

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

**New York Public Service Commission,** )  
**New York Power Authority, and** )  
**New York State Energy Research and** )  
**Development Authority** )  
 )  
 )  
 )  
**v.** )  
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 )  
**New York Independent System** )  
**Operator, Inc.** )

**Docket No. EL15-64-001**

**REQUEST FOR CLARIFICATION OR, IN THE ALTERNATIVE,  
REHEARING OF INDEPENDENT POWER PRODUCERS OF NEW  
YORK, INC. AND ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Section 313(a) of the Federal Power Act (“FPA”)<sup>1</sup> and Rule 713 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,<sup>2</sup> Independent Power Producers of New York, Inc. (“IPPNY”)<sup>3</sup> and Electric Power Supply Association (“EPSA”)<sup>4</sup> and collectively “IPPNY/EPSA”) respectfully request clarification or, in the alternative, rehearing of certain aspects of the *Order on Complaint and Directing Compliance Filing* issued by the Commission on October 9, 2015, in the above-captioned

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<sup>1</sup> 16 U.S.C. § 8251 (2012).

<sup>2</sup> 18 C.F.R. § 385.713 (2015).

<sup>3</sup> IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York. IPPNY’s members include suppliers and marketers that participate in the New York Independent System Operator Inc.’s capacity markets. This pleading represents the position of IPPNY as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>4</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

proceeding.<sup>5</sup> In its October Order, the Commission granted in part, and denied in part, the complaint filed on May 8, 2015, by the New York Public Service Commission, the New York Power Authority (“NYPA”), and the New York State Energy Research and Development Authority (collectively, the “Complainants”) against the New York Independent System Operator, Inc. (“NYISO”), under Section 206 of the FPA, alleging that the NYISO’s buyer-side market power mitigation measures (“BSM Measures”), which are set forth in the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”), are unjust, unreasonable, or unduly discriminatory or preferential.<sup>6</sup>

The Commission granted the Complaint with respect to just two of the requested exemptions and even then, specified that such exemptions must be applied on a narrowly tailored basis. To achieve this end, the Commission directed the NYISO to make a compliance filing revising its BSM Measures “to exempt *a narrowly defined set* of renewable and self-supply resources *that have limited or no incentive and ability* to exercise buyer-side market power to artificially suppress ICAP market prices.”<sup>7</sup> The Commission repeatedly directed the NYISO to allow such exemptions only for a “narrowly defined” set of resources,<sup>8</sup> and expressed concerns about the State’s ability to artificially suppress prices “by channeling uneconomic entry through an exempted load serving entity.”<sup>9</sup> Thus, in fashioning its proposed self-supply exemption, the Commission established that the NYISO must “consider the impacts of state decisions to

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<sup>5</sup> *N.Y. Pub. Serv. Comm’n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015) (“October Order”).

<sup>6</sup> Docket No. EL15-64-000, Complaint of the New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority (May 8, 2015) (“Complaint”).

<sup>7</sup> October Order at P 10 (emphasis added).

<sup>8</sup> *See, e.g., id.* at PP 36, 37, 39, 47, 61.

<sup>9</sup> *Id.* at P 63.

subsidize resources that are owned or contracted for by a self-supplied load serving entity,”<sup>10</sup> and to exclude from the self-supply exemption any “project that has cost or revenue advantages that are irregular or anomalous, that do[es] not reflect arms-length transactions, or that [is] not in the ordinary course of the self-supply load serving entity’s business,” as well as any load serving entity that “has an arrangement for any payments or subsidies that are specifically tied to the load serving entity clearing its project in NYISO’s ICAP market, or to the construction of its project.”<sup>11</sup>

IPPNY/EPSC seeks clarification with respect to the Commission’s requirement that the NYISO propose amendments to its Services Tariff to include a narrowly defined self-supply exemption from the BSM Measures. IPPNY/EPSC requests that the Commission clarify that State entities, such as NYPA, which have demonstrated a strong incentive and ability to subsidize new entry to suppress ICAP prices, are not eligible for the self-supply exemption to be incorporated in the NYISO’s tariffs. In the alternative, if the Commission declines to grant clarification, IPPNY/EPSC respectfully requests rehearing of the Commission’s decision not to explicitly exclude State entities such as NYPA from being eligible for a self-supply exemption for the reasons discussed herein.

## **I. STATEMENT OF ISSUES**

In support of its request, IPPNY/EPSC respectfully submits the following statement of issues on which it seeks clarification or rehearing of the October Order and provides representative precedent in support of its position pursuant to Rule 713(c) of the Commission’s Rules of Practice and Procedure:

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (quoting *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 66) (internal quotation marks omitted).

1. The Commission should clarify that the Services Tariff would be unjust and unreasonable to the extent that it permits State entities such as NYPA to be eligible for a self-supply exemption from the BSM Measures, resulting in artificial price suppression from the State entity's subsidization of uneconomic new entry.
2. To the extent that the Commission denies clarification, rehearing is required because the Commission failed to address arguments and evidence provided by IPPNY/EPSA, Entergy Nuclear Power Marketing, LLC ("Entergy"), and the NYISO's independent Market Monitoring Unit ("MMU") that a self-supply exemption would allow State entities to artificially suppress ICAP prices and harm the NYISO's ICAP market undeterred. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("State Farm"); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("West Deptford").
3. The October Order is arbitrary and capricious, and is not the product of reasoned decisionmaking, because the Commission granted the Complainants' request for self-supply exemption based on the self-supply exemption the Commission approved for the PJM Interconnection's buyer-side mitigation measures in the face of IPPNY/EPSA's, Entergy's, and the MMU's arguments and evidence that there are significant differences between the NYISO's and PJM's markets and despite the Commission rejecting Complainants' request for other exemptions that the Commission had accepted for PJM because of these differences between the two markets. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) ("Fox"); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 322 (D.C. Cir. 2006) ("Williams").

## II. REQUEST FOR CLARIFICATION OR REHEARING

### A. **THE COMMISSION SHOULD CLARIFY, OR IN THE ALTERNATIVE, RULE ON REHEARING, THAT THE OCTOBER ORDER PRECLUDES THE NYISO FROM IMPLEMENTING TARIFF REVISIONS THAT WOULD ALLOW STATE ENTITIES SUCH AS NYPA TO BE ELIGIBLE FOR A SELF-SUPPLY EXEMPTION FROM THE BSM MEASURES.**

#### 1. Request for Clarification

In its October Order, the Commission stated that the NYISO should create a self-supply exemption that would apply only to a "narrowly defined" set of resources.<sup>12</sup> The Commission identified the types of load serving entities that would qualify, including on that list "municipalit[ies], cooperative[s], or single customer entit[ies]" that self-supply the majority of

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<sup>12</sup> *See* October Order at P 61.

their needed capacity, reasoning that the amount of capacity such entities procure from the ICAP markets would be “relatively small” and therefore they would lack the ability to exercise buyer-side market power to artificially suppress ICAP market prices.<sup>13</sup>

While IPPNY/EPISA does not interpret the October Order to permit the NYISO to propose revisions to its BSM Measures that would allow State entities such as NYPA to qualify for a self-supply exemption, other parties may have a different interpretation and advocate that the NYISO propose in its compliance filing a more broadly-defined self-supply exemption that would allow State entities such as NYPA to qualify for a self-supply exemption. In their protests and comments on the Complaint, IPPNY/EPISA and other intervenors demonstrated numerous reasons why the NYISO should not allow a State entity like NYPA to be eligible for a self-supply exemption. A State entity such as NYPA would have the incentive and ability to sponsor an uneconomic entrant to lower prices State-wide and force the retirement of economic but unfavored generation, even though the State entity itself may not profit from the price suppression.<sup>14</sup> The State may elect to use entities such as NYPA and the Long Island Power Authority (“LIPA”) to suppress prices statewide even if the strategy would result in a net loss to that particular entity. In addition, unlike the municipal entities the Commission discussed as lacking the ability to artificially suppress ICAP prices, NYPA and LIPA have large amounts of load and can sponsor enough uneconomic new entry to artificially suppress ICAP prices significantly even if the NYISO proposed narrow net-short and net-long thresholds.<sup>15</sup> Indeed, the MMU stated in its comments on the Complaint in opposition to a self-supply exemption that:

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<sup>13</sup> *Id.*

<sup>14</sup> See Docket No. EL15-64-000, Joint Protest of IPPNY and EPISA (June 29, 2015), at 49 (“IPPNY/EPISA Joint Protest”).

<sup>15</sup> It is notable that the NYISO’s proposed self-supply exemption in the stakeholder process limited eligibility for the exemption to municipal electric systems. The NYISO called the exemption the “Muni Self Supply Exemption.” See Dr. Nicole Bouchez, Proposed ICAP Buyer-Side Mitigation Modifications, Installed Capacity Working Group 2

Even if a particular firm is similar to a vertically integrated utility in the sense that it owns much of the generation needed to satisfy its capacity obligations, it would be inappropriate to grant a self-supply exemption in a restructured market like New York because of the role the market plays in satisfying NYISO's resource adequacy requirements in most areas. If uneconomic self-supply is exempted and this results in depressed capacity prices, the ability of the NYISO capacity market to facilitate needed investment will be undermined.<sup>16</sup>

As many commenters demonstrated, NYPA's impact on the market has been neither an academic nor a theoretical issue. For evidence of both NYPA's ability and incentive to artificially suppress prices, the Commission need only look to the recent history of the Astoria Energy II ("AEII") and Hudson Transmission Partners' ("HTP") projects, referenced by IPPNY/EPISA and other commenters protesting the Complaint.<sup>17</sup> Both of these uneconomic entrants obtained subsidized contracts with NYPA pursuant to discriminatory procurement processes that excluded existing resources, and such contracts were conditioned on construction of the projects. These NYPA contracts were exactly the type of "State decisions to subsidize resources that are owned or contracted for by a self-supplied load serving entity"—decisions that must encompass actions taken by State public power authorities—about which the Commission expressed concern in the October Order.<sup>18</sup> To combat such actions, the Commission directed the NYISO to exclude from eligibility for the self-supply exemption any "project that has cost or revenue advantages that are irregular or anomalous, that do not reflect arms-length transactions,

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(Apr. 18, 2014),

[http://www.nyiso.com/public/webdocs/markets\\_operations/committees/bic\\_icapwg/meeting\\_materials/2014-04-28/CompetitiveEntryExemption%20April%202028.pdf](http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2014-04-28/CompetitiveEntryExemption%20April%202028.pdf). Under the ISO Agreement, NYPA is as a State Public Power Authority and is not a Municipal Electric System. *See* Docket No. ER13-437-000, NYISO Tariff Filing (Nov. 20, 2012), Attachment 1, at 16.

<sup>16</sup> Docket No. EL15-64-000, Motion to Intervene and Comments of the New York ISO's Market Monitoring Unit (June 29, 2015), at 10.

<sup>17</sup> *See* IPPNY/EPISA Joint Protest at 46–47; IPPNY/EPISA Joint Protest, Affidavit of Mark D. Younger (June 29, 2015), ¶¶ 41, 47 ("Younger Affidavit"); *see also* Docket No. EL15-64-000, Protest of Entergy Nuclear Power Marketing, LLC (June 29, 2015), at 30–33 ("Entergy Protest").

<sup>18</sup> October Order at P 63.

or that are not in the ordinary course of the self-supply load serving entity’s business,” as well as any load serving entity that “has an arrangement for any payments or subsidies that are specifically tied to the load serving entity clearing its project in NYISO’s ICAP market, or to the construction of its project.”<sup>19</sup> NYPA’s past behavior demonstrates that it possesses not only the ability and incentive to artificially suppress prices, but also the willingness to do so.

The market bore the harm for 16 months until the AEII facility, initially exempted from mitigation erroneously, was made subject to mitigation pursuant to Commission order.<sup>20</sup> In the case of HTP, the market was only protected from incurring further harm because the HTP facility was correctly mitigated—a determination upheld by Commission order.<sup>21</sup> Absent adequate mitigation, it is reasonable to expect NYPA will take steps once again to artificially suppress capacity prices in New York.

The Commission granted the NYISO flexibility in developing the revisions to its Services Tariff that will include the self-supply exemption, but clearly stated that the resources to which that exemption should apply were to be “narrowly defined” as those lacking the ability and incentive to artificially suppress capacity market prices through the exercise of buyer-side market power.<sup>22</sup> The Commission explicitly enumerated a list of entities—specifically, municipalities, cooperatives, and single customer entities—to which the narrow definition of eligible resources should apply.<sup>23</sup> It pointedly omitted State entities such as NYPA from that list, citing “concerns regarding the state’s ability to artificially suppress prices by channeling uneconomic entry

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<sup>19</sup> *Id.* (quoting *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 66) (internal quotation marks omitted).

<sup>20</sup> Younger Affidavit ¶ 23.

<sup>21</sup> *Id.* ¶ 42.

<sup>22</sup> *Id.* at P 65.

<sup>23</sup> *Id.* at P 61.

through an exempted load serving entity.”<sup>24</sup> For the avoidance of any doubt on this point, rather than wait for the compliance filing and subsequent protests from stakeholders, the Commission should issue a clarification order directing the NYISO to narrowly define the resources eligible for a self-supply exemption from its BSM Measures, reaffirming that eligibility for this exemption shall be limited to those resources that meet narrowly drawn net-short and net-long threshold requirements and that lack the ability and incentive to artificially suppress prices and disallowing the exemption for State entities such as NYPA that clearly have the ability and incentive to, as well as a history of, artificially suppressing prices by supporting uneconomic entry into New York’s markets.<sup>25</sup>

## **2. Alternative Request for Rehearing**

The clarification requested by IPPNY/EP SA best represents the Commission’s intent as expressed in the October Order. If the Commission declines to grant clarification, IPPNY/EP SA requests rehearing of the Commission’s decision directing the NYISO to adopt a self-supply exemption that would apply to State entities such as NYPA. The Commission’s decision is arbitrary and capricious and not the product of reasoned decisionmaking because it failed to provide a reasoned basis for ignoring the substantial evidence<sup>26</sup> provided by IPPNY/EP SA, Entergy, the MMU, and other intervenors that a self-supply exemption would allow State entities

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<sup>24</sup> *Id.* at P 63.

<sup>25</sup> In the October Order, the Commission specified that reference to net short/net long thresholds was short-hand for the full set of PJM self-supply rules, which, importantly, also include a certification process. *See* October Order at P 62 n.154. Given the ample opportunity established by commenters for NYPA to game the thresholds through a pattern of signing contracts, garnering exemptions, and then spinning those contracts off, the Commission should further specify in its clarification order that the NYISO’s self-supply exemption must be back-stopped with an active certification process.

<sup>26</sup> *See, e.g., State Farm*, 463 U.S. at 43 (“[W]e may not supply a reasoned basis for the agency’s action that the agency itself has not given.” (citation and internal quotation marks omitted)); *Williams*, 475 F.3d at 328–29 (“Arbitrary and capricious review strictly prohibits us from upholding agency action based only on our best guess as to what reasoning truly motivated it” (citations omitted)); *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006) (“It will not do for a court to be compelled to guess at the theory underlying the agency’s action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.” (citation and internal quotation marks omitted)).

such as NYPA to once again sponsor uneconomic entry to artificially suppress prices, which would have a devastating impact on the competitive markets in New York.<sup>27</sup>

In addition, the Commission’s acceptance of Complainants’ argument that the Commission-approved PJM self-supply exemption was a sufficient basis to direct a self-supply exemption in the NYISO markets is irrational given the Commission’s general policy that significant regional differences exist between NYISO and PJM. The Commission agreed with IPPNY/EPSA’s, the MMU’s, and the Indicated Suppliers’<sup>28</sup> demonstration that the fundamental differences between PJM’s and the NYISO’s markets supported denying the NYPSC’s proposed blanket exemption for non-gas fired units in New York. The Commission found that:

NYISO’s capacity market is short-term in nature—with auctions for spot, monthly, and three month (strip) capacity—whereas PJM’s auction occurs three years in advance awarding a year-long capacity obligation. In addition, there are other significant differences between the two markets; for instance, as identified by Indicated Suppliers, NYISO is a single-state ISO while PJM is a multi-state (and the District of Columbia) regional transmission organization (RTO). PJM’s peak demand is therefore much higher than NYISO’s peak demand.<sup>29</sup>

The Commission stated that the fact it “has found certain exemptions from buyer-side market power mitigation in PJM or any other region to be just and reasonable is not dispositive of whether the Commission should find NYISO’s buyer-side market power mitigation rules to be unjust and unreasonable absent similar exemptions.”<sup>30</sup> Yet in ordering the NYISO to adopt a self-supply exemption, the Commission determined that “the net-short and net-long threshold approach used in PJM is an effective means of narrowly tailoring a just and reasonable self-

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<sup>27</sup> See Docket No. EL15-64-000, Protest of the Indicated Suppliers (June 29, 2015), at 24–27 (“Indicated Suppliers Protest”); Entergy Protest at 24; IPPNY/EPSA Joint Protest at 46–47, 53.

<sup>28</sup> Astoria Generating Company, L.P., TC Ravenswood, LLC, the NRG Companies, and Cogen Technologies Linden Venture, L.P. comprise the Indicated Suppliers. Indicated Suppliers Protest at 1.

<sup>29</sup> October Order at P 38.

<sup>30</sup> *Id.* (citation omitted).

supply exemption.”<sup>31</sup> The Commission acknowledged that “there are important distinctions between NYISO’s and PJM’s markets” but it did not explain, as it must, why (1) the NYISO’s markets are unjust and unreasonable absent a self-supply exemption, or (2) a self-supply exemption would be just and reasonable for the NYISO’s market despite these distinctions.<sup>32</sup>

Thus, the Commission should find on rehearing that the NYISO must narrowly define the resources that may be eligible for a self-supply exemption from its BSM Measures so as to include only those resources that lack the ability and incentive to artificially suppress prices, and should specify that the NYISO’s proposed tariff revisions in its compliance filing must make State entities such as NYPA with the ability and incentive to, as well as a history of, artificially suppressing prices by supporting uneconomic entry into New York’s markets ineligible for the self-supply exemption.

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<sup>31</sup> *Id.* at P 62.

<sup>32</sup> *See, e.g., West Deptford*, 766 F.3d at 20 (“It is textbook administrative law that an agency must ‘provide[] a reasoned explanation for departing from precedent or treating similar situations differently.’” (citation omitted)).

### III. CONCLUSION

For the foregoing reasons, IPPNY/EP SA respectfully requests that the Commission clarify, or rule on rehearing, that the NYISO must narrowly define the resources eligible for a self-supply exemption from its BSM Measures, limiting eligibility to those resources that lack the ability and incentive to artificially suppress prices and specifying that State entities such as NYPA that have the ability and incentive to, as well as a history of, artificially suppressing prices by supporting uneconomic entry into New York's markets are ineligible for the self-supply exemption.

Dated: November 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Albany, NY, November 6, 2015

By: David B. Johnson  
David B. Johnson