

172 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

New York Independent System Operator, Inc.

Docket No. ER20-1718-001

ORDER REJECTING TARIFF REVISIONS

(Issued September 4, 2020)

1. On April 30, 2020, as amended on July 9, 2020, pursuant to section 205 of the Federal Power Act (FPA),¹ the New York Independent System Operator, Inc. (NYISO) filed proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to enhance Part A of the mitigation exemption test (Part A test) under NYISO's buyer-side market power mitigation measures. In this order, we reject NYISO's proposed enhancements to the Part A test, as discussed below.

I. Background

2. NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new Installed Capacity (ICAP) resources must enter the New York City and G-J Locality capacity zones (mitigated capacity zones)¹ at a price at or above an applicable offer floor until their capacity clears 12 monthly auctions.² NYISO's buyer-side market power mitigation rules do not apply to new resources entering in the broader New York Control Area (NYCA) footprint. NYISO will exempt a new entrant from the offer floor if it passes either one of two exemption tests under its buyer-side market power mitigation rules: the Part A test, discussed herein, or the Part B mitigation exemption test (Part B test).³ These tests assess market capacity conditions or unit-specific costs, respectively. If a resource passes either test, it may offer below the

¹ 16 U.S.C. § 824d.

¹ NYISO's Services Tariff defines "Installed Capacity" as "External or Internal Capacity, in increments of 100 kW, that is made available pursuant to Tariff requirements and ISO Procedures." NYISO, Services Tariff, § 2.9 (27.0.0). The G-J Locality (mitigated capacity zones) consists of Load Zones G, H, I, and J, zones "within which a minimum level of Installed Capacity must be maintained." *Id.* § 2.12 (8.0.0) (defining "Locality").

² NYISO, Services Tariff, § 23.4.5.7 (26.0.0).

applicable offer floor. Under the Part A test, NYISO will exempt a new entrant from the offer floor if the forecast of capacity prices in the first year of a new entrant's operation is higher than the default offer floor, which is 75% of the Net Cost of New Entry (CONE) of the hypothetical unit modeled in the most recent ICAP demand curve reset. This test allows new resources to avoid an offer floor at times when the market is approaching the minimum required level of capacity needed in a given load zone, regardless of whether approaching the minimum required level of capacity is due to load growth or the exit of existing resources. Under the Part B test, NYISO will exempt a new entrant from the offer floor if the forecast of capacity prices in the first three years of a new entrant's operation (three-year mitigation study period), is higher than the Net CONE of the new entrant. Under NYISO's currently effective Services Tariff, the Part B test is performed before the Part A test.

II. NYISO's Proposal

A. April 30, 2020 Filing

3. NYISO explains that the proposed enhancements to its Part A test are designed to more accurately account for the expected transition to cleaner energy resources that will be driven by New York State laws, regulations and policies.¹ NYISO adds that the proposed enhancements reflect input from its independent market monitoring unit (MMU) and from its stakeholders, and also follows Commission precedent by ensuring that NYISO's buyer-side market power mitigation rules continue to protect NYISO's capacity market and prevent price suppression.²

4. NYISO proposes to enhance the Part A test under its buyer-side market power mitigation rules in four ways. First, NYISO proposes to modify its current practice of performing the Part B test before the Part A test, and instead conduct the renewable resources exemption test first, followed by the Part A test, and then the Part B test.³ NYISO states that its proposal is designed to work in tandem with NYISO's renewable

resources exemption compliance filing, in Docket No. ER16-1404-002.⁴ NYISO would first grant renewable resources exemptions to "Qualified Renewable Exemption

3 NYISO, Services Tariff, § 23.4.5.7.2 (26.0.0).

1 Filing at 1, 6.

2 *Id.* at 1-2, 8.

3 *Id.* at 9.

4 *Id.* at 8 n.30. On July 17, 2020, the Commission accepted, subject to condition, NYISO's compliance filing in Docket No. ER16-1404-002. *See N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020).

Applicants,” up to the Renewable Exemption Limit⁵ and, to the extent necessary, based on the proposed pro-ration rules approved in that docket.⁶ After performing the renewable resources exemption test, NYISO proposes to perform the Part A test for all remaining capacity that did not qualify for a renewable resources exemption (while counting capacity that did qualify in forecasted supply). Next, NYISO proposes to apply the Part B test for all remaining capacity that had not qualified for the previous exemptions (while also counting all capacity that did qualify for a previous exemption as part of forecasted supply).⁷

5. NYISO states that resources qualifying for the renewable resources exemption would, by definition, be Public Policy Resources⁸ for purposes of the Part A test. NYISO asserts that it is necessary to conduct the renewable resources exemption test before the Part A test to ensure that the amount of Public Policy Resources separately available for a renewable resources exemption is properly accounted for when applying the Part A test.⁹ NYISO explains that resources included in Expedited Deliverability Studies conducted after the completion of Class Year 2019 will be tested under the Part A test before resources in a future ongoing Class Year.¹⁰ NYISO clarifies that the Competitive Entry

5 Renewable Exemption Limit is defined as: “[T]he maximum amount of UCAP MW calculated by the ISO in accordance with Section 23.4.5.7.13.5.5 in Class Year 2019 and any subsequent Class Year Studies, Additional SDU Studies, and Expedited Deliverability Studies that start after July 1, 2020 that is available for Qualified Renewable Exemption Applicants to receive Renewable Exemptions pursuant to section 23.4.5.7.13.” NYISO Proposed Services Tariff, Attach. H., § 23.2.1.

6 Filing at 9.

7 *Id.*

8 NYISO proposes to define Public Policy Resources as:

An Examined Facility that is an Energy Storage Resource, or an Intermittent Power Resource solely powered by wind or solar energy, or that is determined by the ISO to be a zero-emitting resource.

NYISO, Proposed Services Tariff, Attach. H. § 23.4.5.

9 Filing at 10-11.

10 *Id.* at 10. NYISO contends that this will reflect the “first mover advantage” of resources qualifying for an Expedited Deliverability Study.

Exemption will be applied on a separate timeline and awarded regardless of the results of the Part A or Part B tests.¹¹

6. Second, NYISO proposes to establish two separate mitigation study periods (Group 1 and Group 2). NYISO explains that each group would encompass three consecutive years.¹² Together, NYISO explains, these two mitigation study periods will capture a six-year period of time beginning with the upcoming capability year following the Class Year study. NYISO describes that, for example, in Class Year 2019, the Part A mitigation study period for Group 1 resources would begin with the 2020 capability year and include the 2021 and 2022 capability years.¹³ The Group 2 resources would include the 2023 through 2025 capability years. NYISO proposes to default all resources to Group 2 unless: (1) the resource was already in-service; or (2a) if NYISO determines that the resource falls within a category of resources with construction timelines shorter than three years;¹⁴ and (2b) that it is reasonable to project that the resource could be in-service prior to the start of the second winter capability period that falls within the first three years of the mitigation study period.¹⁵ NYISO states that its proposal allows buyer-side market power mitigation determinations to more closely align with the expected lead time for the resource to complete its development and come into service.¹⁶ According to NYISO, its proposal to allow fast lead time projects to be evaluated before longer lead time projects also helps to prevent gaming because it defaults longer lead time resources into the longer lead time Group 2 category.¹⁷ NYISO adds that its proposal also establishes deadlines for placement in Group 1, which are necessary to administer the Part A test consistent with the time frame outlined in NYISO's Services Tariff.¹⁸

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 11. NYISO states that resources that could fall under this category include, but will not be limited to, small generators sized below 20 MW, solar photovoltaic installations, battery installations, or uprates to existing generators. *Id.*

15 *Id.* NYISO adds that it would retain the discretion to determine that a resource seeming to belong to categories 1 – 2(b) should nevertheless be evaluated as part of Group 2. *Id.*

16 *Id.* at 10.

17 *Id.* at 11.

18 *Id.*

7. Third, NYISO proposes to evaluate resources under the Part A test for each capability year of a resource's three-year mitigation study period.¹⁹ If approved, NYISO will grant Part A exemptions to a resource beginning with the first year that the resource passes the Part A test. NYISO explains that under its proposal, the Part A test could be performed up to three times for a resource, once for each year of the relevant mitigation study period.²⁰ NYISO states that, once a resource passes the Part A test, the resource will be considered in service for the capability year in which it passed the Part A test when included in the forecast for the remaining Part A and Part B tests.²¹ NYISO maintains that its proposal to perform the Part A test for each year of a resource's mitigation study period will allow NYISO's buyer-side market power mitigation rules to more accurately reflect the variability of the expected in-service dates for different kinds of resources.²²

8. Finally, NYISO proposes to modify how resources are ordered for evaluation under the Part A test. Specifically, NYISO proposes to adjust its current ranking method to place Public Policy Resources²³ ahead of non-Public Policy Resources in Part A test evaluations.²⁴ NYISO explains that, under the Services Tariff's requirement that NYISO make Part A test determinations in an order based solely on project costs, conventional resources may be incentivized to enter the market and therefore, signal a need for investment in resources whose development New York State polices are seeking to discourage.²⁵ NYISO asserts that this proposed change will not create a new exemption under NYISO's buyer-side market power mitigation.²⁶ NYISO continues that its proposal is designed to reflect the fact that future development and entry of Public Policy

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 12. NYISO notes that it is not proposing to adopt additional mitigation study periods for individual resource types at this time. *Id.*

23 *See supra* note 12.

24 Filing at 12. NYISO notes that the sequence of Part A tests among Public Policy Resources and non-Public Policy Resources will continue to be based upon the resources' relative cost from lowest to highest. NYISO explains that this sequence makes the most economic resources the most likely to obtain an exemption. *Id.*

25 *Id.* at 7.

26 *Id.* at 2.

Resources will be reasonably certain due to New York State's recent policy initiatives²⁷ as well as Public Policy Resources' economics compared to those of non-Public Policy Resources.²⁸ Functionally, NYISO elaborates, this means that Public Policy Resources are likely to be built and become operational even if they do not have the lowest Net CONE among the resources evaluated under the Part A test.²⁹ NYISO also clarifies that prioritizing Public Policy Resources in the Part A test would not result in price suppression because the proposed changes simply reorder units in the evaluation and do not result in incremental exemptions. NYISO states that the current buyer-side market power mitigation rules already ensure that resources obtain an exemption on the basis that their entry would not increase the surplus of capacity supply over demand to an extent that would cause prices to fall below competitive levels.³⁰ NYISO clarifies that its proposal would not alter this limit on the scope of the Part A exemption test.

9. NYISO explains that, under its proposal, any Public Policy Resources in Group 1 are evaluated using the Part A test mitigation study period before any non-Public Policy Resources in Group 1.³¹ NYISO also explains that all resources in Group 1 would be evaluated for a Part A exemption prior to NYISO's evaluation of Group 2. NYISO states that the same ordering will apply in Group 2. Next, NYISO states that Part A tests will be completed for all eligible resources in a given year within the Part A mitigation study period before testing begins in the subsequent year.³² NYISO states that the proposed

27 NYISO states that this includes, for example, the Climate Leadership and Community Protection Act (CLCPA) and the Peaker Rule. *Id.* at 12-13. NYISO states that the CLCPA requires that 70% of energy consumed in New York State be produced by renewable resources by 2030 and that by 2040 energy consumed in the State must be completely emissions free. NYISO notes that specific plans and timetables for achieving these objectives are still under development and that such plans are expected to be promulgated by New York State agencies over the next several years and implemented in the years that follow. *Id.* at 6 n.23. Further, NYISO explains that it is expected that there will be significant generation retirements in New York State during the period covered by Class Year 2019 because of the New York State Department of Environmental Conservation's "Peaker Rule." *Id.* at 7 n.24 (citing Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines, N.Y. Evtl. Conserv. Law § 227-3 (2020)).

28 *Id.* at 12-13.

29 *Id.* at 13.

30 *Id.* at 13-14.

31 *Id.* at 14.

32 *Id.*

enhancements to the Part A test would not prevent non-Public Policy Resources from receiving an exemption. NYISO explains that unsubsidized resources would continue to be able to obtain a competitive entry exemption under the buyer-side market power mitigation rules, which do not depend on the order of the Part A test evaluation or on resource type.³³ NYISO states that under the Part A evaluation, resources within each group (e.g., Group 1 and Group 2) will be evaluated based on their costs and therefore, resources that are relatively low cost will continue to have a better chance of receiving a Part A exemption, relative to other projects in their group. NYISO also states that resources will continue to be analyzed under the Part B test based on their individual economics.³⁴

10. With respect to how the renewable resources exemption, Part A, and Part B tests would apply to resources in nested zones (e.g., Zone J: New York City), NYISO states that it will perform the Part A test for the nested zones and then perform the same test for the nesting zone (e.g., Zone G-J).³⁵ NYISO states that this testing order will allow resources to receive an exemption under the Part A test if the market signal in any Locality indicates a need for new capacity. NYISO contends that, given that resources in Zone J are also nested within the G-J Locality, it is imperative to allow them to satisfy any market signal that they are capable of meeting.³⁶

11. NYISO argues that the proposed Part A enhancements are consistent with recent Commission precedent reaffirming that ISOs/RTOs may have capacity market mitigation

rules that address expected resource entry and exit patterns³⁷ and with Commission precedent allowing different regions to adopt different market power rules and structures. NYISO states that its proposed changes to the sequence of Part A tests is consistent with these precedents because they will not allow capacity market price suppression.³⁸

33 *Id.*

34 *Id.* at 14-15.

35 *Id.* at 10.

36 *Id.*

37 *Id.* at 15 (citing *Calpine Corp. v PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035, at P 337 & n.720 (2020); *ISO New England, Inc.*, 162 FERC ¶ 61,205, at PP 20, 25 (2018)).

38 *Id.*

12. NYISO requests an effective date of June 30, 2020 to provide NYISO with the time necessary to incorporate the proposed Part A enhancements and avoid disrupting the Class Year 2019 process, including the deadline to make buyer-side mitigation determinations in August 2020.³⁹

B. Deficiency Letter

13. On June 19, 2020, Commission staff issued a deficiency letter requesting further information from NYISO (Deficiency Letter). First, staff asked NYISO to provide examples to illustrate how the proposed enhancements to the Part A test would be implemented in practice, assuming several scenarios, and to compare these results to the results that would be obtained with the current Part A test. Second, staff asked NYISO to confirm whether it will consider all previously granted exemptions when it evaluates a resource for Part A exemptions. Finally, staff asked NYISO to provide greater detail regarding the evaluation of Public Policy Resources for Part A exemptions.

C. Deficiency Response

14. NYISO filed its response to the Deficiency Letter on July 9, 2020 (Deficiency Response). In its response, NYISO provides historical examples of the current Part A test.⁴⁰ Specifically, NYISO references Part A tests conducted in the most recently completed Class Year, i.e., Class Year 2017. NYISO also provides examples to illustrate how its proposal would be implemented in practice using several assumptions and scenarios provided by staff and compares these results with those that would occur under the current Part A Test.⁴¹ Specifically, NYISO explains that, under its proposal, when the first Public Policy Resource unit under evaluation receives a Part A exemption, NYISO will assume that resource to be in-service when evaluating the subsequent projects for a Part A or Part B exemption. NYISO adds that partial Part A exemptions will not be awarded. NYISO also states that, to the extent a facility does not pass the Part A test applicable for Load Zone J, it would then be tested for a Part A exemption using the G-J Locality parameters if Part A exemptions were available in the G-J Locality.⁴²

15. NYISO confirms that it would consider all previously granted exemptions when it evaluates the next resource for a Part A exemption.⁴³ NYISO clarifies that, under its proposal, any resource receiving a renewable resources exemption or a Part A exemption

³⁹ *Id.* at 3, 21-22.

⁴⁰ Deficiency Response at 2-4.

⁴¹ *Id.* at 4-11.

⁴² *Id.* at 5 n.7.

⁴³ *Id.* at 11-12.

are to be included as in-service when evaluating other Examined Facilities for a Part B exemption in the same study period. Further, NYISO states that any resource receiving a renewable resources exemption or a Public Policy Resource receiving a Part A exemption in a prior study will be included as in-service unless it is reasonable to anticipate that the project will not enter the market.

16. NYISO states that there are 21 relevant projects in Class Year 2019, and that these projects are requesting a total of 575.7 MW of Capacity Resource Interconnection Service (CRIS) (ICAP value), with 37.5 MW in Zone J and an additional 538.2 MW in the G-J Locality.⁴⁴ NYISO explains that these numbers are still subject to change because resources still have the ability to withdraw from the current Class Year and these figures do not include five resources that the Class Year study determined require additional System Deliverability Upgrade studies, which are completed on a separate timeline in NYISO's interconnection process.⁴⁵

17. NYISO confirms that, under its proposal, NYISO would evaluate Public Policy Resources in ascending order of Net CONE, immediately followed by evaluating non-Public Policy Resources in ascending order of Net CONE.⁴⁶ NYISO reaffirms that this re-ordering is premised on the expectation that Public Policy Resources are more likely to enter service than non-Public Policy Resources because large numbers of Public Policy Resources will be required to enter operation in order for New York State to meet its public policy mandates.⁴⁷ Specifically, NYISO states that, within the Public Policy Resource category, the lowest Net CONE resources are more likely than more expensive Public Policy Resources to win Requests for Proposal contracts and receive investment to move forward given their relative economics. NYISO explains that the same is true within the non-Public Policy Resource category; the most economic non-Public Policy Resource is more likely to enter the market relative to other non-Public Policy Resources.

18. NYISO states that both the current Part A test and its proposed enhancements will produce efficient, competitive, economic outcomes.⁴⁸ NYISO also reaffirms that its proposal will more accurately reflect evolving market and system conditions in New York State that are expected to result from State policy mandates, while continuing to prevent price suppression. NYISO states that relying solely on economic ranking would lead to

44 *Id.* at 12.

45 *Id.*

46 *Id.* at 13.

47 *Id.*

48 *Id.* at 14.

uneconomic outcomes for consumers in the future. NYISO explains that it is not asking the Commission to endorse or “accommodate” New York State’s policy choices.⁴⁹ NYISO states that the sole purpose of the proposed reordering is to update the buyer-side market power mitigation rules to more accurately account for how those State policies will influence which resources are more likely to actually enter the market in New York. NYISO asserts that its proposal does not create an exemption for Public Policy Resources, but instead creates a mechanism for these resources to enter in and receive compensation from the wholesale markets when expected prices are at a level that would support new entry without price suppression.

19. NYISO’s witness, the MMU, explains that NYISO’s current rules are not optimal because they are not fully effective at minimizing surpluses and instead provide inefficient incentives for investment in new resources that are not needed.⁵⁰ The MMU states that NYISO’s proposal to evaluate Public Policy Resources first under the Part A test will result in efficient, competitive, market outcomes that benefit consumers and continue to protect the integrity of NYISO’s capacity market prices by more effectively avoiding inefficient capacity surpluses.⁵¹ Specifically, the MMU contends that surpluses could lead to higher costs for consumers, market distortions, and higher costs for Public Policy Resources.

III. Notice of Filing and Responsive Pleadings

20. Notice of NYISO’s April 30, 2020 filing was published in the *Federal Register*, 85 Fed. Reg. 26,970 (May 6, 2020), with interventions and protests due on or before May 21, 2020.

21. The New York State Public Service Commission (New York Commission) filed a notice of intervention. Timely motions to intervene were filed by Calpine Corporation, Independent Power Producers of New York, Inc. (IPPNY), New York Transmission Owners,¹ H.Q. Energy Services (U.S.) Inc. (HQUS), Helix Ravenswood LLC

⁴⁹ *Id.* at 15.

⁵⁰ *Id.*, Patton Aff. at 4.

⁵¹ *Id.* at 16.

¹ New York Transmission Owners include: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company d/b/a Power Supply Long Island, Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

(Ravenswood), TDI-USA Holdings Corp. (TDI), MMU, Equinor Wind US LLC (Equinor Wind), NRG Power Marketing LLC and the City of New York.

22. The MMU, Equinor Wind, and the New York Commission filed comments. Ravenswood and IPPNY each filed protests. NYISO, TDI, HQUS, Equinor Wind and the Indicated New York Transmission Owners (Indicated NYTOs) filed answers.

23. Notice of the Deficiency Response was published in the Federal Register, 85 Fed. Reg. 42,852 (July 15, 2020), with protests and interventions due on or before July 30, 2020. TDI filed a protest to the Deficiency Response. NYISO filed an answer to TDI's limited protest.

A. Comments and Protests

24. The MMU, Equinor Wind, and the New York Commission filed comments in support of NYISO's proposal. The MMU and Equinor Wind contend that NYISO's proposal ensures that the buyer-side market power mitigation rules achieve an appropriate balance between: (1) allowing New York State to move forward with recent policies promoting the development of clean generation resources; and (2) preserving the integrity of NYISO's wholesale markets.² The New York Commission states that NYISO's proposal is just and reasonable because the proposal would, among other things: (1) eliminate provisions that could otherwise disadvantage Public Policy Resources that do not receive a renewable resources exemption; (2) recognize and accommodate for variations in resource development time; and (3) recognize that Public Policy Resources are likely to be built regardless of the resources' individual economics.³ Equinor Wind notes that NYISO's proposal to modify the order in which resources are evaluated under the Part A test ensures that Public Policy Resources are not disadvantaged or that NYISO's mitigation exemption test evaluations unnecessarily interfere with state public policy goals.⁴ The MMU, Equinor Wind, and the New York Commission further contend that NYISO's proposal will prevent market distortions resulting from New York state policy (i.e., large-scale resource retirements).⁵ Equinor Wind adds that NYISO's proposal to apply the Part A test to each year of the mitigation study period will improve the accuracy of the Part A test to better reflect the development timelines of a changing resource mix.⁶

² MMU Comments at 2-3; Equinor Wind Comments at 3.

³ New York Commission Comments at 3-4.

⁴ Equinor Wind Comments at 4.

⁵ *Id.*

⁶ Equinor Wind Comments at 6-7.

25. Collectively, IPPNY and Ravenswood argue that the Commission should direct NYISO to revise its proposal in three ways. First, IPPNY and Ravenswood argue that the Commission should direct NYISO to revise its Services Tariff to modify NYISO's proposed coordination of the exemption tests.⁷ Specifically, IPPNY and Ravenswood argue that the Commission should require NYISO to clarify that an Examined Facility will retain its renewable resources exemption if the Examined Facility also passes the Part B test rather than grant the renewable resources exemption MWs to another resource.⁸ Second, IPPNY and Ravenswood assert that NYISO should be prohibited from applying the Part A Test for the G–J Locality to resources in Zone J.⁹ IPPNY argues that NYISO's interpretation of the nesting rules is flawed and that NYISO's proposal would impermissibly exempt Zone J resources by evaluating them against irrelevant G–J Locality demand curve parameters.¹⁰ Finally, IPPNY states that NYISO's proposed definition of Public Policy Resources should be revised because it may include zero-emitting resource technologies that are not consistent with New York State's policy to support new entry of certain generating technologies over others.¹¹

26. In response to NYISO's Deficiency Response, TDI states that it generally supports NYISO's proposal because it better aligns NYISO's buyer-side market power mitigation rules with evolving market conditions, in which Public Policy Resources are more likely to enter the NYISO market than conventional resources.¹² However, TDI argues that this justification is undermined by NYISO's proposal to evaluate a subset of Public Policy Resource projects in Class Year 2019 after other Public Policy Resource and conventional projects are evaluated.¹³ TDI argues that this element of NYISO's proposal will result in outcomes that are contrary to NYISO's justification for the Part A enhancements and is unjust and unreasonable.¹⁴ Specifically, TDI asserts that this element of NYISO's proposal conflicts with NYISO's rationale that Public Policy Resources should be studied before conventional resources to reflect the fact that Public Policy Resources are more likely to enter the NYISO market. For example, TDI states that this element of NYISO's

7 IPPNY Protest at 8, Ravenswood Protest at 15.

8 IPPNY Protest at 5, 8; Ravenswood Protest at 3, 15.

9 IPPNY Protest at 2, 8-11, Ravenswood Protest at 3, 15-16.

10 IPPNY Protest at 9.

11 *Id.* at 11.

12 TDI Limited Protest at 4.

13 *Id.*

14 *Id.* at 1.

proposal unfairly discriminates against TDI's Champlain Hudson Power Express (Champlain Hudson) project and other Public Policy Resource projects in Class Year 2019 that are subject to additional System Deliverability Upgrade studies.¹⁵ TDI Requests that the Commission direct NYISO to implement a mechanism through which all Public Policy Resources in Class Year 2019 can be evaluated under NYISO's buyer-side market power mitigation rules with all other projects entered into this class year.¹⁶

IV. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers submitted in this proceeding and therefore reject them.

B. Substantive Matters

29. We reject NYISO's proposed enhancements to the Part A test as unjust and unreasonable and unduly discriminatory.¹ We find that NYISO's proposal is unduly discriminatory because it does not provide sufficient justification for prioritizing the evaluation of Public Policy Resources before non-Public Policy Resources, independent of cost. Public Policy Resources and non-Public Policy Resources are similarly situated resources in that they must adhere to similar requirements for interconnection and for participation in the NYISO ICAP market. Because Public Policy Resources and non-Public Policy Resources are similarly situated, the proposal would unjustifiably limit non-Public Policy Resource's ability to pass the Part A test and participate on an equal footing with Public Policy Resources. Further, our finding that NYISO's proposal is

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 5.

¹ 16 U.S.C. § 824d. The dissent implies that because the provision at issue is referred to as the buyer-side market power mitigation measure, this should act as a limiting factor in the Commission's analyses of this provision. Glick, Comm'r, dissenting, at P 1. The Commission looks at the full impact and scope of proposed changes to a tariff provision when determining whether it is just and reasonable and not unduly discriminatory or preferential. As we have stated herein, we find NYISO's proposal to be unduly discriminatory.

unduly discriminatory is dispositive; we need not reach NYISO's arguments that its proposal would not cause price suppression.

30. In supporting its proposed enhancements to the Part A test, NYISO asserts that Public Policy Resources are more likely to actually be constructed given New York State laws, regulations, and policies and that non-Public Policy Resources are not likely to enter the market in the future.² For this reason, NYISO proposes to change the order in which projects are evaluated under the Part A test to allow Public Policy Resources to be evaluated before non-Public Policy Resources. While NYISO's filing makes references to certain New York State laws, regulations, and policies that it argues will drive the composition of New York State's resource mix, we disagree that the prevalence of Public Policy Resources in the future composition of New York State's resource mix means they are not similarly situated to non-Public Policy Resources for the purposes of the Part A test. Non-Public Policy Resources must adhere to similar requirements for interconnection and for participation in NYISO's ICAP market as Public Policy Resources and are able to meet the same identified capacity needs in the ICAP market as Public Policy Resources, and therefore, re-ordering the Part A test would be unduly discriminatory. In addition, we find the MMU's arguments that the proposed re-alignment should be accepted because it will minimize surpluses and avoid inefficient incentives for investment in new resources to be unavailing. States "are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s],' . . . including possibly having to pay twice for capacity."³ While we respect that New York State may have initiatives to favor the development of certain types of resources, we reiterate that we must base our decision on our duty to ensure just and reasonable rates pursuant to the FPA, and not on whether the proposal is consistent with federal, state, or municipal renewable energy policies.⁴ Accordingly, we find that NYISO has not sufficiently explained, notwithstanding New York State policies, why NYISO's proposed sequencing of the evaluation of Public Policy Resources for buyer-side market power mitigation exemptions is just, reasonable and not unduly discriminatory or preferential.⁵

2 Filing at 2. For example, NYISO states that New York State laws, regulations, and policies such as the CLCPA will continue to drive, in large part, the composition of New York State's expected overall resource mix. Filing at 6-7.

3 *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 96-97 (3d Cir. 2014) (*NJBPU*) (quoting *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009)).

4 *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,088, at P 12 (2016) (citing 18 U.S.C. § 824d).

5 While NYISO references the precedent accepting ISO-NE's Competitive Auctions with Sponsored Policy Resources (CASPR) mechanism to support its proposal, we find that precedent to be inapposite. Our core concern here is that NYISO's proposal

The Commission orders:

NYISO's filing is hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

unduly discriminates against certain resources. Rather than mitigating the impact of public policy resources as in CASPR, NYISO's proposal effectively seeks to prioritize the possible entry of resources it deems to be favored by the state.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. ER20-1718-001

(Issued September 4, 2020)

GLICK, Commissioner, *dissenting*:

1. Today's order is just the latest in the Commission's ever-growing compendium of attempts to block the effects of state resource decisionmaking. To achieve that end, the Commission has perverted NYISO's buyer-side market power mitigation rules into a mind-boggling series of unnecessary and unreasoned obstacles aimed at stalling New York's efforts to transition the state toward its clean energy future.⁶ As a result, those rules have become an unprincipled regime that has little to do with buyers or the exercise of market power.⁷

31. Today's order only takes us further down the garden path. This time the Commission does not even bother trying to hide behind "price suppression," "investor confidence," "market integrity," "the premise of capacity markets," or any of the other inscrutable buzz words that it has used to justify its efforts to "nullify[]" state policymaking.⁸ Without disputing NYISO's explanation that these reforms would not

⁶ See, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020) (Glick, Comm'r, dissenting at P 1) (explaining that the Commission's order "perverts buyer-side market power mitigation into a series of unnecessary and unreasoned obstacles to New York's efforts to shape the resource mix").

⁷ See, e.g., *id.* (Glick, Comm'r, dissenting at P 16) (concluding that buyer-side market power mitigation rules that do not address buyers with market power are *per se* unjust and unreasonable). In a baffling response, the Commission suggests that my opening paragraph "implies that because the provision at issue is referred to as the buyer-side market power mitigation measure, this should act as a limiting factor in the Commission's analyses of this provision," but that the "Commission looks at the full impact and scope of proposed changes to a tariff provision when determining whether it is just and reasonable and not unduly discriminatory or preferential." *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206, at n.72 (2020) (Order). Quite honestly, I have no idea what that footnote means. See *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (Glick, Comm'r, dissenting at P 30). But I certainly would not disagree that the Commission must look at the full impact and scope of the changes in a proposed filing. But, in this proceeding, it has failed to do exactly that.

⁸ See, e.g., *Calpine Corp.*, 171 FERC ¶ 61,034 (2020) (Glick, Comm'r, dissenting

cause any “price suppression,” the Commission nevertheless rejects the filing because it would expressly facilitate the entry of resources needed to meet New York’s public policy goals. The Commission’s approach is both deeply misguided and will ultimately doom NYISO’s current capacity market construct by forcing New York to choose between the Commission’s constant meddling and the state’s commitment to addressing the existential threat posed by climate change.

* * *

32. Appreciating the implications of today’s order requires a brief foray into the tangled web of buyer-side market power mitigation rules in NYISO’s capacity market. In addition to the exemptions for competitive entry,⁹ some self-supply,¹⁰ and the recently approved (but severely limited) renewables exemption,¹¹ NYISO also implements two additional measures—the Part A and Part B Exemption Tests. Under the Part A Exemption Test, a new resource is exempted from mitigation if the forecasted capacity price for the first year that the resource is operational is higher than the Default Offer Floor, which is 75 percent of the Net Cost of New Entry (Net CONE) of the hypothetical unit modeled in the currently effective demand curve.¹² Under the Part B Exemption Test, a new resource is exempted from mitigation if the average forecasted price in the initial three years of its operation is higher than that particular resource’s Net CONE.¹³ These two exemptions are supposed to add some common sense to the mitigation regime by allowing new resources to enter the market without mitigation if capacity gets tight or if the project would likely be economic over the course of its first three years of operation.¹⁴

33. Against that backdrop, NYISO has proposed a set of minor, but eminently reasonable changes intended to ensure that the Part A Exemption Test accurately reflects

at P 18).

9 NYISO, Services Tariff, Attach H., § 23.4.5.7.9.

10 *Id.* § 23.4.5.7.14; *see also N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (Glick, Comm’r, dissenting at PP 22-25) (explaining why the Commission’s treatment of the New York Power Authority under the self-supply exemption was arbitrary and capricious).

11 NYISO, Services Tariff, Attach H., § 23.4.5.7.13; *see N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (Glick, Comm’r, dissenting at PP 26-30).

12 NYISO Transmittal at 4; *see NYISO, Services Tariff, Attach H.*, § 23.4.5.7.2.

13 NYISO Transmittal at 4; *see NYISO, Services Tariff, Attach H.*, § 23.4.5.7.2.

14 NYISO Transmittal at 4-5.

the commercial and regulatory realities in New York. The only change that elicits any analysis from the Commission in this order is NYISO's proposal to prioritize resources that meet New York's public policy goals¹⁵ in administering the Part A Exemption Test. NYISO explains that doing so would reflect the practical realities in New York, where resources that satisfy the state's policy goals, including the targets in its ambitious Climate Leadership and Community Protection Act, are more likely to reach commercial operation.¹⁶ NYISO points to several reasons why that will be the case, including that Public Policy Resources are more likely to secure the necessary permits and siting permissions, more likely to secure firm off-takers, and more likely to secure favorable financing.¹⁷ For example, NYISO explains how the Accelerated Renewable Energy Growth and Community Benefit Act, passed just a few months ago, established an office specifically for the purpose of accelerating the permitting of large renewable energy facilities.¹⁸

34. NYISO explains that, as a result of these developments, a resource's cost structure is no longer the best predictor of whether it will ultimately get developed.¹⁹ Instead, the best indicator is whether the resource is consistent with New York's policy goals.²⁰ And, because the Part A Exemption Test is ultimately about facilitating the entry of new resources when they are needed to address tight capacity margins,²¹ the likelihood that

15 NYISO proposes to define these resources as Public Policy Resources, which include energy storage resources, wind and solar resources, and other resources that NYISO determines to be zero emitting and consistent with New York's public policy goals. *Id.* at 14.

16 NYISO Transmittal at 12-13; see New York State Public Service Commission Comments at 4.

17 NYISO Transmittal at 13.

18 *Id.*

19 *Id.* (“In the past, it has been reasonable to assume that the most economic resources would be the first to construct in response to market price signals. . . . However, it is no longer valid to assume that the most economic resources are the most likely to be built without reference to the type of resource involved. Considering [Public Policy Resources] before other resources, while continuing to rank resources within each category based on their costs, is more reasonable in light of the interplay of economic and policy considerations in New York State.”).

20 *Id.*; see New York State Public Service Commission Comments at 4.

21 NYISO Transmittal at 12 (explaining that the “the core purpose of the Part A Exemption Test . . . is to identify whether the market has a sufficiently small surplus so

resources that qualify for the exemption secure the necessary permits, financing, and contractual arrangements is of paramount importance and should dictate the order in which resources are evaluated for the exemption.²²

35. At the same time, NYISO's proposal will not affect the mechanisms that ensure that prices remain at what the Commission calls "competitive levels." NYISO explains that its proposal will not change the amount of capacity that qualifies under the Part A Exemption Test, meaning that it will not result in so-called "price suppression."²³ To the contrary, as NYISO explains, ignoring the state's public policy priorities in the Part A Exemption Test would undermine the purpose of that exemption insofar as it would let resources into the market to address a perceived capacity "need" that will already be met by the state's preferred resources.²⁴ Under those circumstances, resources that would otherwise be subject to NYISO's buyer-side market power mitigation would be exempt based on the misapprehension that the resources' capacity is "needed."

36. Nevertheless, the Commission rejects NYISO's filing with perfunctory reasoning that displays not even the slightest effort to wrestle with, or even correctly characterize,²⁵ the arguments advanced by NYISO or the other supporting parties. The Commission first asserts that Public Policy Resources and non-Public Policy Resources are similarly situated because they have similar requirements for interconnection and capacity market participation.²⁶ That's beside the point. NYISO's filing suggests that Public Policy Resources are not similarly situated for the purposes of the Part A Exemption Test

that new entry should not be subject to an Offer Floor.").

22 *Id.* at 14.

23 *Id.* at 13 ("Performing Part A Exemption Tests for [Public Policy Resources] first would not result in price suppression."); see Market Monitoring Unit Comments at 8 (noting that "the current [buyer-side market power mitigation] rules would impede state policy goals even where the subsidized resources would not suppress capacity prices"). In addition, NYISO's proposal would not affect non-Public Policy Resources' eligibility for other exemptions from mitigation. As NYISO explains, "[t]he proposed enhancements to the Part A Exemption Test would not prevent non-[Public Policy Resources] from receiving an exemption. Unsubsidized resources would continue to be able to obtain a Competitive Entry Exemption under the [buyer-side market power mitigation rules], which do[] not depend on the order of the Part A Exemption Test evaluation, regardless of resource type." NYISO Transmittal at 14.

24 *See id.* at 13.

25 *See infra* P 9.

26 Order, 172 FERC ¶ 61,206 at P 29.

because they are subject to relatively favorable siting regimes and, as a result of their status under New York law, are more likely to secure the customers and financing that help ensure that they get developed successfully.²⁷ Given that the purpose of the Part A Exemption Test is to facilitate the entry of resources when capacity margins are getting tight and additional resources are needed, the likelihood that the exempted resources actually appear is a highly relevant and distinguishing feature that would support differential treatment.²⁸ Accordingly, the fact that the Public Policy Resources are subject to the same market and interconnection rules as non-Public Policy Resources is irrelevant.

37. In any case, the Commission has repeatedly recognized that state support may constitute a distinguishing factor that renders resources not similarly situated. For example, in its order accepting ISO New England's Competitive Auctions with Sponsored Policy Resources (CASPR) construct, the Commission approved of an entire new market—the substitution auction—that was open *only* to state-sponsored resources.²⁹ Why it is appropriate to limit an entire auction mechanism to state-sponsored resources, but unduly discriminatory for an ISO to prioritize state-sponsored resources in administering a single exemption from mitigation is, of course, never explained. Instead, the Commission responds only with the puzzling statement that CASPR is inapt because that filing was focused on “mitigating the impact of public policy resources.”³⁰ Putting aside whether that is an accurate characterization of the intent behind CASPR, it still provides no explanation for the Commission's determination that the substitution auction was not unduly discriminatory but NYISO's proposal in this filing is.

38. The Commission next turns to another strawman. In addressing NYISO's discussion of the various New York laws that make the development of Public Policy Resources more likely than other resources, the Commission states that it “disagree[s] that the prevalence of Public Policy Resources in the future composition of New York State's resource mix means they are not similarly situated to non-Public Policy Resources for the purposes of the Part A test.”³¹ But no one, certainly not NYISO, argued that non-

27 NYISO Transmittal at 13.

28 See *ISO New England Inc.*, 150 FERC ¶ 61,065, at P 26 (2015) (“As the Commission has previously explained, the [Federal Power Act] does not forbid preferences, advantages, and prejudices per se. Rather, [it] prohibits ‘undue’ preferences, advantages and prejudices.”); *id.* (explaining that discrimination is not undue where the relevant entities are not “similarly situated”).

29 *ISO New England Inc.*, 162 FERC ¶ 61,205, at PP 7, 45 (2018).

30 Order, 172 FERC ¶ 61,206 at n.76.

31 *Id.* P 30

Public Policy Resources are not similarly situated only because there will be more of them. . Instead, the argument is that Public Policy Resources *are more likely* to enter the market and, accordingly, it is appropriate to prioritize those resources when administering an exemption intended to ensure that new capacity enters the market when supply is tight.³² The Commission’s failure to address NYISO’s *actual* arguments—rather than caricatures of those arguments—is another reason why today’s order is arbitrary and capricious.

39. That brings us to the Commission’s final argument, which represents a subtle, but important shift in its campaign against state policies. As noted, the Commission’s previous orders on this issue have generally focused, in one form or another, on the idea that state policies are unduly suppressing wholesale market prices.³³ NYISO’s proposal in this filing, however, would not change the number of resources that qualify or the supply of capacity that is exempt from NYISO’s buyer-side market power provisions.³⁴ As such, it would not have any effect on capacity market prices.

40. Not to be dissuaded, the Commission still rejects the filing. Lacking any of its usual excuses, the Commission suggests that considering “federal, state, or municipal renewable energy policies”³⁵ is somehow inimical to its responsibilities under the Federal Power Act. That argument appears to stake out the new, and even more radical, position that it is improper for an RTO to design its tariff in a way that even acknowledges, much less accommodates, state public policies—an approach that is both fundamentally misguided and a striking departure from Commission precedent and practice. Indeed, until recently, the Commission has long asserted an interest in balancing the effects of state policies with measures to address how those policies affect capacity market prices. While reasonable minds can disagree over how effectively the Commission struck that balance in years gone by, it is hard to argue that today’s order does anything but confirm that the era of respect for state decisionmaking is over.

32 NYISO Transmittal at 13-14.

33 See, e.g., *Calpine Corp.*, 171 FERC ¶ 61,034, at P 25.

34 If anything, NYISO’s proposal would improve long-term price signals. NYISO’s Market Monitoring Unit explains that, without NYISO’s proposed reprioritization, there may be an inefficient entry of conventional resources, which could lead to higher costs for consumers and other market distortions, including lower energy and ancillary service prices, which can harm supply resources. NYISO Deficiency Response, Patton Aff. at 10.

35 Never mind the fact that NYISO’s proposed definition of Public Policy Resources is not limited only to renewable resources. See NYISO Transmittal at 14.

41. And that, in turn, puts RTOs and ISOs in an impossible position, forcing them to juggle the Commission's ideological antipathy toward state efforts to shape the resource mix with the realities that Congress gave states responsibility over resource decisionmaking and that the physical system will ultimately, and rightfully, reflect those state choices. This filing sought to strike a balance between those concerns by taking into account the effects of New York law while avoiding any of the "price suppression" concerns on which the Commission has been so focused. And NYISO appeared to have done so admirably. The proposal received a super-majority of votes in the stakeholder process and not a single party protested this issue before the Commission, including any of the generator groups that have cheered on the Commission's slew of recent buyer-side mitigation orders. But, of course, the Commission thinks it knows better than NYISO's stakeholders, better than NYISO's Market Monitoring Unit, better than the New York State Public Service Commission, and better than the people of New York. In rejecting NYISO's proposal, the Commission makes clear how little it cares about stakeholder compromise or the consequences its actions will have for the practical reality of running an organized wholesale market.

42. Finally, it is worth reiterating that the most likely outcome of the Commission's misguided campaign to "protect" capacity markets is their ultimate dissolution.³⁶ Today's order makes that result all-the-more likely. New York is currently considering whether to "take back" resource adequacy from NYISO, a move motivated in large part by the Commission's efforts to prevent the NYISO market from reflecting the state's policy choices.³⁷ The evident hostility toward state policies displayed in this order will only add fuel to that fire.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

³⁶ See, e.g., *New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (Glick, Comm'r, dissenting at PP 18-19); *Calpine Corp.*, 171 FERC ¶ 61,034 (Glick, Comm'r, dissenting at PP 98-100).

³⁷ *New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (Glick, Comm'r, dissenting at P 19 (citing N.Y. Pub. Serv. Comm'n, Case 19-E-0530, Order Instituting Proceeding and Soliciting Comments (Aug. 8, 2019), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b1D25F4BE-9A05-463F-A953-790D36E318BC%7d>)).

