

171 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Public Service Commission,
New York Power Authority, Long Island Power
Authority, New York State Energy Research and
Development Authority, City of New York,
Advanced Energy Management Alliance, and
Natural Resources Defense Council

Docket Nos. EL16-92-002
ER17-996-001

v.

New York Independent System Operator, Inc.

New York Independent System Operator, Inc.

ORDER ON CLARIFICATION AND REQUEST FOR CONDITIONAL WAIVER

(Issued May 12, 2020)

1. On March 11, 2020, in accordance with Rule 2008 of the Commission's Rules of Practice and Procedure,¹ NYISO submitted a Notice of Compliance Plan and Request for Conditional Waiver (Filing) in response to the Commission's February 20, 2020 order granting in part and denying in part rehearing and clarification and rejecting compliance filing as moot.² In the February 2020 Order, the Commission granted in part and denied in part rehearing and clarification of its February 3, 2017 order³ that exempted Special Case Resources (SCRs) from NYISO's buyer-side market power mitigation rules. Specifically, in the February 2020 Order, the Commission: (1) directed NYISO to apply

¹ 18 C.F.R. § 385.2008 (2019).

² *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,120 (2020) (February 2020 Order).

³ *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (February 2017 Order), *order on reh'g & clarification*, 170 FERC ¶ 61,120 (2020).

its buyer-side market power mitigation rules to SCRs; (2) found that the calculation of SCRs' offer floors pursuant to the buyer-side market power mitigation rules should exclude payments SCRs receive from retail-level demand response programs designed to address distribution-level reliability needs; (3) initiated a paper hearing to examine the retail-level demand response programs discussed in the underlying complaint; and (4) in light of granting rehearing in part, rejected NYISO's February 2017 compliance filing implementing a blanket exemption for SCRs from NYISO's buyer-side market power mitigation rules.⁴

2. In its Filing, NYISO: (1) notifies the Commission of NYISO's intention to commence application of its buyer-side market power mitigation rules to SCRs beginning in May 2020; (2) explains what NYISO believes to be the effective language in its Market Administration and Control Area Services Tariff (Services Tariff) that governs the calculation of SCRs' offer floors; and (3) requests conditional waiver if necessary, and only to the extent necessary, to authorize NYISO's past implementation of the February 2017 Order from the period between the February 2017 Order (establishing a blanket exemption for SCRs) and the February 2020 Order (granting rehearing in part). We treat NYISO's Filing as a request for clarification of the February 2020 Order and grant in part and deny in part that request, clarify the effective language in NYISO's Services Tariff, direct NYISO to submit a compliance filing within 45 days of the date of this order, to be effective as of the date of this order, to ensure NYISO's eTariff reflects the effective language, and find waiver unnecessary, as discussed below.

I. Background

3. In August 2010, NYISO submitted a compliance filing⁵ in response to a May 2010 order in which the Commission accepted, subject to condition, NYISO's proposed calculation of SCRs' offer floors under NYISO's buyer-side market power mitigation rules. The May 2010 order directed NYISO to file tariff revisions "explaining, with specificity, the criteria it propose[d] to use in evaluating whether to include a specific subsidy or other benefit in its calculation of SCR[s]' offer floors."⁶ Pursuant

⁴ *Id.* PP 1, 17.

⁵ NYISO, Compliance Filing, Docket No. ER10-2371-000 (filed Aug. 24, 2010) (August 2010 Compliance Filing).

⁶ *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at PP 137-38 (2010) (May 2010 Order), *order on reh'g & compliance*, 150 FERC ¶ 61,208 (2015) (March 2015 Order), *order dismissing, as moot, reh'g & compliance*, 158 FERC ¶ 61,127 (2017).

to that directive, NYISO proposed in the August 2010 Compliance Filing to revise Section 23.4.5.7.5 of the Services Tariff, specifying that:

The Offer Floor calculation shall include any payment or the value of other benefits that are awarded for offering of supplying In-City 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.⁷

This language is herein referred to as the State Program Language. At the time of the August 2010 Compliance Filing, if accepted, this language would only be applicable in New York City, NYISO's only mitigated capacity zone.⁸

4. In June 2012, while the August 2010 Compliance Filing remained pending, NYISO submitted a compliance filing in a separate docket related to the creation of a new capacity zone.⁹ In the June 2012 Compliance Filing, NYISO included the State Program Language as unmarked language, only marking its proposed revisions to expand the application of Section 23.4.5.7.5 of the Services Tariff from "In-City Capacity" to "Mitigated Capacity Zone Capacity," reflecting the addition of NYISO's new capacity zone.¹⁰ The Commission accepted the June 2012 Compliance Filing in June 2013 without comment on the State Program Language.¹¹

⁷ August 2010 Compliance Filing at 13.

⁸ NYISO's Services Tariff defines New York City as: "The electrical area comprised of Load Zone J, as identified in the ISO Procedures." NYISO, Services Tariff, § 2.14 (17.0.0). Mitigated Capacity Zone is defined as: "New York City and any Locality added to the definition of "Locality" accepted by the Commission on or after March 31, 2013." *Id.* § 2.13 (20.0.0). Locality is defined as: "A single LBMP Load Zone or set of adjacent LBMP Load Zones within which a minimum level of Installed Capacity must be maintained, and as specifically identified in this subsection to mean: (1) Load Zone J; (2) Load Zone K; and (3) Load Zones G, H, I, and J collectively (*i.e.*, the G-J Locality)." *Id.* § 2.12 (8.0.0).

⁹ NYISO, Compliance Filing, Docket No. ER12-360-001 (filed June 29, 2012) (June 2012 Compliance Filing).

¹⁰ *Id.* at 9.

¹¹ *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,217, at PP 1, 77, 78 (2013) (June 2013 Order).

5. The August 2010 Compliance Filing remained pending until March 2015 when the Commission issued an order on rehearing of the May 2010 Order that explicitly rejected the State Program Language.¹² In the March 2015 Order, the Commission explained that it “did not intend for NYISO to rule on the legitimacy of particular state programs,” and concluded that it was not necessary for NYISO to provide criteria to use in evaluating whether to include a specific subsidy or other benefit in its calculation of SCRs’ offer floors.¹³ The Commission further directed NYISO to revise its Services Tariff to provide that, “unless ruled exempt by Commission order on a request for exemption filed by the state, all rebates and other benefits from state programs must be included in the SCR Offer Floor.”¹⁴

6. In April 2015, NYISO submitted a compliance filing implementing the Commission’s directives in the March 2015 Order, including removing the State Program Language from Section 23.4.5.7.5 of the Services Tariff.¹⁵ The April 2015 Compliance Filing remained pending until February 2017, when the Commission issued: (1) the February 2017 Order in the above-captioned complaint proceeding granting a blanket exemption for SCRs from NYISO’s buyer-side market power mitigation rules;¹⁶ and (2) an order dismissing, as moot, requests for clarification and rehearing of the March 2015 Order and rejecting the April 2015 Compliance Filing in light of the Commission granting a blanket exemption for SCRs in the concurrently issued February 2017 Order.¹⁷

7. In the February 2020 Order, the Commission granted in part and denied in part rehearing and clarification of the February 2017 Order. Specifically, the Commission: (1) directed NYISO to apply its buyer-side market power mitigation rules to SCRs; (2) found that the calculation of SCRs’ offer floors pursuant to the buyer-side market power mitigation rules should exclude payments SCRs receive from retail-level demand response programs designed to address distribution-level reliability needs; (3) initiated a paper hearing to examine the retail-level demand response programs discussed in the underlying complaint; and (4) in light of granting rehearing in part, rejected NYISO’s

¹² March 2015 Order, 150 FERC ¶ 61,208 at P 30.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NYISO, Compliance Filing, Docket No. ER10-2371-002, at 5 (filed Apr. 20, 2015) (April 2015 Compliance Filing).

¹⁶ February 2017 Order, 158 FERC ¶ 61,137 at P 34.

¹⁷ *N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,127 at PP 14-15.

February 2017 compliance filing implementing a blanket exemption for SCRs from NYISO's buyer-side market power mitigation rules.¹⁸ Relevant to NYISO's Filing, the Commission stated that, prior to the February 2017 Order, SCRs' offer floors were equal to the minimum monthly payment for providing installed capacity that the SCR received, "plus the monthly value of any payments or other benefits the [SCR] receive[d] from a third party for providing Installed Capacity," or that the designated installed capacity supplier for the SCR received for the provision of installed capacity by the SCR.¹⁹

II. NYISO's Filing

8. According to NYISO, the Filing: (1) notifies the Commission of NYISO's intention to commence application of its buyer-side market power mitigation rules to SCRs beginning in May 2020; (2) explains what NYISO believes to be the effective language in its Services Tariff that governs the calculation of SCRs' offer floors; and (3) requests conditional waiver if necessary, and only to the extent necessary, to authorize NYISO's past implementation of the February 2017 Order from the period between the February 2017 Order (establishing a blanket exemption for SCRs) and the February 2020 Order (granting rehearing in part). NYISO explains that it intends to commence applying its buyer-side market power mitigation rules to SCRs beginning with SCRs entering the market in the May 2020 capability month.²⁰ NYISO states that, given the unique procedural history of the applicable Services Tariff language, NYISO is providing notice to explain exactly which Services Tariff provisions are currently effective and applicable to new SCRs. NYISO contends that, following the Commission's rejection of the April 2015 Compliance Filing, the currently effective version of Section 23.4.5.7.5 of the Services Tariff includes the State Program Language, as accepted by the June 2013 Order.²¹ NYISO states that it is not seeking any Commission action in response to its description of its compliance plan and intends to conduct offer floor determinations under its buyer-side market power mitigation rules consistent with this compliance plan until the Commission accepts revised rules subsequent to the paper hearing initiated in the February 2020 Order.²²

¹⁸ February 2020 Order, 170 FERC ¶ 61,120 at PP 1, 17.

¹⁹ *Id.* P 17 (quoting NYISO, Services Tariff, § 23.4.5.7.5 (3.0.0)).

²⁰ Filing at 4.

²¹ *Id.*

²² *Id.* at 4-5.

9. NYISO also requests, in accordance with Rule 207(a)(5) of the Commission's rules of practice and procedure,²³ conditional waiver if necessary, and only to the extent necessary, to authorize NYISO's past implementation of the February 2017 Order from the period between the February 2017 Order and the February 2020 Order. NYISO argues that it acted consistent with Commission precedent and normal practice when it began exempting SCRs from its buyer-side market power mitigation rules immediately after issuance of the February 2017 Order.²⁴

III. Notice of Filing and Responsive Pleadings

10. Notice of NYISO's Filing was published in the *Federal Register*, 85 Fed. Reg. 15,772 (Mar. 19, 2020), with interventions and protests due on or before April 1, 2020. E Cubed and Energy Spectrum (jointly) and Public Citizen, Inc.²⁵ filed timely motions to intervene.

11. On April 1, 2020, NYISO's Market Monitoring Unit (MMU) and Independent Power Producers of New York, Inc. (IPPNY) filed protests. On April 13, 2020, NYISO filed an answer to IPPNY's protest.

A. Protests

12. The MMU asks the Commission to direct NYISO to explain why the State Program Language should be considered part of the currently effective Services Tariff, arguing that NYISO did not explain the basis for its assertion that such language is effective other than that the language precedes the April 2015 Compliance Filing.²⁶ The MMU also asserts that it does not believe that the State Program Language is part of NYISO's currently effective tariff.²⁷

²³ 18 C.F.R. § 207(a)(5) (2019).

²⁴ Filing at 5-6 (citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,073 (2016) (*Ameren*); February 2020 Order, 170 FERC ¶ 61,120 at P 21; *Citizens Sycamore-Penasquitos Transmission LLC*, 169 FERC ¶ 61,263, at P 14 (2019)).

²⁵ Public Citizen, Inc. filed a motion to intervene in Docket No. ER17-996-001 only.

²⁶ MMU Protest at 3-4.

²⁷ *Id.* at 3.

13. IPPNY asks the Commission to direct NYISO to immediately remove the State Program Language from its Services Tariff because it is invalid and violates prior Commission action and directives. In particular, IPPNY contends that the Commission “fully addressed and expressly rejected” the State Program Language in the March 2015 Order and reaffirmed that decision in the February 2020 Order.²⁸ IPPNY argues that the Commission accepted the currently effective Services Tariff language in the May 2010 Order and that this language does not include the State Program Language.²⁹ According to IPPNY, NYISO has not sought to modify this language in any subsequent filing and adds that this is the language cited by the Commission in the February 2020 Order as the currently effective Services Tariff provision.³⁰ Given the steepness of NYISO’s demand curves for the relevant capacity zones, IPPNY claims that the adverse impact to capacity market clearing prices of NYISO’s proposed compliance plan could be significant, justifying expedited Commission action.³¹

B. NYISO’s Answer

14. Although NYISO confirms that it proposed the State Program Language in the August 2010 Compliance Filing to apply to SCRs entering New York City, NYISO asserts that it proposed in the June 2012 Compliance Filing to apply the State Program Language to SCRs entering all mitigated capacity zones.³² According to NYISO, while the Commission rejected the August 2010 Compliance Filing in the March 2015 Order, that order only addressed New York City and did not impact the Commission’s acceptance of the June 2012 Compliance Filing in the June 2013 Order.³³ Thus, NYISO contends, the State Program Language that the Commission accepted in the June 2013 Order remained effective after the issuance of the March 2015 Order at least for mitigated capacity zones other than New York City.³⁴ NYISO notes that it sought clarification regarding the scope of the March 2015 Order on this issue, but the Commission dismissed its request for clarification as moot at the same time that it issued

²⁸ IPPNY Protest at 3-9 (citing March 2015 Order, 150 FERC ¶ 61,208 at P 30; February 2020 Order, 170 FERC ¶ 61,120 at PP 16, 18, 22).

²⁹ *Id.* at 5 (citing May 2010 Order, 131 FERC ¶ 61,170 at P 137).

³⁰ *Id.* (citing February 2020 Order, 170 FERC ¶ 61,120 at P 17).

³¹ *Id.* at 11-12.

³² NYISO Answer at 4.

³³ *Id.*

³⁴ *Id.* at 4-5.

the February 2017 Order and never addressed the June 2013 Order's approval of the State Program Language.³⁵ NYISO therefore concludes that the State Program Language, as approved in the June 2013 Order, is a part of NYISO's currently effective Services Tariff language.³⁶

15. NYISO adds that, if the Commission finds that revisions to the Services Tariff are necessary, the Commission should direct NYISO to submit a compliance filing and should clarify whether the State Program Language should be omitted for SCRs entering the New York City zone or all mitigated capacity zones.³⁷ NYISO asks for Commission action "as soon as practicable" to provide certainty to all market participants regarding the rules applicable to SCRs.³⁸ NYISO also asks that any changes should take effect prospectively from Commission acceptance of new Services Tariff language. NYISO explains that SCR enrollment for the May 2020 capability month closed on April 8, 2020, that NYISO plans to make offer floor determinations for those SCRs on April 17, 2020, and that offer floor determinations for subsequent months will also be made on a monthly schedule.³⁹

IV. Discussion

A. Procedural Matters

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

17. 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 or to an answer unless otherwise ordered by the decisional authority. We accept NYISO's answer because it has provided information that assisted us in our decision-making process.

³⁵ *Id.* at 5-6.

³⁶ *Id.* at 6.

³⁷ *Id.* at 7.

³⁸ *Id.* at 8.

³⁹ *Id.*

B. Commission Determination

18. While NYISO has labeled its Filing as a “compliance plan,” we treat NYISO’s Filing as a request for clarification of the February 2020 Order⁴⁰ and grant in part and deny in part that request, clarify the effective language in NYISO’s Services Tariff, direct NYISO to submit a compliance filing within 45 days of the date of this order, to be effective as of the date of this order, to ensure NYISO’s eTariff reflects the effective language, and find waiver unnecessary, as discussed below.

19. The central dispute raised in this proceeding is which tariff language is in effect. Therefore, we find that clarification of the February 2020 Order is needed regarding the effective language in Section 23.4.5.7.5 of NYISO’s Services Tariff that governs NYISO’s calculation of SCRs’ offer floors. Despite NYISO’s claims to the contrary, the Commission never accepted, and indeed expressly rejected, the State Program Language at issue. NYISO is correct that it included the State Program Language in Section 23.4.5.7.5 of the Services Tariff in the June 2012 Compliance Filing that the Commission accepted in the June 2013 Order.⁴¹ However, in the June 2012 Compliance Filing NYISO did not mark the State Program Language as either newly proposed or pending in a different proceeding, and it was not part of the previously accepted Services Tariff language.⁴²

20. Section 35.10(b) of the Commission’s regulations requires that any change to previously filed tariffs must be “marked . . . showing additions and deletions . . . by either highlighting, background shading, bold text, or underlined text,” or strike-through for deletions.⁴³ Section 35.10(c) goes on to state that “only those revisions appropriately designated and marked under paragraph (b) of this section constitute the filing” and Commission acceptance of unmarked portions will not “constitute acceptance of such unmarked changes.”⁴⁴ Because NYISO did not appropriately mark the State Program

⁴⁰ See *Light Power & Gas of NY LLC v. N.Y. Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,216, at P 24 (2019) (citing *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984)) (“We evaluate a pleading based on its substance, rather than its style or form.”).

⁴¹ See *supra* P 4 (discussing the June 2012 Compliance Filing and June 2013 Order).

⁴² June 2012 Compliance Filing, Attach. I, § 23.4.5.7.5 (including unmarked State Program Language and proposing, in redline, to revise the “In-City” to “Mitigated Capacity Zone”).

⁴³ 18 C.F.R. § 35.10(b) (2019).

⁴⁴ *Id.* § 35.10(c).

Language in the June 2012 Compliance Filing, pursuant to section 35.10(c), the Commission's acceptance of the June 2012 Compliance Filing in the June 2013 Order did not constitute acceptance of the State Program Language. As NYISO points out, the Commission has not accepted any revisions to Section 23.4.5.7.5 of the Services Tariff since the June 2013 Order. Therefore, the currently effective Services Tariff language is what the Commission accepted in the June 2013 Order absent the State Program Language. We clarify that the State Program Language should be omitted for SCRs entering all mitigated capacity zones. We direct NYISO to submit a compliance filing within 45 days of the date of this order, to be effective as of the date of this order.

21. NYISO also requests in its Filing conditional waiver if necessary, and only to the extent necessary, to authorize NYISO's past implementation of the February 2017 Order from the period between the February 2017 Order (establishing a blanket exemption for SCRs) and the February 2020 Order (granting rehearing in part). That waiver is unnecessary because in the February 2017 Order, the Commission directed NYISO to exempt SCRs from NYISO's buyer-side market power mitigation rules effective as of the date of that order.⁴⁵

The Commission orders:

(A) NYISO's request for clarification is hereby granted in part and denied in part, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a compliance filing, within 45 days of the date of this order, effective as of the date of this order, as discussed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁵ February 2017 Order, 158 FERC ¶ 61,137 at P 30; *see Ameren*, 155 FERC ¶ 61,073 at PP 21-22 (The Commission's compliance directive was sufficient to finalize replacement rate as of date of order where required tariff changes left no uncertainty.).

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GLICK, Commissioner, *concurring*:

1. I concur in today's order because it correctly states what should be the governing tariff language as a result of the Commission's various orders in these proceedings. That does not, however, mean that I agree with those orders. As I have previously explained, "[b]uyer-side market power mitigation should be all about and only about mitigating buyer-side market power. To the extent that buyer-side market power mitigation rules apply to buyers without market power, they are per se unjust and unreasonable."¹ That means that the Commission should be imposing buyer-side market power measures on Special Case Resources only to the extent that they are buyers with market power.² The Commission's orders in this proceeding have failed to ensure that NYISO's mitigation regime is tailored to that specific issue. Accordingly, I continue to believe that NYISO's mitigation regime is unjust and unreasonable and will impose arbitrarily high offer floors that will raise prices and make it more difficult for Special Case Resources to participate in NYISO's capacity market.

For these reasons, I respectfully concur.

¹ *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 170 FERC ¶ 61,120 (2020) (Glick, Comm'r, dissenting at P 1).

² *Id.* P 19.

Richard Glick
Commissioner