UNITED STATES OF AMERICA
BEFORE THE
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.	)	

REQUEST FOR REHEARING OF INDICATED NEW YORK TRANSMISSION OWNERS

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission")[1] and Section 313(a) of the Federal Power Act ("FPA"),[2] the Indicated New York Transmission Owners ("Indicated NYTOs")[3] hereby request rehearing of the Commission's February 20, 2020 order in the above-captioned proceeding.[4]

[1] 18 C.F.R. § 385.713 (2019).

[2] 16 U.S.C. § 825l(a).

[3] For purposes hereof, the Indicated NYTOs are: Central Hudson Gas & Electric Corporation ("Central Hudson"), Consolidated Edison Company of New York, Inc. ("Con Edison"), New York Power Authority ("NYPA"), New York State Electric & Gas Corporation ("NYSEG"), Orange and Rockland Utilities, Inc. ("O&R"), Long Island Power Authority ("LIPA"), Long Island Lighting Co., d/b/a/ Power Supply Long Island ("PS Long Island"), and Rochester Gas and Electric Corporation ("RG&E"). NYPA and LIPA/PS Long Island also have joined in a separate rehearing petition with New York Public Service Commission ("NYPSC"), New York State Energy Research and Development Authority ("NYSERDA") and the City of New York, filed in this docket on March 20, 2020.

[4] *N.Y. Pub. Serv. Comm'n and N.Y. Energy. Research. and Dev. Auth.. v. N.Y. Indep. Sys. Operator, Inc., et al.*, 170 FERC ¶ 61,119 (2020) ("Complaint Order").

I. BACKGROUND

On July 29, 2019, the NYPSC and NYSERDA ("Complainants") filed a complaint under Section 206 of the FPA against the New York Independent System Operator, Inc. ("NYISO") (the "Complaint").[5] The Complaint requested that the Commission direct the NYISO to amend the provisions of the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") to add a blanket exemption to the rules governing buyer-side mitigation ("BSM") measures for electric storage resources ("ESRs"). The Complaint sought to modify the BSM rules under the Services Tariff to exempt ESRs on a blanket basis because, among other reasons, the BSM rules unduly limit ESR participation in the NYISO markets and interfere with FPA-reserved state rights and legitimate public policy objectives. The Complainants sought also, in the alternative to the requested blanket exemption, a limited 300 MW/year BSM exclusion for new ESRs.

The Indicated NYTOs filed a timely doc-less motion to intervene and provided two related sets of comments in support of the Complaint.[6] The Companies emphasized that New York State's interest in ESRs is not to subsidize ESRs to under-cut the NYISO's Installed Capacity ("ICAP") markets so as to drive out existing, legacy generation resources.[7] Rather, New York State's purpose is to exercise its lawful authority over generation resources and the technologies

[5] *See* Notice of Complaint, *N.Y. Pub. Serv. Comm'n and N.Y. Energy. Research. and Dev. Auth.. v. N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL19-86-000 (July 30, 2019).

[6] *See* Complaint Order at PP 10, 16-21. Central Hudson, NYSEG and RG&E joined comments together and are referred to in the Complaint Order as the "Indicated Transmission Owners." *See id*. at n. 32. ConEd, O&R, NYPA and PS Long Island joined comments together and are referred to in the Complaint Order as the "Companies"). For purposes of this filing, the Indicated Transmission Owners and the Companies are collectively referred to as the "Indicated NYTOs."

[7] *See* Companies' Comments at pp. 1, 5-6 (discussing testimony of Mr. Adam B. Evans, Attachment A to the Complaint).

used to provide retail electricity supply in the state from resources that include additional environmental, fuel diversity, distribution system stability, and resilience value that are not procured or compensable by the ICAP markets.[8] The Indicated Transmission Owners further emphasized that applying the BSM rules generally to ESRs "can lead to over-mitigation that is contrary to sound economic principles."[9] The Commission was urged to grant the Complaint, in either full or in the alternative, so that uneconomic over-mitigation would not block new entry of ESRs during the critical early years of New York's build-out of a portfolio of smartly located ESRs in mitigated ICAP zones.[10]

Collectively, the Indicated NYTOs' supporting comments explained that ESRs provide valuable services through several delivery channels: (a) Unforced Capacity ("UCAP") in the ICAP market; (b) retail electricity supply; and (c) environmental, technology, resilience, fuel diversity and other closely related state-level energy policy benefits. The Indicated NYTOs' supporting comments noted further that ESRs in New York lack the intention, incentive or ability to exercise buyer-side market power to suppress artificially ICAP market prices.[11] Accordingly, the Indicated NYTOs' contended that application of BSM to ESRs in the ICAP market would maintain an unreasonable barrier to entry that will not improve reliability but, instead, artificially inflate ICAP prices and otherwise increase costs for delivered electricity supply procured by and for New Yorkers.

[8] *See Id.* at pp. 2, 4-5.

[9] *See* Indicated Transmission Owners' Comments at p. 4.

[10] *Id.* at pp. 4-5.

[11] *Id.* at pp. 6-9.

On February 20, 2020, the Commission issued the Complaint Order, denying both the primary and alternative relief requested by Complainants. The Complaint Order, among other things:

- Found that Complainants failed to establish that unmitigated entry of new ESRs in NYISO's mitigated capacity zones would not result in the suppression of ICAP prices, essentially finding that the Complaints had failed to "prove the negative";[12]

- Found that applying BSM to ESRs in NYISO's mitigated capacity zones "does not divest New York" of jurisdiction over generation facilities or its acknowledged "authority to set generation-related environmental goals;"[13]

- Found that New York State's laws and programs related to ESRs "allow uneconomic entry" into the ICAP market by providing "out-of-market support;"[14]

- Found that ESRs should be evaluated as to suitability for an exemption from BSM on a class, aggregate and cumulative basis, rather than recognizing them as distinct market-based rate sellers participating in the market separately;[15]

- Found that, when considered on an aggregated basis and disregarding the individual status of separate ESRs, ESRs as a class could be "tools of price suppression;"[16]

- Discussed with approval the Commission's 2017 SCR Complaint Order[17] in which it held that distribution-level demand response resources participating in ICAP markets as Special Case Resources were more limited functionally and had less discretion relative to ICAP market participation;[18]

[12] *See* Complaint Order at P 37.

[13] *Id.*

[14] *Id.*

[15] *See Id.* at P 39.

[16] *See Id.*

[17] *See Id.* at P 41 (discussing *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) ("*SCR Complaint Order*")).

[18] *See Id.*

- Recognized that excluding ESRs from BSM "could lead to customers 'paying twice' for capacity" and observed that "the possibility of double-payment is a risk that states are free to take when crafting legislation;"[19]

- Acknowledged the 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," yet nevertheless justified continued application of BSM to ESRs as necessary to protect the accuracy of ICAP market prices signals.[20]

II. SUMMARY OF ARGUMENT

The aforementioned Complaint Order's findings and acknowledgements suffer from significant defects that should be reconsidered and rectified on rehearing. The Commission's fundamental priority under the FPA is to protect electricity consumers through "orderly development of plentiful supplies of electricity . . . at reasonable prices."[21] The Complaint Order fails to adhere to this priority by improperly equating "orderly development" with wholesale price maintenance at levels sufficient to protect existing generators against competition by new market participants in the form of ESRs. As demonstrated by Complainants and reinforced by many other parties, ESRs perform multiple services, provide value across multiple channels and do not depend exclusively upon the NYISO markets or other Commission-jurisdictional markets for survival. By imposing a form of competitive penalty on ESR participation in the ICAP market, the Commission improperly and unreasonably handicaps them as a class from contributing valuable UCAP to the market. The result is artificially elevated price maintenance via an overly broad and unduly restrictive *ex ante* mitigation regime that rests on flawed presumptions and faulty analysis.

[19] *Id.* at P 42.

[20] *See Id.* at PP 43-44.

[21] *Nat'l Ass'n for Advancement of Colored People v. FPC*, 425 U.S. 663, 670 (1976) ("*NAACP v. FPC*").

As demonstrated by Complainants and numerous other parties that filed supporting comments and evidence, New York State's programs encourage timely development and commercialization of new ESRs in the state.[22] This is a lawful State prerogative that Congress expressly reserved to New York and every other state under Section 201 of the FPA.[23] New York State's programs do not compensate or provide other value for the supply of UCAP in NYISO's ICAP market. The Commission is obligated under the express terms and structure of the FPA to accommodate to the maximum extent possible state policies that encourage new forms of generation technology or otherwise seek to foster new generation development in the state that promotes other legitimate state policies, including fuel diversity, grid management, resilience and technology objectives.[24]

This is all the more the case where, as here, any such programmatic benefits (referred to herein as "Other Attributes") involve values that are not procured or compensable under NYISO's ICAP market construct. The Complaint Order freely acknowledges the effect of its ruling will be to permit increased costs for electricity consumers in New York. Nevertheless, the Commission wrongly concludes that such increases are New York's problem, essentially a problem of New York's own making. The Complaint Order stumbles, abandoning the FPA's framework of cooperative federalism and, ultimately, embracing protectionism over competition.

The Complaint Order's defects are not limited to its failure to respect the important jurisdictional roles reserved to the states under Section 201 of the FPA. Its defects also go to the heart of the Commission's mandated roles under Sections 205 and 206 to ensure that jurisdictional

[22] *See, e.g.*, Complaint at pp. 15-22 (discussing state policies), Exhibit A, Evans Affidavit at ¶¶ 5, 7 & 16 ("Evans Affidavit")..

[23] *See* 16 U.S.C. §§ 824(b) and 824o(i)(3); *New York v. FERC*, 535 U.S. 1, 24 (2002).

[24] *See, e.g., Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) ("*Hughes*").

rates and services are just and unreasonable and not unduly discriminatory. FERC's historic introduction of competition into wholesale electric markets has brought significant benefits to electricity consumers through the efficiencies and downward price pressures effectuated by competition. However, the Complaint Order is anti-competitive by shielding existing, legacy generation from rivalry by new competitors in the ICAP market. Competition is the means by which FERC theoretically ensures under Part II of the FPA that rates in the capacity market are just and reasonable.[25] The Complaint Order's anticompetitive effects, however, result in the Complaint Order being irreconcilable with the requirements of FPA Sections 205 and 206. Moreover, the Complaint Order's anticompetitive effects cannot be saved by the economic theory of prevention of monopsony power because there is no basis to presume or find that the ESRs, individually or as a class, have buyer-side market power. By keeping in place an artificial floor to support the economics of incumbent generators that are unable to compete in markets for Other Attributes—a floor that captures and effectively extends the value of Other Attributes to legacy generation suppliers that do not provide them—the Complaint Order sanctions cross-subsidies that are unduly discriminatory and preferential, which undermines the proper functioning of the ICAP markets.[26]

In sum, the Complaint Order is unduly discriminatory because it provides market protections to a class of generators solely due to their luck of having already entered the market and shielding them from impacts of lacking the ability to compete for the supply of Other

[25] As the Supreme Court has written, "The Commission [] undertakes to ensure "just and reasonable" wholesale rates by enhancing competition—attempting, as we recently explained, 'to break down regulatory and economic barriers that hinder a free market in wholesale electricity.'" *FERC v. Elec. Power Supply Assoc.*, 136 S. Ct. 760, 768 (2016) ("*FERC v. EPSA*") (discussing and quoting ***Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.***,554 U.S. 527, 536 (2008) ("***Morgan Stanley Capital Group***")).

[26] ***See Mid-Tex Elec.. Co-Op., Inc. v. FERC***, 773 F.2d 327, 357 (D.C. Cir. 1985) (discussing "double whammy" problem) ("*Mid-Tex*").

Attributes in markets outside of the ICAP markets. It is unduly preferential because it assures a minimum ICAP market price that includes the value of Other Attributes, which price becomes applicable to legacy or incumbent generators without regard to whether they actually provide the Other Attributes. It is unjust and unreasonable because it requires electricity consumers to pay the value of Other Attributes to UCAP suppliers that do not provide benefits for that value.

III. STATEMENT OF ISSUES/SPECIFICATIONS OF ERROR

In accordance with Rules 713(c)(1) and 713(c)(2) of the Commission's Rules of Practice and Procedure, the Indicated NYTOs provide the following statement of issues and specification of errors:

1. The Complaint Order violates the Administrative Procedure Act ("APA") because it ignores evidence in the record, presumes without record evidence that ESRs participate in NYISO markets on a combined and aggregate basis, relies upon speculation and unsound economic theory, and fails to articulate a reasoned basis for its determinations or provide transparency into its reasoning and the connection between facts found and conclusions reached. 5 U.S.C. § 551 *et seq.*; 16 U.S.C. 824e; s*ee, e.g., Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) ("*State Farm*"); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998) ("*Allentown*"); *Town of Norwood v. FERC*, 80 F.3d 526 (D.C. Cir. 1996) ("*Town of Norwood*").

2. The Complaint Order errs by failing to meet the Commission's obligations under Section 206 of the FPA to ensure that rates and services are just and unreasonable and not unduly preferential. *See* 16 U.S.C. § 824e; 16 U.S.C. § 825l; *FERC v. EPSA*, 136 S. Ct. at 768; *NAACP v. FPC*, 425 U.S. at 670; *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668 (9th Cir. 2007); *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017); *FirstEnergy Serv. Co. v. FER*C, 758 F.3d 346 (D.C. Cir. 2014) ("*FirstEnergy*"); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) ("*Electrical District*"); *Cities of Bethany v. FERC*, 727 F.2d 1121 (D.C. Cir. 1984); *Ameren Services Company, Northern Indiana Pub. Serv. Co. v. Midwest Ind. Sys. Op., Inc.*, 155 FERC ¶ 61,073 (2016).

3. The Complaint Order errs because it wrongly interferes with the exclusive jurisdiction of the States under the FPA over facilities used in generation, local distribution and otherwise subject to regulation by the states and over distribution reliability. 16 U.S.C. §§ 824(a) & (b), 824o(b)(1). *See Hughes*, 136 S. Ct. at 1288; *FERC v. EPSA*, 136 S. Ct. at 760; *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015)) ("*Oneok*"); *New York v. FERC*, 535 U.S. at 24; *Pac. Gas & Elec. Co v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *NAACP v. FPC*, 425 U.S. at 670; *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507 (1947); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 181 (1932); *Coal. for Competitive Elec.* 906 F.3d at 57; *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d at 668.

4. The Complaint Order errs by finding that continued application of *ex ante* BSM to ESRs is just and reasonable, or that substantial evidence has not been presented to determine such application is not unjust and unreasonable and unduly discriminatory and preferential. It does so because the Commission's reasoning is circular and its findings are contrary to its own precedent without adequate explanation and contradicted by substantial evidence that ESRs, whether considered individually or collectively, lack the incentive and capability to exercise buyer-side market power for artificially depressing ICAP market prices. 16 U.S.C. §§ 825l; *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 108 (2nd Cir. 2015); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *FirstEnergy*, 758 F.3d at 348; *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010) ("*SMUD v. FERC*"); *Towns of Concord, Norwood, & Wellesley v.* FERC, 955 F.2d 67 (D.C. Cir. 1992); *Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,176 (2018), *order denying reh'g*, 170 FERC ¶ 61,215, P 135 (2020); *Indep. Power Producters of N.Y. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, *on reh'g*, 170 FERC ¶ 61,118 (2020).

5. The Complaint Order is arbitrary and capricious because it authorizes non-competitive protectionism to inflate artificially ICAP prices by enabling an unreasonably and overly restrictive application of BSM on ESRs as a class of resources, without engaging in reasoned decision-making. This results in uneconomic over-mitigation, effective subsidization of incumbent generation, imposition of cross-subsidies and market distortions that are unjust, unreasonable, unduly discriminatory and preferential (favoring incumbent generation to the detriment of retail electricity consumers). *See* 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 825l; *FERC v. EPSA*, 136 S. Ct. at 768; *Hughes*, 136 S. Ct. at 1288; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018), *cert. denied sub nom. Elec. Power Supply Ass'n v. Rhodes*, 139 S. Ct. 1547 (2019) ("*Coal. for Competitive Elec.*"); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d at 668; *FERC v. Xcel*

Energy Servs. v. FERC, 815 F.3d 947 (D.C. Cir. 2016); *N.J. Bd. Of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014) ("*NJBPU*").

6. The Complaint Order errs by finding without reasoned explanation that *ex ante* application of BSM to ESRs in the ICAP market is just and reasonable and not unduly discriminatory and preferential, even though such application requires ICAP minimum offer prices to include costs and compensation for attribute values that incumbent generators do not offer or supply in the ICAP markets, which artificially inflates prices that harm electricity consumers and undermines proper functioning of the ICAP markets required for all sales for resale thereunder to be just and reasonable and not unduly discriminatory under FPA Sections 205 and 206. *See* 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 825l; *FERC v. EPSA*, 136 S. Ct. 760; *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (1025); *Morgan Stanley Capital Group*, 554 U.S. at 536 (2008); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) ("*Atl. Ref. Co.*"); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005).

7. The Complaint Order errs by authorizing continued application of BSM for purposes other than preventing the exercise of monopsony power to artificially lower capacity market prices that would undermine orderly development of generation resources to meet the need of consumers for reliable supply of electricity at the lowest reasonable cost. *See* 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 825l; *State Farm*, 463 U.S. at 43; *NAACP v. FPC*, 425 U.S. at 670; *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d at 668; *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007); *Town of Norwood*, 80 F.3d at 533; *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Cities of Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984).

8. The Complaint Order errs by permitting, without reasoned explanation or justification, treatment as state subsidies New York programs encouraging development of ESRs in the state in ways that do not duplicate the value compensated through the NYISO's ICAP market. The Complaint Order's rulings cause artificial inflation of capacity prices that favors incumbent generators and economically harms electricity consumers. *See* 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 825l; *Hughes*, 136 S. Ct. at 1288; *NAACP v. FPC*, 425 U.S. at 670; *TransCanada v. FE*RC, 811 F.3d 1 (D.C. Cir. 2015); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d at 668. *Mid-Tex*, 773 F.2d at 357.

IV. REQUEST FOR REHEARING

The Commission erred by imposing a burden on the Complainants to prove a negative that applying unmitigated entry, or annual mitigation of up to 300 MW, of new ESRs in NYISO's mitigated capacity zones would not result in the suppression of ICAP prices.[27] The Complaint Order's articulation and application of this burden is incorrect. The question the Commission should be answering is whether the Complaint presents substantial evidence that NYISO's BSM rules over-mitigate the potential for an ESR to suppress artificially ICAP prices through the exercise of buyer-side market power (also often referred to by economists as monopsony power). The Complaint easily meets its appropriate burden.

When authorizing NYISO to add BSM rules to the Services Tariff, the Commission recognized that the ICAP markets compensate suppliers of capacity for the value of the capacity supplied.[28] That is, as explained by Complainants' witness Evans, a Utility Analyst in the New York State Department of Public Service Office of Markets and Innovation, the ICAP markets procure only fungible locational capacity and pay only for the value of fungible locational capacity.[29] When the Commission approved BSM for the New York City ("NYC") area as part of the NYISO's Services Tariff, it limited the application of BSM to "large net buyers," stating that "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."[30]

[27] *See* Complaint Order at P 37.

[28] *See N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, P 86 (2008) ("*Original BSM Order*").

[29] *See* Evans Affidavit at ¶ 16 ("Supply resources that are either located on the distribution system or rely on renewable fuel or do not combust fossil fuels to produce electricity, while providing energy and capacity, may also provide environmentally-beneficial attributes, distribution system reliability and other benefits and services that are not compensated by the wholesale markets.") (emphasis added).

[30] *Id.* at P 106.

Given the obvious and substantial changes in circumstances since BSM was first implemented (not the least of which is the commercial emergence of utility-scale battery storage technologies),[31] the Complaint made a strong and persuasive case that modern ESRs lack the size, incentive and ability to utilize bidding practices in a way to artificially depress ICAP prices.[32] The Complaint also showed that New York State is not providing out-of-market payments for fungible local capacity procured in the ICAP markets.[33] Rather, New York State's programs concerning ESRs relate to values squarely within traditional state authority reserved to it under the FPA and outside the scope of the ICAP market.[34]

Departing from the basis upon which the Commission first granted NYISO the authority to apply BSM to all new capacity resources, the Complaint Order casts asunder Complainants' points and authorities. It disregards the fact that New York State's programs procure attributes outside the scope of the ICAP market and outside the Commission's jurisdiction. So too, the Complaint Order found size, incentive and ability to artificially depress ICAP market prices to be irrelevant. The Commission explained: (a) New York State's laws and programs related to ESRs "allow uneconomic entry" into the ICAP market *per se* by providing "out-of-market support" and that (b) ESRs should be evaluated as to suitability for an exemption from BSM on a class, aggregate and cumulative basis;[35] and when so considered, that ESRs as a class could be "tools of

[31] *See* Federal Energy Regulatory Commission, State of the Markets 2019, at p. 10 & Fig. 14 (March 19, 2019).

[32] *See* Complaint at pp. 14-22.

[33] *See Id.* at pp. 27-30.

[34] *See Id.* at pp. 30-32 (citing and quoting, *inter alia*, *New York v. FERC*, 535 U.S. 1, 24 (2002) and *Hughes*, 136 S. Ct. at 1290-91).

[35] *See Id.* at P 39.

price suppression."[36] The Complaint Order's explanations simply do not support a rational basis to deny the Complaint in its entirety.

A. Any Benefits Earned by ESRs under New York Law Are for Supplying Value That Are Not Procured or Compensated in the ICAP Market

New York State has retained authority and is statutorily entitled under FPA Section 201 to engage in integrated resource planning, value generation attributes, establish supply portfolio standards and regulate load serving entities' purchase decisions/priorities and retail rates.[37] New York State likewise has retained jurisdiction over local distribution facilities and distribution reliability, roles reserved to the states by FPA Sections 201 and 217.[38] As the Supreme Court has explained, "States retain significant control over local matters," including "administration of integrated resource planning and utility buy-side and demand-side decisions . . . [and] authority over utility generation and resource portfolios."[39] New York State programs regarding ESRs do not reduce the amount of UCAP required under the NYISO's ICAP markets. ESRs, just like other potential UCAP suppliers, bid to sell only fungible local short-term capacity. The ICAP market does not procure or price any other capacity products or specific attributes, such as local grid stability and management, environmental attributes, or avoided distribution upgrades. Therefore, any value that an ESR may earn because it agrees to provide such non-ICAP value is incidental and comparable to non-ICAP value that may be derived by other potential competitors.[40]

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[36] *See Id.*

[37] *See* 16 U.S.C. § 824(b)(1) (2018); *Hughes*, 136 S. Ct. at 1292; *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 767; *New York v. FERC*, 535 U.S. at 24; *Pac Gas & Elec. Co.*, 461 U.S. at 205.

[38] 16 U.S.C. §§ 824(b)(1), 824o(b)(1).

[39] *New York v. FERC*, 535 U.S. at 24. *See also Coalition for Competitive Elec.*, 906 F.3d at 54-55 (states have authority to require state-regulated utilities to build or contract with certain kinds of resources and pay compensation for Other Attributes).

[40] For example, coal-fired generators have the potential to earn value from the sale of combustion residuals, which have a variety of valuable uses, such as improving strength and durability of materials. According to the U.S. E.P.A., the most recent available data from responses to an American Coal Ash Association survey of electric

Recognition of non-ICAP value is far from unprecedented. For example, natural gas-fired generators that choose to participate in the ICAP markets have the potential to monetize byproduct gypsum from the flue gas desulfurization process.[41] Natural gas-fired generators or any other type of supply-side participant in the ICAP market are free to capture the value of any non-ICAP attributes associated with their commercial activities. If any such generators were to develop or install technologies that have the ability to provide the value sought by the New York State programs, they would be free to pursue the opportunity.

Realization of that value is not the kind of "out-of-market" payment that justifies reasonable concern and warrants mitigation. Outside revenue streams may be "out-of-market" in a way relevant to the Complaint Order where the payment is for the same things that the ICAP market procures. However, there is a fundamental difference between a generator having the potential to earn value from attributes that are not compensated in the relevant market, on the one hand, and a generator having the potential to earn revenues from non-market sources for in-market services. The key is to focus on the relevant market. The relevant market in this proceeding and under the NYISO's BSM rules is the ICAP market alone, and the New York State programs do not supply non-market payments for those in-market services.

The Complaint included substantial discussion and offered supporting evidence on this critically important distinction, [42] but the Complaint Order's determination does not address this central argument at all.[43] By penalizing ESRs' participation in the ICAP markets for realizing

utilities showed that in 2014, at least 46 million tons of coal ash were beneficially used. *See* https://www.epa.gov/coalash/coa-ash-reuse.

[41] *See* http://www.fgdproducts.org/FGDGypsumIntro.htm.

[42] *See* Complaint at pp. 32-34.

[43] *Cf. Noram Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (FERC's "dismissive treatment of NorAm's market center objection, which was hardly a response at all, was not the product of a reasoned decision-making process"); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) ("[i]t most emphatically

value earned for supplying non-ICAP attributes sought by the State of New York, the Commission has exceeded the scope of its authority and affirmatively encroached upon matters reserved to the state by the FPA. The Supreme Court has supported states' rights to encourage and foster the development and supply of the non-ICAP attributes provided by ESRs without running into the Commission's lawful authority under the FPA."[44] Indeed, the fact that state program payments to ESRs are not conditioned on ESRs clearing in the NYISO's ICAP markets demonstrates that ESRs satisfy the Courts' requirements under *Hughes*.[45] It further demonstrates that ESRs are not participating in the NYISO ICAP markets with an intent to suppress prices. Rather, the record shows that ESRs are seeking to provide green energy attributes to the state in furtherance of a legitimate state goal of encouraging the development of storage and renewable energy resources. The Complaint Order's failure to acknowledge or otherwise address this critical distinction is a fundamental flaw. This flaw renders the Commission's determinations and the resulting denial of the Complaint contrary to law, not the product of reasoned decision making, arbitrary and capricious.

B. The Commission Erred in Presuming that ESRs Participate in Relevant Markets on an Aggregated Basis

The Complaint asserted, and multiple parties agreed, that ESRs are limited in size, scope functionality and location and, hence, lack the ability and incentive to exercise buyer-side market

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remains the duty of this court to ensure that an agency engage the arguments raised before it—that it conduct a process of *reasoned* decision-making') (emphasis original).

[44] *See Hughes*, 136 S. Ct. at 1298 ("States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain") (citing *Oneok, Inc.*, 135 S. Ct. at 1599) and at 1299 ("Nothing in this opinion should foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation. So long as a State does not condition payment of funds of capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.") (internal citations and quotation marks omitted).

[45] *Id.*

power to manipulate bids into the ICAP market to artificially depress prices (monopsony power).[46] The Commission decided that it is not relevant whether an individual ESR or combination of individual ESRs has/have monopsony/oligopsony power, the intent or ability to depress market prices acting alone or in combination with others.[47] Without record evidence to support such a finding, the Complaint Order found that ESRs comprise a single, monolithic market presence that necessarily acts in unison for common purpose to artificially depress ICAP market prices.[48] This finding inexplicably departs from the very basis upon which BSM was approved for the NYISO ICAP market in the first place.[49]

The Commission thus erred because its finding is not reasonably explained. Furthermore, the Order not only lacks support by requisite substantial evidence, but it is contradicted by the factual record. By aggregating all new ESRs for purposes of assessing the justness and reasonableness of applying BSM, the Commission finds that market power would be exercised *per se* because more supply translates to lower prices, regardless of the actual market participation practices of any single ESR or evidence that ESRs act or would act in concert. The Complaint Order conflates lower prices occurring through the normal workings of supply and demand (*e.g.*, competition) with artificial downward price manipulation. As Commission Glick states in his dissent, "[t]he Commission's suggestion that [ESRs], collectively, might have market power is as

[46] Complaint Order at P 19.

[47] As the FTC has explained, "[a] buyer has monopsony power—or a group of buyers has oligopsony power—when it can profitably reduce prices in a market below competitive levels by curtailing purchases of the relevant product or service." Statement of the Fed. Trade Comm'n, *In the Matter of Caremark Rx, Inc./AdvancePCS*, FTC File No. 031-0239 at 2 (2004) (available at: https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040211ftcstatement0310239.pdf

[48] Complaint Order at P 39.

[49] *See Original BSM Order* at P 86.

absurd as expressing a concern that a particular natural gas resource may have market power because natural gas resources, viewed collectively, have market power."[50]

C. ESRs Increase Competition on the Supply Side of ICAP and Do Not Artificially Depress ICAP Market Prices

The "exercise of buyer market power occurs when a buyer manipulates a market so as to artificially depress prices."[51] In evaluating whether a resource should be subject to BSM, the relevant issue is not whether an entire class of resource types can collude to manipulate, but whether the new entrant can exercise monopsony power to manipulate downward through the cost to that bidder of supplying UCAP.[52] The Complainants met that burden by providing substantial evidence that any state programmatic benefits inuring to ESRs in New York do not contribute or provide the "missing money" the ICAP market is designed to provide.[53] The possibility that ESRs do not have the same "missing money" calculus as generators already in the market does not undermine the function and economic price discovery in the ICAP market for fungible UCAP. The possibility of less "missing money" for UCAP—because ESRs do not need as much support from the ICAP market as other generators with fewer Other Attributes—contributes to lower cost to consumers for generation adequacy.

Over-mitigating capacity resources results in a needless increase in ICAP prices above the level necessary to provide "missing money" to assure resource adequacy. Given ESRs supply Other Attributes not procured through the ICAP market—but are forced to include value received

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[50] *Id.*, Glick Dissent at n. 38.

[51] Richard B. Miller, Neil H. Butterklee & Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity Markets: Time for a Change,* 33 Energy L.J. 449, 457 (2012).

[52] SCR Complaint Order at P 30.

[53] *See* Complaint at pp 10-22 & Evans Affidavit. *Cf. N.Y. Pub. Serv. Comm'n v. NYISO*, 153 FERC ¶ 61,022 at P 25 (noting incumbent generators' position that "the ICAP market is supposed to be agnostic with respect to" Other Attributes and that FERC has rejected that "certain resources are more 'worthy' (and should therefore be paid more) than other resources….").

from the supply of Other Attributes in BSM offer-floors—then the ICAP market is doing more than supplying missing money. It is effecting a transfer payment of a cross-subsidy from the pockets of New York ratepayers to prop up artificially high ICAP market prices that are not the product of the normal workings of supply and demand.[54] ICAP market prices are made to include, by Federal regulatory dictate, the value received by ESRs from state programs that are not tied to the ICAP market and are not provided by UCAP suppliers through the ICAP markets.[55] This result is not just and reasonable and is a far greater threat to the integrity of the ICAP market than the value received by ESRs to promote legitimate State policy goals.[56]

To prevent New Yorkers from having to over-pay for UCAP, a blanket exemption from BSM for ESRs is required. Such an exemption will not result in the unmitigated exercise of buyer-side market power. The Commission and the NYISO retain numerous tools to prevent and deter the exercise of actual buyer-side market power.[57] The Complaint Order, therefore, errs by not

[54] *See, e.g., Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (adding supply in a market lowers prices, which is "all quite natural" and explaining States "retain the right" to make choices within its lawful authority "that affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity.").

[55] The Commission, in an order issued concurrently with the Rehearing Order, found (correctly) that such values are not procured or compensated under the ICAP markets and, as such, the value for non-market attributes earned by certain generators does not justify imposition of BSM. *See Indep. Power Producers of N.Y. v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,118 (2020), denying rehearing of *Indep. Power Producers of N.Y. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015) ("*IPPNY*"). The Rehearing Order thus fails to reflect reasoned decision-making, is arbitrary and capricious. The Commission was correct in *IPPNY*. *Cf. ISO New England, Inc.*, 165 FERC ¶ 61,202, at P 85 (2018) (requiring offer-floors to include value of attributes not procured in a capacity market produces "artificial and inefficient" wholesale market outcomes that are not just and reasonable).

[56] *See Atl. Ref. Co.*, 360 U.S. at 388 (FPA requires the Commission to provide electric consumers "a complete, permanent, and effective bond of protection from excessive rates and charges."). *Compare Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S.312, 320 (2007) (explaining "the costs of erroneous findings of predatory-pricing liability are quite high because the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition, and, therefore, mistaken findings of liability would chill the very conduct the antitrust laws are designed to protect.") (internal quotes and cites omitted). *See also Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,215 at P 135 (refusing to apply BSM as a "prophylactic measure" as a "safety net to prevent future abuse").

[57] The Commission's rules and regulations concerning market-based rates under Section 205 presumably will apply to ESRs. In order to obtain and retain market-based rate authority, owners of ESRs will be required to show that they lack the ability to exercise market power and will be subject to losing that authority if they exercise market

appropriately accommodating legitimate state policy objectives and by being indifferent to whether the legitimate exercise of state authority causes FERC-jurisdictional rates to be greater than otherwise would occur through competitive dynamics.[58]

Exempting ESRs from BSM does not sacrifice generation adequacy or undermine competitive auction market principles. It does, however, impose an artificially elevated price floor expressly designed to maintain a protected market for incumbent generators.[59] Indeed, an oft-cited Supreme Court description of *per se* illegal price fixing clearly suggests that the Complaint Order effectuates what would be illegal price fixing if it were undertaken by private parties rather than the Commission.[60] Justice Douglas's cautionary words in *Socony* remain instructive against the approach taken to BSM and offer-floors by the Commission:

> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. ***They are all banned because of their actual or potential threat to the central nervous system of the economy***.[61]

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power. ESRs participating in the NYISO's ICAP market also will be subject to active Commission oversight and subject to penalty and disgorgement authority of the Commission for market manipulation. *See* 16 U.S.C. § 824v(a); 18 C.F.R. § 1c.2 (2019). *See also FERC v. City Power Marketing LLC*, 199 F. Supp. 3d 218, 238 (D.D.C. 2016) ("The Anti-Manipulation Rule [gives] clear notice that fraudulent schemes of all sorts [are] prohibited."); *Vitol Inc. and Federico Corteggiano*, 169 FERC ¶ 61,070 (2019) (order assessing civil penalties). The use of enforcement authority, rather than broad *ex ante* mitigation, provides sufficient protection against ESR exercise of market power, revealing BSM as unnecessary for that purpose.

[58] *Compare* Complaint Order at 42 *with New England States Comm. on Elec. v. ISO New England, Inc.*, 142 FERC ¶ 61,108 at P 35 (2013) ("[T]he Commission must balance two considerations … its responsibility to promote efficient markets and efficient prices, and … its interest in accommodating the ability of states to pursue other legitimate state policy objectives.") (emphasis added) and with .

[59] The Commission has a responsibility to consider and address the anticompetitive effects of class wide application of BSM to ESRs. *See N.Y. Ind. Sys. Op., Inc.*, 127 FERC ¶ 61,136 at P 6 (2009) (citing and quoting *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-59 (1973) and *Alabama Power Co. v. Federal Power Comm'n*, 511 F.2d 383, 393 (D.C. Cir. 1974)). Price maintenance agreements among actual or potential competitors is a *per se* violation of the Sherman Act. Vertical price maintenance is a potential antitrust violation subject to the rule of reason. *See, e.g., White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) ("Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.") (Brennan, J., concurring) (citations omitted).

[60] *See United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940) ("A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*") ("*Socony*")

[61] *Id*. at 224 & n. 59.

The administrative determination of offer-floors under NYISO's BSM rules create, therefore, a form of monopoly rent or cross-subsidy forced on New York electricity consumers that unreasonably discriminates unjustly in favor of existing competitors.[62] However, any increase in ICAP cost imposed due to the offer-floors from BSM must be justified as needed, and no more than needed, for that purpose.[63] On rehearing, the Commission needs to address why increased costs for ICAP due to price maintenance that provide an incentive for incumbent generators not to retire remain just and reasonable in light of the Complaint Order's admission that New Yorkers will be forced to double-pay for ICAP.

D. It is Not Just and Reasonable for BSM to be a Cudgel to Penalize the State for Valuing and Procuring Other Attributes

The Complaint cogently explained that the ICAP markets are limited to procurement and supply of UCAP. The fact that NYISO's ICAP markets do not procure Other Attributes does not mean that the Other Attributes are wanted by New Yorkers for illegitimate reasons. Consumers in the State of New York want and need Other Attributes. And they should be able to obtain the value of those Other Attributes without having to pay twice for UCAP in the ICAP market because BSM is causing *ex ante* over-mitigation. The Complaint Order accepts without apparent concern that the result of applying BSM to ESRs under the Services Tariff will be to increase total costs for reliable electricity supply that meets State objectives.[64]

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[62] *See Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust principles are for "the protection of competition, not competitors") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[63] *See, e.g., City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955) (any penalty must be needed and no more than needed for the intended purpose), *cert. den. Sub nom., Panhandle E. Pipe Line Co. v. City of Detroit*, 352 U.S. 829 (1956). *See also Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1498-1520 (D.C. Cir. 1984) ("FERC failed to forecast or otherwise estimate the dimensions of the need for additional capacity, and did not even attempt to calibrate the relationship between increased rates and the attraction of new capital*."); Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 FERC ¶ 61,168, at 61,594 (1992) (FERC "is free to set rates to provide incentives so long as there is a correlation between the incentive and the result to be induced") (citation omitted).

[64] Complaint Order at P 42.

The Courts rightly have been skeptical of generic solutions "for a problem that exists only in isolated pockets. In such as case, the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious."[65] ESRs lack both necessary ingredients to justify administrative market intervention to prevent artificial price suppression. These two necessary ingredients are the presence of both incentive *and* ability to exercise buyer-side market power.[66] The Complaint Order errs by concluding that the mere presence of ESRs that earn value from Other Attributes necessarily means they present a clear and present danger to the ICAP markets and must be subject to *ex ante* buyer-side mitigation, regardless of price impacts borne by electricity consumers in New York and regardless that ESRs lack the ability in fact to exercise buyer-side market power,.

V. CONCLUSION

The Commission is duty bound to reasonably accommodate legitimate State interests in procuring Other Attributes and in shaping the fuel and technology mix for electricity generation in New York. The purpose of the ICAP market is limited the assuring generation adequacy, without regard to Other Attributes. The Complaint made a compelling case that class-wide application of BSM to ESRs is not justified because ESRs do not have the interest or ability to artificially lower ICAP prices and that application of BSM in the circumstances is not just and reasonable. The Commission should have granted the Complain, or at least in the alternative to

[65] *Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 37 (D.C. Cir. 2002); *see also Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954, 956 (D.C. Cir. 2007).

[66] *See, e.g., N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 36 (2015) (NYISO BSM unjust and unreasonable when it is applied to "resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices" and Commission considers both "incentive *and* ability to exercise market power." *Id.* at P 36 (emphasis original).

authorize a 300 MW class year exemption. The Commission should grant rehearing, grant the Complaint in full or part, and meet its responsibility to reach a reasonable accommodation between the interests of consumers as manifested in New York State policies supporting Other Attributes supplied by ESRs and generators.

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Dated: March 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties on the official Service List compiled by the Secretary in this proceeding.

Dated at Birmingham, Alabama, this 23rd day of March 2020.

/s/ Lyle Larson
Lyle D. Larson

Document Content(s)