by arguments that NYISO's buyer-side market power mitigation rules should only apply to large entities because the buyer-side market power mitigation rules must limit the cumulative impacts of all new entry and not just the impacts from large market participants.

The Commission orders:

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

(B) NYISO is hereby directed to submit a compliance filing within 90 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Honorable is concurring with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>245</sup> See *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015).

<sup>246</sup> NYAPP June 29, 2015 Comments at 6-7.

**Appendix A**

<b>Motions to Intervene and Notices of Intervention</b>	<b>Comments and Protests</b>
American Public Power Association	American Public Power Association (APPA)
American Wind Energy Association	American Wind Energy Association and Alliance for Clean Energy, Inc. (collectively, AWEA)
Astoria Energy LLC and Astoria Energy II LLC	Astoria Generating Company, L.P., TC Ravenswood, LLC, NRG Power Marketing LLC, GenOn Energy Management, LLC, and Cogen Technologies Linden Venture, L.P. (collectively, the Indicated Suppliers)
Astoria Generating Company, L.P.	City of New York, Multiple Intervenors, New York State Department of State's Utility Intervention Unit, and Natural Resources Defense Council (collectively, the Consumers)
Brookfield Energy Marketing, LP	Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corp., Rochester Gas and Electric Corp., and Central Hudson Gas and Electric Corp. (collectively, the Indicated TOs)
Calpine Corporation	Entergy Nuclear Power Marketing, LLC (Entergy)
Central Hudson Gas and Electric Corp.	Independent Power Producers of New York, Inc. and Electric Power Supply Association (jointly, IPPNY/EPISA)
City of New York	Large Public Power Council (LPPC)
Cogen Technologies Linden Venture, L.P.	Market Monitoring Unit (MMU)

<b>Motions to Intervene and Notices of Intervention</b>	<b>Comments and Protests</b>
Consolidated Edison Company of New York, Inc.	Niagara Mohawk Power Corp. d/b/a National Grid USA (National Grid)
Consolidated Edison Energy, Inc.	New York Association of Public Power (NYAPP)
Electric Power Supply Association	TDI USA Holdings Corp. (TDI)
Energy Nuclear Power Marketing, LLC	
Exelon Corporation	
Hudson Transmission Partners, LLC	
H.Q. Energy Services (U.S.) Inc.	
Independent Power Producers of New York, Inc.	
Large Public Power Council	
Long Island Power Authority and its operating subsidiary, Long Island Lighting Company d/b/a Power Supply Long Island	
Market Monitoring Unit	
Maryland Public Service Commission	
Multiple Intervenors	
National Rural Electric Cooperative Association	
Natural Resources Defense Council	
New York Association of Public Power	
New York State Department of State's Utility Intervention Unit	

<b>Motions to Intervene and Notices of Intervention</b>	<b>Comments and Protests</b>
New York State Electric and Gas Corp.	
NextEra Energy Resources, LLC	
Niagara Mohawk Power Corp. d/b/a National Grid USA	
NRG Power Marketing LLC and GenOn Energy Management, LLC	
Orange and Rockland Utilities, Inc.	
PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power New York LLC	
RENEW Northeast, Inc.	
Rochester Gas and Electric Corp.	
SunEdison Utility Holdings, Inc.	
TC Ravenswood, LLC	
TDI USA Holdings Corp.	
Upstate New York Power Producers, Inc.	

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New York Public Service Commission,  
New York Power Authority, and  
New York State Energy Research and  
Development Authority

Docket No. EL15-64-000

v.

New York Independent System Operator, Inc.

(Issued October 9, 2015)

HONORABLE, Commissioner, *concurring*:

In today's order the Commission granted a renewable resources exemption to NYISO's buyer-side mitigation rules. This exemption is an important step in accommodating New York's public policy goals.

Striking the proper balance for buyer-side mitigation rules is critical. Capacity markets should accommodate appropriate public policy goals and protect consumers from purchasing excess capacity. Capacity markets should also deter the subsidization of new entry that could unduly depress capacity market prices. In advancing public policy goals today, the Commission correctly recognized that an exemption for intermittent renewable resources is appropriate here because these resources are unlikely to contribute to buyer-side market power.

As markets and policies continue to mature, there will be a continued need to recognize competing interests among diverse stakeholders. States, including New York, and other stakeholders will need to collaborate and cooperate to develop strategies to comply with the Environmental Protection Agency's Clean Power Plan. It is clear that New York will rely upon renewable resources, in part, to meet future Clean Power Plan emissions standards. Actions taken by the Commission today will support New York's efforts to invest in renewable resources while protecting consumers.

Accordingly, I concur with today's order.

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Colette D. Honorable  
Commissioner