UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	**)**	**Docket No. ER16-1404-000**

JOINT ANSWER OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC. AND ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Commission, Independent Power Producers of New York, Inc. ("IPPNY")[1] and the Electric Power Supply Association ("EPSA")[2] hereby answer the July 19, 2019 motion of the New York Independent System Operator, Inc. ("NYISO") in the above-captioned docket.[3] The NYISO requests that the Federal Energy Regulatory Commission ("Commission") rule on the NYISO's April 13, 2016 filing[4] ostensibly to comply with the Commission's October 9, 2015 order in Docket No. EL15-64-

[1] IPPNY is a trade association representing companies involved in the development of electric generating facilities, the generation, sale, and marketing of electric power, and the development of natural gas and energy storage facilities in the State of New York. IPPNY member companies produce more than 60% of New York's electricity, utilizing almost every generation technology available today such as wind, solar, natural gas, oil, hydro, biomass, and nuclear. This pleading represents the position of IPPNY as an organization, but not necessarily the views of any particular member with respect to any issue.

[2] Launched over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

[3] Docket No. ER16-1404-000, *New York Indep. Sys. Operator, Inc*., Motion Requesting Commission Action on Compliance Filing, Notice of Implementation Plans, and Conditional Request for Tariff Waivers of the New York Independent System Operator, Inc. (July 19, 2019) ("Motion").

[4] Docket No. ER16-1404-000, *supra*, Compliance Filing and Request for Commission Action within Sixty Days (Apr. 13, 2016) ("Compliance Filing").

000.[5] The Compliance Filing proposed revisions to the buyer-side market power mitigation rules ("BSM Rules")[6] to exempt certain intermittent renewable (the "Renewable Exemption") and self-supply resources (the "Self-Supply Exemption") from the imposition of Offer Floor mitigation and to cap the amount of these intermittent renewables that could qualify for the Renewable Exemption in the Mitigated Capacity Zones at 1,000 MW of installed capacity ("ICAP") in any given Class Year (the "1,000 MW Cap").[7]

In its Motion, the NYISO notified the Commission that it will apply the Renewable Exemption as-filed when it issues BSM Determinations for the 2019 Class Year if the Commission has not addressed its Compliance Filing by that time.[8] The NYISO also conditionally requested that the Commission grant tariff waivers that would allow any BSM Determinations made prior to a Commission ruling to remain in effect should the Commission subsequently modify the NYISO's proposed Renewable Exemption ("Conditional Tariff Waiver Request").[9]

As discussed more fully below, IPPNY/EPSA support the NYISO's request that the Commission rule on the Compliance Filing by at least 30 days before the NYISO must issue BSM Determinations, which the NYISO estimates as May 2020. For the reasons demonstrated in the IPPNY/EPSA Protest and set forth herein, the Commission should, however, reject the NYISO's proposed 1,000 MW Cap and instead order the NYISO to adopt the methodology to determine a

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[5] *N.Y. Pub. Serv. Comm'n et al. v. N.Y. Indep. Sys. Operator, Inc*., 153 FERC ¶ 61,022 (2015) ("October 2015 Order"), *order on reh'g*, 154 FERC ¶ 61,088 (2016). At the time the order was issued, New York State had not yet begun to take a series of actions aimed at addressing climate change more aggressively.

[6] The BSM Rules are set forth in Section 23.4.5.7 *et seq*. of the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

[7] Compliance Filing at 10.

[8] *Id.* at 2.

[9] *Id.* at 3.

cap that IPPNY/EPSA proposed in their May 31, 2016 protest of the Compliance Filing.[10] Since the Commission issued its October 2015 Order, State public policy intervention in New York, like in PJM, has increased substantially and most recently has been codified in a comprehensive State statute to address climate change.[11] If its impacts on the New York markets are not addressed by the Commission, the effects of these State public policy initiatives on the competitive markets will be devastating.

IPPNY/EPSA also object to NYISO's implementing the Renewable Exemption as-filed if the Commission does not address its Compliance Filing by the time it must issue BSM Determinations. Such implementation is unlawful because the NYISO is legally obligated to apply the existing BSM Rules and cannot apply the proposed Renewable Exemption to make BSM Determinations unless the Commission accepts the Renewable Exemption.[12] In its ruling on the Motion, the Commission should, therefore, direct the NYISO to apply the existing BSM Rules, without application of the Renewable Exemption, to developers in the 2019 Class Year unless and until the Commission accepts the Compliance Filing. As the NYISO cannot implement the Renewable Exemption as-filed until the Commission accepts its Compliance Filing, the Conditional Tariff Waiver Request is moot and must be denied. Assuming *arguendo* that the

[10] Docket No. ER16-1404-000, *supra*, Joint Protest of Independent Power Producers of New York, Inc. and Electric Power Supply Association (May 31, 2016) ("IPPNY/EPSA Protest"). IPPNY/EPSA also requests that the Commission direct the NYISO to make the modifications to the Self-Supply Exemption that IPPNY/EPSA demonstrated are required in the IPPNY/EPSA Protest. IPPNY/EPSA does not address the Self-Supply Exemption in this answer because the NYISO stated that it does not anticipate that any entity will seek a Self-Supply Exemption in the 2019 Class Year and, therefore, it does not need to implement this exemption.

[11] *See* 2019 N.Y. Sess. Laws Ch. 106 (S. 6599) (the "Climate Act").

[12] While the IPPNY/EPSA answer addresses specific issues with the Renewable Exemption and the NYISO's Motion, should the NYISO seek to implement the Self-Supply Exemption prior to a Commission ruling accepting the exemption, the NYISO similarly lacks the authority to do so for the same reasons demonstrated in this answer, and thus, IPPNY/EPSA also oppose implementation of the NYISO's proposed Self-Supply Exemption.

Commission does not find the Conditional Tariff Waiver Request moot, it should deny it because the NYISO has failed to meet its burden of satisfying the Commission's requirements for a tariff waiver.

I. BACKGROUND

In its October 2015 Order, the Commission directed the NYISO to make a compliance filing revising its BSM Rules "to exempt a narrowly defined set of renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices."[13]

The Commission further ruled that the NYISO additionally must "limit the total amount of such renewable resources—in the form of a megawatt cap—that may receive the exemption" for the express purpose of "further limit[ing] any risk that these exempted resources will impact NYISO's ICAP market prices."[14] The Commission provided parameters on the types of resources that should be eligible for the Renewable Exemption and the design of a megawatt cap but stated that "the specifics of the renewable resources exemption are best worked out through the stakeholder process."[15] With respect to the megawatt cap, the Commission indicated that ISO New England's ("ISO-NE") 200 MW control-area wide cap on the amount of renewable resources that could qualify for an exemption from Offer Floor mitigation under ISO-NE's minimum offer price rule should serve as a model for the NYISO's proposed cap.[16]

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[13] October 2015 Order at P 10.

[14] *Id.* at P 51.

[15] *Id.* at P 50.

[16] *Id.* at P 51.

In its Compliance Filing, the NYISO proposed revisions to its BSM Rules to exempt from the imposition of Offer Floor mitigation Generators solely powered by technologies that are defined as an "Intermittent Power Resource"[17] solely powered by wind or solar and to cap the amount that these resources located in Mitigated Capacity Zoned can qualify for the Renewable Exemption at 1,000 MW of ICAP in any given Class Year.

Since the NYISO's Compliance Filing was made, circumstances have changed significantly directly due to substantial State intervention to support its public policy initiatives, most recently garnering the force of statute. On July 18, 2019, New York State enacted the Climate Leadership and Community Protection Act. By its express terms, New York's electric system, which produced 26% of its electricity from renewable resources in 2018, must add sufficient renewable resources to ensure 70% of energy consumed by 2030 is emissions-free. Ten years later, energy consumed must be entirely emissions-free. To achieve these levels, the Climate Act also requires the entry of six gigawatts of distributed energy solar capacity by 2025 and nine gigawatts of offshore wind capacity by 2035.[18]

[17] "Intermittent Power Resource" is defined in the Services Tariff as "[a] device for the production of electricity that is characterized by an energy source that: (1) is renewable; (2) cannot be stored by the facility owner or operator; and (3) has variability that is beyond the control of the facility owner or operator. In New York, resources that depend upon wind, solar energy or landfill gas for their fuel have been classified as Intermittent Power Resources. Each Intermittent Power Resource that depends on wind as its fuel shall include all turbines metered at a single scheduling point identifier (PTID)." Services Tariff § 2.9.

[18] In its order implementing an offshore wind generation program, the NYPSC established the goal of installing 2,400 MW of offshore wind generation. *See* NYPSC Case 18-E-0071, *In the Matter of Offshore Wind Energy*, Order Establishing Offshore Wind Standard and Framework for Phase I Procurement (July 12, 2018), at 62. In the span of less than a year, the offshore wind standard was transformed from a goal to a statutory mandate *and* multiplied nearly four-fold to 9,000 MW.

II. THE COMMISSION SHOULD RULE ON THE NYISO'S COMPLIANCE FILING IN TIME FOR THE NYISO'S BSM DETERMINATIONS IN MAY 2020 BUT SHOULD REJECT THE 1,000 MW CAP AND DIRECT THE NYISO TO ADOPT IPPNY/EPSA'S PROPOSED CAP.

In its Motion, the NYISO states that the Commission's inaction on the Compliance Filing has been inconsequential because there has not been any intermittent renewable resources that would be eligible for the Renewable Exemption in prior Class Years.[19] The NYISO states that a Commission ruling is now necessary because wind and solar projects proposed to be located in Mitigated Capacity Zones may participate in the 2019 Class Year, which starts on August 9, 2019. The NYISO estimates that it will need to issue BSM Determinations by May 2020 and requests that the Commission rule at least 30 days in advance of this date to provide the NYISO adequate time to implement the Renewable Exemption for any such wind and solar projects that enter the 2019 Class Year.

IPPNY/EPSA support the NYISO's request that the Commission rule on the Compliance Filing before BSM Determinations must be made in the 2019 Class Year to avoid the unnecessary and substantial uncertainty to developers of intermittent renewable resources located in Mitigated Capacity Zones that may enter the 2019 Class Year and all Market Participants regarding the scope and application of the BSM Measures. Moreover, timely Commission action on the Compliance Filing will avoid unnecessary litigation over the NYISO's legal authority to implement the Renewable Exemption in the absence of a Commission ruling on the Compliance Filing and thereby conserve administrative and judicial resources. As established in Point III below, contrary

[19] Compliance Filing at 6.

to the NYISO's claims and its flawed interpretation of the relevant case law, the NYISO lacks the requisite legal authority in this regard.

In its ruling on the Compliance Filing, however, the Commission should reject the NYISO's proposed 1,000 MW Cap. As demonstrated in the IPPNY/EPSA Protest, application of the 1,000 MW Cap would severely, and likely irreparably, depress ICAP prices given the potential for the cap to be reached each Class Year in the Mitigated Capacity Zones, a potential more significantly exacerbated by the enactment of the Climate Act.[20] IPPNY/EPSA demonstrated that if 1,000 MW of onshore wind entered for each of the four years between Capability Year 2017/2018 and 2020/2021, New York City ("NYC"), Lower Hudson Valley ("LHV"), and New York Control Area ("NYCA") ICAP prices would drop by 67%, 52%, and 40% respectively, compared to the prices that would result without the Renewable Exemption. In winter months when UCAP ratings for units are higher and capacity prices are below summer levels, capacity prices would drop to $0.00/kW-month in NYC, LHV, and NYCA. ICAP prices would decline even further with the entry of offshore wind due to its much higher UCAP ratings. If 1,000 MW of offshore wind entered each year in NYC, prices would decline by 83%, 76%, and 58% for NYC, LHV, and NYCA, respectively, compared to the ICAP prices that would have existed without the Renewable Exemption.

IPPNY/EPSA also demonstrated that, unlike the ISO-NE's 200 MW cap,[21] which was designed to limit the amount of renewable resources that could receive the renewable exemption

[20] IPPNY/EPSA Protest at 3.

[21] The Commission ruled that ISO-NE's 200 MW cap was just and reasonable because it was designed to limit the amount of renewable resources that could receive the renewable exemption each year to projected load growth and therefore balanced the Commission's competing goals of protecting the market from artificial price suppression and avoiding over-mitigation.

each year to projected load growth, the 1,000 MW Cap would allow exempted renewable resources to far exceed load growth.[22] At the time of its Compliance Filing, the NYISO had forecasted annual load growth of 29 MW in the LHV Locality and 22 MW in the NYC Locality from 2016 to 2026,[23] and now the NYISO is forecasting that load will decrease by 159 MW in the LHV Locality and 79 MW in the NYC Locality from 2020 to 2030.[24]

In fact, the NYISO did not design the 1,000 MW Cap to match load growth as it simply set the cap at a level corresponding to the amount of intermittent renewable projects it anticipated at that time would be developed in the near future.[25] At the time of the Compliance Filing, the 1,000 MW ICAP was equivalent to more than 11 years of load growth in NYC and approximately 8 years of load growth for LHV. Today, even longer periods will be required now that load is forecasted to decrease and higher capacity factor resources, such as offshore wind generation facilities, have obtained contracts to be constructed. If 1,000 MW of offshore wind were constructed at the 1,000 MW Cap, it would be equivalent to more than two decades (22 years) of NYC load growth. Importantly, ISO-NE's 200 MW cap that was the model for the NYISO cap subsequently was replaced, in part, because the amount of subsidized new entry far exceeded expected load growth.[26] Particularly in light of the enactment of the Climate Act, given the

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[22] IPPNY/EPSA Protest at 7–8.

[23] Docket No. ER16-1404-000, *supra*, Motion to Intervene and Comments of the NYISO's Market Monitoring Unit (June 1, 2019), at 4 ("MMU Comments").

[24] 2019 Load & Capacity Data (Gold Book), NYISO, at 20, https://www nyiso.com/documents/20142/2226333/2019-Gold-Book-Final-Public.pdf/.

[25] *See* MMU Comments at 3–4.

[26] In January 2018, ISO-NE submitted an FPA Section 205 filing with the Commission to replace the 200 MW cap with its Competitive Auctions with Sponsored Policy Resources ("CASPR") proposal. Pointing to substantial increases in MWs subsidized under State public policy initiatives far exceeding any expected levels of load growth (*i.e.*, a Massachusetts initiative to contract for 2,800 MW of new resources to satisfy legislative mandates matched against a region that had not experienced its expected load growth), ISO-NE supported its proposal, in part, by noting, "[t]hree years later, the ISO's expectations have not materialized, and the RTR exemption now presents a greater risk

potential that 1,000 MW of intermittent renewable resources would be exempt from Offer Floor mitigation each Class Year, the impact to ICAP prices over successive Class Years is even more unworkable.[27]

Specifically, New York's Climate Act dictates an extremely rapid transition to an electric system that produces 70% of its electricity from such resources by 2030 and 100% of its electricity from zero-emitting resources by 2040 which makes reaching the 1,000 MW Cap in each Class Year far more likely now.[28] As noted above, a 6,000 MW solar generation requirement and a 9,000 MW offshore wind generation requirement by 2025 and 2035, respectively, are core components of the Climate Act. Notably, NYSERDA announced three weeks ago that it awarded contracts to two developers to construct a total of 1,700 MW of offshore wind projects to enter commercial operation in 2024, one of which is the 816 MW Empire Wind Project connecting into the New York City Mitigated Capacity Zone.[29] The Empire Wind Project received approval of its interconnection reliability study from the Transmission Planning and Advisory Subcommittee on August 1, 2019.[30] Assuming it receives the Operating Committee's approval of the study later this

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of price suppression." *See* Docket No. ER18-619-000, *ISO-New England, Inc.*, Revisions to ISO New England Transmission, Markets and Services Tariff Related to Competitive Auctions with Sponsored Policy Resources (Jan. 8, 2018), at 11. The Commission approved ISO-NE's proposal. *ISO New England, Inc*., 162 FERC ¶ 61,205, at PP 99–102 (2018) ("ISO-NE CASPR Order").

[27] It is important to note that the NYISO's independent Market Monitoring Unit ("MMU") demonstrated that, based on forecasted load growth in the LHV Locality, the 1,000 MW Cap would likely cause ICAP prices to fall significantly, lead to generator retirements, and require reliability-must-run agreements to retain units needed for reliability. *Id.* at 4. The MMU advocated that the Commission "encourage NYISO to more fully consider forecasted load growth in establishing the cap level." *Id.*

[28] *See* Climate Act.

[29] *Governor Cuomo Executes the Nation's Largest Offshore Wind Agreement and Signs Historic Climate Leadership and Community Protection Act*, Gov. Andrew M. Cuomo (July 18, 2019), https://www.governor ny.gov/news/governor-cuomo-executes-nations-largest-offshore-wind-agreement-and-signs-historic-climate.

[30] *NYISO Review of the System Reliability Impact Study for Empire Wind Project Interconnection Queue #737*, NYISO (Aug. 1, 2019),

week, it is likely to enter the 2019 Class Year and would be eligible to apply for a Renewable Exemption, should the Commission approve one.

As demonstrated in the IPPNY/EPSA Protest, a Renewable Exemption cap that is limited to one-half of one percent of the current minimum unforced capacity ("UCAP") requirement for each Mitigated Capacity Zone at the time the Class Year begins (the "0.5% UCAP Cap") would provide at least some measure of protection to the market from price suppression while not implicating over-mitigation.[31] Based upon ICAP requirements in the Mitigated Capacity Zones as of the date of the Compliance Filing, the 0.5% UCAP Cap would exempt approximately 43.5 MW of UCAP in the NYC Locality and approximately 67.2 MW of UCAP for the LHV Locality, which includes NYC, of resources that are eligible for the Renewable Exemption per Class Year. IPPNY/EPSA's proposed 0.5% UCAP Cap would exempt more entry from Offer Floor mitigation than projected load growth (three times and two and one half times the projected annual load growth for NYC and LHV, respectively) to the detriment of the ongoing development of the competitive markets but would permit far less artificial price suppression than if the 1,000 MW Cap were implemented.[32]

The grounds for rejecting the NYISO's 1,000 MW Cap and approving IPPNY/EPSA's 0.5% UCAP Cap are even stronger than they were three years ago, when NYISO filed, and IPPNY/EPSA protested, the Compliance Filing. First, as discussed above, New York's Climate Act will cause the rapid entry of intermittent renewable resources across the State, with thousands

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https://www.nyiso.com/documents/20142/7799444/04c_Q737_EmpireWind_SRIS_NYISO_Review_TPAS.pdf/bfa4dd63-9154-9715-eaf3-bd2370a703ce.

[31] IPPNY/EPSA Protest at 5.

[32] *Id.* at 12.

of MWs of offshore wind and solar likely entering Mitigated Capacity Zones in each Class Year until the goals of the Climate Act are met. The 1,000 MW Cap will significantly suppress ICAP prices for years, forcing retirements as soon as the projects in the 2019 Class Year come online. Without strong BSM Rules, the market will not provide adequate price signals to retain resources in the Mitigated Capacity Zones that are needed for reliability.[33] As a result, these resources will require RMR agreements while operations of other otherwise economic resources in these regions will no longer be viable. Retirements will ensue. Worse yet, these reliability resources will struggle to remain in service and become unavailable unexpectedly due to operating issues. Reliability consequences and market failure will result. Over time, the New York system will be composed of resources subsidized under State public policy programs, RMR units, and emergency actions in an attempt to maintain reliable service. The market will be effectively dead.

Second, since its October 2015 Order, the Commission has strengthened its policy on the need for offer floor mitigation to protect ICAP markets from artificial suppression caused by resources entering and staying in the market with the benefit of out-of-market compensation in response to the substantial expansion of State public policy initiatives and the changed circumstances these actions have presented. Pointing to significant changed circumstances occasioned by the substantial increase in State intervention to support public policy programs in the PJM region, the Commission issued an order a year ago finding that it was unjust and

[33] IPPNY/EPSA urge the Commission to rule as soon as possible on IPPNY's January 19, 2016 protest filed in Docket No. EL13-62-002, another long-pending filing concerning the NYISO's BSM Rules. As the existing BSM Rules apply only to new entrants in the NYC and LHV Localities, IPPNY's 2016 protest requested that the Commission order the NYISO to expand the application of the BSM Measures and Offer Floor Mitigation to new entrants in the Rest of State and to the retention of existing uneconomic generators that are retained in the market with out-of-market compensation. *See* Docket No. EL13-62-002, *Independent Power Producers of New York, Inc. v. New York Indep. Sys. Operator, Inc*., Protest of Independent Power Producers of New York, Inc. (Jan. 19, 2016).

unreasonable to continue to limit PJM Interconnection, L.L.C.'s ("PJM's") offer floor mitigation mechanism, the Minimum Offer Price Rule ("MOPR"), only to new natural-gas fired resources.[34] In so doing, the Commission expressly recognized the price suppressive impact that large amounts of subsidized renewable resources will have. The Commission stated:

> Over the last few years, the integrity and effectiveness of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market. The amount and type of generation resources receiving such out-of-market support has increased substantially. What started as limited support primarily for relatively small renewable resources has evolved into support for thousands of megawatts (MWs) of resources ranging from small solar and wind facilities to large nuclear plants. As existing state programs providing out-of-market payments continue to grow, more states in the PJM region are considering providing more support to even more resources, based on an ever-widening scope of justifications.[35]

The Commission ruled that the MOPR "fails to mitigate price distortions caused by out-of-market support granted to other types of new entrants or to existing capacity resources of any type."[36] Likewise, the Commission approved ISO-NE's proposal to replace its 200 MW renewable exemption with CASPR, in part, to address the substantial influx of State-subsidized generation pursuant to public policy initiatives.[37] As established above, the amount and type of generation

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[34] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 5 (2018) ("June 2018 Order") (rehearing pending) (holding, "we find here that the increase in programs providing out-of-market support… has changed the circumstances in PJM. . . ."). The scope of changed circumstances in New York that recently has been put into motion in New York through the Climate Act arguably well exceeds those in PJM thereby justifying review as to whether any renewable exemption could reasonably be considered to be warranted at this juncture.

[35] *Id.* at P 1.

[36] *Id.* at P 5.

[37] *See* ISO-NE CASPR Order at P 72.

resources receiving out-of-market support in New York also has grown and will continue to grow significantly, just as the Commission found was the case with respect to PJM. The Commission's approval of the 1,000 MW Exemption would be flatly inconsistent with its June 2018 Order.[38]

Third, since the NYISO's Compliance Filing, the NYISO has completed a substantial market design effort in response to the proceeding initiated by the Commission to explore how to harmonize State public policy initiatives with competitive wholesale markets.[39] Specifically, the NYISO worked through the stakeholder process and developed a comprehensive market design and associated tariff amendments that would internalize the value of carbon emissions reductions in wholesale energy prices that would much more effectively address the State's climate change goals than the NYISO's proposed Renewable Exemption and its associated 1,000 MW Cap.[40] The proposed tariff amendments provide that the NYPSC would set the value of carbon (the "Carbon Adder"). Under this approach, the full carbon cost would be added to the energy bids of carbon-emitting resources. The NYISO dispatch would thereby incorporate the full carbon cost in its commitment and dispatch decisions, and those costs would be included in the wholesale energy

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[38] While the Commission can and does allow for regional differences, it has likewise made clear that this does not mean that "principles underlying market design in one region are not applicable to another . . . ." *Consolidated Edison Co. of N.Y., Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 47 (2015), *reh'g*, 152 FERC ¶ 61,110 (2015).

[39] *See* Docket No. AD17-11-000, *State Policies and Wholesale Markets Operated by ISO New England, Inc., New York Independent System Operator, Inc. and PJM Interconnection, L.L.C.*, Notice of Technical Conference (Mar. 3, 2017) ("State Public Policy Proceeding"), at 1 (recognizing that "[i]n recent years, there have been increased interest by state policy makers to pursue policies that prioritize certain resources or resource attributes" and stating that "there is an open question of how the competitive wholesale markets, particularly in states or regions that restructured their retail electricity service, can select resources of interest to state policy makers while preserving the benefits of regional markets and economic resource selection"); *see also* Docket No. AD17-11-000, *supra*, Supplemental Notice of Technical Conference (Apr. 28, 2017).

[40] Ethan D. Avallone, *Carbon Pricing: Market Design Complete*, NYISO(June 20, 2019), at 5, https://www.nyiso.com/documents/20142/7129597/6.20.2019_MIWG_Carbon_Pricing_MDC_FINAL.pdf/cf67ebb8-d0fc-7b4b-100f-c3756d6afae8.

prices, which all zero-emitting resources would be paid.[41] Carbon emitting resources would be paid the wholesale-energy price but would be required to pay for the cost of carbon for the unit's generation and such funds collected would be returned to loads.[42]

As the energy price would include the Carbon Adder, as set by the NYPSC, it should significantly reduce, if not eliminate, the perceived need for out-of-market payments that are being provided to incent the development of new, and the retention of existing, resources that are otherwise uneconomic.[43] Resources that do not receive out-of-market compensation are eligible for another exemption to Offer Floor mitigation under the BSM Rules, the so-called Competitive Entry Exemption.[44]

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[41] *Id.*

[42] *Id.* In its reports to Market Participants, the NYISO has reported that it has not brought the Carbon Adder proposal to a market participant vote because it is unknown whether the State supports it, even though the New York Department of Public Service Staff has been closely involved in the development of the proposal since its inception two years ago. If the State supported the Carbon Adder, IPPNY/EPSA believe it is likely that the Carbon Adder would receive the necessary votes from market participants and the NYISO Board of Directors would approve its filing with the Commission. In addition to providing a more efficient means to meet the State's public policy goals, a major benefit of the Carbon Adder is that renewable resources could be added to the system without the need for a Renewable Exemption.

[43] ISO-NE's CASPR proposal constituted its response to the Commission's efforts in the State Public Policy Proceeding. The NYISO's carbon pricing proposal is its response. Absent a Commission directive, however, a 58% vote of the Management Committee and NYISO Board concurrence are required for the NYISO to submit its Carbon Adder proposal to the Commission under FPA Section 205.

[44] With the Carbon Adder, the State can achieve its public policies without artificially suppressing ICAP prices. However, the State will have far less incentive to support the Carbon Adder if the Commission accepts the 1,000 MW Cap, as most renewable resources that will need to be added to the system to meet the goals of the Climate Act will be eligible for the Renewable Exemption. Given that the State has an alternative means to meet its policy goals that can be implemented relatively quickly, is market-based, is consistent with the Commission's efforts in its State Public Policy Proceeding, and will not cause a devasting reduction in ICAP prices, there is no justification to accept the 1,000 MW Cap.

III. THE NYISO MUST APPLY THE EXISTING BSM RULES, NOT ITS PROPOSED RENEWABLE EXEMPTION, IN MAKING BSM DETERMINATIONS UNLESS THE COMMISSION ACCEPTS THE RENEWABLE EXEMPTION.

To support its position it will implement the Renewable Exemption as-filed if the Commission does not rule on the Compliance Filing before its BSM Determinations for the 2019 Class Year, the NYISO points to a 2016 Commission order addressing the Midwest Independent Transmission System Operator, Inc.'s ("MISO's") authority to implement tariff provisions in a compliance filing, ministerial in nature, prior to the Commission's acceptance there of.[45] The MISO Order is apples to oranges and does not support the NYISO's position. In fact, the MISO order and judicial precedent cited therein demonstrate why NYISO cannot lawfully implement the Renewable Exemption as filed unless the Commission accepts the exemption in the Compliance Filing.

Section 206 of the Federal Power Act ("FPA") provides that once the Commission finds that the challenged tariff provisions in a section 206 complaint proceeding are unjust, unreasonable, or unduly discriminatory or preferential, "the Commission shall determine the just and reasonable rate ... to be thereafter observed and in force, and shall fix the same by order."[46] The MISO Order cites to *Electrical District No. 1 v. FERC*,[47] a United States Court of Appeals for the District of Columbia Circuit decision which addressed what it means for the Commission to "fix" a rate for purposes of Section 206(a) such that it is to be thereafter observed and in force.[48]

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[45] *Ameren Services Co. et al. v. Midwest Indep. Transmission Sys. Operator, Inc. et al.*, 155 FERC ¶ 61,073 (2016) ("MISO Order").

[46] Federal Power Act § 206, 16 U.S.C. § 824e (2018).

[47] 774 F.2d 490 (D.C. Cir. 1985) ("*Electrical District*").

[48] *Id.*

In *Electrical District*, the court rejected the Commission's attempt to make a rate change effective back to the date of its compliance directive, rather than as of the date of the Commission's acceptance of the utility's compliance filing. The court stated that making the new rate effective as of the date of an initial "order setting forth no more than the basic principles pursuant to which the new rates are to be calculated would make unforeseeable liabilities a regular consequence of rate adjustments . . . ."[49]

The court further stated that rather than waiting for the utility to calculate the rates in a compliance filing, the Commission could calculate and fix the rate itself in the initial order.[50] The Commission did so in the MISO Order. The Commission ruled that MISO could implement a rate prior to the Commission accepting the compliance filing proposing the rate because the initial Commission order established that exact rate and the compliance filing was merely "ministerial in nature, in that it was limited simply to making the revisions to the text that the Commission specified in the Order on Paper Hearing."[51] The Commission stated that rate "was known through issuance of the Order on Paper Hearing, and making the rate effective at that time left no uncertainty that could only be removed through acceptance of the compliance filing."[52] The Commission ruled, "[f]or these reasons, the Commission's action in the Order on Paper Hearing is precisely the type of 'mechanical and expeditious ... process' that permits fixing a rate in an 'initial order' without a requirement of subsequent further Commission approval."[53]

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[49] *Id.* at 493.

[50] *Id.* at 494.

[51] MISO Order at P 21.

[52] *Id.* at 22.

[53] *Id.* (citing *Electrical District* at 494).

The Commission's actions in the October 2015 Order stand in stark contrast to the fact pattern presented in the MISO Order. As discussed above, in its October 2015 Order, the Commission provided parameters for the NYISO to use to work with its stakeholders to identify the generator technologies that would be eligible for the Renewable Exemption and to set the level of the exemption cap. The Commission did not fix the rate, and there was nothing about the October 2015 Order that made compliance with its directives a purely "ministerial" or "mechanical" exercise. To the contrary, the Commission gave the NYISO relatively broad latitude to determine, with stakeholder input, which resources should qualify for the Renewable Exemption and the level of the cap.[54] The Commission did not, for example, state that only wind and solar resources should be eligible or that the cap should be set at 1,000 MW, as NYISO has proposed. In fact, the NYISO admits that the Commission did not include a directive as comparably clear as the directive in the MISO Order with respect to the annual MW cap.[55] As in *Electrical District*, the Commission has yet to "fix" any particular renewable exemption as the replacement rate, and the NYISO must apply the existing BSM Rules until the Commission does so.

Therefore, the Commission should direct the NYISO to apply the existing BSM Rules in the event the Commission has not ruled on the Compliance Filing at least 30 days before the NYISO must issue BSM Determinations.

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[54] The NYISO stated in its Compliance Filing that the October 2015 Order "gave the NYISO general guidance concerning the parameters of the two new exemptions. It left the NYISO with substantial flexibility to work with its stakeholders to develop the details and to propose them in this filing." Compliance Filing at 3.

[55] Motion at 11.

IV. THE COMMISSION SHOULD REJECT THE NYISO'S CONDITIONAL TARIFF WAIVER REQUEST.

The NYISO requests that the Commission grant tariff waivers that would allow any BSM Determinations made prior to a Commission ruling on the Compliance Filing to remain in effect should the Commission subsequently modify the proposed Renewable Exemption. As demonstrated in Point III, the NYISO cannot implement the Renewable Exemption as-filed unless the Commission accepts its Compliance Filing. Thus, the NYISO's Conditional Tariff Waiver Request is moot and must be denied. Assuming *arguendo* that the Commission does not find the Conditional Tariff Waiver Request moot, the Commission should reject it because it falls far short of the standard for a waiver articulated in Commission precedent.

A party may petition the Commission for a limited waiver of its tariff provisions when (1) it has identified a "concrete problem" that the waiver will address; (2) the waiver requested is of limited scope; (3) the Commission's grant of the waiver will not have undesirable consequences; and (4) the party has sought the waiver in good faith.[56] The NYISO's Tariff Waiver Request cannot satisfy this long-established standard because the NYISO's request does not address a concrete problem, is not in good faith, is not limited in scope, and the Commission's grant of the waiver would harm market participants.

The NYISO's Conditional Tariff Waiver Request is contingent on the Commission modifying the Compliance Filing. The request does not address a concrete problem at this juncture because, while the Compliance Filing should be modified for all the reasons established

[56] *Midcontinent Indep. Sys. Operator, Inc*., 145 FERC ¶ 61,070, at P 27 (2013).

by IPPNY/EPSA, there are no waivable tariff provisions governing the application of the Renewable Exemption until the Commission rules on the NYISO's Compliance Filing.[57]

As demonstrated in Point III, the NYISO's position that it is required to implement the Renewable Exemption as-filed is not supported by precedent. In fact, pursuant to controlling precedent, it would be unlawful for the NYISO to implement the Renewable Exemption as-filed unless the Commission accepts the Compliance Filing. NYISO's position is completely baseless as a matter of law, and the Commission has rejected the proposition that a movant can be regarded as seeking waiver in good faith under such circumstances.[58]

Nor is the NYISO's Conditional Tariff Waiver Request necessarily limited in scope. As NYISO's requested relief is premised on the Commission modifying the Renewable Exemption *after* the NYISO issues BSM Determinations for developers in the 2019 Class Year, it is uncertain what tariff provisions would be waived and the associated scope of the impact of such waiver on other market participants. In addition, if granted by the Commission, it would establish a precedent for future waiver requests.[59] While the NYISO is seeking a tariff waiver only with respect to the 2019 Class Year, there are many other renewable projects in the NYISO's interconnection queue that are proposing to be located in Mitigated Capacity Zones. Particularly given the State's commitment pursuant to the Climate Act to develop intermittent renewable resources, some of these projects are likely to be eligible to participate in future Class Years. Intermittent renewable resources that enter Class Years subsequent to the 2019 Class Year will

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[57] *See PJM Capacity Suppliers*, 167 FERC ¶ 61,119, at P 12 (2019) (finding no concrete problem exists until Commission acts on complaint filing).

[58] *See CPV Shore, LLC*, 168 FERC ¶ 61,048, at P 23 (2019).

[59] *See Coso Energy Developers, et al.*, 134 FERC ¶ 61,088, at P 18 (2011) (denying waiver request because the waiver could serve as a precedent for other projects, leading to adverse impacts).

demand tariff waivers to ensure the continued effectiveness of their exemptions. The NYISO would thus need to seek the same tariff waivers for future Class Years if the Commission grants the instant request but does not rule on the Compliance Filing in the interim. Thus, the scope of the waiver could well be much broader than the NYISO represents in its Motion.

Finally, if resources were permitted to continue to be exempt from Offer Floor mitigation after the Commission directs the NYISO to reduce the level of the cap, merchant resources will substantially be harmed by the artificial price suppression caused by the erroneous exemptions. As the extent of the harm is unknown until the Commission rules on the level of the cap, the Commission lacks sufficient information to assess the merits of the NYISO's request at this time.[60] If the Commission granted the Conditional Tariff Waiver Request, the Commission would permit resources that the NYISO had erroneously exempted from Offer Floor mitigation under the Renewable Exemption as-filed to continue to reap the benefits of the NYISO's erroneous decision even after the Commission has rejected or modified the Renewable Exemption. Contrary to the NYISO's baseless conclusion, such a waiver, and the undermitigation it would support, would not cause "comparatively minor harm to certain third party interest."[61] Rather, depending on the scope of the Commission's decision, this undermitigation could involve hundreds of MWs. As IPPNY/EPSA demonstrated above and in the IPPNY/EPSA protest, the exemption of 1,000 MW of uneconomic entry from Offer Floor mitigation in the Mitigated Capacity Zones will severely suppress ICAP prices on which merchant facilities that do not receive out-of-market compensation depend to cover their operating expenses, debt and capital costs.

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[60] *See N.Y. Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,100, at PP 16, 17 (2009) (deferring action on waiver request until NYISO provides data and analysis of the impact on market participants).

[61] *See* Motion at 14.

Intermittent renewable resources that enter Class Years subsequent to the 2019 Class Year and do not obtain a Renewable Exemption with a lower Commission-approved cap will also be harmed by 2019 Class Year entrants that unjustifiably received an exemption under the 1,000 MW cap. On the other hand, resources that would be eligible for the Renewable Exemption as-filed have no reasonable expectation that the Commission will accept the NYISO's Compliance Filing. Thus, the harm to merchant facilities and future intermittent resources caused by granting the Tariff Waiver Request substantially outweighs any purported benefit of providing intermittent renewable resources in the 2019 Class Year a permanent exemption from Offer Floor mitigation based on a Renewable Exemption subsequently rejected or modified by the Commission.

V. CONCLUSION

For the foregoing reasons, the Commission should issue an order expeditiously directing the NYISO to adopt IPPNY/EPSA's proposed 0.5% UCAP Cap. If the Commission does not issue an order addressing the Compliance Filing at least 30 days before the NYISO must issue BSM Determinations for the 2019 Class Year, it should issue an order on the Motion directing the NYISO to apply the existing BSM Rules, not the Renewable Exemption, until the Commission issues an order on the Compliance Filing. Finally, the Commission should reject the NYISO's Tariff Waiver Request.

Dated: August 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Albany, NY, August 5, 2019.

By: *David B. Johnson*
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