

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

New York Independent System Operator, Inc.)

Docket No. ER19-467-001

**PROTEST OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.**

On December 3, 2018, the New York Independent System Operator, Inc. (“NYISO”) filed proposed revisions to its Market Administration and Control Area Services Tariff (“Services Tariff”) and Open Access Transmission Tariff (“OATT”) (collectively, the “NYISO Tariffs”) with the Federal Energy Regulatory Commission (“Commission”)¹ in compliance with the Commission’s Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, which was issued by the Commission on February 15, 2018.² The NYISO’s proposed tariff revisions consist of new and amended market rules and a clarification of the existing Services Tariff in the form of the reinstatement of tariff language that previously was believed to be superfluous and was erroneously removed as a ministerial modification in a 2016 filing. These provisions collectively are designed to facilitate the participation of Energy Storage Resources (“ESRs”) in the NYISO-administered Energy, Ancillary Services, and Installed Capacity (“ICAP”) markets.³

¹ Docket No. ER19-467-000, *N.Y. Indep. Sys. Operator, Inc.*, Compliance Filing (Dec. 3, 2018) (the “December Filing”).

² *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018); Docket Nos. RM16-23-000 et al., Errata Notice (Feb. 28, 2018); 83 Fed. Reg. 9580 (Mar. 6, 2018) (“Order No. 841”).

³ Capitalized terms that are not otherwise defined in this filing shall have the meaning specified in the NYISO Tariffs.

In its December Filing, the NYISO stated that it was not proposing any substantive changes to its Buyer Side Market Power Mitigation Measures for ICAP (the “BSM Rules”), and, thus, “[t]he current BSM Rules would apply to the entry of new Energy Storage Resources that are larger than 2 MW.”⁴ The NYISO also proposed to clarify its existing tariff provisions by reinstating a specific provision of its BSM Rules, “Category III” of “Examined Facilities,” that would more clearly apply certain aspects of such rules to new ESR entry as well as to the entry of other Generators that are 2 MW or less in Mitigated Capacity Zones unless such resources can demonstrate that they meet the requirement to be exempt from the BSM Rules under the Services Tariff (the “BSM Rules Proposal”).⁵ As the NYISO established, the NYISO mistakenly removed the Category III tariff language in its 2016 tariff filing proposing rules to govern the participation of Behind-the-Meter Net Generation Resources (the “BTM:NG Filing”) in the NYISO’s markets based on the flawed assumption that new resources of this size would no longer be entering the market, and therefore, the provision could be eliminated as a ministerial “clean up” measure.⁶

In its February 7, 2019 comments on the December Filing, Independent Power Producers of New York, Inc. (“IPPNY”) requested that the Commission accept the NYISO’s BSM Rules

⁴ December Filing at 51.

⁵ *Id.* at 51–54. Prior to the removal of part of this provision in 2016 based on the erroneous understanding that it had become obsolete, Section 23.4.5.7.3 of the Services Tariff defined three specific categories of Examined Facilities. Category I and II facilities included proposed new Generators that are members of a Class Year and that had requested Capacity Resource Interconnection Service (“CRIS”) or new or existing Generators that expected to receive CRIS rights from another Generator. Services Tariff § 23.4.5.7.3. Category III facilities included, in relevant part, “each proposed new Generator that is . . . not subject to a deliverability requirement (and therefore, is not in a Class Year).” December Filing at 51.

⁶ *Id.* at 51–54. Throughout this proceeding, the NYISO has repeatedly acknowledged it made an error when it proposed to remove the language at issue as a ministerial modification in 2016, specifying in its May 1 Response that it could have made an errata filing to correct it if it had discovered its error closer in time to the 2016 filing. *See* Docket No. ER19-467-000, *supra*, Letter from Gregory J. Campbell to Kurt D. Longo (May 1, 2019) (“May 1 Response”) at 23.

Proposal because it removed uncertainty as to the process for determining Offer Floors and exemptions from Offer Floors under the BSM Rules with respect to Generators that are not required to satisfy a deliverability requirement, which include resources 2 MW or less.⁷ As IPPNY demonstrated in its answer to the joint protest of the New York State Public Service Commission (“NYPSC”) and the New York State Energy Research and Development Authority, the NYPSC’s ESR initiative could result in a substantial number of ESRs 2 MW or less being installed on the system in the Mitigated Capacity Zones.⁸

On April 1, 2019, the Commission’s Office of Energy Market Regulation (“OEMR”) issued a deficiency letter addressing the NYISO’s December Filing in which it, *inter alia*, asked a series of questions pertaining to application of the BSM rules to resources 2 MW or less.⁹ In its response to the questions in the April 1 Letter regarding the BSM Rules Proposal, the NYISO continued to support its proposal that the erroneously removed tariff language must be reinstated so that it is clear that the BSM Rules apply to resources, including ESRs 2 MW or less.¹⁰ However, in response to the OEMR’s specific question about the applicability of the current BSM Rules, the NYISO also inexplicably asserted that: (i) the currently effective BSM Rules do

⁷ Docket No. ER19-467-000, *supra*, Comments of Independent Power Producers of New York, Inc. (Feb. 7, 2019) (“IPPNY February Comments”) at 2.

⁸ Docket No. ER19-467-000, *supra*, Motion for Leave to Answer and Answer of Independent Power Producers of New York, Inc. (Feb. 27, 2019) (“IPPNY Answer”) at 9–12.

⁹ Docket No. ER19-467-000, *supra*, Letter from Kurt D. Longo, Director, Division of Electric Power Regulation – East to Gregory J. Campbell, Attorney, NYISO (Apr. 1, 2019) (“April 1 Letter”); *see also* May 1 Response at 24, 25.

¹⁰ *See* May 1 Response at 22–24 (documenting there was no economic basis to remove this language and grant an exemption to these resources nor was one offered and noting the Commission previously has held and the Market Monitoring Unit (“MMU”) previously has demonstrated that small resources could have cumulative impacts that have material price effects).

not apply to resources 2 MW or less; and (ii) if they did, such resources would be subject to automatic Offer Floor mitigation.¹¹

Pursuant to the Commission’s Combined Notices of Filing #1, issued on May 2, 2019, IPPNY hereby protests this aspect of the NYISO’s response to the OEMR regarding the application of the BSM Rules to resources 2 MW or less. Consistent with its February Comments, IPPNY reiterates its support for the NYISO’s BSM Rules Proposal because it removes any unnecessary uncertainty claimed to exist as to how these rules are to be applied. Doing so would also have the benefit of rendering moot this issue concerning the NYISO’s latest interpretation of how its BSM Rules would operate absent Commission action. Thus, IPPNY urges the Commission to accept the NYISO’s BSM Rules Proposal.¹²

However, should the Commission nevertheless choose to address the NYISO’s argument about the applicability of the currently effective BSM Rules, the Commission should summarily reject it. As demonstrated in the IPPNY February Comments and as discussed further below, the currently effective BSM tariff provisions and past Commission orders clearly establish that these rules apply to all resources in Mitigated Capacity Zones, including resources 2 MW or less. Contrary to the NYISO’s most recent interpretation, the NYISO is not required to “automatically” subject resources 2 MW or less to Offer Floor mitigation because nothing in the currently effective tariff bars the application of the three exemptions from Offer Floor mitigation to such resources.

¹¹ *Id.* at 24–25.

¹² By taking this step, the Commission would restore the “Examined Facilities” definition to its full scope of encompassing all new resources thereby eliminating the need to engage in the NYISO’s tariff interpretation gymnastics addressed at length below.

Indeed, in direct contravention of the Commission's orders addressing the BSM Rules in New York for over a decade, the NYISO's interpretation that the BSM Rules do not apply to resources 2 MW or less would provide an automatic exemption from Offer Floor mitigation to all such resources, even if they are subsidized uneconomic new entry. Such a flawed interpretation not only clearly violates the Commission's past orders holding that new subsidized uneconomic resources in Mitigated Capacity Zones should be subject to the BSM Rules and potential Offer Floor mitigation, it conflicts with the express language of the tariff that establishes the BSM Rules impose Offer Floor mitigation on all resources unless exempt under the BSM Rules. This interpretation, therefore, cannot be sanctioned by the Commission, particularly at a time when the subsidized uneconomic entry of large number of small ESRs is actively being supported under various public policy initiatives.

I. THE EXISTING BSM RULES APPLY TO RESOURCES 2 MW OR LESS.

On April 1, 2019, the OEMR requested additional information from the NYISO to allow the Commission to act on the NYISO's December Filing.¹³ Specifically, the OEMR asked the NYISO to:

explain whether, under NYISO's current buyer side mitigation rules, a resource 2 MW or less is subject to mitigation and, if so, whether it can avoid mitigation after passing one of these three buyer side mitigation tests. Or, absent NYISO's proposal, would an Energy Storage Resource 2 MW or less be subject to mitigation automatically because it does not qualify for an exemption?¹⁴

¹³ April 1 Letter.

¹⁴ *Id.* at 5. The OEMR also asked about whether, and how, these resources would fit into the Class Year process. *Id.* The NYISO explained they do not fall within that process and also suggested the BSM test procedures could be streamlined so market entry by these resources would not be delayed. *See* May 1 Response at 24, 27–28.

In its May 1 Response, the NYISO reiterated its position that its existing tariff provisions needed to be clarified by reinstating tariff language previously deleted erroneously. However, the NYISO also stated for the first time, that “[a] resource 2 MW or less is not subject to mitigation under the NYISO’s currently effective BSM Rules.”¹⁵ In an attempt to support this new interpretation, the NYISO took the position that the BSM Rules only apply to “Examined Facilities” and “NCZ Examined Projects.”¹⁶ The NYISO’s position erroneously conflates two unrelated mechanisms, and thus, it has no basis.

A. The NYISO’s Currently Effective BSM Rules Impose an Offer Floor on All New Resources in Mitigated Capacity Zones Unless the Resource Demonstrates It Meets the Requirements of an Exemption.

As noted above, the IPPNY February Comments demonstrated that the NYISO’s currently effective BSM Rules clearly impose an Offer Floor on all new resources entering Mitigated Capacity Zones, including resources 2 MW or less, unless a resource is able to demonstrate that it qualifies for a specific exemption listed in the Services Tariff.¹⁷ The NYISO’s MMU made the same demonstration in its answer to protests of the December Filing.¹⁸ In an attempt to respond to these facts, the NYISO stated in its May 1 Response that “[u]nder this interpretation, entrants that are not Examined Facilities would automatically be subject to mitigation but be ineligible for any kind of exemption.”¹⁹ The NYISO’s interpretation of the BSM Rules is inconsistent with the Commission’s past orders holding that all new resources in

¹⁵ May 1 Response at 24.

¹⁶ *Id.* at 25.

¹⁷ IPPNY Comments at 5–6.

¹⁸ Docket No. ER19-467-000, *supra*, Motion to Intervene Out-of-Time, Request for Leave to Answer, and Limited Answer of the NYISO Market Monitoring Unit (Feb. 25, 2019) (“MMU Answer”) at 5.

¹⁹ May 1 Response at 25.

Mitigated Capacity Zones should be subject to the BSM Rules unless exempt under the BSM Rules.

The BSM Rules are the NYISO's primary tool to ensure that subsidized, uneconomic ICAP supply that enters the market in the Mitigated Capacity Zones does not artificially suppress ICAP prices to the detriment of the competitive markets and the investors that rely on such markets. Since their inception more than ten years ago, the Commission has clearly held in a series of orders that the BSM Rules are intended to mitigate all subsidized uneconomic entry by imposing Offer Floor mitigation and that the limited exemptions from Offer Floor mitigation it has accepted are designed to ensure that the BSM Rules do not deter economic entry.²⁰

Size alone is not a basis to exempt resources. Indeed, the Commission specifically rejected a request filed under Section 206 of the Federal Power Act ("FPA") to exempt resources less than or equal to 20 MW from imposition of Offer Floor mitigation.²¹ The NYISO cites to that fact in its May 1 Response.²² In that order, the Commission ruled that "[t]he 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"²³ The same logic

²⁰ See *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at PP 100–01, 103–06, 117 (2008) (holding that mitigation applies to all new entry in the in-City market to prevent uneconomic entry and units should be exempted from mitigation if units are economic at the time of entry decisions); *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at PP 29, 44 (2008) (holding that BSM Rules apply to new uneconomic entrants and "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"); *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 43 (2010) ("[N]ew entry mitigation is intended to deter the construction of uneconomic capacity."); *N.Y. Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,077, at P 28 (2011) (holding that the purpose of the BSM Rules is "to deter uneconomic entry, not economic entry" and uneconomic projects cannot enter the market unless subject to Offer Floor mitigation).

²¹ *N.Y. Pub. Serv. Comm'n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015), at PP 78–79 ("2015 BSM Order").

²² See May 1 Response at 23 (citing to the MMU's analysis in this regard and past Commission determinations recognizing that "the cumulative impact of smaller resources could have material price effects").

²³ See BSM Order at P 78.

applies with equal force to ESRs and other resources 2 MW or less, again, particularly in light of the State's current public policy initiatives focused on subsidizing substantial amounts of such uneconomic entry.

As IPPNY stated in its February Comments, the BSM Rules do not provide, and the Commission has not directed the NYISO to propose, an exemption from the imposition of an Offer Floor to new entrants in Mitigated Capacity Zones that are 2 MW or less or are not required to satisfy a deliverability requirement to be eligible to supply ICAP.²⁴ Nor has the NYISO made a tariff filing under FPA Section 205 or 206 and met the applicable burden of proof to implement such a tariff change.²⁵ As the NYISO indicated in its December Filing, its BTM:NG Filing did not intend to exempt Generators 2 MW or less from the imposition of an Offer Floor; it was a mistake.²⁶ There was no discussion whatsoever in the BTM:NG Filing, nor in any of the comments and protests that were filed in response thereto, regarding an exemption for Generators 2 MW or less.²⁷ As the NYISO forthrightly acknowledges in its May 1 Response, the NYISO did not present an economic rationale for removing the language from the Examined Facilities definition.²⁸ Nor did the Commission establish in its order accepting these proposed tariff revisions that removing the Category III language would exempt Generators 2 MW or less

²⁴ IPPNY February Comments at 5.

²⁵ This is a particularly important fact given that, as noted *supra*, the Commission previously has rejected a complaint filed under FPA Section 206 seeking similar relief on the grounds that complainants failed to demonstrate the existing tariff provisions were unjust and unreasonable.

²⁶ December Filing at 53.

²⁷ See *generally* Docket No. ER16-1213-000.

²⁸ See May 1 Response at 22 (contrasting to the exemptions to the BSM Rules which were expressly authorized by the Commission following review of the economic analysis presented by the NYISO or complainants as justification for such action).

in Mitigated Capacity Zones from the imposition of an Offer Floor.²⁹ Therefore, the BSM Rules continue to apply to resources 2 MW or less.

B. The NYISO Has Erroneously Conflated the Procedural Framework Established by the Examined Facilities Concept with Mandated BSM Testing of all New Resources That Have Not Met the Requirements to Secure an Exemption.

The NYISO's interpretation of the BSM Rules in its May 1 Response also conflicts with the tariff language in the BSM Rules imposing Offer Floor mitigation on all resources unless exempt under the BSM Rules and conflates the procedural framework established by the "Examined Facilities" concept in the BSM Rules with the mitigation determinations themselves. The first sentence in Section 23.4.5.7 of the Services Tariff states, "[u]nless exempt as specified below, offers to supply Unforced Capacity from a Mitigated Capacity Zone Installed Capacity Supplier: (i) shall equal or exceed the applicable Offer Floor; and (ii) can only be offered in the ICAP Spot Market Auctions."³⁰ Indeed, in the portion of its May 1 Response further supporting its BSM Rules Proposal to reinstate the erroneously removed tariff language, the NYISO itself recognized "Commission precedent directs the NYISO to evaluate all new entrants under its [BSM Rules] unless a specific exemption has been justified on economic grounds."³¹ That provision is controlling for these purposes.

The Services Tariff defines Offer Floor for Installed Capacity Suppliers that are not Special Case Resources as:

the lesser of (i) a numerical value equal to 75% of the Mitigation Net CONE translated into a seasonally adjusted monthly UCAP value ("Mitigation Net CONE Offer Floor"), or (ii) the numerical

²⁹ See generally *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,166 (2016).

³⁰ May 1 Response at 25; Services Tariff § 23.4.5.7.

³¹ See May 1 Response at 22 (citing Commission decision denying complaint to extend exemption to many resources on the basis that the exemptions had not been justified).

value that is the first year value of the Unit Net CONE determined as specified in Section 23.4.5.7, translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate, (“Unit Net CONE Offer Floor”).³²

The Services Tariff defines “Unit Net CONE” as:

localized leveled embedded costs of a specified Installed Capacity Supplier, including interconnection costs, and for an Installed Capacity Supplier located outside a Mitigated Capacity Zone including embedded costs of transmission service, in either case net of likely projected annual Energy and Ancillary Services revenues, and revenues associated with other energy products (such as energy services and renewable energy credits, as determined by the ISO, translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate.³³

Significantly, the definitions of Offer Floor and Unit Net CONE make no mention of, and thus are not limited to, Examined Facilities. They instead apply to all new resources.

Section 23.4.5.7 specifies three exemptions from the application of an Offer Floor.

Contrary to the NYISO’s interpretation, the Services Tariff does not limit the applicability of the three exemptions to Examined Facilities. Instead, they specifically apply to an “Installed Capacity Supplier.” Section 23.4.5.7 states, in relevant part:

An Installed Capacity Supplier, in a Mitigated Capacity Zone for which the Commission has accepted an ICAP Demand Curve, shall be exempt from an Offer Floor if: (a) the price that is equal to the (x) average of the ICAP Spot Market Auction price for each month in the two Capability Periods, beginning with the Summer Capability Period commencing three years from the start of the year of the Class Year (the “Starting Capability Period”) is projected by the ISO, in accordance with Section 23.4.5.7.15, to be higher than (y) the numerical value equal to 75 percent of the Mitigation Net CONE that would be applicable to such supplier in the same two (2) Capability Periods (utilized to compute (x)), (b) the price that is equal to the average of the ICAP Spot Market Auction prices in the six Capability Periods beginning with the

³² Services Tariff § 23.2.1.

³³ *Id.*

Starting Capability Period is projected by the ISO, in accordance with Section 23.4.5.7.15, to be higher than the reasonably anticipated Unit Net CONE of the Installed Capacity Supplier, or (c) it has been determined to be exempt pursuant to Section 23.4.5.7.9 (the “Competitive Entry Exemption”).³⁴

Specifically, the Services Tariff makes clear that *a proposed new Generator or Unforced Capacity Delivery Rights* that becomes a member of a Class Year after Class Year 2012 is eligible for the Competitive Entry Exemption if it demonstrates it does not have certain executed or unexecuted contractual relationships with specified entities. Significantly, there is nothing in the Services Tariff that requires a resource to be an Examined Facility to be eligible for a Competitive Entry Exemption.

Yet notwithstanding the express language of its tariff and clear Commission precedent which the NYISO itself cites in the May 1 Response, the NYISO then asserts the BSM Rules do not apply to resources 2 MW or less absent Commission action in its May 1 Response because they are not Examined Facilities.³⁵ The NYISO appears to base its interpretation that the BSM Rules apply only to Examined Facilities on Section 23.4.5.7.3 because it requires the NYISO to perform exemption and Unit Net CONE determinations for *Examined Facilities*, and language in Section 23.4.5.7 and subsequent sections that specify the time at which the NYISO must perform and provide Unit Net CONE determinations and exemption determinations for Examined Facilities.³⁶ From this language, the NYISO leaps to the unjustified conclusion that resources that are not Examined Facilities are ineligible for the Offer Floor mitigation exemptions and, therefore, it does not have a mechanism to test facilities other than Examined Facilities.³⁷ Based

³⁴ *Id.* § 23.4.5.7.2.

³⁵ *See* May 1 Response at 24–26.

³⁶ *Id.* at 25–26.

³⁷ *Id.* at 25.

on this unjustified conclusion, the NYISO then asserts resources 2 MW or less must be automatically mitigated if they are subject to the BSM Rules, a result that the NYISO characterizes as “unreasonable, inconsistent with Commission policy, and incompatible with other provisions of the BSM Rules.”³⁸ Because the NYISO’s interpretation would lead to the very artificial price suppression result that the Commission accepted the BSM Rules to avoid, it must be rejected.

The NYISO’s FPA Section 205 filing to implement the Examined Facilities concept demonstrates the flaw inherent in the NYISO’s newly hatched interpretation.³⁹ In its filing letter in the In City Load Side Mitigation Proceeding, the NYISO explained that its then current BSM Rules did not expressly state when the NYISO would perform a mitigation exemption test or whether the NYISO was required to perform the test for resources that did not request a test.⁴⁰ The NYISO stated that “the proposed tariff revisions would increase transparency to all Market Participants, provide potential new entrants with *greater certainty* at the time that they must make critical investment decisions, and prevent new entrants from facing either under- or over-mitigation while protecting the market from the consequences of both.”⁴¹ Importantly, the NYISO stated that its Proposed new Section 23.4.5.7.3 “clarifies that the NYISO would make

³⁸ *Id.* The NYISO also argues that this interpretation is unreasonable because it is inconsistent with the Commission’s order providing a blanket exemption to new Special Case Resources. *Id.* (citing *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017)) (“SCR Exemption Order”). The NYISO’s argument is inapposite because, as the NYISO and IPPNY have stated, the only reason the NYISO can claim resources 2 MW or less are exempt from Offer Floor mitigation is because of the NYISO’s mistaken removal of the Category III language, not because of a Commission order, like its SCR Exemption Order, directing the NYISO to exempt such resources from the BSM Rules.

³⁹ Docket No. ER10-3043-000, *N.Y. Indep. Sys. Operator, Inc.*, Proposed Enhancements to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for Waiver of Prior Notice Requirement (Sept. 27, 2010) (“In City Load Side Mitigation Proceeding” and “September 2010 Filing,” respectively).

⁴⁰ *Id.* at 9.

⁴¹ *Id.* at 2 (emphasis added).

the determination for all ‘Examined Facilities,’ which, unlike the currently effective BSM Rules by virtue of the erroneously removed Category III definition, would *expressly encompass all* potential new entrants.”⁴² The NYISO thus added the Examined Facilities definitions to its Services Tariff to provide a framework for conducting its exemption determination process by tying it to the Class Year process.

The key point is that the NYISO proposed the Examined Facilities definitions for the limited purpose of defining *when* the NYISO conducts the mitigation exemption tests for a new entrant, not *whether* it does. Thus, while the BSM Rules require the NYISO to perform mitigation exemption determinations for Examined Facilities in a predefined time frame using a predefined framework, the BSM Rules do not proscribe the NYISO from performing exemption determinations for other resources just as it did in the period leading up to the In City Load Side Mitigation Proceeding.

Indeed, the result of the NYISO’s interpretation would be an automatic exemption from Offer Floor mitigation for all resources 2 MW or less, even if they constituted subsidized uneconomic new entry, thereby violating the Commission’s long-established precedent that all new resources in Mitigated Capacity Zones should be subject to Offer Floor mitigation unless they qualify for one of the limited exemptions specified in the BSM Rules demonstrating they are economic. It is, thus, the NYISO’s interpretation that is “unreasonable, inconsistent with Commission policy, and incompatible with other provisions of the BSM Rules.” Other than advancing an untenable technical reading of its BSM Rules, the NYISO has not provided any justification for adopting an interpretation of its error in removing the Category III tariff

⁴² *Id.* at 10 (emphasis added).

language that would support allowing all these subsidized uneconomic resources to evade Offer Floor mitigation.⁴³

As demonstrated in the Commission's orders and the NYISO's own filings, Offer Floor mitigation applies to all new entrants to avoid subsidized uneconomic entry. The exception to this rule is the exemptions which have been narrowly tailored by the Commission over a series of orders. The exception applies, however, if, and only if, a new entrant can demonstrate that it qualifies for the exemption it seeks. Pending Commission acceptance of the NYISO's BSM Proposal, the NYISO must interpret its BSM Rules to apply Offer Floor mitigation to resources 2 MW or less, and the NYISO must define when it will apply the Offer Floor and mitigation exemption determinations. These resources can request a BSM exemption determination if they elect to do so to manage their risks or the NYISO can determine when to study them. However, as the NYISO stated in its December Filing, it must be consistent with Commission precedent that the BSM Rules must apply to all Generators to ensure consistent and equitable treatment across all generation types.⁴⁴

II. CONCLUSION

As demonstrated above, to maintain the effectiveness of the NYISO's ICAP market mitigation structure in the Mitigated Capacity Zones, the Commission should accept the NYISO's BSM Rules Proposal and direct the NYISO to clarify its existing BSM Rules by

⁴³ Importantly, in response to the OEMR's question about how many of these resources would secure exemptions, the NYISO stated it could not predict with certainty which of these resources would receive an exemption. *See* May 1 Response at 26. The NYISO's statement confirms that it is possible that some of these resources would *not* secure exemptions under the BSM Rules. The Commission cannot sanction the artificial price suppression that would result if these resources were permitted to sidestep the BSM Rules.

⁴⁴ December Filing at 51 (citing *N.Y. Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,206 (2008), *reh 'g*, 127 FERC ¶ 61,042 (2009)).

reinstating the tariff language incorporating resources 2 MW or less within the Examined Facilities definition.

Respectfully submitted,

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Dated: May 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the foregoing document by electronic mail or first-class mail upon each person designated on the official service list compiled by the Secretary to the Commission in this proceeding.

David B. Johnson
David B. Johnson

Dated: May 22, 2019