IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Natural Resources Defense Council, Advanced Energy Economy, American Wind Energy Association, Petitioners, v. Federal Energy Regulatory Commission, Respondent.	)	Case No. 20-1223

PROTECTIVE PETITION FOR REVIEW AND REQUEST THAT PETITION BE HELD IN ABEYANCE

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), Natural Resources Defense Council ("NRDC"), Advanced Energy Economy ("AEE"), and American Wind Energy Association ("AWEA") (together, the "Clean Energy Advocates") hereby petition this Court to review and set aside the following orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission"):

1. *New York State Public Service Commission and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc.*, Order Denying Complaint, Docket No. EL19-86-000, 170 FERC ¶ 61,119 (Feb. 20, 2020) ("February 2020 Order," attached hereto as Exhibit A); and
2. *New York State Public Service Commission and New York State Energy Research and Development Authority v. New York Independent System*

Operator, Inc., Order Granting Rehearings For Further Consideration, Docket No. EL19-86-001, (Apr. 20, 2020) ("April 2020 Tolling Order," attached hereto as Exhibit B).

Clean Energy Advocates timely requested rehearing of FERC's February 2020 Order on March 23, 2020. Under the Federal Power Act, upon receiving a request for rehearing, FERC "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." 16 U.S.C. § 825*l*(a). Unless the Commission acts upon a request for rehearing within thirty days of filing, such application is deemed denied, and the rehearing proponent may seek judicial review. *Id.; see also* 18 C.F.R. § 385.713(f). On April 20, 2020, FERC purported to "act upon" Clean Energy Advocates' March 23, 2020 request for rehearing by issuing a boilerplate order the Commission officially titles a "grant of rehearing for further consideration" but colloquially refers to as a "tolling order," that does not actually grant rehearing, but unilaterally extends itself unlimited additional time to consider the request.

The Commission routinely uses tolling orders to give itself additional months or years of time to issue an appealable final order.[1] The legality of FERC's

[1] *See, e.g.*, En Banc Brief of Alliance of the Shenandoah Valley, et al. as Amici Curiae Supporting Petitioners, *Allegheny Defense Project v. FERC*, 932 F.3d 940 (D.C. Cir.), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019) (no. 17-1098), 2020 WL 263599 at 21-22, App. D (Based on a review of agency records, "[o]ver the past two years, FERC tolled *every* timely filed rehearing request it received in proceedings in which it issued a decision," several of which have been pending for years.).

use of tolling orders to delay judicial review is pending before the Court on *en banc* review in *Allegheny Defense Project v. FERC*, 932 F.3d 940 (D.C. Cir.), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019).[2] Petitioners in *Allegheny Defense* argue that, under the Natural Gas Act,[3] Congress did not authorize FERC to issue tolling orders that extend the statutory thirty-day period for action on an application for rehearing. If this Court in *Allegheny Defense* finds FERC's tolling order practice unlawful, and such a determination was accorded retroactive application,[4] FERC's April 20, 2020 Tolling Order could be deemed a nullity. Clean Energy Advocates' request for rehearing would then be deemed to have been denied by operation of law, and the sixty-day period to seek judicial review would expire on June 22, 2020. While this may seem an attenuated course of events, Clean Energy Advocates believe we must act with an abundance of caution in light of this Court's admonition in *Eagle-Picher Industries Inc. v.*

[2] The *Allegheny Defense en banc* hearing was held on April 28, 2020.

[3] If this Court invalidates FERC's tolling order practice under the Natural Gas Act, that determination would likely extend to tolling orders under the Federal Power Act. *See Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (Because the FPA and NGA "are 'in all material respects substantially identical' . . . constructions of one are authoritative for the other." (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956) and citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).").

[4] *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law . . . that rule is the controlling interpretation . . . and must be given full retroactive effect.").

EPA that "petitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." 759 F.2d 905, 909 (D.C. Cir. 1985).

For the reasons stated herein, Clean Energy Advocates respectfully request that the Court review and set aside FERC's February 2020 Order and April 2020 Tolling Order, but ask that the Court hold this petition in abeyance until the issuance of a decision by this Court in *Allegheny Defense*.

Dated: June 19, 2020

Respectfully submitted,

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DISCLOSURE STATEMENTS

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Natural Resources Defense Council, Advanced Energy Economy, and American Wind Energy Association (collectively "Clean Energy Advocates") make the following disclosures:

Natural Resources Defense Council, Inc. (NRDC) is a national non-profit corporation with more than 3 million members and activists nationwide and over 40,000 members in New York State. NRDC's headquarters, which is its largest office and where several hundred employees work, is located in New York City. The cost of electricity to power NRDC's headquarters is directly tied to prices in, and thus the functioning of, the markets administered by NYISO. NRDC is committed to the preservation and protection of the environment, public health, and natural resources. To this end, NRDC is actively involved in advancing policies that reduce greenhouse gas emissions and other dangerous forms of air pollution and that accelerate the deployment of clean energy resources. NRDC has a long-standing interest in environmental issues in New York, particularly with respect to energy policy. NRDC has no parent companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in NRDC.

American Energy Economy (AEE) is a not-for-profit business association dedicated to making energy secure, clean, and affordable. AEE represents more than 100 companies and organizations that span the advanced energy industry and its value chains. AEE's membership also includes large users of electricity with corporate goals for ensuring that the energy they use is both clean and affordable. Resources represented in AEE's membership include, but are not limited to, energy efficiency, demand response, solar photovoltaics, solar thermal electric, wind, energy storage, biofuels, electric vehicles, advanced metering infrastructure, transmission and distribution efficiency, fuel cells, hydropower (including pumped storage), nuclear power, combined heat and power, and enabling software. AEE members actively develop and deploy distributed energy resources and build business models for aggregation of these resources. AEE's members own, manufacture, and/or develop electric storage resources and other advanced energy technologies that seek to participate in the NYISO-administered energy, capacity, and ancillary services markets. AEE does not have any parent companies or issue stock, and no publicly held company has a 10% or greater ownership interest in AEE.

American Wind Energy Association (AWEA) is a non-profit 501(c)(6) organization organized under the laws of the state of Michigan. AWEA is a national non-profit trade association representing over 1,000 member companies

with a common interest in encouraging the deployment and expansion of wind energy resources in the United States, including project developers, project owners and operators, financiers, utilities, marketers and customers. AWEA's members also include storage developers who are active participants in the markets administered by NYISO. The treatment of storage under the buyer-side mitigation rules in NYISO's capacity markets affect the deployment and utilization of wind and other renewable resources in NYISO. AWEA is a non-profit corporation and, as such, no entity has any ownership interest in it. AWEA does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

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CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that on this 19th day of June, 2020, I caused to be served copies of the foregoing Petition for Review and Request That Petition Be Held in Abeyance and Corporate Disclosure Statements via electronic mail to:

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and by electronic mail on all parties on the Commission's service list in the underlying proceeding Docket Nos. EL19-86-000 and EL19-86-001 listed below.

Dated: June 19, 2020

/s/ Meagan Burton
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Exhibit A

***New York State Public Service Commission and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc.*, Order Denying Complaint, Docket No. EL19-86-000, 170 FERC ¶ 61,119 (Feb. 20, 2020)**

170 FERC ¶ 61,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Public Service Commission and New York State Energy Research and Development Authority

Docket No. EL19-86-000

v.

New York Independent System Operator, Inc.

ORDER DENYING COMPLAINT

(Issued February 20, 2020)

1. On July 29, 2019, pursuant to sections 206 and 306 of the Federal Power Act (FPA),[1] and Rule 206 of the Commission's Rules of Practice and Procedure,[2] the New York Public Service Commission (New York Commission) and the New York State Energy Research and Development Authority (NYSERDA) (collectively, the Complainants) filed a complaint against the New York Independent System Operator, Inc. (NYISO). The Complainants allege that the application of NYISO's buyer-side market power mitigation rules contained in Section 23.4 of NYISO's Market Administration and Control Area Services Tariff (Services Tariff)[3] is unjust, unreasonable, and unduly discriminatory because the rules limit electric storage resources' entry and participation in NYISO's capacity market and interfere with federal and state policy objectives. For reasons discussed below, we deny the complaint.

[1] 16 U.S.C. §§ 824e, 825e (2018).

[2] 18 C.F.R. 385.206 (2019).

[3] NYISO, Services Tariff, 23.4 Mitigation Measures (18.0.0).

I. Background

2. NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new capacity resources must enter the New York City or G-J Locality[4] Installed Capacity (ICAP) markets (mitigated capacity zones) at a price at or above the applicable offer floor and continue to offer at or above that price until their capacity clears 12 monthly auctions.[5] A new entrant can be exempted from the offer floor if NYISO determines that it passes either "Part A" or "Part B" of the mitigation exemption test.[6] Under Part A, NYISO will exempt a new resource from its buyer-side market power mitigation if its capacity price forecast for the first year is higher than the default offer floor.[7] Under Part B, NYISO will exempt a new resource from its buyer-side market power mitigation if the price forecast for the average of the next three years is higher than the net cost of new entry (CONE) of the new resource.

3. In February 2018, the Commission issued Order No. 841, directing Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to establish participation models regarding the participation of electric storage resources in wholesale markets.[8] In response to the Commission's directive, NYISO proposed a participation model for electric storage resources in the NYISO-administered markets that recognized electric storage resources' physical and operational characteristics.[9] As

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[4] Localities are areas within the New York Control Area that have transmission constraints and for which NYISO has established a minimum level of ICAP that must be maintained. The localities in NYISO are: Zone J (New York City), Zone K (Long Island), and Zones G, H, I, and J (collectively, the G-J Locality) (the Lower Hudson Valley and New York City). Under NYISO's ICAP market rules, mitigation measures are applied in Zone J and the G-J Locality. NYISO, Services Tariff, § 2.12 Definitions (10.0.0).

[5] *Id.* § 23.4.5.7 (14.0.0).

[6] *Id.* § 23.4.5.7.2 (14.0.0).

[7] The default offer floor is 75% of the net CONE of the hypothetical unit used in NYISO's most recent demand curve reset.

[8] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,127, Order No. 841, at P 3 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,127 (2019).

[9] *See* NYISO, Compliance Filing, Docket No. ER19-467-000 (filed December 3, 2018).

part of that filing, NYISO proposed, and the Commission approved, as consistent with Order No. 841, the application of NYISO's existing buyer-side market power mitigation rules to new electric storage resources.[10]

II. Complaint

4. The Complainants explain that NYISO's ICAP auctions are designed to encourage new investment, retain existing capacity that is needed, and inform retirement and entry decisions by providing a price signal that indicates when sufficient capacity is available or when additional ICAP resources are needed.[11] The Complainants explain that resources must clear the ICAP auction or contract bilaterally for their capacity to be counted towards meeting New York's Installed Reserve Margin.[12] The Complainants state that one of the capacity mitigation measures in effect in NYISO's mitigated capacity zones is offer floor mitigation, which is intended to address concerns with monopsony market power by imposing a minimum offer price to counteract the incentive for buyers to suppress capacity prices below competitive levels. The Complainants state that electric storage resources are currently subject to the same buyer-side market power mitigation rules as traditional generators and are deemed to be economic if either (1) 75% of Net CONE or (2) their actual Unit Net CONE, is lower than the forecasted capacity prices for the relevant mitigation study period.[13]

5. The Complainants assert that the application of NYISO's buyer-side market power mitigation rules limits electric storage resources' entry and participation in NYISO's capacity market and interferes with federal and state policy objectives, and therefore, is both unjust, unreasonable, and unduly discriminatory, and inconsistent with Order No. 841.[14] Complainants state that Order No. 841 was meant to remove barriers so that electric storage resources can participate in the wholesale markets and mandated that RTO/ISO markets be designed to accommodate electric resource participation to the full extent of their technical capability.[15] Therefore, the Complainants request that the

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[10] *N.Y. Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,225, at PP 57, 74 & 75 (2019).

[11] Complaint at 9.

[12] *Id.*

[13] *Id.* at 9-10.

[14] *Id.* at 2-3.

[15] *Id.* at 35.

Commission establish a blanket exemption for new electric storage resources from NYISO's currently effective buyer-side market power mitigation measures. Alternatively, the Complainants request that the Commission approve a megawatt cap exemption that would enable up to 300 MW of electric storage resources to enter the NYISO market each year without the "threat of mitigation."[16]

6. The Complainants argue that the full and unrestricted participation of electric storage resources in NYISO markets is necessary to further New York's statewide electric storage goal and deployment policy.[17] The Complainants state that the state of New York is pursuing a number of energy and environmental policy objectives to increase the production of electricity from renewable energy sources and the deployment of electric storage resources by 2030.[18] This includes, among other things, the recent amendment of New York State Public Service Law to recognize the state's interest in ensuring adequate amounts of electric storage resources on a statewide basis and directing the New York Commission to establish statewide electric storage goals for 2030.[19] The Complainants state that, in response, the New York Commission issued an order in December 2018 announcing a statewide electric storage goal of 3,000 MW by 2023, with an interim goal of 1,500 MW by 2025, and also establishing a framework to encourage electric storage development in New York.[20] The Complainants note that approximately 300 MW of electric storage resources are expected to be included in Class Year 2019 and that 3,000 MW are anticipated to enter over the next 10 years.[21] Accordingly, the Complainants argue that the development of electric storage resources is necessary to achieve "various legitimate State polices"[22] and that applying buyer-side market power mitigation measures to electric storage resources in mitigated capacity

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[16] *Id.* at 4.

[17] *Id.* at 30.

[18] *Id.* at 15.

[19] *Id.* at 14-15 (citing New York Commission, Case 18-E-0130, *Energy Storage Deployment Program, Order Establishing Energy Storage Goal and Deployment Policy* (issued December 13, 2018) (Energy Storage Order)).

[20] *Id.* at 15 (citing New York Commission, Case 18-E-0130, *Energy Storage Deployment Program, Order Establishing Energy Storage Goal and Deployment Policy* (issued December 13, 2018) (Energy Storage Order).

[21] *Id.* at 37.

[22] *Id.* at 16-22.

zones will shift project development away from the region where energy storage can provide the greatest benefits.[23]

7. The Complainants also argue that NYISO's application of buyer-side market power mitigation to electric storage resources is inconsistent with the cooperative federalism design of the FPA and interferes with the state's authority over energy production, including "questions of need, reliability, cost, and other related state concerns."[24] The Complainants state that, while the Commission regulates interstate transmission and wholesale sales of electricity, wholesale auctions regulated by the Commission are explicitly neutral as to "environmental or technical goals," and have "no feature to explicitly recognize …environmental or technological goals."[25] The Complainants argue that states, by contrast, regulate generation facilities and retail sales of electricity to achieve environmental objectives. Complainants assert that subjecting electric storage resources to buyer-side market power mitigation counteracts the state's effort to meet these generation and environmental objectives and identify resources needed to meet their resource adequacy goals, thereby upsetting the balance of state and federal interests intended by the FPA.[26]

8. The Complainants state that the Commission has granted several exemptions from NYISO's buyer-side market power mitigation rules. They note that, in 2015, the Commission granted resource-specific exemptions from the buyer-side market power mitigation rules for certain renewable and self-supply resources.[27] The Complainants add that, in 2017, the Commission granted a blanket exemption for demand response resources, i.e., Special Case Resources (SCRs), from NYISO's buyer-side market power mitigation rules.[28] In doing so, the Complainants state, the Commission found that the payments SCRs receive from dual participation in retail-level demand response programs are not effective tools of price suppression.[29] The Complainants argue that, like SCRs,

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[23] *Id.* at 2-3.

[24] *Id.* at 30.

[25] *Id.*

[26] *Id.* at 31- 32.

[27] *Id.* at 10 (citing *N.Y. State Pub. Serv. Comm'n. v. N.Y. Indep Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015) (October 2015 Order)).

[28] *Id.* at 10-11 (citing *N.Y. State Pub. Serv. Comm'n. v. N.Y. Indep Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (SCR Order)).

[29] *Id.* at 11 (citing SCR Order, 158 FERC ¶ 61,137 at P 31).

electric storage resources are not effective tools of price suppression and should therefore qualify for a blanket exemption from NYISO's buyer-side market power mitigation rules.[30]

III. Notice, Interventions, and Additional Pleadings

9. Notice of the complaint was published in the *Federal Register*, 84 Fed. Reg. 38,027 (2019), with interventions or protests to be filed by August 19, 2019.

10. Timely motions to intervene were filed by: Exelon Corporation, H.Q. Energy Services, Inc., New York Transmission Owners, et al. (NYTOs),[31] Public Citizen, Inc., Electric Power Supply Association, NRG Power Marketing, LLC., Calpine Corporation, Energy Management Alliance, American Wind Energy Association (AWEA), New York Battery and Energy Storage Technology Consortium, Advanced Energy Economy, Convergent Energy and Power, LP, Vistra Energy Corporation. Timely motions to intervene and comments were filed by the AES Corporation, PSEG Companies, Natural Resources Defense Council, City of New York, Helix Ravenswood, Key Capture Energy, LLC (Key Capture), NYISO's Market Monitoring Unit (MMU), Energy Storage Association (ESA) (with comments), GlidePath Development, LLC (GlidePath). The Independent Power Producers of New York (IPPNY) submitted a timely motion to intervene and a protest. The New York Association of Public Power filed an out-of-time motion to intervene. Separate comments were submitted by: Consolidated Edison of Company of New York, Inc., Orange and Rockland Utilities, Inc., New York Power Authority, and Long Island Lighting Company d/b/a Power Supply Long Island (collectively, The Companies), Indicated Transmission Owners,[32] and the Clean Energy Parties.[33]

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[30] *Id.*

[31] NYTOs consist of: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York Power Authority; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; Power Supply Long Island; and Rochester Gas and Electric Corporation.

[32] Indicated Transmission Owners consist of: Central Hudson Gas & Electric Corporation, New York State Electric & Gas Corporation, and Rochester Gas and Electric Corporation.

[33] Clean Energy Parties consist of: the Advanced Energy Economy, the Advanced Energy Management Alliance, the Alliance for Clean Energy New York, Consumer

11. On August 19, 2019, NYISO filed an answer to the complaint. On September 6, 2019, the American Wind Energy Association submitted an answer to NYISO's Answer. On October 1, 2019, the New York State Entities submitted an answer to IPPNY's protest, MMU's comments, and NYISO's answer. On October 21, 2019, IPPNY filed an answer to comments and protests opposing the complaint, including IPPNY's protest.

A. NYISO's Answer

12. NYISO asserts that the Commission should deny the complaint. NYISO argues that the Complainants have not demonstrated that the currently effective buyer-side market power mitigation rules are unjust, unreasonable, or unduly discriminatory in the absence of a blanket exemption for electric storage resources. NYISO states that Commission precedent requires NYISO to implement the buyer-side market power mitigation rules because under-mitigation of uneconomic entry can artificially suppress capacity prices, which harms long-term consumer interests.[34] Commission precedent, according to NYISO, also requires NYISO to strive to avoid the potential harms of over-mitigation, which discourages entry by new resources.[35] To achieve this balance between under-mitigation and over-mitigation, NYISO states, the Commission has authorized NYISO to establish certain exemptions from the buyer-side market power mitigation rules, which apply only to resources that are shown to lack both the incentive and the ability to suppress capacity market prices.[36] NYISO asserts that the Complainants have not shown that either of their proposed exemptions satisfies this requirement, though it is possible that such a showing could be made in the future.[37]

13. NYISO argues that the Complainants fail to demonstrate that the unmitigated entry of electric storage resources in NYISO's mitigated capacity zones would not result in the suppression of capacity prices. NYISO contends that the Complainants do not address the fact that the aggregate impact of the entry of numerous small resources must be considered even when the entry of any individual resource is unlikely to cause price

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Power Advocates, Natural Resources Defense Council, New York Battery and Energy Storage Technology Consortium, and Sustainable FERC Project.

[34] NYISO Answer at 3 (internal citations omitted).

[35] *Id.* (internal citations omitted).

[36] *Id.* *See, e.g.*, October 2015 Order, 153 FERC ¶ 61,022 at P 10; *reh'g*, 154 FERC 61,088 at P31 (2016) (October 2015 Rehearing).

[37] NYISO Answer at 2.

suppression.[38] NYISO further argues that the Complainants acknowledge that the entry of large numbers of storage resources may have "incidental" or "short-term" price effects, which is inconsistent with what the Commission has previously required to support an exemption.[39] Moreover, NYISO states that the Commission does not require evidence of intent to suppress prices before buyer-side market power mitigation rules may be applied.

14. NYISO further contends that buyer-side market power mitigation rules are not an impermissible barrier to entry.[40] NYISO explains that the Commission has previously rejected claims that, to the extent that mitigation rules may discourage uneconomic entry by certain state-preferred resources, such rules are inherently a barrier to entry that impermissibly interfere with legitimate state authority.[41] Instead, NYISO further explains, the Commission has held that mitigation rules are not barriers to entry so long as they are structured to avoid over-mitigation.[42] Additionally, with respect to the Complainants' arguments that buyer-side market power mitigation is inconsistent with Order No. 841, NYISO states that Order No. 841 does not require that storage resources be exempt from mitigation.[43]

15. NYISO adds that the Complainants' failure to meet the burden of proof under FPA section 206 does not foreclose the possibility of improving buyer-side market power mitigation rules. NYISO states that it has identified a project for 2020 that would involve a comprehensive review of its buyer-side market power mitigation rules and suggests that the Commission let NYISO's stakeholder process determine whether buyer-side market power mitigation rule enhancements should be pursued and what form those enhancements should take.[44]

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[38] *Id.* at 6.

[39] *Id.*

[40] *Id.* at 8.

[41] *Id.* at 7.

[42] *Id.*

[43] *Id.* at 7-8.

[44] *Id.* at 9-10.

B. Comments

16. Key Capture, the Companies, Clean Energy Parties, ESA, and GlidePath argue that electric storage resources provide substantial value to the market and that application of buyer-side market power mitigation to new electric storage resources will limit or eliminate the ability of electric storage resources to be compensated for that value, thereby violating the Commission's mandate in Order No. 841.[45] The Companies cite to Order No. 841's finding that existing RTO/ISO market rules are unjust and unreasonable in that they inhibit the participation of electric storage resources in RTO/ISO markets, thereby reducing competition and failing to ensure just and reasonable rates.[46]

17. Key Capture, the Companies, the Indicated Transmission Owners, and the City of New York point out that the Commission has previously invited the New York Commission to make a FPA section 206 filing seeking an exemption from mitigation "if it believes that the inclusion in the [offer floor] of rebates and other benefits under a state program interferes with a legitimate state objective."[47] Key Capture, City of New York, the Companies, and ESA argue that subjecting electric storage resources to buyer-side market power mitigation directly interferes and conflicts with New York's legitimate policy objectives.[48]

18. Clean Energy Parties contend that buyer-side market power mitigation violates the FPA's cooperative federalism framework,[49] and that, while the Commission has authority to regulate wholesale market rates, the FPA reserves states' authority "over facilities used for the generation of electric energy."[50] Clean Energy Parties argue that states retain their independent policymaking authority to address resource adequacy, as well as a variety of important interests, including local health and safety as well as environmental quality

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[45] Key Capture Comments at 3, ESA Comments at 3, GlidePath Comments at 5; the Companies Comments at 3; Clean Energy Parties Comments at 17.

[46] The Companies Comments at 3.

[47] *Id.* at 4-5 (citing *N.Y. Indep. Sys. Operator, Inc.* 124 FERC ¶ 61, 301 at P 38 (2008)); Key Capture Comments at 5 (citing *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208, at P 30 (2015)).

[48] The Companies Comments at 7; City of New York Comments at 2; ESA Comments at 4.

[49] Clean Energy Parties Comments at 14.

[50] 16 U.S.C. § 824(b)(1).

standards.[51] Clean Energy Parties argue that applying buyer-side market power mitigation to electric storage resources is contrary to cooperative federalism because it "elevate[s] NYISO's determination that [electric] storage resources are 'uneconomic' over New York's decision to help meet the goals of the Climate Act and other policies."[52]

19. Key Capture, Clean Energy Parties, and the Companies contend that granting the requested exemption is consistent with Commission precedent because electric storage resources have limited incentive and ability to exercise buyer-side market power and artificially suppress capacity prices.[53] Key Capture cites affidavit testimony of its expert witness stating "[i]t is unlikely that an entity could exercise buyer-side market power with a storage resource, given the small size of battery storage resources, the small share of total capacity owned by storage developers, and the declining capacity value of short-duration battery storage resources at higher storage penetrations."[54] Clean Energy Parties also contend that any impact on ICAP capacity prices will be "tempered" by several factors.[55] Clean Energy Parties, however, acknowledge that recent Commission orders have found that, in aggregate, significant amounts of resources supported by state programs can have negative effects on capacity market prices.[56] Clean Energy Parties distinguish those cases from NYISO's application of buyer-side market power mitigation to electric storage resources by arguing that NYISO has not alleged that the ICAP

[51] 16 U.S.C. §§ 824(b) and 16 U.S.C. § 824(o).

[52] Clean Energy Parties Comments at 16.

[53] Key Capture Comments at 7; the Companies Comments at 9; Clean Energy Parties comments at 3.

[54] Key Capture Comments, Gramlich aff. ¶ 10.

[55] Clean Energy Parties Comments at 9. The factors listed by Clean Energy Parties are: (1) of the 3,000 MWs of electric storage resources contemplated by the Energy Storage Order, only some are likely to be in the zones currently subject to mitigation; (2) new electric resources may not be assigned their full capacity value; (3) electric storage resources will enter into NYISO gradually, reducing the price impact in mitigated zones; (4) it is likely that many of the resources will not participate in the ICAP market; and (5) other New York State standards and market influences will also affect ICAP prices. *Id.* at 9-10; Energy Storage Order.

[56] Clean Energy Parties Comments at 13 (citing *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 24 (2018); *Calpine Corp. v. PJM Interconnection*, L.L.C., 163 FERC ¶ 61,236 at P 5 (2018) ("2018 PJM Order")).

market's ability to provide resource adequacy is threatened by the price-suppressive effects of electric storage resources procured under state programs.

20. Key Capture also supports the Complainants' alternative request for an exemption for electric storage resources with a 300 MW cap, but requests that the Commission consider allowing up to a 1,000 MW cap.[57]

21. Clean Energy Parties argue that applying buyer-side market power mitigation to electric storage resources will raise costs for consumers. According to Clean Energy Parties, the possible exclusion of electric storage resources from the ICAP market could lead to customers "paying twice" for capacity.[58]

22. IPPNY asserts that the Commission should deny the complaint because the Complainants have failed to meet their burden under FPA section 206 to demonstrate that NYISO's existing buyer-side market power mitigation measures are unjust and unreasonable.[59] IPPNY argues that the Complainants have failed to demonstrate any specific harm to the markets or market participants and that the proposed exemptions are designed to exempt exactly the type of new entry that buyer-side market power mitigation is designed to mitigate.[60] IPPNY notes that the Commission has ruled that only purely intermittent resources with low capacity factors are eligible for exemption. IPPNY avers that electric storage resources are not similarly qualified for such an exemption.[61] IPPNY adds that the Complainants fail to provide any reasonable basis for the Commission to find that the alternative proposed exemption with a 300 MW cap is a just and reasonable replacement to the existing buyer-side market power mitigation.

23. IPPNY also contends that the application of buyer-side market power mitigation to electric storage resources does not interfere with state policy goals or Order No. 841. IPPNY states that Order No. 841 expressly permits NYISO to apply its existing market power mitigation measures to alleviate market power concerns[62] and that buyer-side market power mitigation does not impose requirements on state policies that promote certain types of generating technology. IPPNY notes that the New York Commission

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[57] Key Capture Comments at 2.

[58] Clean Energy Parties Comments at 16-17.

[59] IPPNY Protest at 3.

[60] *Id.* at 21.

[61] *Id.* at 39.

[62] *Id.* at 23.

has previously and unsuccessfully argued before the Commission that buyer-side market power mitigation should not be applied because of its interference with state energy policies.[63]

24. MMU asserts that buyer-side market power mitigation is an important tool for ensuring a workable balance between facilitating state policy objectives and ensuring that prices are just and reasonable for both merchant and subsidized resources.[64] IPPNY classifies buyer-side market power mitigation as a "shield" necessary to protect against price distortions that would otherwise undermine resource adequacy and NYISO's demand curve model.[65] MMU explains that subsidized new entry has the potential to disrupt both the balance between supply and demand as well as long-term economic price signals that facilitate merchant entry and exit in NYISO's capacity market.[66] MMU asserts that there is no threshold for new entry that triggers buyer-side market power mitigation and that such mitigation is driven not by the size of individual projects, but by the aggregate amount of generating capacity that receives out-of-market subsidies.[67]

C. Answers

25. IPPNY replies to the Complainants' claim that the amount of electric storage resource capacity that will participate in NYISO's ICAP market will be less than 3,000 MW over ten years, arguing that the Complainants' claim is belied by their request for a 300 MW cap to be assessed on an annual basis.[68] IPPNY notes that the Complainants'

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[63] *Id.* at 23-24.

[64] MMU Comments at 3.

[65] IPPNY Protest at 6. IPPNY stresses that if the "shield" provided by buyer-side market power mitigation ceases to exist, electric storage resources will prevent the entry of new, and the maintenance of existing, economic resources that are needed to meet reliability standards over the long term. *Id.*

[66] MMU Comments at 3,7.

[67] *Id.* at 8-9. MMU states that, for example, the effects of 100 individual five MW projects entering the market is no different from one 500 MW generator entering the market.

[68] IPPNY Answer at 5.

argument that the entry of electric storage resources will only trigger a short-term change in wholesale capacity prices is unsupported by any evidence.[69]

26. AWEA asserts that NYISO interprets the FERC standard on mitigating market power too rigidly. AWEA suggests that, rather than adhering to the standard that buyer-side market power mitigation is appropriate where a market participant has both the incentive and the ability to influence prices, the Commission should find that either the lack of ability or lack of incentive to suppress prices should insulate a resource from buyer-side market power mitigation application.[70] AWEA argues that the Commission should evaluate the likely ability and incentive of individual storage resources to exert market power, not the aggregate effect of multiple resources. AWEA contends that electric storage resources have limited capacity credit and therefore "have limited or no incentive and ability to exercise buyer-side market power."[71]

27. IPPNY reiterates its position that allowing state-subsidized electric storage resources to enter the market without mitigation threatens the viability of projects needed to maintain reliability.[72] IPPNY argues that the artificial suppression of market prices resulting from the entry of unmitigated, subsidized resources would prevent the market from efficiently reflecting the need for competitive new entry, additional investments in existing facilities, or adjustments to the location and/or timing of projects.[73] IPPNY argues that this harms reliability even if, as the Complainants note, existing reliability standards and procedures remain in place.[74]

28. NY State Entities cite the Commission's finding that interference with a legitimate state policy may form the basis for a buyer-side market power mitigation exemption request.[75] NY State Entities assert that the complaint adequately demonstrates that the

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[69] *Id.*

[70] AWEA Answer at 3.

[71] *Id.* at 5 (citing October 2015 Rehearing 154 FERC ¶ 61,088 at P 31).

[72] IPPNY Answer at 7.

[73] *Id.* at 7-8.

[74] *Id.* at 7.

[75] NY State Entities Answer at 5 (citing *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 38).

application of buyer-side market power mitigation to electric storage resources interferes with New York State's policy objectives related to renewable energy.

29. NY State Entities oppose IPPNY's contention that a blanket exemption for electric storage resources will lead to failure of the wholesale capacity market and reliability consequences for New York.[76] NY State Entities state that rather than "flood[ing]" the market, the potential impact of electric storage resources on the market will be limited by the pace and location of deployment, the operation of market rules, and the effect of other market forces.[77] NY State Entities label IPPNY's claim that system reliability will be threatened by a blanket exemption for electric storage resource from buyer-side market power mitigation as "conjecture," arguing that existing reliability standards and processes will remain in place to ensure system reliability.[78] AWEA states that application of buyer-side market power mitigation rules to electric storage resources will inefficiently steer storage development to geographic areas where they provide less reliability value.[79]

30. NY State Entities argue that the Part B Test does not capture all of the expected benefits from electric storage resources and would fail to attract investment in the same manner as a buyer-side market power mitigation exemption.[80] According to NY State Entities, the competitive entry exemption also fails to provide a reasonable alternative to a buyer-side market power mitigation exemption for electric storage resources because waiting for the market to develop products that fully reflect the benefits associated with electric storage resources is not satisfactory because the timing is too uncertain.[81]

31. NY State Entities disagree with MMU's contention that need for buyer-side market power mitigation is driven by the aggregate amount of generating capacity that receives out-of-market subsidies.[82] NY State Entities argue that buyer-side market power

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[76] *Id.* at 8.

[77] *Id.* at 9.

[78] *Id.* at 11.

[79] AWEA Answer at 8.

[80] NY State Entities Answer at 15-16.

[81] *Id.* at 16.

[82] *Id.* at 17.

mitigation should not be used to counteract state policy initiatives and that MMU's contention amounts to a new interpretation of NYISO market rules.[83]

32. NY State Entities argue that the Commission should not defer considering the proposed buyer-side market power mitigation exemption to the NYISO stakeholder process.[84] NY State Entities stress that NYISO's stakeholder process is inefficient at developing a consensus on buyer-side market power mitigation exemptions and contend that the stakeholder process is unlikely to support a buyer-side market power mitigation exemption for electric storage resources or any alternative measure to accommodate state policy objectives.[85] NY State Entities assert that both proposals are beyond the scope of the complaint and should not be considered in this proceeding.

IV. Discussion

A. Procedural Matters

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

34. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant New York Association of Public Power's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

35. 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 answer unless otherwise ordered by the decisional authority. We accept IPPNY, AWEA, and NY State Entities' answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

36. We find that the Complainants have failed to meet their burden under FPA section 206 to demonstrate that the existing buyer-side market power mitigation rules

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[83] *Id.* at 18.

[84] *Id.* at 6.

[85] *Id.* at 6-7.

contained in Section 23.4 of NYISO's Services Tariff are unjust, unreasonable, or unduly discriminatory.[86] Therefore, we deny the complaint.

37. The Complainants, Key Capture, City of New York, the Companies, and ESA primarily argue that the development and participation of electric storage resources in NYISO's market are necessary to achieve various legitimate state policies and that subjecting electric storage resources to buyer-side market power mitigation inappropriately interferes with such policies. Complainants and Clean Energy Parties similarly argue that applying buyer-side market power mitigation to electric storage resources is inconsistent with cooperative federalism. However, these arguments do not warrant a finding under FPA section 206 that NYISO's buyer-side market power mitigation rules are unjust and reasonable. While the Complainants note various energy and environmental policies in New York, they fail to demonstrate that the unmitigated entry of electric storage resources in NYISO's mitigated capacity zones would not result in the suppression of capacity prices. Mitigation of electric storage resources in New York does not divest New York State of its jurisdiction over generation facilities or its authority to set generation-related environmental goals. New York State remains free to pursue its environmental objectives through its regulation of electricity generation. Where state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable.[87] Therefore, we find that the application of buyer-side market power mitigation to electric storage resources in NYISO appropriately protects the capacity market from the price suppressive effects of resources receiving out-of-market support while preserving the cooperative federalism approach established under the FPA.

38. We do not agree with arguments that subjecting electric storage resources to buyer-side market power mitigation limits these resources' entry and participation in NYISO's capacity market. NYISO's buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones unless an entrant demonstrates that it is eligible for an exemption.[88] These resources are able to participate in the market similar to any other resources and NYISO's buyer-side market power mitigation rules do not foreclose these resources' ability to pass the Part B test, which already takes into consideration certain incentives, such as explicitly considering the expected benefits to

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[86] 16 U.S.C. § 824e (2018).

[87] *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014) (affirming the Commission's decision to eliminate the state mandate exemption because "below-cost entry suppresses capacity prices…[the Commission is] statutorily mandated to protect the [PJM capacity auction] against the effect of such entry").

[88] *See, e.g.*, October 2015 Order, 153 FERC ¶ 61,022 at P 10.

zero-emissions resources that result from New York's participation in the Regional Greenhouse Gas Initiative. These resources could also seek to utilize NYISO's competitive entry exemption,[89] or, alternatively, NYISO's self-supply exemption.[90]

39. The Complainants note that 300 MW of electric storage resources are expected to be included in Class Year 2019, 3,000 MW of electric storage resources are anticipated to enter over the next 10 years, and electric storage resources are needed to support New York State's policy goals. Clean Energy Parties similarly stress that electric storage resources will enter into NYISO gradually, thereby reducing the price impact in mitigated capacity zones. However, neither the Complainants nor Clean Energy Parties address the aggregate impact of the entry of numerous small resources into the NYISO market. As explained in the October 2015 Order, the cumulative effect of multiple smaller units could have a significant impact on ICAP market prices.[91] Further, as MMU explains, buyer-side market power mitigation is driven not by the size of individual projects, but by the aggregate amount of generating capacity that receives out-of-market subsidies.[92] Therefore, we disagree with the Complainants, Key Capture, the Companies, AWEA, and Clean Energy Parties that electric storage resources could not be effective tools of price suppression and should therefore qualify for a blanket exemption from NYISO's buyer-side market power mitigation rules.

40. In addition, contrary to the arguments made by the Complainants, Key Capture, the Companies, Clean Energy Parties, ESA, and GlidePath, we find that buyer-side market power mitigation is not inconsistent with Order No. 841's mandate that ISOs/RTOs reduce or eliminate barriers to electric storage participation in their markets. Order No. 841 does not address buyer-side market power mitigation. Thus, it neither mandates that electric storage resources be exempt from such mitigation, nor states that buyer-side market power mitigation, on its own, presents an impermissible barrier to entry.

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[89] *N.Y. Indep. Sys. Operator*, 150 FERC ¶ 61,139 (2015).

[90] October 2015 Order, 153 FERC ¶ 61,022 at P 62.

[91] *Id.* P 79 (denying request to establish exemptions under the buyer-side market power mitigation rules for controllable, transmission lines, natural gas resources smaller than 20 MW, repowered resources, and nuclear resources).

[92] MMU Comments at 8-9.

41. In the SCR Order, the Commission stated that "SCRs are limited in the sense that their performance is subject to being called by NYISO during a mandatory event; SCRs do not have the discretion to reduce load at will and expect to get paid."[93] We find that electric storage resources, by contrast, do not possess an identical "limited" nature because electric storage resources possess the ability to choose whether and when to participate in the market. We therefore decline to extend the logic used to exempt SCRs to exempt electric storage resources in this proceeding. Moreover, the Commission has held that there should be no special exemption for controllable resources.[94]

42. Although Clean Energy Parties argue that the possible exclusion of electric storage resources from the ICAP market could lead to customers "paying twice" for capacity, that fact would not render the application of buyer-side market power mitigation to electric storage resources unjust and unreasonable. While the possibility of double-payment is a risk that states are free to take when crafting legislation,[95] the Commission may exercise its authority to ensure that rates in wholesale markets remain just and reasonable.

43. Although Clean Energy Parties point out that NYISO does not claim that the price-suppressive effects of electric storage resources procured under state programs threaten the ICAP market's ability to provide resource adequacy, we find that this argument is extraneous.[96] Regardless of whether the ICAP market's ability to provide resource adequacy has been threatened to date, it remains necessary to protect the price signals that it provides to incent the economically efficient entry and exit of resources. Therefore, it is important to protect capacity market prices from price suppression to ensure that the capacity market can operate as designed.

44. AWEA contends that application of buyer-side market power mitigation rules to electric storage resources will inefficiently steer storage development to geographic areas where they provide less reliability value. We disagree and find that the application of buyer-side market power mitigation does not inappropriately limit developers' option to build in any of New York State's capacity zones. NYISO's market rules do not obligate or deny developers' choice to build generation resources in any specific capacity zone in New York State. As mentioned above, the buyer-side market power mitigation rules help

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[93] SCR Order, 158 FERC ¶ 61,137 at P 32 n.61.

[94] October 2015 Order, 153 FERC ¶ 61,022 at P 86.

[95] *See New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d at 74 (holding that 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.")

[96] Clean Energy Parties Comments at 13.

to ensure that the NYISO capacity market provides accurate price signals that are necessary to drive and signal investment needs for the region. In responding to these signals, interested parties are free to build electric storage resource facilities either outside of or within the state's mitigated capacity zones.

The Commission orders:

The complaint is hereby denied, 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.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Public Service Commission and New York State Energy Research & Development Authority Docket No. EL19-86-000

v.

New York Independent System Operator, Inc.

(Issued February 20, 2020)

GLICK, Commissioner, *dissenting*:

1. Today the Commission issues a series of orders addressing buyer-side market power mitigation rules in the NYISO capacity market. Notably, none of the orders is actually focused on buyers with market power. Instead, these orders only illustrate the extent to which the Commission has perverted "buyer-side market power mitigation" in order to prop up prices, lock in the current resource mix, and attack state policies that promote clean energy. As I have previously explained, that "is illegal, illogical, and truly bad public policy."[1] Buyer-side market power mitigation should be all about and only about mitigating buyer-side market power. To extent that buyer-side market power mitigation rules apply to buyers without market power, they are *per se* unjust and unreasonable.

* * *

2. When first introduced, buyer-side market power rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise its monopsony power to lower the capacity market clearing price. To the extent that the Commission required buyer-side mitigation of capacity market offers, it limited the mitigation to only resources that could be used effectively for the purpose of depressing capacity market prices or to resources with both the incentive and ability to depress capacity market clearing prices.[2] In short, buyer-side

[1] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (*Calpine v. PJM*) (Glick, Comm'r, dissenting at P 1).

[2] *See, e.g., PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34, 103-104 (2006) (discussing the buyer-side market power mitigation provisions imposed as part of the settlement that created the Reliability Pricing Model); *see also* Richard B. Miller, Neil H. Butterklee & Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity*

market power mitigation was all about and only about the exercise of buyer-side market power.[3]

3. Over the course of the last decade, however, the Commission has abandoned that narrow focus. It now no longer requires a resource to have market power—or even any incentive to depress capacity market prices—before subjecting that resource to buyer-side market power mitigation. Minimum offer price rules (MOPR) that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decisionmaking.[4] The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the basis that it promotes competition.[5] But, in reality, the Commission is not promoting anything remotely resembling actual competition.[6]

Markets: Time for a Change?, 33 Energy L.J. 449, 460-61 (2012) (*Time for a Change?*) (discussing the Commission's early approach to buyer-side market power mitigation).

[3] *See, e.g., PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 ("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."); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61211, at P 106 (2008) (explaining that buyer-side market power "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").

[4] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4); *see also* Miller, Butterklee & Comes, *Time for a Change?*, 33 Energy L.J. at 461 ("[B]uyer mitigation has effectively become new entrant mitigation under which all new entrants are subject to mitigation unless otherwise exempted because they have somehow demonstrated that their new facility is not 'uneconomic.'").

[5] *See, e.g., Calpine v. PJM*, 169 FERC ¶ 61,239 at P 38 (discussing the Commission's finding on the need to main the "integrity of competition"); *id.* n.38 ("This Commission determined many years ago that the best way to ensure the most cost-effective mix of resources is selected to serve the system's capacity needs was to rely on competition."); *ISO New England, Inc.*, 162 FERC ¶ 61,205, at P 24 (2018) (asserting that states' exercise of their authority over generation facilities "raises a potential conflict with . . . competitive wholesale electric markets").

[6] It is also worth noting that this Commission's infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power.

4. The basic premise of market competition is that sellers should compete with each other to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the "missing money" that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.[7] That means that capacity market competition should follow a single 'first principle': Enabling resources to vie with each other to require as little "missing money" as possible in order to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly "competitive," resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. That type of competition can, in theory, produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

5. Instead of promoting that type of competition, the Commission's approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.[8] Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally

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One example is the Chairman's premature termination of the enforcement process regarding the nearly 1,000 percent year-over-year increase in prices in MISO Zone 4 and the Commission's failure to provide any justification for its finding that such a rate is just and reasonable. *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm'r, dissenting at PP 4-5). Another is the Commission's failure over the course of the last year to take any action on the complaints regarding PJM's Market Seller Offer Cap. Those complaints allege that PJM's current rules allow for the exercise of market power, which increased the total cost of capacity by more than a billion dollars. *See* PJM Independent Market Monitor Complaint, Docket No. EL19-47-000 at 11-12.

[7] *See, e.g.*, James F. Wilson, *"Missing Money" Revisited: Evolution of PJM's RPM Capacity Construct* 1 (2016), *available at* https://www.publicpower.org/system/files/documents/markets-rpm_missing_money_revisited_wilson.pdf (discussing the concept of "missing money" and the origin of capacity markets in the eastern RTOs); Roy J. Shanker January 10, 2003 Comments, Docket No. RM-01-12-000 (discussing the idea of missing money).

[8] *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

force new entrants to bid at or above an administratively determined estimate[9] of what a new resource "should" cost, while existing resources are permitted to bid at a lower level.[10] In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity market tend to be disproportionately made up of new technologies and resources needed to satisfy state or federal public policies, the Commission's use of the MOPR also has the unmistakable effect (and, recently, the intent[11]) of slowing the transition to a cleaner, more advanced resource mix.

6. That type of quasi-competition does not lead to an efficient market outcome. As noted, the purpose of capacity markets is to procure the lowest-cost of bundle of resources needed to reliably provide electricity by making resources compete based on the amount of "missing money" they require to cover their costs.[12] To achieve that outcome efficiently, resources' capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly

[9] In previous orders, the Commission has made much out of so-called unit-specific exemptions, which permit a resource to bid below a default offer floor if it can convince the relevant market monitor that its estimated net going forward costs are below that floor. If the resource succeeds in that endeavor, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing.

[10] In ISO New England and NYISO, existing resources are exempt from mitigation. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 170 FERC ¶ 61,119, at P 38 (2020) (*NYPSC v. NYISO*) ("NYISO's buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones."); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 3 ("ISO-NE utilizes a minimum offer price rule, or MOPR, that requires new capacity resources to offer their capacity at prices that are at or above a price floor set for each type of resource"). The Commission's recent order in PJM applied the MOPR to existing resources, but makes them subject to a different—and generally more favorable—pricing regime than new resources. *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 2 ("[T]he default offer price floor for applicable new resources will be the Net Cost of New Entry (Net CONE) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (Net ACR) for their resource class." (footnotes omitted)); *id.* (Glick, Comm'r, dissenting at PP 32-35) (criticizing the Commission for using different offer floor formulae for existing and new resources).

[11] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

[12] *See supra* P 4.

from Commission-jurisdictional markets.[13] If the market ignores some of those costs and revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

7. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.[14] That is simply wrong. As explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

8. The FPA is clear. The states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity as well as practices affecting those wholesale sales,[15]

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[13] The periodic demand curve resets that occur in the eastern RTOs illustrate the variety of factors that go into determining the missing money. For example, consider everything that went into developing the net CONE in NYISO's most recent demand curve reset, which address factors ranging from federal, state, and local requirements related to environmental considerations, regional differences in capital and labor costs, as well differences in social justice requirements. *See* NYISO Transmittal, Docket No. ER17-386-000, Exhibit D (Analysis Group study addressing demand curve parameters). Those factors affect not only what resource you build and where you can build it, but also how you can operate that resource and, therefore, what revenues you can expect to earn and what costs you can expect to incur. Considering all those factors is necessary in order produce efficient price signals guiding when and where to cite new capacity, notwithstanding the fact that they are not derived from Commission-jurisdictional markets.

[14] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119, at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a minimum offer price rule to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support.").

[15] Specifically, as relevant here, the Commission's jurisdiction applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public

Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy."[16] Instead, Congress gave the states exclusive jurisdiction to regulate those facilitates.[17]

9. Although those jurisdictional lines are clearly drawn, the practical reality is far messier. As the Supreme Court has observed, the FPA's spheres of jurisdiction are not "hermetically sealed:"[18] One sovereign's exercise of its authority will inevitably affect matters subject to the other sovereign's exclusive jurisdiction.[19] For example, any state

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utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification." 16 U.S.C. § 824e(a) (2018); *see also id.* § 824d(a) (similar).

[16] *See id.* § 824(b)(1) (2018); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517–18 (1947) (recognizing that the analogous provisions of the NGA were "drawn with meticulous regard for the continued exercise of state power"). Although these cases generally deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission's role under the FPA.

[17] 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States").

[18] *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the Natural Gas Act).

[19] *See EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission "uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets").

regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.[20] But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation"[21] and the natural result of a system in which regulatory authority is divided between federal and state government.[22]

10. Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the FPA's dual-federalist structure. When the Commission tries to prevent a state public policy from having an inevitable, but indirect effect on the capacity market, it takes on the role that Congress gave to the states. That is true even where the Commission claims that its only "policy" is to block the effects of state public policies, not the policies themselves. After all, a federal policy of eliminating the effects of state policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

11. Moreover, as former Commission Chairman Norman Bay correctly observed, an "idealized vision of markets free from the influence of public policies . . . does not exist,

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[20] *Zibelman*, 906 F.3d at 57 (explaining how a state's regulation of generation facilities can have an "incidental effect" on the wholesale rate through the basic principles of supply and demand); *id.* at 53 ("It would be 'strange indeed' to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates." (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that proceeding "can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close . . . . A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.").

[21] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *id.* ("recogniz[ing] the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy").

[22] *Cf. Star*, 904 F.3d at 523 *(*"For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.").

and it is impossible to mitigate our way to its creation."[23] Instead, public policy and energy markets are inextricably intertwined.[24] Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.[25] Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a "competitive" market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission's goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition or one that is insulated from public policy.

12. And the end result will be deeply inefficient, no matter how many times my colleagues use the words "market" and "competition." The resources procured through that market will require considerably more missing money than would the set of resources procured in the absence of this kind of over-mitigation.[26] That means customers will be paying for more expensive capacity than they should. Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, the capacity markets will procure more capacity than the regions actually need and

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[23] *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

[24] As the FPA itself recognizes, "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. § 824 (2018).

[25] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 27-28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (Glick, Comm'r, dissenting at 6-9) (explaining how "[g]overnment subsidies pervade the energy markets and have for more than a century"); *ISO New England Inc.*, 162 FERC ¶ 61,205 (Glick, Comm'r, dissenting in part and concurring in part at 3) ("Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation.").

[26] That is particularly true given that the Commission permits a resource to increase its estimated costs due to state policy and environmental goals (*e.g.*, the increased fixed and variable costs associated with selective catalytic reduction, *see* NYISO Transmittal, Docket No. ER17-386-000 at 2), but not its revenue derived from state public policies or goals that may happen to be aimed at the exact same goals.

customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

13. In addition, widespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts, especially given the ever-growing threat posed by climate change.[27] A capacity construct that ignores those states' public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the wrong types of resources or resources that are not needed at all. It is hard for me to see how a price signal that encourages redundant investment is a "competitive" or desirable outcome, much less a just and reasonable one.

14. The Commission has suggested that if it succeeds in blocking state policies, then capacity markets will become efficient little islands unto themselves.[28] But a capacity market is a means to an end, not an end in itself. It is a construct that is supposed to minimize the amount of money that customers spend on capacity in order to meet a target reserve margin.[29] A capacity market that does not serve that purpose and is "efficient" only if you disregard the fact that, in the real-world, it produces inefficient results is a market that we ought to reject out-of-hand.

15. Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should focus only on actual market power. In the event that a resource lacks buyer-side market power, its capacity market offer should not be subject to buyer-side mitigation.[30] That result is both more consistent with the FPA's dual-federalist design and the Commission's core responsibility as a regulator of monopoly/monopsony power.[31] That approach would also be a great deal simpler and

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[27] *See, e.g., Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 55).

[28] *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5; *ISO New England*, 162 FERC ¶ 61,205 at P 21.

[29] *See supra* P 4.

[30] State polices that exceed the states' jurisdiction because they set or aim at wholesale rates would, of course, remain preempted. *See, e.g., Hughes*, 136 S. Ct. at 1298.

[31] *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that "FERC's authority generally rests on the public interest in

would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level.[32] In short, I believe that buyer-side market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.[33]

16. "Actual" is an important distinction here. The Commission has at times suggested that extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.[34] We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is or could be an exercise of market power fundamentally misunderstands the role of state regulation under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission's regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.[35]

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constraining exercises of market power").

[32] Some of the proceedings resolved by today's orders have stretched on for nearly seven years at this point. *See, e.g.*, Independent Power Producers of New York Complaint, Docket No. EL-13-62-000 (filed in May 2013).

[33] In dissents from previous Commission orders addressing MOPRs, I have also argued that the Commission's policy in those particular cases exceeded its jurisdiction because it directly targeted state policies. *E.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 7-17). I still believe that to be true. But my point today is a broader one: The Commission should altogether abandon the use of buyer-side market power regimes to address something other than actual buyer-side market, even putting aside whether the Commission's application of those regimes exceeds its jurisdiction in the first place.

[34] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at PP 37, 39; *see also N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137 (Bay, Chairman, concurring at 3) ("The MOPR is not applied to the state, which may not actually be a buyer and which is acting on behalf of its citizenry, but to the resource, which is offering to sell capacity to the market and which may be a commercial entity. The theory, in other words, assumes such a congruence of interests between the state and the resource that the resource is mitigated for the conduct of the state.").

[35] *See Hughes*, 136 S. Ct. at 1298 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates."); *see also New England Ratepayers Ass'n*, 168 FERC ¶ 61,169, at PP

17. Recently, several parties and even the Commission have argued that if we do not block state policies, prices may drop so low that capacity markets may cease to ensure resource adequacy.[36] As an initial matter, there is simply no evidence that we are even remotely close to a scenario in which states policies render the capacity markets useless.[37] Although capacity prices have fallen in recent years, that has more to do with the entry of more efficient resources and excess supply (which is likely due at least in part to the mitigation regime itself), not state policies. In any case, if we ever reach a point where the only way to "save" a capacity market is to unmoor it from reality by blocking state policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-world outcomes or the Commission usurping the role that Congress reserved for the states.

18. Indeed, the Commission's efforts to "save" capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. One need look no further than New York, where the Public Service Commission has begun a proceeding to consider "taking back" from NYISO the responsibility for ensuring resource adequacy. The Commission's overreach in today's orders will no doubt create greater momentum in that direction.

* * *

41-46 (2019) (finding a state policy preempted because it sets a wholesale rate).

[36] *E.g.*, *ISO New England*, 162 FERC ¶ 61,205 at PP 21, 24; *see Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (asserting that state policies compromise the "integrity" of the capacity market); *see* Calpine Complaint, Docket No. EL16-49-000, at 31-32.

[37] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (Glick, Comm'r, dissenting at 9-11).

19. Turning to the merits of this specific order, I dissent because I believe that buyer-side market power mitigation regimes that do not apply only to buyers with market power are *per se* unjust and unreasonable. Accordingly, because NYISO mitigates storage resources, irrespective of whether they have buyer-side market power, I would grant the complaint.[38]

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

[38] The Commission's suggestion that electric storage resources, collectively, might have market power is as absurd as expressing a concern that a particular natural gas resource may have market power because natural gas resources, viewed collectively, have market power. *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at P 39.

Document Content(s)

Exhibit B
***New York State Public Service Commission and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc.*, Order Granting Rehearings For Further Consideration, Docket No. EL19-86-001, (Apr. 20, 2020)**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York State Public Service Commission and New York State Energy Research and Development Authority — Docket No. EL19-86-001

v.

New York Independent System Operator, Inc.

ORDER GRANTING REHEARINGS FOR FURTHER CONSIDERATION

(April 20, 2020)

Rehearings have been timely requested of the Commission's order issued on February 20, 2020, in this proceeding. *New York State Public Service Commission and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc.*, 170 FERC ¶ 61,119 (2020). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the requests for rehearing (and any timely requests for rehearing filed subsequently)[1] would be deemed denied. 18 C.F.R. § 385.713 (2019).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[1] *See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Document Content(s)