

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

<b>New York State Public Service Commission,</b>	)	<b>Docket Nos. EL16-92-002 and</b>
<b>New York Power Authority, Long Island Power</b>	)	
<b>Authority, New York State Energy Research</b>	)	
<b>and Development Authority, City of New York,</b>	)	
<b>Advanced Energy Management Alliance,</b>	)	
<b>and Natural Resources Defense Council</b>	)	
	)	
	)	
	)	
<b>v.</b>	)	
	)	
<b>New York Independent System Operator, Inc.</b>	)	
	)	
<b>New York Independent System Operator, Inc.</b>	)	<b>ER17-996-001</b>
	)	<b>(not consolidated)</b>

**PROTEST OF INDEPENDENT  
POWER PRODUCERS OF NEW YORK, INC. AND  
REQUEST FOR EXPEDITED COMMISSION ACTION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”)<sup>1</sup> and the Commission’s March 13, 2020 Combined Notice of Filings #1, Independent Power Producers of New York, Inc. (“IPPNY”) hereby protests the New York Independent System Operator, Inc.’s (“NYISO”) proposed compliance plan that it filed with the Commission on March 11, 2020.<sup>2</sup> In its proposed Compliance Plan, the NYISO reported how it planned to apply its buyer-side market power mitigation measures

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<sup>1</sup> 18 C.F.R. § 385.211 (2020).

<sup>2</sup> Docket Nos. ER17-996-001 et al., *New York State Pub. Serv. Comm’n, et. al. v. New York Indep. Sys. Operator, Inc.*, Notice of Compliance Plan and Request for Conditional Waiver of the New York Independent System Operator, Inc. (Mar. 11, 2020) (“Compliance Plan”).

(“BSM Measures”) to Special Case Resources (“SCRs”) beginning with the May 2020 capability month in purported compliance with the Commission’s February 20, 2020 order pending completion of the paper hearing process that the Commission established therein and the Commission’s acceptance of revised Market Administration and Control Area Services Tariff (“Services Tariff”) provisions.<sup>3</sup> Specifically, the NYISO stated that it would include language in Services Tariff, Attachment H, Section 23.4.5.7.5 that, if implemented, would exclude from the calculation of a new SCR’s Offer Floor those payments or the value of other benefits that are provided under *all* State programs (the “Exclusion Language”)<sup>4</sup>—the very same language the Commission addressed and expressly rejected in its March 2015 Order, a determination the Commission then reaffirmed in its February 2020 Order.<sup>5</sup>

As demonstrated below, the Commission should expeditiously issue an order directing the NYISO to immediately remove the Exclusion Language from its Services Tariff because it is invalid and violates clear prior Commission action and directives, including the clear holding and underlying intent of the February 2020 Order.

**I. THE COMMISSION HAS FULLY ADDRESSED AND EXPRESSLY REJECTED THE EXCLUSION LANGUAGE, AND THUS, THE NYISO MUST REMOVE IT FROM ITS SERVICES TARIFF.**

Erroneously characterizing the Exclusion Language as part of the “currently effective” Section 23.4.5.7.5 of Attachment H to its Services Tariff, the NYISO asserted in its proposed Compliance Plan that it will apply the Exclusion Language when calculating Offer Floors for

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<sup>3</sup> *New York State Pub. Serv. Comm’n, et. al. v. New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,120 (2020) (“February 2020 Order”).

<sup>4</sup> Compliance Plan at 4.

<sup>5</sup> *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208, at P 30 (2015) (“March 2015 Order”); February 2020 Order at PP 17, 22.

new SCRs until the Commission accepts revised tariff language following the paper hearing process.<sup>6</sup> The relevant part of this section as identified by the NYISO in its proposed Compliance Plan is quoted below with the Exclusion Language italicized.

The Offer Floor for a Special Case Resource shall be equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resources. *The Offer Floor calculation shall include any payment or the value of other benefits that are awarded for offering or supplying Mitigated Capacity Zone Capacity except for payments or the value of other benefits provided under programs administered or approved by New York State or a government instrumentality of New York State.*<sup>7</sup>

As established *infra*, the Exclusion Language was fully addressed and expressly rejected by the Commission in the March 2015 Order, a determination the Commission reaffirmed in its February 2020 Order. If the NYISO is permitted to implement its proposed approach, payments or other benefits under *all* State programs will be excluded from the calculation of the Offer Floor for all new SCRs beginning with the May 2020 capability month. This, in turn, will produce a lower Offer Floor than required by Commission orders which could well allow SCRs

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<sup>6</sup> Compliance Plan at 4. The NYISO does not explain why it believes the Exclusion Language is effective other than its statement that “the currently effective tariff language precedes the tariff language proposed in the April 2015 Compliance Filing that was subsequently rejected in February 2017.” *Id.* In an attempt to resolve this issue, IPPNY offered an explanation to the NYISO demonstrating that its proposal to apply the Exclusion Language is erroneous. As of the time of this filing, the NYISO has not corrected its proposed Compliance Plan with the Commission. Absent Commission action, it is IPPNY’s understanding that the NYISO will apply the Exclusion Language to Offer Floor calculations for new SCRs beginning with the May 2020 capability month.

<sup>7</sup> *Id.*

to erroneously clear their installed capacity (“ICAP”) offers and artificially suppress ICAP prices across the entire New York Control Area (“NYCA”).<sup>8</sup>

As the evolution of the Commission’s orders concerning the application of BSM Measures to SCRs culminating in the February 2020 Order clearly demonstrates, the only Commission-accepted tariff language that describes how Offer Floors must be calculated for SCRs requires the NYISO to include any payments or benefits an SCR receives from a third party either directly or through its designated ICAP supplier. The Commission cited this language in the February 2020 Order.<sup>9</sup>

The Commission initially directed the NYISO to apply the BSM Measures to SCRs in its September 30, 2008 order granting rehearing and reversing its March 7, 2008 order which had exempted SCRs from the BSM Measures.<sup>10</sup> On October 30, 2008, the NYISO filed proposed tariff language applying the BSM Measures to SCRs in compliance with the Commission’s September 2008 Order.<sup>11</sup> Proposed Section 4.5(g)(v) of Attachment H to the Services Tariff provided, in relevant part:

An In-City Installed Capacity Supplier that is a Special Case Resource shall be subject to an Offer Floor for (A) its initial offer to supply Installed Capacity, and (B) its initial offer to supply

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<sup>8</sup> The impact will be the most pronounced if the SCR in question is located in Zone J because the artificial price effects of its erroneous mitigation determination will adversely affect suppliers throughout the LHV Zone (composed of Zones G-J) and the NYCA market. If the resource is located in the LHV Zone but outside Zone J, suppliers in all zones but New York City will be adversely affected.

<sup>9</sup> See February 2020 Order at P 17 (quoting remaining effective tariff language identified as Services Tariff, Section 23.4.5.7.5 (3.0.0.) following its determination that rehearing must be granted and earlier order’s blanket exemption must be rejected to prevent SCRs from artificially suppressing ICAP market prices below competitive levels.”).

<sup>10</sup> *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 120 (2008) (ruling “mitigation of uneconomic investment should not apply to SCRs”); *order on rehearing*, 124 FERC ¶ 61,301, at P 41 (2008) (“September 2008 Order”) (directing the NYISO to file tariff sheets reflecting its ruling requiring “SCRs to comply with NYISO’s in-City mitigation rules as approved herein” because “it is appropriate for NYISO’s in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants”).

<sup>11</sup> Docket Nos. EL07-39-005, et al., *New York Indep. Sys. Operator, Inc.*, Tariff Filing and Request for Waiver of the New York Independent System Operator, Inc. (Oct. 30, 2008) (“October 2008 Compliance Filing”).

Installed Capacity following a period of one year or more in which it did not offer to supply Installed Capacity. Responsible Interface Parties shall identify to the ISO any Special Case Resource that is subject to an Offer Floor, in accordance with ISO Procedures. The Special Case Resource shall continue to be subject to an Offer Floor for the following 11 months, for a total for 12 months. *The Offer Floor for a Special Case Resource shall be equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resource.*<sup>12</sup>

In compliance with the September 2008 Order, the NYISO did not propose to exclude from the SCR Offer Floor calculation the value of any payments or other benefits received by the SCR from any programs, including any State programs.

The Commission accepted this proposed tariff revision in its May 2010 Order.<sup>13</sup> The NYISO has not sought to modify this language in any subsequent filing and it remains effective today. As noted above, it is the language the Commission cited in its February 2020 Order as the currently effective tariff provision.

In addition to accepting this tariff language in the May 2010 Order, the Commission began to consider whether there should be limited exceptions to permit some forms of payments to fall outside of the Offer Floor calculation. To that end, the Commission stated that it would be appropriate to eliminate payments an SCR receives from State programs that further specific legitimate policy goals.<sup>14</sup> At that time, the Commission determined that payments under two

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<sup>12</sup> *Id.* at Attachment 1, First Revised Sheet No. 476.04—Original Sheet No. 476.04A (emphasis added).

<sup>13</sup> *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 137 (2010) (“May 2010 Order”). When the NYISO renumbered its Services Tariff provisions to accommodate future submissions under the FERC e-Filing system, this section became known as Services Tariff, Section 23.4.5.7.5, the section at issue in the NYISO’s proposed Compliance Plan.

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

rebate programs should not be included in the calculation of the SCR Offer Floor.<sup>15</sup> The Commission directed the NYISO to “publish on its website a complete list of programs whose subsidies and other benefits are to be included in the offer floor, as well as all programs whose subsidies or benefits are to be excluded from the calculation of the offer floor.”<sup>16</sup> The Commission also required the NYISO to submit tariff language proposing the criteria it would use to evaluate subsidies for purposes of calculating Offer Floors for new SCRs.<sup>17</sup> Some of IPPNY’s members sought rehearing of the Commission’s determination in the May 2010 Order to permit limited exceptions to the payments to be included in the Offer Floor calculation for new SCRs.<sup>18</sup>

After seeking clarification from the Commission that the May 2010 Order did not require the NYISO to determine the legitimacy of State programs,<sup>19</sup> the NYISO proposed in a separate filing to add the Exclusion Language to Services Tariff Section 23.4.5.7.5, purportedly in compliance with the May 2010 Order.<sup>20</sup> Offering its “assum[ption] that the Commission would agree that state programs should be presumed to be aimed at serving valid public policy goals” as the basis for this proposed Exclusion Language, the NYISO highlighted the fact that it had, therefore, proposed “to exclude *all* payments and the other benefits to SCRs under state

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

<sup>16</sup> *Id.* at P 138.

<sup>17</sup> *Id.* at P 137.

<sup>18</sup> Docket Nos. EL07-39-006, et. al., *supra*, Request for Rehearing of Independent Power Producers of New York, Inc. (June 21, 2010).

<sup>19</sup> Docket Nos. EL07-39-004, et al., *supra*, Request for Clarification of the New York Independent System Operator, Inc. (June 21, 2010) at 4 (“June 2010 Clarification Request”).

<sup>20</sup> Docket No. ER10-2371-000, *New York Indep. Sys. Operator, Inc.*, Resubmittal of August 12, 2010 Filing (Aug. 24, 2010) at 13 (“August 2010 Filing”). Building on the position taken in its clarification request, the NYISO asserted that it “does not believe that the Commission could have intended for it to pass judgment on the ‘legitimacy’ of individual state programs.” *Id.* at 12.

programs from the Offer Floor calculation.”<sup>21</sup> IPPNY and individual members also protested the NYISO’s August 2010 Filing on the grounds, *inter alia*, that the NYISO had failed to comply with the May 2010 Order, had conducted no analysis whatsoever and had simply defaulted to a blanket exemption of all State programs which would cause significant uneconomic entry and concomitant artificial price suppression.<sup>22</sup>

In its March 2015 Order, the Commission summarily rejected the proposed Exclusion Language, emphasizing, “neither did we intend to grant a blanket exemption for all state programs that subsidize demand response.”<sup>23</sup> Eliminating any potential for doubt whatsoever that it had indeed rejected the very tariff modifications on which the NYISO now seeks to rely in its proposed Compliance Plan, the Commission further stated, “[w]e note that, because NYISO did not propose to provide criteria as directed by the May 20, 2010 Order and, instead, proposed to add a blanket exclusion from the Offer Floor calculation of any payment or the value of other benefits provided under programs administered or approved by New York State or a governmental instrumentality of New York State, NYISO’s filing would not have complied with the May 20, 2010 Order.”<sup>24</sup>

Finding the State could request an exemption pursuant to section 206 of the Federal Power Act “if it believes that the inclusion in the SCR Offer Floor of rebates and other benefits under a state program interferes with a legitimate state objective,” the Commission directed the

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<sup>21</sup> *Id.* (Emphasis added).

<sup>22</sup> Docket Nos. ER10-2210, *New York Indep. Sys. Operator, inc.*, Motion to intervene of Astoria Generating Company, L.P. et al. and Joint Protest of the In-City Suppliers (Sept. 1, 2010) at 12 *et seq.*

<sup>23</sup> *See* March 2015 Order at P 30 (citation omitted). Granting rehearing of its determination that the two rebate programs identified in its May 2010 Order should not be included in the calculation of SCR Offer Floors, the Commission further found “any determination regarding the treatment of rebates and benefits under these two programs going forward be made in accordance with the procedure we establish above.” *Id.* at P 31.

<sup>24</sup> *Id.* at note 82.

NYISO to revise its tariff to provide that “all rebates and other benefits from state programs must be included in the SCR Offer Floor” unless the State requests, and the Commission grants, such an exemption.<sup>25</sup> On April 20, 2015, the NYISO filed proposed revisions to Services Tariff Section 23.4.5.7.5 specifying all rebates and other benefits from State programs will be included in the calculation of the Offer Floor for new SCRs in New York City unless ruled exempt by a Commission order on a request for an exemption filed by the State.<sup>26</sup>

While these tariff revisions remained pending before the Commission, the complainants in the above-captioned docket filed their complaint against the NYISO on June 24, 2016 seeking a blanket exemption from the BSM Measures for all SCRs in Mitigated Capacity Zones, including SCRs currently subject to mitigation.<sup>27</sup> Pertinent to the NYISO’s proposal to utilize the Exclusion Language as “currently effective” tariff language, the Commission began its February 2017 Order by establishing that the then Commission-accepted and currently effective Section 23.4.5.7.5 was limited to the language addressing any third party payments or other benefits.<sup>28</sup> Because the Commission determined at that time that new SCRs in Mitigated Capacity Zones should be exempt from the BSM Measures,<sup>29</sup> it correspondingly rejected as moot the NYISO’s April 2015 Compliance Filing in a companion order issued the same day.<sup>30</sup> On

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<sup>25</sup> *Id.* at P 30.

<sup>26</sup> Docket No. ER10-2371-002, *New York Indep. Sys. Operator, Inc.*, Compliance Filing (Apr. 20, 2015) (“April 2015 Compliance Filing”).

<sup>27</sup> Docket No. EL16-92-000, *New York State Pub. Serv. Comm’n v. New York Indep. Sys. Operator, Inc.*, Complaint Requesting Fast Track Processing (June 24, 2016) (“SCR Complaint”).

<sup>28</sup> *New York State Pub. Serv. Comm’n v. New York Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (“February 2017 Complaint Order”) at P 2, n.7. The Commission then recounted the various challenges to the application of the BSM Measures to SCRs. *Id.* at P 3.

<sup>29</sup> *Id.* at PP 30, 34.

<sup>30</sup> *New York Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,127 (2017).



February 17, 2017, the NYISO submitted proposed tariff revisions to exempt SCRs from the BSM Measures and requested an effective date of February 3, 2017.<sup>31</sup>

On March 6, 2017, IPPNY filed a request for rehearing of the February 2017 Complaint Order, requesting that the Commission reverse its decision granting a blanket exemption from the BSM Measures to SCRs.<sup>32</sup> Per the NYISO's proposed Compliance Plan, the NYISO has been exempting SCRs from the BSM Measures since February 3, 2017.<sup>33</sup>

In its February 2020 Order, like its February 2017 Order, the Commission began by establishing the only Commission-accepted version of Section 23.4.5.7.5 is limited to the language including third party payments and other benefits in the calculation of SCR Offer Floors.<sup>34</sup> Addressing IPPNY's rehearing request of the February 2017 Order, the Commission reaffirmed its determination in its 2010 and 2015 orders that SCRs should be subject to the BSM Measures, granted IPPNY's rehearing request and thus rejected as moot the NYISO's February 2017 Filing.<sup>35</sup> The Commission also again identified the need to consider whether payments derived from certain retail level demand response programs should be excluded from SCR Offer Floor calculations and initiated a paper hearing to determine whether the retail-level demand response programs listed in the complaint "are designed to address distribution-level reliability

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<sup>31</sup> Docket No. ER17-996-000, *New York Public Service Commission, et al. v. New York Independent System Operator, Inc.*, Compliance Filing (Feb. 17, 2017) ("February 2017 Filing").

<sup>32</sup> Docket No. EL16-92-001, *supra*, Request for Rehearing of Independent Power Producers of New York Inc. (Mar. 6, 2017).

<sup>33</sup> Compliance Plan at 3.

<sup>34</sup> See February 2020 Order at P 2, n.5.

<sup>35</sup> *Id.* at PP 16, 18, 22.

needs and, therefore, whether payments from those programs should be excluded from the calculation of SCRs' offer floors."<sup>36</sup>

As the Commission's February 2020 Order and March 2015 Order rejected the Exclusion Language providing a blanket exemption for State programs that provide payments to SCRs, the only Commission-accepted tariff language concerning the calculation of the Offer Floor for SCRs is the language the Commission accepted in its May 2010 Order as cited by the Commission itself in the February 2017 Order and the February 2020 Order and is composed, in its entirety, as follows:

*The Offer Floor for a Special Case Resource shall be equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resource.*<sup>37</sup>

Indeed, because this language was previously accepted by the Commission, there was, by definition, no need for it and, correspondingly, the February 2020 Order did not include, any requirement for the NYISO to submit a compliance filing to effectuate this Order. Thus, the NYISO must be directed to immediately remove the last sentence of Section 23.4.5.7.5 that is reflected in its proposed Compliance Plan to align this section with the Commission's holdings in the May 2010 Order, March 2015 Order and the February 2020 Order.

Applying Section 23.4.5.7.5 in this manner pending completion of the paper hearing is bolstered by the fact that the NYISO's BSM Measures act on an exception basis, *i.e.*, unless

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<sup>36</sup> *Id.* at PP 17, 19.

<sup>37</sup> *Id.* at Attachment 1, First Revised Sheet No. 476.04–Original Sheet No. 476.04A (emphasis added). Per the background discussions in both of these orders, this is the 3.0.0 version of Services Tariff Section 23.4.5.7.5 and stands as the only tariff provision accepted by the Commission as of this time.

exempt, an entity is mitigated. By extension, unless exempt, a payment an entity receives from a third party must be included in the calculation of an Offer Floor to ensure an SCR's Offer Floor accurately reflects its economics. This approach is further bolstered by the fact that the Commission expressly found that in the February 2020 Order that "certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels."<sup>38</sup> There is thus absolutely no basis in the evolution of this tariff provision, the long history of prior Commission orders or, most certainly, the Commission's most recent order that provides a basis for the NYISO to exclude all payments received under State programs from the calculation of the SCR Offer Floor beginning with the May 2020 capability month

## **II. EXPEDITED COMMISSION ACTION IS REQUIRED**

In its proposed Compliance Plan, the NYISO notes it is not seeking action by the Commission, indicates it has filed its Compliance Plan to provide notice and states that it will apply Section 23.4.5.7.5 including the Exclusion Language starting with the May 2020 capability month, *i.e.*, to next month's ICAP capacity market auctions.<sup>39</sup> Thus, absent expeditious Commission action to prevent a clear violation of past Commission orders, the NYISO will apply its BSM Measures to any new SCRs seeking to enter the capacity markets in the Mitigated Capacity Zones in a manner that the Commission has expressly determined just one month ago could artificially suppress ICAP prices below competitive levels.

Given the steepness of the ICAP Demand Curves that apply to the Mitigated Capacity Zones, particularly the ICAP Demand Curve for the New York City ("NYC") Zone, the adverse

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<sup>38</sup> See February 2020 Order at P 17.

<sup>39</sup> See Compliance Plan at 4-5.

impact to ICAP market clearing prices could be significant. IPPNY has calculated that, based on the Summer 2020 Demand Curve slope, the new entry of 100 MW of Unforced Capacity (“UCAP”) in New York City assuming all other things are not changed would reduce UCAP clearing prices by \$0.27/kW-month in the statewide capacity market, \$0.91/kW-month in the Lower Hudson Valley (“LHV”) and \$1.40/kW-month in NYC. If the entry occurred in LHV, it would reduce UCAP clearing prices by \$0.27/kW-month in the statewide capacity market and \$0.91/kW-month in LHV.<sup>40</sup>

### III. CONCLUSION

For the aforementioned reasons, the Commission should expeditiously issue an order directing the NYISO to immediately remove the Exclusion Language from its Services Tariff because it is invalid and violates clear prior Commission action and directives, including the clear holding and underlying intent of the February 2020 Order.

Dated: April 1, 2020

Respectfully submitted,

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<sup>40</sup> See Nicholas S. Whitney Manager, *Annual Update for 2020-2021 ICAP Demand Curves*, ICAP Market Operations ICAPWG, Nov. 5, 2019. <https://www.nyiso.com/documents/20142/9062219/2020-2021%20Annual%20Update%20110519%20ICAPWG.pdf/75d4bfe1-8b6e-bfd1-d84e-0ba7bfe80f6c>; [http://icap.nyiso.com/ucap/public/ldf\\_view\\_icap\\_calc\\_selection.do](http://icap.nyiso.com/ucap/public/ldf_view_icap_calc_selection.do) at 26.

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, April 1, 2020

By: David B. Johnson  
David B. Johnson