UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	)	**Docket No. ER16-1404-001**
	)	**Docket No. ER16-1404-002**

REQUEST FOR REHEARING OF THE CLEAN ENERGY ADVOCATES

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2019), the American Wind Energy Association ("AWEA"),[1] the Alliance for Clean Energy – New York ("ACE-NY"),[2] the Natural Resources Defense Council ("NRDC"),[3] the Sustainable FERC Project,[4] and the Solar Council[5] (collectively "Clean Energy Advocates") hereby request rehearing of the Commission's order issued on July 17, 2020, in the above-captioned proceedings (the "July Order").[6]

[1] AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA's members include active participants in the markets administered by NYISO.
[2] Alliance for Clean Energy New York promotes the use of clean, renewable electricity technologies and energy efficiency in New York State, in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution. Its members are a mix of private companies and non-profit organizations interested in promoting clean energy and creating opportunities for growth in New York's clean energy economy.
[3] NRDC is a national nonprofit environmental organization, headquartered in New York City, with more than 3 million members and activists nationwide and over 40,000 members in New York State. NRDC is committed to the preservation and protection of the environment, public health, and natural resources.
[4] The Sustainable FERC Project is a partnership of state, regional and national environmental and other public interest organizations working to expand the deployment of clean energy resources into America's electricity transmission grid and to reduce and eventually eliminate carbon pollution from the U.S. power sector.
[5] The Solar Council is a group of companies participating in AWEA's RTO Advisory Council that own, operate, develop, and finance solar projects and act, in coordination with AWEA, to advance joint goals before the Federal Energy Regulatory Commission and the nation's regional transmission markets and independent system operators.
[6] *New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020) ("July Order").

As discussed herein, the Commission's July Order erred by improperly subjecting renewables to Buyer-Side Mitigation ("BSM"), by approving an unworkable "regulatory retirement" basis for exempting renewables from BSM, and by approving an unreasonably stringent impact threshold for the scope of the renewables exemption.

I. STATEMENT OF ISSUES AND SPECIFICATION OF ERROR

Pursuant to Rules 203(a)(7) and 713, 18 C.F.R. §§ 385.203(a)(7) and 385.713 (2019), Clean Energy Advocates present the following identification of errors and statement of issues:

1. The July Order fails to address potential over-mitigation, and does not engage in a serious inquiry into either the incentive or capability of renewable resources to actually exercise market power or otherwise suppress prices. Precedent from the Commission itself and appellate courts requires the Commission to act consistent with these requirements, or to adequately explain its departure from them. The Administrative Procedure Act does not allow the Commission to break with its own precedent without "'providing a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" The July Order's expansion of mitigation is arbitrary and capricious and inconsistent with reasoned decision making because the Commission impermissibly departs with its own precedent related to mitigation without explaining this departure.[7]

2. The July Order provides NYISO with unfettered authority to administer an unreasonably narrow Incremental Regulatory Retirements standard that is unworkable and cannot be consistently applied. In approving the Incremental Regulatory Retirements standard, the Commission failed to consider important aspects of the problem and ignored record evidence, rendering the decision arbitrary and capricious.[8] The aspects the Commission failed to properly consider include:

---

[7] *See, e.g.*, *W. Deptford, LLC v. Fed. Energy Regulatory Comm'n*, 766 F.3d 10, 17 (D.C. Cir. 2014) (quoting *Alcoa Inc. v. Fed. Energy Regulatory Comm'n*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)); *see also Fox Television Stations, Inc.*, 556 U.S. at 515 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books."); *Edison Mission Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 394 F.3d 964, 969 (D.C. Cir. 2005) ("[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm . . . ."); *Midwest Independent System Operator, Inc.*, 109 FERC ¶ 61,157, at P 238 (2004) (explaining that assuring just and reasonable rates requires the Commission to "balance under-mitigation and over-mitigation").

[8] 5 U.S.C. § 706(2)(A); 16 U.S.C. § 824e(a); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Agencies must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. An agency rule is arbitrary and capricious if it relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise).

a. The Renewables Exemption Limit is based on an unreasonably narrow definition of Incremental Regulatory Retirements.

b. The Renewables Exemption Limit unreasonably excludes quantifiable reductions in Unforced Capacity that are unavailable during NYISO's peak load.

c. The Renewable Exemption Limit unreasonably limits Incremental Regulatory Retirements to "new or amended" regulatory actions.

d. The Commission unlawfully vests NYISO with unfettered authority to implement an unworkable Incremental Regulatory Retirements standard.

These failures render the July Order arbitrary and capricious, and inconsistent with the Commission's obligation to fix rates that are just and reasonable and not unduly discriminatory or preferential.

3. The Commission agreed with NYISO's proposal to set the impact threshold for the Renewables Exemption Limit unreasonably low, and did so with only a "conclusory statement"[9] that lacked any reference to the "essential facts upon which the administrative decision was based;"[10] these deficiencies render the $0.50/kilowatt-month impact threshold arbitrary and capricious.

II. REQUEST FOR REHEARING

1. Subjecting Renewables to Buyer-Side Mitigation is Improper

In the July Order, the Commission largely accepts NYISO's proposed methodology for applying BSM to renewables. However, the application of BSM to renewables is itself flawed for two reasons: 1) it does not comport with past Commission or judicial precedent, and 2) it is not narrowly tailored to address actual or likely market power.

The Commission's stated purpose for *Buyer*-Side Mitigation to limit the ability of *buyers* to exercise market power. As the Commission noted in 2008 when it approved in-City BSM measures, "this mitigation is aimed at preventing uneconomic entry by net *buyers* of capacity, the *only market participants* with an incentive to sell their capacity for less than its cost."[11] In

[9] *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).
[10] *See United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)).
[11] *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 106 (2008) (emphasis added).

the same order, the Commission justified its support of BSM by noting that uneconomic entry that suppresses capacity prices "can inhibit new entry, and thereby raise price and harm reliability, in the long-run."[12] The Commission supported comparable mitigation measures, and similar animating concerns behind them, in PJM and ISO-NE.[13] As Commissioner Glick noted in dissent to the July Order, "the Commission's buyer-side market power mitigation regime should be all about—and only about—buyers with market power. *In the event that a resource is not a buyer with market power, its capacity market offer should not be subject to buyer-side mitigation*."[14] Here, the renewable resources that would be mitigated (unless covered by the exemption) would be *sellers*, and thus are outside the intended ambit of BSM. The July Order makes no serious effort to identify market power concerns from *sellers* of capacity from renewable resources.

The Commission has historically sought to limit application of mitigation measures to market participants that have *both* the ability and incentive to exert market power. This is particularly true for renewables; in past decisions, the Commission has noted that due to their minimal operating costs and variable output, renewables have very limited ability to suppress prices. For this reason, the Commission directed NYISO to exempt certain renewable resources from NYISO's buyer-side mitigation measures in the underlying proceeding.[15] The Commission previously approved PJM mitigation measures excluding renewables from the Minimum Offer

[12] *Id.* at P103.
[13] *See, e.g., PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P104 (2006) ("The Commission finds the Minimum Offer Price Rule a reasonable method of assuring *that net buyers do not exercise monopsony power by seeking to lower prices through self supply*")(emphasis added).
[14] July Order, Comm'r Glick Dissenting, at ¶16 (emphasis added).
[15] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 153 FERC ¶ 61,022, at P36 (2015) (granting exemption from buyer-side mitigation to certain renewable resources that have "limited or no incentive and ability to exercise buyer-side market power").

Price Rule,[16] and *specifically* held that renewable resources have little ability to suppress market prices in ISO-New England ("ISO-NE").[17] Commission precedent finding that renewable resources lack the ability or incentive to exert market power is well-established.

The July Order provides no indication that renewable resources seeking to interconnect to a mitigated capacity zone are "net buyers of capacity," nor that they possess market power. The July Order similarly fails to identify any actual (or even likely) ability or incentive by renewable resources to suppress capacity prices. Indeed, renewable resources, like all net-sellers of capacity, benefit from high capacity market prices because it increases the revenues and thus the return on investment of the resource. Accordingly, the July Order is inconsistent with, and deviates from, past Commission precedent without adequate notice. This does not comport with the requirements of the Administrative Procedure Act.[18]

Finally, this overextension of BSM to non-buyer resources with no ability or inclination to suppress prices carries a significant risk of excessive mitigation, which the July Order does not meaningfully address. In past decisions, the Commission has attempted to balance the risks of over- and under-mitigation.[19] Indeed, the U.S. Court of Appeals for the District of Columbia Circuit has remanded Commission orders approving NYISO mitigation measures that did not

---

[16] *See, e.g.*, *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 166 (2013), *rev'd on other grounds sub. nom. NRG Power Mktg., LLC v. Fed. Energy Regulatory Comm'n*, 862 F.3d 108, 110 (D.C. Cir. 2017)(exempting renewable resources from the MOPR, and finding that the "MOPR may be focused on those resources that are most likely to raise price suppression concerns"); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 153 (2011) ("Wind and solar resources are a poor choice if a developer's primary purpose is to suppress capacity market prices. Due to the intermittent energy output of wind and solar resources, the capacity value of these resources is only a fraction of the nameplate capacity. This means that wind and solar resources would need to offer as much as eight times the nameplate capacity of a CT or CC resource in order to achieve the same price suppression effect.").

[17] *ISO New England Inc.*, 150 FERC ¶ 61,065, at P 26 (2015) ("[R]enewable resources are not similarly situated to other types of resources in that they are unlikely to be used for price suppression. As the Commission has explained, because renewable resources such as wind and solar can only qualify a fraction of their nameplate capacity, renewable resources are a poor choice if a developer's primary purpose is to suppress capacity market prices.").

[18] *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515, (2009) ("An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

[19] *See, e.g. Midwest Independent System Operator, Inc.*, 109 FERC ¶ 61,157, at P 238 (2004) (explaining that assuring just and reasonable rates requires the Commission to "balance under-mitigation and over-mitigation").

properly account for price impacts on competitive entry, stating that fundamental economic errors and lack of reasoned analysis were "the epitome of agency capriciousness."[20]

Here, the use of a highly subjective "Incremental Regulatory Retirements" standard (discussed *infra*) as the basis for the scope of the exemption risks mitigating renewable resources in an unpredictable fashion. Because New York State's policies call for significant additions of renewable energy,[21] these resources will be developed – and will be able to provide energy and capacity to NYISO's markets – but may not be exempted from BSM. If renewables are mitigated, more expensive NYISO generators will be selected in capacity auctions, which would raise capacity prices unnecessarily. Moreover, FERC's orders will cause New Yorkers to pay for the same capacity twice: they will first pay for renewable resources through programs designed to facilitate the state's clean energy goals, and then they will have to pay a second time for duplicative capacity when the BSM rules block those renewable resources from being selected in capacity auctions. The July Order's failure to take these likely consequences into account will cause "substantial harm" to New York residents and customers, in the words of the *Edison Mission Energy* Court. As Commissioner Glick notes in his dissent,

> [W]here entities are buyers, the Commission should impose buyer-side market power mitigation measures only when those buyers possess actual market power and, even then, the *mitigation must be reasonably tailored to the potential for the exercise of market power*.[22]

The Commission's failure to "reasonably tailor" mitigation measures to the potential exercise of market power renders the July Order arbitrary and capricious.

---

[20] *Edison Mission Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 394 F.3d 964, 969 (D.C. Cir. 2005) ("[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm . . . .").
[21] *See* New York Climate Leadership and Community Protection Act of 2019, Senate Bill S6599.
[22] July Order, Glick Dissent at ¶20 (emphasis added).

2. The July Order is arbitrary and capricious because it provides NYISO with unfettered authority to implement an unreasonably narrow Incremental Regulatory Retirements standard that is unworkable and cannot be consistently applied.

The July Order adopts NYISO's proposed Renewables Exemption Limit, which would establish a new methodology for calculating the limit on the amount of Unforced Capacity available for a Renewable Exemption (the "Renewable Exemption Limit") for each Mitigated Capacity Zone within each Class Year Study.[23] The Renewables Exemption Limit is based, in large part, on the definition of Incremental Regulatory Retirements, which is intended to reflect incremental retirements attributable to "direct" regulatory action that have taken place since the prior study period.[24] Only incremental new MW of capacity that "have retired, or are planning to permanently cease operation, in order to comply with or in response to *new or amended* regulations or statutes, or other regulatory or related action" count towards the Renewable Exemption Limit.[25] In addition, "such regulatory action must be a *significant factor* in the retirement of the Generator (i.e., a factor that contributes materially to the retirement)."[26] Importantly, the July Order vests NYISO with unfettered authority to determine whether specific retirements qualify as Incremental Regulatory Retirements,[27] which empowers NYISO to significantly increase or decrease the Renewables Exemption Limit at its sole discretion.[28]

Of note, the Renewables Exemption Limit adopted in the July Order provides far less transparency on how New York's clean energy policies will mesh with NYISO's capacity market than NYISO's original proposal to establish a 1,000 MW cap on the volume of intermittent renewable resources in each Class Year Study. In its February 2020 Order, the

[23] Capitalized terms that are not otherwise defined herein shall have the meaning specified in the Services Tariff.
[24] July Order at ¶ 31.
[25] Proposed Services Tariff § 23.4.5.13.5.3 (emphasis added).
[26] Proposed Services Tariff § 23.4.5.13.5.3 (emphasis added).
[27] July Order at ¶ 66.
[28] April Compliance Filing at 9.

Commission rejected the 1,000 MW cap for being based on "historical entry of all resource types across the entire New York Control Area" while ignoring the details of the proposal and substantial evidence demonstrating that the 1,000 MW cap was more narrowly tailored to account for renewable entry in *both* the mitigated capacity zones and the entire control area.[29] The approved Renewables Exemption Limit, in contrast, establishes an unworkable standard that is fundamentally flawed in at least four ways.

A. The Renewables Exemption Limit is based on an unreasonably narrow definition of Incremental Regulatory Retirements.

The July Order errs by not including *all* retirements from the Renewables Exemption Limit. The Commission purports to adopt the Renewables Exemption Limit because it "appropriately" limits the ability of renewable resources to depress capacity prices.[30] Its logic is that the definition of Incremental Regulatory Retirements functions to offset the price reducing impact of increased supply from renewable resources that benefit from state policies by tying the Renewables Exemption Limit to the amount of incumbent resources that retire due to state policies.[31] The definition of Incremental Regulatory Retirements therefore attempts to negate the impact of state policies on capacity market prices by limiting the increase in supply to the amount offset by an equivalent decrease in supply. Accordingly, the Commission claims to be concerned with maintaining just and reasonable rates in the capacity market.[32]

[29] July Order, Glick Dissent at ¶26 (citing April 2016 Compliance Filing, Attach. V, Bouchez Aff. ¶ 13 ("allowing this quantity of ICAP MW to receive a Renewable Exemption in a given Class Year would be reasonable because it would not be likely to result in the artificial suppression of capacity prices in Mitigated Capacity Zones and it would not overly restrict the availability of Renewable Exemptions").
[30] *See* July Order at ¶ ¶ 31, 50.
[31] July Order at ¶ ¶ 31, 50.
[32] February 2020 Order, 170 FERC ¶ 61,121 at P 48 ("a MW cap limits the risk that the renewable resources exemption will significantly impact market prices and it is such limitation that makes this tariff revision just and reasonable").

However, if the Commission's true concern was price impact, the Renewables Exemption Limit should reflect the total MW of Unforced Capacity from all retiring resources, rather than attempting to limit it to the amount that will retire due to state actions. As Clean Energy Advocates have previously explained:

> [I]n considering the price impact experienced by the sellers in the market, it is far more logical to use a formula accounting for all retirements. Every resource retirement, whether caused by regulatory actions or by other factors, tightens the demand/supply balance and serves to raise market prices. If the megawatt value for renewable exemptions is tied to the total quantity of retiring resources, the net effect of retirements and exempt renewable generators that enter the market is that suppliers in the market experience no change in market prices over time.[33]

Therefore, "there is no price-based justification for limiting exemption cap on new renewables to only those retirements caused by state action."[34]

Instead, the July Order adopts a standard for the Renewables Exemption Limit that attempts to determine the motivation underlying a Generator's economic decision in order to nullify state policies, including policies that impact (i) generator emissions, (ii) operating permits, (iii) availability of fuel supply, (iv) assessment of property taxes, and (v) compensation outside of the ISO markets[35]—all of which are matters wholly outside of the Commission's jurisdiction.[36] Retirement decisions, however, are made after accounting for a multitude of factors, such as state and federal laws and policies, fuel prices, projected energy demand,

---

[33] Clean Energy Advocates Protest at 6 (*See* New York Dep't of Env'tl Conservation Regulations, Subpart 227-3.5(a) (compliance options) ("'Ozone season stop.' An owner or operator of an existing SCCT may opt to comply with this Subpart by not operating the SCCT during the ozone season. The ozone season stop provision must be included as an enforceable permit condition in a final permit or permit modification issued prior to the applicable compliance deadline of this Subpart."), available at https://www.dec.ny.gov/regulations/116185.html.).

[34] July Order, Comm'r Glick Dissenting, at ¶28.

[35] See Proposed Services Tariff § 23.4.5.7.13.5.3.

[36] *Nebbia v. People of New York*, 291 U.S. 502, 524 (1934); see also *New York v. United States*, 505 U.S. 144, 156 (1992) ("The States unquestionably do retai[n] a significant measure of sovereign authority ... to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.").

competition, [and] revenue needs," none of which operate in isolation.[37] These factors often interact with each other, and each can be highly variable, changing dramatically in relatively short periods of time. Moreover, retirements often lag significantly behind the motivating regulatory action.[38] Attempting to isolate which retirements are deemed "regulatory"—and therefore can be backfilled via the renewable exemption—is not a standard that can be easily or consistently applied. Ultimately, the Renewables Exemption Limit is based on an unreasonably narrow and unworkable definition of Incremental Regulatory Retirements that is plainly intended to thwart policies that lie outside of the Commission's jurisdiction, not to maintain just and reasonable rates in the capacity market.

B. The Renewables Exemption Limit unreasonably excludes certain quantifiable reductions in UCAP that are unavailable during NYISO's peak load due to regulatory actions.

The July Order further errs by excluding seasonal retirements that are directly tied to regulatory actions from the Renewables Exemption Limit. Certain generating units in the mitigated capacity zones plan to satisfy the New York State Department of Environmental Conservation (NYSDEC) regulations concerning seasonal NOx emission limits by shutting down in summer months (when ozone emissions are high), but remaining online in winter months.[39] Importantly, NYISO's system peaks in the summer period, and the installed reserve margins and locational capacity requirements are based on summer peak load projections. Therefore, if a resource is not available during the summer, it will not contribute to meeting the system peak load requirements upon which the capacity market demand curve is based.

[37] Clean Energy Advocates Protest at 6.
[38] July Order, Comm'r Glick Dissenting, at ¶ 30.
[39] Clean Energy Advocates Protest at 6-7; Indicated NYTOs Protest at 13.

Seasonal retirements are codified in legally binding agreements with NYSDEC. As both NYISO and the Commission acknowledge, "taking a seasonal outage can be the result of a legitimate regulatory compliance plan."[40] Once the Generator has entered into the compliance plan, it is not simply "choos[ing] not to participate during certain months" as the Commission claims.[41] Such a compliance plan is a legally binding agreement between the Generator and NYSDEC that results in a quantifiable reduction in UCAP supply during peak periods—the Generator has made an enforceable commitment to seasonally retire its capacity precisely when the capacity is most needed. The seasonal outage is also "directly" linked to regulatory action—no subjective parsing of the factors contributing to the capacity reduction is necessary.

Seasonal retirements should be counted as retired for the purpose of calculating the Renewable Exemption Limit because their departure from the summer capacity market will raise the price of summer capacity. The effect of unavailable units on summer capacity prices is the same as if they were retired. Moreover, counting seasonal retirements as the equivalent of retired for the purposes of the renewable exemption computation is consistent with NYISO's proposed principle of offsetting effects (i.e., the net effect of plants leaving the market and renewable generation entering the market is *de minimis*).

Failing to deem this seasonal retirement an Incremental Regulatory Retirement also creates a perverse incentive for resources considering complete retirement to instead seasonally retire. If any generation owner controls multiple generators in a capacity zone, seasonal retirements of some units (which, per the July Order, would not be replaced via the Renewable Entry Exemption) would raise capacity revenues for other units; this actually *increases* the potential for the exercise of market power. By willfully excluding known and measurable

[40] July 2020 Order at ¶ 52; NYISO Answer at 8.
[41] July 2020 Order at ¶ 52.

seasonal capacity reductions that are short of a full retirement and failing to acknowledge the price impact of seasonal retirements, the Commission's decision in the July Order exacerbates the problem created by the unreasonably narrow definition of Incremental Regulatory Retirements.

C. The Renewable Exemption Limit unreasonably limits Incremental Regulatory Retirements to "new or amended" regulatory actions.

The Commission also errs by requiring the retirement to be the result of "new or amended" regulatory actions. This requirement is ambiguous and unworkable in practice because it does not provide market participants with a clear understanding of how the Incremental Regulatory Retirements definition will be applied. As Commission Glick warns, "Such obvious ambiguity is a recipe for endless litigation."[42] Moreover, this temporal requirement threatens to preclude substantial upcoming regulatory retirements from counting towards the Renewables Exemption Limit.

Retirements often lag significantly behind a causal regulatory action, which will likely be the case in NYISO in the coming years. In 2019, New York State enacted its landmark Climate Leadership and Community Protection Act (CLCPA) to address climate change and environmental injustice, among other concerns, by requiring that its generation mix to significantly reduce carbon emissions.[43] The CLCPA accomplishes this by establishing ambitious electric sector targets, including requiring that 70 percent of the state's electricity come from renewable energy by 2030, and 100 percent of the state's electricity supply be emissions free by 2040.[44] In addition, the NYSDEC adopted a rule that may lead to the retirement of over 3,000 MW from peaking units, many of which are in the Mitigated Capacity

[42] July Order, Comm'r Glick Dissenting, at ¶ 30.
[43] A08429/S06599 (New York 2019).
[44] CLCPA §4, amending Public Service Law §66-p(2).

Zones.[45] Similarly, Indian Point Energy Center is retiring pursuant to an agreement reached in 2017.[46] Ambiguity over what is meant by "new or amended" state actions, including those mentioned above, and how this requirement will be interpreted threatens to functionally exempt thousands of megawatts of capacity that will retire, in whole or in part, because of state regulatory actions.

NYISO did not present, nor did the Commission cite from any source, any evidence as to why the time between the agreement to retire and the actual date of retirement should be relevant to whether the capacity counts towards the renewable exemption.[47] Instead, the exemption should reflect the timing of the retirement, not the timing of the adoption of a state policy. By arbitrarily crafting the definition of Incremental Regulatory Retirements to potentially exclude significant regulatory retirements, the Commission unreasonably narrows the definition of Incremental Regulatory Retirements.

D. The Commission unlawfully vested NYISO with unfettered authority to implement an unworkable Incremental Regulatory Retirements standard.

The Commission errored by ordering NYISO to modify its proposal to remove the Commission's role as arbiter of disagreements about which retirements qualify as Incremental Regulatory Retirements.[48] This problem would not exist if the Renewables Exemption Limit was based on *all* retirements, rather than only on Incremental Regulatory Retirements, because such a standard could be objectively administered. As mentioned in the previous section, the Incremental Regulatory Retirements definition is an unworkable standard that cannot be consistently applied because it requires NYISO to ascertain the motivating factors of the

[45] Indicated NYTOs Protest at 4.
[46] July Order, Comm'r Glick Dissenting, at ¶ 30.
[47] *Id.*
[48] July 2020 Order at ¶ 66.

retirement. As discussed above, retirement decisions are made due to multiple factors, none of which operate in isolation.[49] The Incremental Regulatory Retirement definition requires NYISO to parse out if and to what extent state policies are a "significant factor in the retirement of the Generator (i.e., a factor that contributes materially to the retirement)."[50] Without further criteria for measurement, "significant" and "contributes materially" are subjective standards effectively devoid of meaning.

As NYISO expressly acknowledged, "it must weigh the significance of policy and non-policy factors in retirement decisions, and that *this determination may significantly increase or decrease the Renewable Entry Limit.*"[51] Such vast discretion is why NYISO requested additional safeguards to ensure that the Incremental Regulatory Requirements rule is properly construed, including procedures for the Commission to resolve disputes.[52] The Commission, however, rejected this request and disavowed itself of "[any] prescribed role in such determinations."[53] In doing refusing to review disputes, it tacitly acknowledged that the Incremental Regulatory Retirement is fundamentally unworkable and cannot be consistently applied. Indeed, the Commission ordered that it have no role in determining which retirements qualify as Incremental Regulatory Retirement because "it is unclear what standard of review the Commission would use in resolving a disagreement."[54] Of course, this problem is no less true for NYISO than for the Commission. NYISO should not have unfettered authority to implement a standard that enables it to significantly increase or decrease the Renewable Entry Limit if that standard is too unworkable for the Commission to review when disagreements arise. The Commission's grant

[49] Clean Energy Advocates Protest at 6.
[50] *See* Proposed Services Tariff § 23.4.5.7.13.5.3.
[51] April Compliance Filing at 9 (emphasis added).
[52] April Compliance Filing at 9.
[53] July 2020 Order at ¶ 66.
[54] July 2020 Order at ¶ 66.

to NYISO of unfettered authority to implement an unworkable Incremental Regulatory Retirements standard is both arbitrary and captious and an unlawful abdication of the Commission's duty to ensure that rates are just and reasonable and not discriminatory or preferential.

3. The 0.50/kw-month impact threshold for the Renewable Exemption Limit is unreasonably low, and the Commission's conclusory acceptance is arbitrary and capricious.

One of the criteria used in the determination of the Renewable Entry Limit is the potential impact on capacity market prices. In the July Order, the Commission approved NYISO's proposed $0.50/kW-month price impact per zone as the threshold.[55] NYISO's rationale for using the threshold of $0.50/kW-month was that this figure is also used in the physical withholding thresholds under NYISO's supplier-side capacity market power mitigation rules. NYISO also stated that it considered alternative thresholds, such as the $2.00/kW month threshold used in 23.4.5.4.1 of the NYISO's Market Services Tariff in the review of Exports of capacity from a Mitigated Capacity Zone.[56] Clean Energy Advocates and other parties argued that using a higher threshold of up to $2.00/kW-month impact level would be appropriate. Some parties argued that this threshold should be additive to the regulatory retirements-based exemption cap number.[57]

In the July Order, the Commission simply accepted NYISO's proposal to mirror the same value in the Renewable Exemption Limit that is used in physical withholding thresholds under NYISO's supplier-side capacity market power mitigation rules, but failed to explain *why* the

[55] July 2020 Order at ¶ 95.
[56] *See n.* 1 in NYISO Compliance Filing, Johnson aff., Docket No. (Apr. 7, 2020)
[57] *See* July Order at ¶ 93 (quoting NY Entities Protest at 8: "NY Entities argue that NYISO should revise the Minimum Renewables Exemption Limit to be 'the greater of $0.50/kW-month or $0.50/kW plus the price impact of the sum of (i) load forecast, (ii) UCAP Incremental Retirements, (iii) URM Impact, and (iv) the UCAP MW in the Renewable Exemption Bank for each mitigated capacity zone.'").

lowest possible threshold should be chosen. Both thresholds ($.50/kW-month and $2.00/kW-month) address the issue of supplier market power caused through withholding. The Commission's entire reasoning on this point is a blanket conclusory statement:

> We agree with NYISO that it is appropriate to mirror the same value in the Renewable Exemption Limit that is used in physical withholding thresholds under NYISO's supplier-side capacity market power mitigation rules to help ensure that the renewable resources exemption does not have more than a *de minimis* effect on the market price forecasts in a single mitigated capacity zone.

The Commission gives no explanation of the basis for its agreement with NYISO. The Commission also rejected, without any explanation, the parties' comments to make the price impact-based threshold quantity *additive* to the Incremental Regulatory Retirements-based quantity. While adding the impact threshold would allow for a *de minimis* price impact, which the July Order purports to seek, the actual effect of this acceptance would be to allow for essentially *no* price impact.

The Administrative Procedure Act requires invalidation of agency decisions that fail to "examine the relevant data and articulate a satisfactory explanation for [the] action including a 'rational connection between the facts found and the choice made.'"[58] Agencies must identify the "essential facts upon which the administrative decision was based" [59] and explain their rationale with actual evidence beyond a "conclusory statement." [60] In the July Order, the Commission failed to provide any basis for its acceptance of NYISO's proposed $0.50/kW-mo impact threshold, and failed to reasonably consider combining the Incremental Regulatory

[58] *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.,* 463 U.S. 29, 43 (1983), *citing Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 168 (1962).
[59] *See United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep't of the Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)).
[60] *Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993).

Retirements standard and the impact threshold, rendering this determination arbitrary and capricious.

III. CONCLUSION

For the foregoing reasons, the Clean Energy Advocates respectfully request rehearing of the July Order.

Gabe Tabak
Counsel
American Wind Energy Association
1501 M St NW, 9th Fl.
Washington, DC 20005
gtabak@awea.org

Anne Reynolds
Executive Director
Alliance for Clean Energy New York
119 Washington Ave Suite #1G
Albany, NY 12210
areynolds@aceny.org

Christopher Casey, Senior Attorney
Cullen Howe, Senior Advocate
Natural Resources Defense Council
40 W. 20th St.
New York, NY 10011
ccasey@nrdc.org
chowe@nrdc.org

John Moore
Director, Sustainable FERC Project
20 N. Wacker Street, Suite 1600
Chicago, IL 60201
moore.fercproject@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served this day upon each person designated on the official service list compiled by the Secretary in these dockets.

Dated at Washington, DC this 17th day of August 2020.

/s/ Gabe Tabak

_____

Gabe Tabak
Counsel
American Wind Energy Association
1501 M Street, NW, Suite 900
Washington, DC 20005
(202) 383-2500
gtabak@awea.org