150 FERC ¶ 61,214
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Independent Power Producers of New York, Inc. Docket No. EL13-62-000

v.

New York Independent System Operator, Inc.

ORDER DENYING COMPLAINT

(Issued March 19, 2015)

1. On May 10, 2013, as amended on March 25, 2014, Independent Power Producers of New York, Inc. (IPPNY) filed a complaint (Complaint) against the New York Independent System Operator, Inc. (NYISO), under section 206 of the Federal Power Act (FPA),[1] alleging that the NYISO Market Administration and Control Area Services Tariff (Services Tariff) is unjust and unreasonable. IPPNY argues that by allowing *de minimis* offers from existing capacity resources that would have exited the market but for the determination that those resources are needed to address local reliability issues, NYISO is causing artificial price suppression in the New York Control Area (NYCA) Installed Capacity (ICAP) spot market auctions. IPPNY requests that the Commission direct NYISO to require that such resources be excluded from the capacity market or be offered at levels no lower than the resources' going-forward costs. In its amendment to the Complaint, IPPNY requests that this remedy also be applied to the repowering of units that would be uneconomic, absent out-of-market payments. As discussed below, the Commission denies IPPNY's Complaint. However, based on concerns regarding potential price suppressive impacts of repowering agreements, the Commission directs NYISO to establish a stakeholder process to consider whether mitigation measures are needed to address those concerns. NYISO is further directed to file with the Commission

[1] 16 U.S.C. § 824e (2012).

within 90 days of the date of this order regarding the status of such stakeholder discussions.

I. Complaint

2. IPPNY asserts that certain resources would have exited the market but for out-of-market revenues under reliability-must-run (RMR) contracts and similar mechanisms, including, but not limited to, Reliability Support Services Agreements (RSSAs), like those approved in 2012 and 2013 by the New York State Public Service Commission (New York Commission) for facilities that would otherwise have been mothballed. IPPNY claims that below-cost offers from such resources have already caused, and will continue to cause, severe artificial suppression in the NYCA ICAP spot market auctions.

3. IPPNY states that the core purpose of capacity markets is to maintain system reliability by sending the price signals needed *both* to encourage entry of economic new resources and to discourage the premature exit of economic existing resources. IPPNY further states that the Commission has repeatedly and consistently acted to protect the capacity markets from the pernicious effects of uneconomic entry by requiring new entrants to offer capacity into the market at competitive levels, that is, at levels consistent with the cost of entering the market.[2] IPPNY adds that the Commission has approved measures to prevent uneconomic entry in the New York City Locality, but the Commission declined to extend those measures to the suppression of capacity prices caused by the retention of uneconomic existing resources, finding the latter threat to be "speculative" at that time.[3] IPPNY contends that these concerns are no longer speculative as illustrated by the examples of Dunkirk Power, LLC (Dunkirk) and Cayuga Operating Company, LLC (Cayuga), each of which entered into RSSAs with its associated transmission company under which Dunkirk[4] and

---

[2] Complaint at 2-3.

[3] *Id.* at 4 (citing *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 43 (2010) (May 20, 2010 Order)).

[4] The Dunkirk RSSA was attached to National Grid's December 6, 2013 filing with the Commission in Docket No. ER14-543-000 at Exhibit 10. In that filing, National Grid proposed to revise its tariff's wholesale transmission service charge provisions to provide for the pass through of costs it incurs under Reliability Support Services-type agreements, such as the Dunkirk RSSA. In an order which issues concurrently with this one, that matter is set for hearing and settlement judge proceedings.

Cayuga[5] agreed to operate and maintain specified units in return for an agreed-upon payment from the associated transmission company.

4. According to IPPNY, Cayuga and Dunkirk, after filing notices with the New York Commission to mothball units that were not economic to operate at current and forecasted prices, entered into RSSAs with the local transmission owners to continue operating certain of their units to address identified system conditions. IPPNY states that Cayuga's RSSA expressly requires that its facility's capacity be offered into ICAP spot market auctions at a "*de-minimis* price," and it is reasonable to infer from statements of the New York Commission that RSSAs entered into by Dunkirk on August 27, 2012 (2012 Dunkirk RSSA) and March 4, 2013 (2013 Dunkirk RSSA) may require similar below-cost offers. IPPNY asserts that Cayuga's *de minimis* offers, alone, have already been artificially suppressing prices in the NYCA ICAP spot market auctions and, unless addressed, can be expected to suppress such prices by $7-8/kW-year (all other things being equal).[6] According to IPPNY, this price suppression directly amounts to a loss of more than $77 million per year for rest-of-state capacity suppliers.[7]

5. IPPNY argues that capacity prices will be artificially suppressed if existing uneconomic resources receiving out-of-market revenues offer their capacity below their going-forward costs. IPPNY states that the Commission has observed in prior orders that the exercise of buyer-side market power may reduce capacity costs in the short-run by producing a capacity surplus, but ultimately raises capacity costs in the long-run.[8] IPPNY asserts this long-run capacity price rise occurs because existing generators become unable to recover their costs and exit the market, thus tightening available capacity and raising costs. IPPNY asserts that uneconomic retention of existing capacity causes the same harm as uneconomic new entry because in both cases uneconomic capacity is being used to suppress clearing prices thereby distorting market signals and harming otherwise economic merchant resources that rely upon the NYISO markets for their revenues. IPPNY further asserts that the Commission recognized the harm that can result from the retention of uneconomic existing resources when it rejected California

---

[5] The Cayuga RSSA is *available at*: http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B92703DF1-DDBF-42B9-A859-EEE5309CE029%7D.

[6] Complaint at 4 (citing attached Younger Aff. ¶ 68).

[7] *Id*. at 41 (citing Younger Aff. ¶ 27).

[8] *Id*. at 22 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 20 (2013)).

Independent System Operator Corporation's (CAISO's) proposal to offer financial support to uneconomic resources that are determined to be needed for flexible capacity and local reliability in the next two-to-five year forward period.[9]

6. IPPNY includes Mark D. Younger's affidavit (Younger Affidavit) in support of its Complaint. Mr. Younger states that the market is based on a concept of perfect competition and generators are expected to offer into the energy, ancillary service and capacity markets close to, or below, their respective going-forward cost levels where economic units are expected to have very low going-forward costs because they are either able to be dispatched frequently enough to achieve adequate revenues from the energy markets or they have low costs overall.[10] IPPNY states that, by contrast, suppliers that receive out-of-market cost support no longer need to rely on market revenues to cover all, or part of, their costs and may be required or have an incentive to bid below their going-forward costs, to the detriment of other suppliers. IPPNY contends that the Cayuga RSSA, with its obligation to offer capacity at a *de minimis* price, is one example. IPPNY continues that it is reasonable to infer that the agreed upon capacity bid prices set forth in one or both of the Dunkirk RSSAs is also *de minimis* based on the New York Commission's stated expectation that the associated capacity price will be bid into the capacity price at a *de minimis* price.[11] Moreover, according to IPPNY, even in the absence of an express requirement to submit below-cost offers, RMR-type agreements may provide incentives for the generator to submit such offers.

7. IPPNY states that Mr. Younger demonstrates that incentives or requirements for below-cost offers, like that in the Cayuga RSSA, have significant, detrimental impacts on the NYCA ICAP markets. In particular, according to Mr. Younger, the Cayuga filing before the Commission under FPA section 205, as well as information set forth in the New York Commission's Cayuga Order, indicated that "the Cayuga [F]acility has [going-forward costs] of between slightly more than $70/kW-year and slightly more than

---

[9] *Id*. (citing *California Indep. Sys. Operator Corp*., 142 FERC ¶ 61,248, at P 1 (2013) (*CAISO*)).

[10] *Id*. at 23, Younger Aff. ¶ 46. Mr. Younger states that using going-forward costs as the proxy for a competitive bid is economically sound because they are assumed to be the correct level for a capacity offer to determine whether a facility is economic and should sell its capacity into the spot market auctions. Younger Aff. ¶ 52.

[11] *Id*. at 24 (citing Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Case No. 12-E-0136 (New York Public Service Commission Aug. 16, 2012) at 24).

$134/kW-year."[12] Mr. Younger asserts that, accordingly, because of the recent low levels of the NYCA capacity clearing prices, if Cayuga had submitted capacity offers that were based on its going-forward costs, such offers would have been well above the competitively determined market clearing price based upon the rest of the capacity currently in the market (i.e., according to Mr. Younger, the Cayuga [F]acility properly would not clear the market because it is not economic).[13]

8. Mr. Younger states that, similarly, to the extent that the 2013 Dunkirk RSSA is approved for cost recovery by the New York Commission, National Grid will pay Dunkirk $72.32 million to continue to operate Unit 1 of the Dunkirk Facility, which "[o]n a capacity basis . . . is equivalent to $450/kW-year, well above the [clearing price] for capacity as reflected through the NYCA capacity spot market clearing price.[14] IPPNY adds that the 2012 Dunkirk RSSA, and, if approved, the 2013 Dunkirk RSSA, may further exacerbate this artificial suppression of clearing prices in the NYCA auctions.

9. IPPNY further asserts that, as the New York State Electric & Gas Corporation (NYSEG) has confirmed, Cayuga has been providing service pursuant to the terms of the Cayuga RSSA since January 16, 2013, thus the *de minimis* offer requirement in that agreement has resulted in an artificial suppression of prices beginning with the February 2013 NYCA spot market auction. Further, according to IPPNY consultant Mr. Younger, by requiring Cayuga to sell its capacity at a *de minimis* price, the Cayuga RSSA will result in an artificial suppression of the NYCA spot market clearing price by between $7/kW-year and $8/kW-year, all else being held equal.[15] Mr. Younger translates his per kW estimate into an annual estimate of price suppression of more than $77 million per year for rest-of-state capacity suppliers, assuming that roughly 50 percent of the capacity is sold either in the NYCA spot market auctions or under contracts.[16]

10. Mr. Younger asserts that the NYISO capacity market has returned very little revenue for the last few years, and in 2011 there were more than 5,700 MW of units in the NYCA rest-of-state region that operated very infrequently, meaning that such units

[12] *Id.* at 25 and Younger Aff. ¶ 33.

[13] *Id*. at Younger Aff. ¶ 66.

[14] *Id.* at Younger Aff. ¶ 35.

[15] *Id.* at Younger Aff. ¶ 68.

[16] *Id*. at Younger Aff. ¶ 27.

likely received very little net revenues from the energy markets.[17] IPPNY argues that the Cayuga and Dunkirk mothball notices demonstrate that both the Cayuga and Dunkirk facilities were losing money and would have exited the market had they not been found to be needed to address an identified system condition and their owners provided with out-of-market payments under the RSSAs. IPPNY states that the need to address an identified system condition does not alter the fact that the facilities are uneconomic and should not be permitted to offer into the ICAP spot market auctions as if they were economic. Indeed, according to IPPNY, the retention of these uneconomic units, combined with the *de minimis* bidding requirements in at least one of the existing RSSAs, will mean that the market will not equilibrate and remaining suppliers, as well as potential new suppliers, will not see accurate price signals. As a consequence, IPPNY argues, other generators that would otherwise be economic but for the artificial price suppression could be forced to issue retirement notices prematurely and/or forego maintenance on their units, while demand response providers may choose to forego ongoing participation in the markets.[18]

11. IPPNY states that the Commission has long recognized that RMR-type agreements should be used only as a "last resort," because they "suppress market-clearing prices and deter investment in new generation"[19] and, even as a last resort, RMR agreements must be narrowly tailored and limited in scope and duration in order to minimize the harm to the market. IPPNY states that in other independent system operators (ISO) or regional transmission organizations (RTO) with capacity markets, RMR-type agreements and rate schedules have been developed, either as form agreements or on a case-specific basis, with the involvement of the ISO/RTO, and, accordingly, have been carefully crafted to minimize the disruption of the organized markets.[20] IPPNY contends that the Cayuga RSSA, however, does nothing to minimize its detrimental effect on the organized capacity market.

12. IPPNY argues that artificial price suppression will undercut investor confidence in the market and will deter needed investment in existing units. It further argues that

[17] *Id.* at Younger Aff. ¶ 75.

[18] *Id*. at 28, Younger Aff. ¶ 77.

[19] *Id*. at 28-29 (citing *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 41 (2007)).

[20] IPPNY states that PJM Interconnection, LLC (PJM), for example, takes an active role in the development of RMR arrangements and they typically provide that the capacity of the RMR units will not be offered into the organized capacity market.

parties whose short term interests are served by suppressing prices may favor reliance on RMR-type agreements when there are other more efficient solutions, such as generation, transmission or distribution system upgrades.[21] IPPNY contends that this short-sighted perspective is not sustainable.

13. Anticipating an argument that the units at issue are required to operate to meet a local reliability need and should also be counted as participating in the NYCA capacity market as a corollary function to their core function of meeting the identified local need, IPPNY states that such an approach will hinder the ongoing development of competitive markets. Further, according to Mr. Younger, while there are rules in place to limit the impact on the energy markets of running generation out-of-merit to address identified system conditions, including Bid Production Cost Guarantees,[22] no such safeguards exist for the capacity market in New York. Mr. Younger argues that treating these RMR units as if they were in merit for capacity market purposes notwithstanding their documented uneconomic nature will fragment the NYCA capacity market into "balkanized segments" which would not be modeled in any of NYISO's resource adequacy analyses.[23] According to Mr. Younger, this, in turn, would mean that other market participants would not be given the ability to compete to satisfy the identified reliability need, or, for those that are outside the defined reliability area, to adequately assess whether the market is likely to offer them adequate revenues over time.[24]

14. IPPNY requests that the Commission either (1) exclude from the capacity market existing resources that would have exited the market but for out-of-market payments under RMR-type agreements, or (2) require such resources to offer their capacity into the markets at offers no lower than their going-forward costs. IPPNY proposes the following tariff language:

> "Uneconomic Existing Resource" means any existing Generator that cannot cover its costs from actual and projected revenues received from the ISO Administered Markets and that would have been mothballed or retired or

---

[21] Complaint at 30, Younger Aff. ¶¶ 79-84.

[22] When out-of-merit calls are made, the remainder of the units operating in the energy market are given a Bid Production Cost Guarantee to ensure that the operation of an out-of-merit unit will not result in any of the other units running at a loss. Younger Aff. at 89.

[23] Complaint at 31, Younger Aff. ¶ 93.

[24] *Id.*

> that otherwise would have ceased supplying Installed Capacity and Energy for a period of one month or more but for revenues or other payments received outside the ISO Administered Markets under reliability must-run contracts and similar mechanisms, including, but not limited to, reliability support services agreements, to recover its costs. An existing Generator shall be considered an Uneconomic Existing Resource from and after the date on which it has entered into such a contract or mechanism or otherwise would have been mothballed or retired or would have ceased supplying Installed Capacity and Energy but for such revenues or other payments.

15. IPPNY also proposes to use the definition of "Going-Forward Costs" currently in the Services Tariff with certain revisions to extend the applicability of the definition beyond the New York City (NYC) locality (Zone J) and to indicate that the offset for energy and ancillary services revenues must be limited to those revenues that are derived from the markets, i.e., only non-contract revenue.[25] IPPNY states that its proposal would require that an uneconomic existing resource's capacity only be offered in the ICAP spot market auctions and would preclude the use of such capacity to satisfy any Load Serving Entity's unforced capacity obligation unless it is obtained through an ICAP spot market auction.[26] IPPNY adds that these restrictions are substantively identical to those applied to offers by new entrants' mitigation under the in-City buyer-side market power rules.

16. IPPNY asserts that the Commission should also require that NYISO ensure that such resources are only called on to operate to the extent needed to address the reliability concern underlying the RMR designation. Moreover, according to IPPNY, NYISO should also be required to take steps to ensure that the RMR-type mechanisms remain in place for limited time periods and only until longer-term generation or transmission solutions are put in place.

17. IPPNY requests that the Commission make the requested relief effective immediately upon issuance of a Commission order granting this Complaint, with the exception of the relevant tariff revisions, which IPPNY states should be included in a compliance filing due 20 days from the issuance of the order. IPPNY recognizes that some parties may object that the issues raised in the Complaint should be vetted through

---

[25] IPPNY explains that currently the Going-Forward Costs definition is only used to calculate offer caps for pivotal suppliers, and the definition presumes the unit is still participating in the market. According to IPPNY, in the case of a resource receiving revenues under RMR-type agreements, subtracting those revenues from Going-Forward Costs would mask the uneconomic nature of the facility.

[26] Proposed new section 23.4.5.9.

the stakeholder process before being put into effect. However, IPPNY argues that stakeholders have an opportunity to voice concerns in the instant proceeding, and moreover, stakeholders have spent many months discussing the proper compensation for uneconomic resources that are determined to be required for reliability, but recent developments with the implementation of the RSSAs have outpaced stakeholder discussions. IPPNY asserts that the exercise of market power and the resulting unjust and unreasonable capacity prices should not be allowed in the name of the stakeholder process.

18. On March 25, 2014, IPPNY submitted an amendment to the Complaint (Amendment), to address an executed term sheet between National Grid and Dunkirk (Dunkirk Repowering Term Sheet)[27] that, according to IPPNY, contemplates over $215 million in out-of-market payments over a 10-year period to Dunkirk for repowering its otherwise uneconomic coal-fired Units 2, 3, and 4 of the Dunkirk Generating Station. IPPNY's Amendment includes the Dunkirk Repowering Term Sheet, revisions to its originally-proposed tariff revisions to cover this type of agreement, and a second supplemental affidavit of Mr. Younger addressing the effects of the proposed agreement on the NYCA ICAP markets.

19. IPPNY asserts that the agreement between Dunkirk and National Grid will result in retention of a much larger amount of uneconomic existing generation (435 MW) and for a much longer time than did the Cayuga RSSA. Thus, IPPNY asserts that the price suppression that Mr. Younger associated with the first Cayuga RSSA will be worsened. IPPNY states that, according to National Grid, PA Consulting projected that over the 10-year term, the Dunkirk-National Grid agreement will suppress NYCA capacity prices by $841 million.[28]

20. IPPNY asserts that the identified localized reliability need is for, at most, approximately 150 MW and that this need can be addressed at a far lower cost through transmission upgrades.[29] IPPNY also states that there can be no dispute that Dunkirk Units 2, 3 and 4 are uneconomic because Dunkirk had sought to mothball all three of the

[27] On June 27, 2014, IPPNY also filed a motion to lodge the June 14, 2014 order of the New York Public Service Commission (NYPSC) approving the Dunkirk Repowering Term Sheet. *Order Addressing Repowering Issues and Cost Allocation and Recovery*, Case 12-E-0577 (State of New York Public Service Commission June 13, 2014).

[28] March 25, 2014 Amendment at 11.

[29] *Id*. at 2, 14.

units and in fact mothballed two of them. IPPNY asserts that the Commission should either exclude that capacity from the capacity markets or incorporate IPPNY's proposed language into the Services Tariff. IPPNY states that its amended proposal incorporates certain clarifying changes to ensure that these revisions address not only uneconomic retention through RMR-type arrangements, but also uneconomic existing capacity that is being brought back into, and kept in, service as a result of out-of-market payments, like Dunkirk Units 2, 3, and 4.

21. IPPNY challenges NYISO's and Dr. Patton's[30] assertion that the RSSA units are not "uneconomic," but rather, "merely revenue inadequate." as merely splitting hairs. IPPNY contends that there is no basis for NYISO's suggestion that units needed for reliability should be exempt from buyer-side mitigation, because, under Dr. Patton's two-pronged test, a unit must be "right-sized" to meet the reliability need, and retention of the unit must be the most cost effective way to meet the identified system condition.[31] IPPNY asserts that Dunkirk fails this test and, thus, warrants mitigation. According to IPPNY, proceedings before the New York Commission in 2013 established a reliability need for only 150 MW of capacity, but the Dunkirk Repowering Term Sheet results in retention of 435 MW of installed capacity. Further, IPPNY adds, repowering Dunkirk Units 2, 3 and 4 is "two to four times as expensive as the transmission upgrades that would be required to solve the reliability need."[32] In addition, IPPNY asserts, the duration of the Dunkirk solution is similarly out of proportion to any identified reliability need. IPPNY asserts that, contrary to National Grid's claim that the transaction contemplated by the Term Sheet will "mitigate potential reliability risk that may arise between 2015 and 2017,"[33] no additional reliability risks have been identified for this time period that cannot be addressed through operating protocols.[34]

II. <u>Notice of Complaint and Amendment and Responsive Pleadings</u>

22. Notice of the May 10, 2013 Complaint was published in the *Federal Register*, 78 Fed. Reg. 29,364 (2013), with interventions and protests due on or before May 30,

---

[30] *See infra* P 32.

[31] *Id*. at 14.

[32] *Id*., Second Supplemental Younger Aff. ¶ 26.

[33] March 25, 2014 Amendment at 14 (citing Attachment A, National Grid's NYPSC Filing at 8).

[34] *Id*.at 14 (citing Second Supplemental Younger Aff. ¶ 31).

2013. Notice of IPPNY's March 25, 2014 Amendment was published in the *Federal Register,* 79 Fed. Reg. 18,901, with interventions and protests due on or before April 14, 2014.

23. H.Q. Energy Services Inc.; New York Association of Public Power; Calpine Corporation; NRG Companies; Brookfield Energy Marketing LP; PSEG Energy Resources & Trade LLC and PSEG Power New York LLC; Exelon Corporation; American Public Power Association; Dynegy Marketing and Trade, LLC and Sithe/Independence Power Partners, LP; National Resources Defense Council; the New York Transmission Owners;[35] Cayuga and Multiple Intervenors[36] each filed timely motions to intervene.

24. The Sierra Club filed a timely motion to intervene and protest. National Grid USA Service Company, Inc. (National Grid) filed a timely motion to dismiss and protest.[37] The Indicated New York Transmission Owners (Indicated NYTOs)[38] filed a protest. The New York Commission filed a notice of intervention and protest.

25. Entergy Nuclear Power Marketing, LLC (Entergy) filed a timely motion to intervene and comments in support of the relief requested in the Complaint. The Electric Power Supply Association (EPSA), and TC Ravenswood, LLC (Ravenswood) each filed a timely motion to intervene and comments in support of the Complaint. On May 30, 2013, NYISO filed an answer to the Complaint.

26. On June 14, 2013, IPPNY filed an answer to the answer of NYISO and other protestors. Also on June 14, 2013, Ravenswood filed an answer to NYISO and other

---

[35] For purposes of this intervention, the New York Transmission Owners consists of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[36] Multiple Intervenors states that it is an unincorporated association of approximately 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State.

[37] National Grid timely filed a motion to intervene as part of the New York Transmission Owners' filing.

[38] The Indicated NYTOs consists of all the entities listed in note 34 above with the exception of Niagara Mohawk Power Corporation.

protestors and NYISO filed an answer to Ravenswood's prior comments. On June 28, 2013, NYISO filed an answer to Ravenswood's June 14, 2013 answer. On November 12, 2013, IPPNY filed a motion to lodge the RSSA 2 between NYSEG and Cayuga.

27. Entergy and EPSA filed comments in support of the March 25, 2014 Amendment and the revised requested relief. On April 14, 2014, NYISO and the New York Commission filed answers to IPPNY's motion to amend and IPPNY's March 25, 2014 Amendment. On April 29, 2014, IPPNY filed an answer to the April 14, 2014 pleadings of NYISO and the New York Commission.

28. On June 27, 2014, IPPNY filed a motion to lodge the June 13, 2014 order of the New York Commission approving a term sheet between National Grid and Dunkirk, which, IPPNY states, provides out-of-market payments to Dunkirk for repowering the uneconomic Units 2, 3 and 4 at the Dunkirk Generating Station.

29. On July 14, 2014, the New York Commission filed an answer to IPPNY's June 27, 2014 motion to lodge the New York Commission's June 13, 2014 order approving a term sheet between National Grid and Dunkirk. The New York Commission opposes the motion stating that: (1) it inappropriately attempts to circumvent the NYISO stakeholder process; (2) the asserted harm in the Dunkirk repowering proposal is speculative and thus, the Complaint is not ripe for Commission review; (3) the motion focuses on issues that are not sufficiently related to the Complaint and do not arise out of the same transaction.

30. On July 25, 2014, IPPNY filed a motion to lodge a petition (Ginna Petition) filed with the New York Commission requesting that it initiate a proceeding to examine a proposal for the continued operation of the 581 MW R.E. Ginna Nuclear Power Plant. IPPNY asserts that the Ginna Petition provides further evidence that the uneconomic "non-exit" problem still exists and is, in fact, getting worse.

A. NYISO's Answer to the Complaint

31. NYISO responds that it and its Market Monitoring Unit (MMU), represented by Dr. David Patton (Dr. Patton), agree that "uneconomic retention" is not causing artificial price suppression in the NYISO capacity markets. NYISO asserts that, to its knowledge, the Commission has never approved a proposal to extend the reasoning underlying its uneconomic entry precedent to encompass "uneconomic retention" of existing resources and IPPNY does not point to any such rulings. NYISO states that the May 20, 2010 Order rejected a request for rehearing that called for existing resources to be subject to buyer-side mitigation and stated that "Ravenswood's concerns should be addressed in the annual report prepared by the independent market monitor to the extent the monitor finds

evidence to support their concerns."[39] However, according to NYISO, the MMU has never found evidence that would justify adopting rules to mitigate the "uneconomic retention" of existing resources either before or after the issuance of the May 20, 2010 Order. NYISO states that, as noted in the affidavit of Dr. Patton (Patton Affidavit) attached to its Answer, the MMU has been aware of the existing RSSAs and has consistently advised NYISO that the Cayuga bidding requirement, and any other comparable requirement that may exist in the Dunkirk RSSAs, are efficient given the identified need not addressed by the market.[40] NYISO states that it was not a party to, and was not involved in the development of, either the Cayuga or the Dunkirk RSSAs; nevertheless, it has monitored the New York Commission's proceedings and consistently agreed with the MMU's conclusions and recommendations regarding the existing RSSAs.

32. The Patton Affidavit asserts that the Complaint is based on the false assertion that the Cayuga and Dunkirk units are uneconomic and, therefore, will distort the capacity market if allowed to clear. Dr. Patton states that, although ideally the market requirements would be fully consistent with the reliability requirements of the system, it is well-recognized that none of the ISO/RTO-administered electricity markets fully reflect all of the reliability requirements, and therefore, do not set prices that reflect the full reliability needs of the system.[41] He states that when reliability needs are not captured in the market requirements, the market will not set prices that reflect the marginal costs of satisfying the need. Hence, according to Dr. Patton, resources that contribute to satisfying the need will not receive revenues that reflect the full value of these reliability services, and this can cause the unit to appear to be "uneconomic" when, in fact, it is simply "revenue inadequate" because the market requirements do not include this reliability need.[42]

33. In the case of Cayuga and Dunkirk, Dr. Patton asserts that although the units are revenue inadequate without the RSSAs, that fact does not support IPPNY's assertion that they are uneconomic. Dr. Patton further asserts that if the planning need being

---

[39] NYISO May 30, 2013 Answer at 7 (citing *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170 at P 43).

[40] NYISO May 30, 2013 Answer at 8 (citing Patton Aff. ¶¶ 9, 39).

[41] Dr. Patton maintains that the relatively narrow local reliability needs associated with maintaining the security of the transmission system are particularly difficult to fully incorporate in the ISO/RTO market framework. Patton Aff. ¶ 19.

[42] Patton Aff. ¶ 20.

satisfied by the Cayuga and Dunkirk were fully specified in the capacity market, these units would both clear the market at prices sufficient to keep them in operation if they were the lowest-cost means to satisfy the need. He asserts that the fact that the markets do not reflect this local reliability need makes the units no less economic, and makes it no more justifiable to mitigate Cayuga or Dunkirk.

34. NYISO argues that it is efficient and reasonable for the Cayuga and Dunkirk units that are covered by existing RSSAs to clear in the capacity market because the units are economic from the perspective of satisfying NYISO's reliability requirement, and, as explained above, if the reliability needs satisfied by these units were reflected in the capacity market, the units would both clear.[43]

35. NYISO asserts that IPPNY's proposal to require the Cayuga and Dunkirk units to offer capacity at the level of the going-forward costs without reference to RSSA revenues is flawed and would require units covered by existing RSSAs to offer their capacity at inflated prices. NYISO further asserts that IPPNY's arguments regarding the proposed price suppressive impacts of the existing RSSAs are irrelevant because they are predicated on invalid economic assumptions. NYISO states that, because Dr. Patton has demonstrated that the existing RSSAs are not harming the markets, there is no "impact" issue to discuss.

36. NYISO states that the Commission need not address IPPNY's concerns regarding possible future RSSAs, New York State's Energy Highway Initiative,[44] or other actions that New York State might pursue in the future. These concerns, according to NYISO, are a product of IPPNY's flawed assumption that RSSAs with *de minimis* bidding requirements will necessarily result in artificial price suppression. The Patton Affidavit refutes that assumption as well as suggestions that RSSAs will cause capacity markets to "unravel." NYISO maintains that future RSSAs will only cause artificial price suppression if they do not address a legitimate reliability need or if the need that they address is already fully captured by capacity market requirements so that prices will account for the need. NYISO states that, if it were to identify a future RSSA that appeared to violate one of Dr. Patton's criteria, it would investigate and take any necessary action under its existing tariff authority. NYISO also maintains that IPPNY's brief references to various pending or potential New York State initiatives are limited and

[43] NYISO May 30, 2013 Answer at 14.

[44] The "Energy Highway Initiative" refers to the New York Energy Highway Blueprint, which outlines recommended actions to improve New York State's energy infrastructure, including building additional generation and transmission capacity in the rest-of-state region. *Available at*: http://www.nyenergyhighway.com/Blueprint.html.

conclusory, and do not satisfy its burden of proof under the FPA. NYISO states that the Commission should direct IPPNY to raise its concerns about these initiatives in the stakeholder process in the first instance.

37. NYISO asserts that because the existing RSSAs do not result in uneconomic retention, buyer-side market power, or artificial price suppression in Commission-jurisdictional markets, there is no need for tariff revisions or other Commission action. Further, according to NYISO, the Commission should discourage IPPNY from attempting to circumvent the NYISO stakeholder process. NYISO states that, even if the Complaint had merit, IPPNY's decision to file a complaint without making an effort to first raise its concerns through the NYISO stakeholder process would violate Commission policy and precedent and would be contrary to the ISO agreement establishing the authority and governance of NYISO that IPPNY's members have executed. According to NYISO, IPPNY effectively acknowledges that the Complaint represents an "end-run" around the stakeholder process, but IPPNY attempts to justify this based on its supposed need for expedited Commission action. NYISO states that this claim is baseless in that IPPNY has been aware of the issues in this proceeding since last year and made multiple filings with the Commission in late 2012 and early 2013 concerning them.

B. Protests

38. National Grid moves to dismiss the Complaint without prejudice pending completion of the NYISO stakeholder process. National Grid also protests the Complaint. It argues that given the complexity of the issues raised by IPPNY, the number of interested parties, and the far-reaching consequences for New York electricity markets, reliability planning, and system operations, the proper forum, at least at this stage, is the NYISO stakeholder process, rather than an administrative litigation proceeding designed to narrowly address one aspect of a much broader issue. National Grid further states that IPPNY does not adequately address the complexities of the outcome proposed in its Complaint. For example, according to National Grid, IPPNY's arguments and proposed solutions do not sufficiently take into account the distinction between out-of-market payments made to an existing uneconomic unit needed to address short-term system reliability and a long-term out-of-market payment to an uneconomic unit intended to influence market prices in order to produce broader societal benefits. National Grid states that its agreements with Dunkirk are limited in duration to the period pending the completion of permanent transmission upgrades that National Grid is currently in the process of implementing. In addition, National Grid claims that with respect to estimates provided by IPPNY witness Younger, IPPNY provides no analysis or other support for this assertion, and absent such corroboration, the Commission should give it no weight.

39. National Grid states that, should the Commission agree to address the merits of IPPNY's Complaint at this time, it should deny the Complaint on the grounds that IPPNY

has failed to demonstrate that *de minimis* or similar capacity bidding provisions contained in short-term contracts providing for the continued operation of existing generators for reliability purposes have had, or will have, a detrimental impact on NYISO's ICAP markets.

40. The Indicated NYTOs also argue that IPPNY is improperly attempting to circumvent the stakeholder process. They argue that IPPNY concedes that the Commission has already denied a similar claim for relief in the context of the NYC ICAP market[45] and yet fails to provide supporting evidence despite the clear directive in the May 20, 2010 Order that evidence to support price suppression concerns would be necessary. The Indicated NYTOs attach to their filing an affidavit of Michael D. Cadwalader (Cadwalader Affidavit) that states both Cayuga and Dunkirk are bidding properly because they are needed for reliability and there is no evidence that the reliability contracts have not been limited in scope and duration to this reliability need.[46] The Indicated NYTOs argue that an efficient outcome results when a generator is selected to provide ICAP only if its going-forward costs are less than or equal to the price of ICAP. They contend that, in cases where a generator can be mothballed, its going-forward costs may include the costs it can avoid by mothballing (less net energy and ancillary services revenue that it would forego as a consequence of being mothballed). However, if the generator is needed for reliability, going-forward costs would only include costs that it can avoid if it does not provide ICAP, while remaining in service. According to Indicated NYTOs, since the Cayuga and Dunkirk facilities cannot be mothballed at this time due to reliability concerns, the costs they would avoid by doing so are irrelevant to determining how their capacity would be offered in a competitive market.[47]

41. Moreover, according to Indicated NYTOs, the Dunkirk and Cayuga bids are consistent with NYISO's practices in other parts of the market, which recognize that market operation rules should reflect practical realities in order to provide proper incentives to market participants. Indicated NYTOs and Mr. Cadwalader point to the example of out-of-merit generation needed in response to local reliability concerns. They state that the price calculations take out-of-merit output as given instead of trying to calculate the energy prices that would have existed as if there were no out-of-merit generation.

[45] Indicated NYTOs May 30, 2013 Protest at 6 (citing Complaint at 4 and n.8).

[46] *Id*. at 7 (citing Cadwalader Aff. ¶¶ 14-21).

[47] *Id*. at 8-9 (citing Cadwalader Aff. ¶¶ 8, 20, 22).

42. Indicated NYTOs argue that IPPNY has not demonstrated that market conditions justify what it concedes to be a novel plan to impose an offer floor for bids from existing generators in the rest-of-state market where the Commission has never before found the need for this type of price mitigation. Indicated NYTOs argue that IPPNY's Complaint ignores the reality that price suppression would be extremely difficult to achieve as a practical matter, and it has presented no evidence to the contrary. Further, according to Indicated NYTOs, IPPNY provides no evidence that generators kept in service for reliability reasons are not actually needed for reliability.

43. The New York Commission asserts that the Commission should reject the Complaint and not impose ICAP market mitigation measures upon generators that have been identified as needed for reliability purposes. The New York Commission states that the participation of generators such as Cayuga and Dunkirk is entirely consistent with the primary purposes of the ICAP market to incent the retention of generation needed for reliability. It argues that IPPNY fails to recognize that Dunkirk and Cayuga were identified as the only options, and therefore the most economic options, available to meet the identified reliability need in the short term.[48] The New York Commission states that, with respect to the longer term, it has required local transmission owners to engage in a competitive process, including the use of "request for proposals" to seek alternative generation, transmission, and demand response solutions to help determine the most economically efficient solutions.[49] The New York Commission also objects to IPPNY's suggestion that Dunkirk and Cayuga should be required to bid no lower than their going-forward costs and IPPNY's assertion that, in calculating those costs, the offset for energy and ancillary services must be limited to revenues "derived from the markets." The New York Commission argues that, given that Dunkirk and Cayuga are already committed by the RSSAs to be available, the going-forward costs associated with taking the additional step of participating in the statewide ICAP market are negligible.

44. The New York Commission also asserts that IPPNY's proposal would have the unjust and unreasonable effect of artificially increasing rest-of-state ICAP prices, while doing nothing to address the underlying local reliability needs. The result, according to the New York Commission, would be to create an artificial scarcity in the statewide capacity market, thereby sending an improperly high price signal. In addition, the New York Commission asserts that IPPNY's Complaint and proposed solution ignore the fact that the exit of existing generators has already begun to tighten the upstate capacity market, with predictable impacts on NYCA capacity prices.

[48] NYPSC May 30, 2013 Protest at 6.

[49] *Id.*

45. The Sierra Club urges the Commission to deny the Complaint in regard to the RSSAs for Dunkirk and Cayuga and to continue a separate proceeding to consider IPPNY's buyer-side power concerns. The Sierra Club states that if the Commission grants the complaint with respect to the Cayuga and Dunkirk facilities and they fail to clear in the ICAP market, capacity prices will be higher than they would have been if the facilities provided *de minimis* bids and cleared. At the same time, according to the Sierra Club, ratepayers will be saddled with the costs of the RSSAs to keep the Cayuga and Dunkirk capacity in place, effectively paying twice for the units' capacity. The Sierra Club contends that out-of-market contracts for uneconomic new or repowered coal or natural gas generation masquerading as a solution for legitimate reliability needs present an entirely different situation from the current Dunkirk and Cayuga RSSAs. It states that, while it would prefer that the RSSAs were not necessary, it supports the *de minimis* bidding requirement for the duration necessary to resolve legitimate reliability issues in a cost-effective and prompt manner.

C. **Comments in Support of the Complaint**

46. Entergy, Ravenswood, and EPSA support the Complaint. EPSA comments that RMR arrangements in PJM provide that the RMR unit will not bid into the capacity market. EPSA urges the Commission to exclude generation owners with RMR-type agreements from the capacity market altogether and states that the Commission has long sought to minimize the use of RMR-type mechanisms. EPSA adds that in developing the capacity market in ISO New England, a specific objective included obviating the need for RMR agreements and the Commission noted that extensive use of them undermines effective market performance.[50] Therefore, EPSA argues, if the Commission decides that capacity offers from such resources must be at levels no lower than the units' going-forward costs, such resources should only be dispatched on a limited basis to address the underlying reliability concern and the duration of the RMR contract should be as limited as possible to minimize impacts to the market.

47. Ravenswood supports IPPNY's request for relief and argues that exclusion of the subsidized uneconomic resources would be the more appropriate action. Ravenswood submits the affidavit of Roy J. Shanker (Shanker Affidavit) in support of its filing. Ravenswood argues that evidence of artificial price suppression and/or market manipulation requires timely implementation of buyer-side mitigation measures for uneconomic existing resources. Ravenswood asserts that the Complaint provides evidence that, at a minimum, one existing uneconomic generating facility (Cayuga) that would have otherwise exited the market not only remains in the market but is submitting

[50] EPSA May 30, 2013 Filing (citing *Devon Power LLC*, 103 FERC ¶ 61,082, at P 31 (2003) (*Devon Power*)).

below-cost offers into the market. Ravenswood contends that Cayuga and, likely, Dunkirk, is being subsidized by the RSSA and as a *quid pro quo,* agreed to offer its capacity into the market at a *de minimis* price. According to Ravenswood, this has the effect of artificially suppressing prices. Ravenswood states that it does not oppose the conclusions that the two generating facilities are required for reliability purposes, but rather opposes only the RSSA terms that require them to offer their capacity in the wholesale capacity market at levels far below that which would be expected in a competitive market. Ravenswood further notes that it, as well as IPPNY, has been trying for years to expand buyer-side mitigation provisions in NYISO without success. Ravenswood asserts that NYISO and its "controlling block" of stakeholders have refuted its efforts to reform mitigation in the capacity market to ensure that adequate revenue is provided to capacity suppliers in the first instance.[51]

48. Ravenswood contends that the actions giving rise to the Complaint fully satisfy each element of the Anti-Manipulation Rule.[52] Ravenswood states that the Commission has recognized that market manipulation may occur where an entity possesses the incentive and the ability to depress market clearing capacity prices below the competitive level[53] and the Commission has determined that trading activity conducted with the intent to depress prices, causing artificial prices in the market, and benefiting from such artificially depressed prices violates the Anti-Manipulation Rule.[54] Ravenswood contends that, like *Brian Hunter* and *Energy Transfer Partners*, a contract that includes a *quid pro quo* that capacity be offered at a *de minimis* price into the wholesale capacity market, instead of being excluded or offered at its actual costs, in return for uneconomic subsidized payments, directly works to impair, obstruct, or defeat the NYCA capacity market by artificially suppressing capacity prices and is a direct violation of the Anti-Manipulation Rule. Ravenswood requests that the Commission not only direct NYISO to incorporate market-wide buyer-side mitigation measures applicable to the retention of uneconomic existing resources, but also issue a ruling that rejects as unlawful any

[51] Ravenswood May 30, 2013 Comments at 17-18.

[52] 18 C.F.R. § 1c.2 (2008); *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at PP 49, 52-53, *reh'g denied*, 114 FERC ¶ 61,300 (2006) (Anti-Manipulation Rule).

[53] Ravenswood May 30, 2013 Comments at 11 (citing *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085, at P 51 (2007)).

[54] Ravenswood May 30, 2013 Comments at 11 (citing *Brian Hunter*, 135 FERC ¶ 61,054, at P 62 (2011) (*Brian Hunter*); *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086, at P 4 (2007) (*Energy Transfer Partners*)).

contractual terms that purport to require a supplier to offer its capacity into NYISO wholesale markets below cost. Ravenswood argues that such an order is required by the FPA and by the Anti-Manipulation Rule.

D. Answers

49. In its June 14, 2013 answer, Ravenswood asserts that the following four points are critical to resolving issues raised in the Complaint: (1) NYISO markets fail to express certain reliability constraints, requiring out-of-market subsidies through mechanisms such as RSSAs to compensate otherwise uneconomic suppliers that are utilized to resolve reliability problems that result from such constraints; (2) NYISO fails to recognize that the conditions that result in the need for agreements such as RSSAs are actually local transmission reliability deficiencies,[55] not a capacity reliability problem, and thus NYISO fails to accurately assign cost responsibility for the transmission deficiencies; (3) despite RSSAs addressing a local reliability issue, the suppliers that are paid under such agreements offer their capacity into the market at a *de minimis* price, which suppresses capacity prices for all other suppliers and; (4) these distorted market prices fail to incentivize long-term solutions for the reliability deficiencies that necessitated the RSSA. Ravenswood asserts that NYISO and its Patton Affidavit recognize and identify flaws in its market design that are exemplified and exacerbated by the contracts of the Cayuga and Dunkirk RSSAs. Ravenswood recommends, per the testimony of Dr. Roy Shanker, that the costs of retaining suppliers in the interest of local transmission reliability should be treated as a transmission expense and assigned to the local customers who are experiencing the reliability constraint. Ravenswood adds that NYISO's market outcomes should reflect that these facilities are temporary transmission substitutes and not capacity resources. Ravenswood states that these facilities should also not be allowed to offer their capacity into the capacity market at essentially a zero price given that the facilities cannot economically compete in that market based upon their actual costs.[56]

50. In its June 14, 2013 answer, NYISO states that Ravenswood's assertions that NYISO is failing to act on conduct that constitutes market manipulation is false.[57] NYISO asserts that there is no basis for Ravenswood to invoke FPA section 222, the

---

[55] Ravenswood asserts that NYISO's 2012 Comprehensive Reliability Plan identifies contingency outages and other thermal and voltage violations on non-bulk and bulk transmission facilities that would result if Dunkirk and/or Cayuga were to retire. Ravenswood June 14, 2013 Answer at 6.

[56] Ravenswood June 14, 2013 Answer at 10.

[57] NYISO June 14, 2013 Answer at 2.

Anti-Manipulation Rule established by Order No. 670, or any other Commission manipulation precedent in this proceeding. NYISO notes that its MMU has consistently advised that there is nothing anti-competitive about the bidding requirements in either the Cayuga or Dunkirk RSSAs.[58] Further, NYISO states there is no merit to Ravenswood's assertions that NYISO's position in this proceeding was dictated by an alleged "controlling block" of stakeholders or to Ravenswood's arguments regarding fast-track processing.[59]

51. In its June 14, 2013 answer, IPPNY states that both NYISO's answer and protests to IPPNY's Complaint rely on two unsupported contentions: (1) that there is a difference between a resource being "uneconomic" and being "revenue inadequate" that justifies permitting the resource to suppress capacity prices; and (2) that unjust and unreasonable rates become lawful under the FPA because stakeholders have yet to recognize them as unjust and unreasonable.[60] IPPNY contends that NYISO and the MMU attempt to characterize the units owned by Cayuga and Dunkirk as "revenue inadequate" instead of "uneconomic." However, according to IPPNY, claims that units needed for reliability must be considered economic, or that their being uneconomic should simply be ignored, boil down to little more than an assertion that units needed for reliability should be exempt from measures intended to prevent the artificial suppression of ICAP prices.

52. IPPNY contends that the Cayuga and Dunkirk units are indeed "uneconomic" under any relevant definition of that term, under Commission precedent, and according to the notices of intent to mothball units made by Cayuga and Dunkirk.[61] IPPNY asserts that the Commission has determined that reliance by ISO New England on out-of – market RMR agreements was unjust and unreasonable, and required ISO-New England to implement measures to "incorporate the effect of those agreements into a market-type mechanism."[62] IPPNY also asserts that the Commission rejected the proposal of the CAISO to provide out-of market payments to units required for reliability, reminding CAISO of the need to employ market-based tools to provide transparent and effective

---

[58] *Id*. at 3.

[59] *Id*. at 4.

[60] IPPNY June 14, 2013 Answer at 2.

[61] *Id*. at 3-5.

[62] *Id*. at 6 (citing *Devon Power*, *LLC*, 103 FERC ¶ 61,082, at P 29 (2003)).

locational price signals to ensure reliability.[63] More recently, according to IPPNY, the Commission rejected an argument by PJM's Independent Market Monitor that a limited reliability exception is appropriate when PJM identifies an "immediate, local reliability issue," finding that "[n]othing in the record suggests that PJM is ill-equipped to fulfill its duty to ensure adequate capacity for the entire PJM region."[64]

53. IPPNY states that Dr. Patton's position is based on a hypothetical market design and ignores the realities of the actual design of the NYISO market. It further states that NYISO's ICAP markets are only intended to ensure resource adequacy, and are not designed for the transmission security issues that have necessitated preventing Cayuga and Dunkirk from mothballing their facilities.[65] It adds that NYISO's ICAP markets do not have the level of granularity that would be required to reflect the reliability need for the Cayuga and Dunkirk facilities.

54. IPPNY contends that there is no basis for claims that Cayuga and Dunkirk should offer their capacity at *de minimis* prices, given the fundamental flaws in the argument that units needed for reliability are necessarily economic. In addition, IPPNY responds to the New York Commission's argument that applying offer floors based on going-forward costs, as requested by IPPNY, would create an artificial scarcity in the state-wide capacity market. IPPNY states that this argument is unpersuasive because the capacity market continues to have significant excess beyond its minimum capacity requirement.[66]

55. IPPNY states that arguments made by NYISO and the NYTOs, suggesting that going-forward costs should be considered *de minimis* for a resource that would have been mothballed but for out-of-market revenues, ignore both the uneconomic nature of the resource and the purpose of using going-forward costs to set an offer floor.[67] IPPNY states that the purpose of using going-forward costs to set an offer floor is to approximate the competitive offers that would be made by Cayuga and Dunkirk in the absence of their out-of-market RSSAs. IPPNY's witness, Mr. Younger, asserts that NYISO's and

---

[63] *Id.* at 6 (citing *California Indep. Sys. Operator Corp.*, 142 FERC ¶ 61,248 at P 64).

[64] *Id.* at 6-7 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 59 (2013) (*PJM*)).

[65] *Id*. at 7, Younger Aff. ¶¶ 16-18.

[66] IPPNY June 14, 2013 Answer at 10-11.

[67] *Id*. at 11.

NYTOs' arguments that out-of-market payments should be treated as if they were instead market revenues would result in transmission owners being permitted to make out-of-market payments to uneconomic units that they wish to keep in the market while simultaneously allowing the unit to otherwise participate fully in other aspects of the structured markets.[68] Further, IPPNY states that NYISO's and NYTOs' arguments would sacrifice the long-term sustainability of the market for lower prices in the short term and contradict Commission precedent.[69]

56. Finally, IPPNY states that fast track processing of the Complaint is appropriate due to the continuing adverse impacts of out-of-market contracts like the Cayuga and Dunkirk RSSAs on NYISO's ICAP market.[70] IPPNY states that despite requests by protesters for the Commission to delay action on the Complaint in the name of the stakeholder process, it believes that further stakeholder discussions would be futile.[71] In addition, IPPNY state that National Grid's allegations regarding the accuracy of Mr. Younger's calculations of the magnitude of the Cayuga RSSA on prices in the NYCA ICAP auctions are unsupported and should be dismissed.[72]

57. In its June 28, 2013 Answer, NYISO asserts that Ravenswood has mischaracterized statements made by Dr. Patton about it being well-recognized that none of the ISO/RTO markets fully reflect all reliability requirements, and therefore, those markets do not set adequate prices to reflect the needs of the market. According to NYISO, Dr. Patton has shown that unexpressed reliability constraints are a function of all RTO/ISO markets. NYISO provides an affidavit from Dr. Patton (Patton Answering Affidavit) confirming "the design of the NYISO market is sound."[73] According to NYISO, the Patton Answering Affidavit also refutes Ravenswood's claim that available capacity resulting from RSSAs should not be allowed in the capacity market. Dr. Patton states that capacity prices should reflect the total available capacity in the market, which includes that available from RSSAs, and that the resulting market prices merely "mimics

---

[68] *Id*. at 12.

[69] *Id*. at 12-13 (citing *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at P 135 (2012)).

[70] *Id*. at 14.

[71] IPPNY June 14, 2013 Answer at 15-16.

[72] *Id.* at 14-16, Patton Aff. ¶¶ 13-14.

[73] NYISO June 28, 2013 Answer at 4-5.

the market results one would see in the [Rest-of-State] market if the unexpressed reliability need were modeled in the market."[74]

E. <u>Comments and Answers to the Amendment</u>

58. In its April 4, 2014 answer to the Amendment, the New York Commission argues that IPPNY's motion to amend should be rejected because it focuses on issues not sufficiently related to the Complaint. According to the NYPSC, the Amendment addresses a Term Sheet related to refueling that is not part of the same transaction or occurrence as the RSSAs, IPPNY makes no claim that the Term Sheet has already impacted capacity prices, and the alleged harms are hypothetical and speculative.[75] The NYPSC states that combining dissimilar topics in one case would confuse the proceeding, would not promote efficiency and would cause unnecessary delay. Alternatively, the NYPSC states, the claims raised in the Amendment should be summarily dismissed because IPPNY is attempting to circumvent the stakeholder process. The NYPSC asserts that the issue of refueling is under active consideration before NYISO stakeholder groups, with the participation of IPPNY and its members, but IPPNY has chosen to unilaterally petition for Commission intervention rather than engaging in the stakeholder process to its conclusion. Further, according to the NYPSC, IPPNY's response in the initial Complaint proceeding that the market impact of the RSSAs required quicker action than provided in the stakeholder process does not apply here where there is no current market impact requiring an immediate remedy.

59. In addition, the New York Commission asserts that the issues raised in the Amendment are not ripe for Commission consideration because: (1) the Term Sheet is pending before the New York Commission; (2) NYISO has not yet had cause or opportunity to fully address the treatment of refueled plants in general or the refueling of Dunkirk pursuant to the Term Sheet, in particular; (3) even if the Term Sheet is approved, the refueling will take at least a year and a half, so claims of market effects are speculative. Finally, the New York Commission argues that the Commission should deny the relief requested in the proposed amendment because, as the New York Commission argued in its May 30, 2013 protest, buyer-side mitigation should not be imposed upon generators that have been identified as needed for reliability purposes.[76]

[74] *Id*. at 6, Patton Aff ¶ 11.

[75] NYPSC April 4, 2014 Answer at 6.

[76] NYPSC April 14, 2014 Answer at 11-12. The NYPSC cites to Commission approval of the PJM tariff that contains several exemptions to buyer-side mitigation for this reason. *Id*. (*citing PJM Interconnection, LLC*, 143 FERC ¶ 61,090, at PP 47-56 (2013)).

Moreover, according to the New York Commission, NYISO is also considering policy-based exemptions to buyer-side mitigation, including a renewable resource exemption and a refueling exemption. In addition, the New York Commission states that the mere fact that an action could lower capacity prices does not mean that the action constitutes unlawful price suppression.

60. In its April 14, 2014 answer to the Amendment, NYISO states that the MMU continues to support the indicators for determining when uneconomic retention arrangements may be problematic that are included in the NYISO Answer. NYISO states that it has sought tariff changes when it concluded that mitigation rules were justified and it is cognizant of the potential harm to the markets presented by over-mitigation. NYISO believes that the stakeholder process has been an effective vehicle for addressing changes to market power mitigation rules while guarding against over-mitigation. NYISO contends that the Amendment fails to demonstrate that uneconomic retention is a "well-defined structural problem" that necessitates the adoption of market power mitigation rules. [77] NYISO adds that mitigation proposals must have the support of "a fully developed factual record."[78] Further, NYISO states, the May 20, 2010 Order, involving the refinement of buyer-side market power mitigation rules in the New York City ICAP market, rejected Ravenswood's claim that a change in contractual or financial arrangements pertaining to an existing generation facility should subject it to a new form of buyer-side mitigation.

61. IPPNY responds in its April 29, 2014 answer that the Term Sheet and the RSSAs are both examples of keeping uneconomic resources from exiting the market and thereby artificially suppress NYCA ICAP prices. IPPNY asserts that its concerns are not premature, positing that the Commission routinely hears complaints about flawed tariff provisions without waiting for actual harm to occur, and that, had IPPNY waited to raise the issue, it would have faced a significant risk of the Commission withholding relief entirely or of relief being granted only on a prospective basis. IPPNY also asserts that urgently needed market reforms cannot be hold hostage to the NYISO stakeholder process. IPPNY adds that it has attempted to bring its concerns regarding the Dunkirk Units 2-4 repowering to stakeholders' attention but there has been no movement in the stakeholder process to address these concerns. IPPNY states that neither NYISO nor the MMU has conducted any analysis as to whether there is any legitimate reliability need for Dunkirk Units 2-4. Nor, according to IPPNY, have they put forward any evidence

---

[77] NYISO April 4, 2014 Answer at 9 (citing *California Indep. Sys. Operator Corp*., 139 FERC ¶ 61,211 (2011).

[78] *Id*. at 10 (citing *New York Indep. Sys. Operator, Inc*., 106 FERC ¶ 61,111, at PP 22, 28, and 30 (2004).

refuting IPPNY's arguments regarding the Term Sheet. Instead, IPPNY states, NYISO accuses IPPNY of applying an overly literal interpretation of NYISO's earlier statements and now claims that the need for the resource need not be immediate and that any project that will address future conditions and contingencies that could trigger applicable reliability or that provides broader electric system benefits should be deemed economic and exempted from mitigation measures.[79]

III. Commission Determination

A. Procedural Matters

62. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

63. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process. We grant IPPNY's November 12, 2013 Motion to Lodge, its June 27, 2014 Motion to Lodge, and its July 25, 2014 Motion to Lodge because the documents provided aided in our disposition of the matters raised in the Complaint.

B. Substantive Matters

64. The issue before us is whether NYISO's tariff is unjust and unreasonable because it permits existing capacity resources needed for short-term reliability and capacity resources with repowering agreements to offer their capacity at *de minimus* levels. Pursuant to section 206 of the FPA, Complainant bears the burden of making that demonstration. For the reasons discussed below, we find that IPPNY has not met that burden and we, therefore, deny the Complaint.

65. We find that IPPNY has failed to show that NYISO's tariff is unjust and unreasonable without imposing minimum bid requirements for existing resources needed for short-term reliability in NYISO's rest-of-state capacity market. IPPNY's reliance on NYISO's market mitigation rules for the NYC locality[80] is misplaced, as those rules

---

[79] IPPNY April 29, 2014 Answer at 9 (citing NYISO April 14, 2014 Answer at 13).

[80] *See* Complaint at 34.

apply only to new entry. NYISO's NYC seller-side mitigation rules also are not relevant as they apply a maximum (not a minimum) bid cap equal to the higher of a new supplier's going-forward costs or the Reference Level used to establish the New York City capacity market demand curves.[81] We agree with Indicated NYTOs that the Dunkirk and Cayuga bids are consistent with NYISO's practices in other parts of the market, which recognize that market operation rules should reflect practical realities in order to provide proper incentives to market participants. While IPPNY would have the Commission direct NYISO to change its existing mitigation rules in the capacity market, it has not demonstrated harm to the market in its original Complaint that justifies excluding the Cayuga or Dunkirk units or conduct that is inconsistent with competitive bidding behavior.

66. We agree with Dr. Patton that "the units are economic from the perspective of satisfying the NYISO's reliability requirements. . . . If the reliability needs satisfied by these units were reflected in the capacity market, the units would both clear."[82] As Dr. Patton notes, these units would also contribute to addressing the NYCA capacity requirement in meeting the local reliability need.[83] Thus, we agree with Dr. Patton that "it is efficient for these units to clear in the NYISO capacity market, [and] [a]ny provisions imposed that would cause them not to clear would be unreasonable."[84] Similarly, competitive offers are expected to reflect going-forward costs as adjusted for revenues that are consistent with revenues earned in competitive markets. If going-forward costs adjusted for revenues are very low, then it would be reasonable to expect a low capacity market offer that reflects the low going-forward costs. We agree with the New York Commission that, when RSSA revenues are taken into consideration, the Cayuga and Dunkirk units' going-forward costs would likely be low. Because Cayuga and Dunkirk are needed for reliability and would clear a capacity market that also reflected local reliability needs, RSSA revenues received by these resources reflect the value of the services provided by these resources to customers. In calculating the going-forward costs of these two resources, it is reasonable to deduct their RSSA revenues, because the revenues do not overstate the value provided by the resources to customers.[85]

---

[81] *See* NYISO, Market Services Tariff, Attachment H, § 23.4.5.2.

[82] *Id*. at Patton Aff. ¶ 26.

[83] *Id.*

[84] *Id*. at Patton Aff. ¶ 25.

[85] NYISO May 30, 2013 Answer, Patton Aff. ¶¶ 28-32.

It is therefore reasonable, and fully consistent with NYISO's tariff rules, for the units to bid at *de minimus* levels.

67. The Commission rejects IPPNY's contention that significant capacity price decreases have occurred in the rest-of-state spot market auctions, solely as a consequence of the RSSAs. In fact, the record reflects that spot market capacity prices increased, not decreased, in 2013 as compared to the same months in 2012. Moreover, because the reasons for changes in capacity prices are complex and multi-faceted, changes in prices cannot be attributed to one cause, i.e., the RSSAs. As noted by the New York Commission,

> IPPNY's Complaint and proposed solution ignore the fact that the exit of existing generators has already begun to tighten the upstate capacity market, with predictable impacts on NYCA capacity prices…. Recent [retirements] have decreased upstate supply by nearly 1,000 MW, which alone would increase NYCA prices by about $2/kW-month, based on the NYISO's current NYCA demand curve…. [T]he May 2013 NYCA spot market cleared at $5.76/kW-month, almost $3/kW-month above the May 2012 price and more than triple the 10-year average price, contradicting IPPNY's claim of "severe artificial suppression of prices" in the NYISO's upstate capacity market.[86]

68. IPPNY cites *CAISO* and EPSA cites *Devon Power* for the proposition that the Commission disfavors out-of-market agreements and has found that extensive use of RMR-type agreements undermines market performance. IPPNY overstates the Commission's holding in *CAISO*. The Commission rejected CAISO's proposal of an "interim flexible capacity and local reliability resource retention (FLRR) mechanism" because of numerous flaws, not simply because it was an out-of-market solution.[87] The Commission, *inter alia*, found that the FLRR mechanism would not effectively accomplish the stated goal of ensuring the availability of the needed resources in the two-to-five year forward period.[88] The Commission also noted that CAISO had at its disposal a number of options for addressing any imminent retirements that might result in reliability threats. The Commission has emphasized that RMR agreements should be of a limited duration so as to not perpetuate out-of-market solutions that have the potential, if

---

[86] NYPSC May 30, 2013 Protest at 9.

[87] *CAISO*, 142 FERC ¶ 61,248 at P 63.

[88] *Id.* P 65.

not undertaken in an open and transparent manner, to undermine price formation.[89] In fact, the Commission required NYISO in developing an RMR program, "to ensure that RMR agreements are used only as a limited, last-resort measure."[90] The Commission required NYISO in its process to consider alternatives to RMRs in an open and transparent manner.[91] We agree that capacity markets should recognize transmission constraints as much as possible, so as to minimize the need for RMR contracts. But where it is not feasible or practical to model all constraints, some RMR agreements may be necessary, since market prices in these instances may be insufficient to retain enough capacity in these locations to reliably serve load in these locations. Where RMR agreements are necessary, those resources also satisfy the reliability needs of the broader NYCA footprint, and it would be inefficient to procure other capacity elsewhere in the NYCA footprint to satisfy the NYCA capacity needs met by the RMR capacity. Thus, it is efficient for such RMR resources to clear in the NYCA capacity auction and take on a capacity obligation.

69. However, we find that the new evidence of the Dunkirk repowering agreement and accompanying argument and testimony in IPPNY's March 25, 2014 Amendment raise potential issues of artificial price suppression. Unlike the RSSA contracts discussed in the original Complaint that procure adequate capacity to address short-term reliability needs, the Dunkirk repowering agreement appears to procure more capacity than is needed for short-term reliability, and for a much longer term. We are concerned that if the additional capacity created by the repowering agreement above the amount needed for short-term reliability is allowed to offer into the NYISO capacity market at prices below the cost of repowering, such capacity might deter new entry or displace less-costly existing capacity in NYCA. As a result, capacity market prices could be artificially suppressed.

70. As part of assessing the need for buyer-side market power mitigation of rest-of-state resources, however, the Commission must consider the current state of the NYISO market, the existing market rules, and the unique aspects of the Dunkirk repowering agreement. Mitigation measures in NYISO currently apply only to the NYC locality and the G-J locality, not the broader NYCA footprint, and IPPNY only offers limited evidence for the relief it seeks. Further, even with this new information, there is no existing policy in NYISO for how buyer-side market power mitigation would apply to

[89] *New York Indep. Sys. Operator,* 150 FERC ¶ 61,116, at P 2 (2015). (NYISO RMR Order).

[90] *NYISO RMR Order*, 150 FERC ¶ 61,116, P 2.

[91] *NYISO RMR Order*, 150 FERC ¶ 61,116, P 16.

repowering agreements, and especially not to an agreement that purportedly resolves, at least in part, a short-term reliability need. Thus, we would still need to develop criteria for evaluating repowered resources before applying mitigation, such as the process for calculating legitimate costs and a process for evaluating, before a resource incurs repowering costs, whether a mitigation exemption is warranted. These considerations prevent the Commission from applying mitigation as requested, and we therefore deny the Complaint.

71. However, while we find that IPPNY has not satisfied its burden under section 206, we recognize that IPPNY's Amendment raises concerns regarding whether changed circumstances in the rest-of-state may necessitate the prospective adoption of market power mitigation rules for the rest-of-state. Consistent with NYISO's statement that mitigation proposals must have the support of a fully developed factual record and a stakeholder process, we direct NYISO to establish a stakeholder process to consider (1) whether there are circumstances that warrant the adoption of buyer-side mitigation rules in the rest-of-state; and (2) whether resources under repowering agreements similar to Dunkirk's have the characteristics of new rather than existing resources, triggering a buyer-side market power evaluation because of their potential to suppress prices in the capacity market and what mitigation measures need to be in place to address such concerns. We will require NYISO to submit a report to the Commission within 90 days of the date of this order regarding NYISO's analysis of these issues and the outcome of such stakeholder discussion.[92] The Commission will review the report to determine whether additional actions need to be taken.

72. Finally, we reject Ravenswood's allegation of market manipulation as unsupported. For a claim of market manipulation to succeed, three elements must be shown: (1) a scheme or artifice to defraud, (2) made with scienter, and (3) in connection with a transaction subject to the jurisdiction of the Commission.93 Ravenswood suggests that market manipulation could be established in this instance without intent, and cites Commission Order No. 670,[94] *Brian Hunter*, and *Energy Transfer Partners* for this proposition.[95] However, Order No. 670 expressly states that "any violation of the Final

[92] This report will be noticed for comment.

[93] 18 C.F.R. § 1c.2 (2013); *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, at PP 49, 52-53, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[94] *Id.*

[95] Ravenswood May 30, 2013 Comments at 11 (citing *Brian Hunter*, 135 FERC ¶ 61,054 at P 62; *Energy Transfer Partners*, 120 FERC ¶ 61,086 at P 4).

Rule requires a showing of scienter."[96] And Ravenswood's own summary of the other two orders expressly acknowledges that the Commission made findings of intent.[97] Here, Ravenswood fails to allege or demonstrate either the existence of a scheme or artifice to defraud, or the existence of scienter. Thus, we reject Ravenswood's allegation of market manipulation.[98]

73. Accordingly, we deny the Complaint.

The Commission orders:

(A) IPPNY's Complaint is hereby denied.

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

---

[96] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 52.

[97] Ravenswood states: "In the case of *Brian Hunter*, the Commission determined that the lead natural gas trader for Amaranth intentionally manipulated the market by causing artificial prices in the market..." and "in *Energy Transfer Partners*, ...the Office of Enforcement determined that wholesale natural gas prices had been manipulated at a major trading hub for the purpose of suppressing the prices to benefit other financial positions and other physical positions." Ravenswood Comments at 11-12. (*Underlining added.*)

[98] With respect to IPPNY's broader concerns about future out-of-market payments to uneconomic existing resources, we recognize the obligation and authority of both NYISO and its MMU to identify and address any anti-competitive conduct that may arise and find no reason to presume that either entity would fail to exercise this authority should issues arise in the future. *See* NYISO Services Tariff §§ 23.1.1; 30.3.3; and 30.4.