

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

New York State Public Service)	Docket No.	EL19-86-000
Commission and New York State)		
Energy Research and Development)		
Authority)		
)		
v.)		
)		
New York Independent System)		
Operator, Inc.)		

REQUEST FOR REHEARING OF CLEAN ENERGY PARTIES

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 8251(a), and Rule 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Natural Resources Defense Council, the Sustainable FERC Project, the American Wind Energy Association, and Advanced Energy Economy (collectively “Clean Energy Parties”) hereby request rehearing of the Commission’s Order Denying Complaint, 170 FERC ¶ 61,119 (February 20, 2020) (the “February 2020 Order” or “the Order”).

I. Introduction

The Order denied a complaint (the “NYSPSC Complaint” or “Complaint”) filed by the New York State Public Service Commission (“NYSPSC”) and the New York State Energy Research and Development Agency (“NYSERDA”) against the New York Independent System Operator (“NYISO”).¹ The Complaint requested that NYISO either exempt all energy storage resources (“ESRs”), or in the alternative, up to 300 MW of ESRs per year, from NYISO’s buyer-

¹ Complaint on Behalf of the New York State Pub. Serv. Comm’n and the New York State Energy Research and Dev. Auth. and Request for Fast Track Processing, Docket No. ER19-467 (July 29, 2019).

side mitigation (“BSM”) regime (collectively, the “Exemptions”).² For the reasons explained below, the Clean Energy Parties request rehearing and reversal of the February 2020 Order’s denial of the Complaint.

II. Statement of Issues

In accordance with Rule 713(c),³ Clean Energy Parties present the following identification of errors and statement of issues. The Commission violated the Federal Power Act (“FPA”)⁴ and the Administrative Procedure Act (“APA”)⁵ in denying the relief requested in the Complaint and upholding NYISO’s application of BSM to ESR. In particular:

1. The February 2020 Order is arbitrary and capricious because it fails to consider New York’s legitimate state regulatory objectives
 - a. The Commission ignores the collaborative federalism under the Federal Power Act and New York’s legitimate regulatory role in promoting ESRs.⁶
 - b. The Commission’s application of buyer-side mitigation to ESRs will thwart New York’s legitimate regulatory goals.
 - c. The Commission failed to consider or balance the impacts of its order on New York’s legitimate regulatory goals as it was required to do.⁷

² NYSPSC Complaint at 4.

³ 18 C.F.R. § 385.713.

⁴ 16 U.S.C. §§ 791 *et seq.*

⁵ 5 U.S.C. § 500 *et seq.*

⁶ See 16 U.S.C. § 824; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring); *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 775, 193 L. Ed. 2d 661 (2016), *as revised* (Jan. 28, 2016); *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 512–13 (1989); *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 2015 (1983); *Nebbia v. People of New York*, 291 U.S. 502, 524 (1934); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013); *Connecticut Dep’t of Pub. Util. Control v. F.E.R.C.*, 569 F.3d 477, 481 (D.C. Cir. 2009); *New York State Pub. Serv. Comm’n & New York State Energy Research & Dev. Auth.*, 170 FERC ¶ 61,119 (Feb. 20, 2020) (Glick, Comm’r, dissenting at P 11); *Renewable Energy, Inc. v. CAISO*, 117 FERC ¶ 61,072, at P 10 (2006); *Re S. California Edison Co.*, 159 P.U.R.4th 381 (Feb. 22, 1995).

⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983); *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61023 (Apr. 8, 2016); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P143; *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, P3 (2011).

- d. The Commission's mitigation reach exceeds its statutory grasp under the FPA⁸
2. The February 2020 Order's application of buyer-side mitigation to ESRs is unlawful because it lacks a reasoned basis
 - a. The Commission misapplies buyer-side mitigation, which is designed to prevent buyers or their agents from exercising market power to reduce capacity market prices below competitive levels by paying out-of-market subsidies to support new capacity.⁹
 - b. The February 2020 Order lacks a reasoned basis because ESRs do not have the incentive or the ability to suppress prices and therefore lack market power.¹⁰
 - c. The February 2020 Order lacks a reasoned basis because it does not allow for ESRs to bid based on their true costs.¹¹
 - d. The February 2020 Order lacks a coherent theory of harm or substantial evidence to support its extraordinary reordering of market outcomes.¹²
 3. The Commission failed to address evidence in the record regarding costs to ratepayers of ESR mitigation or explain why its replacement rate reflects the required balancing of consumer and investor interests, violating its statutory duty to protect ratepayers.¹³

⁸ *Coal. for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41, 49–50 (2d Cir. 2018); *Connecticut Dep't of Pub. Util. Control*, 569 F.3d at 481; *Grand Council of the Crees v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000); *ISO New England, Inc.*, 138 FERC ¶ 61,027, at P 91 (2012); *ISO New England, Inc.*, 155 FERC ¶ 61,023, at P 23 (2016); *PJM Interconnection LLC*, 135 FERC ¶ 61,022, at P 143; *PJM Interconnection LLC*, 137 FERC ¶ 61,145, at P 3 (2011); *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995).

⁹ *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007); *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008); *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006).

¹⁰ *See New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,033 (Jan. 23, 2020); *New York Pub. Serv. Comm'n., et al.*, 54 FERC ¶ 61,088, at P 31 (Feb. 5, 2016); *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023 (Apr. 8, 2016); *Renewables/Self-Supply Rehearing Order*, 154 FERC ¶ 61,088, at P 31.

¹¹ *See New York State Pub. Serv. Comm'n & New York State Energy Research & Dev. Auth.*, 170 FERC ¶ 61,119 (Feb. 20, 2020) (Glick, Comm'r, dissenting at P 13).

¹² 16 U.S.C. §§ 824d (a)-(b); *Calpine Corp., et al. v. PJM Interconnection, LLC*, 169 FERC ¶ 61,239 (Dec. 19, 2019); *Harris v. FERC.*, 784 F.3d 1267 (9th Cir. 2015); *Blumenthal v. FERC.*, 552 F.3d 875, 882–83 (D.C. Cir. 2009); *California ex rel. Lockyer v. FERC.*, 383 F.3d 1006, 1012–13 (9th Cir. 2004); *Env'tl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991).

¹³ *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956); *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165, 174 (2010); *NextEra Energy, Inc., et al., v. Pac. Gas and Elec. Co. Exelon Corp., et al.*, 167 FERC ¶ 61,096, at P 12 (May 1, 2019); *Duke Energy Carolinas, et al., LLC*, 156 FERC ¶ 61,201, at P 36 (Sept. 22, 2016).

- a. The Commission breached its duty to protect NYISO ratepayers from overpaying for capacity.¹⁴
 - b. The February 2020 Order will over-mitigate the NYISO capacity market, increasing costs needlessly and reducing reliability for ratepayers.¹⁵
 - c. The Commission ignored these increased costs in violation of its statutory duty to protect ratepayers from overpaying for capacity.¹⁶
 - d. The Commission's reliance on the Third Circuit's opinion in *NJBPU* to deflect responsibility for these increased costs is misplaced.¹⁷
4. The Order is unlawful because it fails to comply with Order No. 841¹⁸

¹⁴ *FERC v. EPSA*, 136 S. Ct. 760, 781 (2016); *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165, 174 (2010); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956); *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *Xcel Energy Servs. Inc. v. F.E.R.C.*, 815 F.3d 947, 952–53 (D.C. Cir. 2016); *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262–63 (D.C. Cir. 2007); *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991); *NextEra Energy, Inc., et al., v. Pac. Gas and Elec. Co. Exelon Corp., et al.*, 167 FERC ¶ 61,096 at P 12; *Duke Energy Carolinas, et al.*, 156 FERC ¶ 61,201, at P 36 (Sept. 22, 2016); *New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 154 FERC ¶ 61,088, at P 31; *Consolidated Edison Co. of New York v. New York Independent System Operator, Inc.*, 150 FERC ¶ 61,139 at P5 (2015); *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039, at P 52 (Jan. 24, 2014); *New York Indep. System Operator, Inc.*, 143 FERC ¶ 61,217, at P 77 (2013); *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211, at P 103 (2008).

¹⁵ *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039, at P 52 (Jan. 24, 2014).

¹⁶ *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018); *TransCanada Power Mktg., Ltd. v. FERC*, 811 F.3d 1, 11–13 (D.C. Cir. 2015); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984); *State of N.C. v. FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 (Mar. 9, 2019); *Midwest Independent Transmission System Operator, Inc.*, 153 FERC ¶ 61,229 (2015); *PJM Interconnection, LLC*, 143 FERC ¶ 61,090, at P 26 (2013); *Questar Pipeline Co.*, 142 FERC ¶ 61,127, at P 17 (2013); *El Paso Elec. Co. v. Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,182, 61,939 n.41 (Aug. 1, 1994).

¹⁷ *NJBPU v. FERC*, 744 F.3d 74 (3d Cir. 2014); *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991); *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229, at P 110 (Nov. 20, 2015); *El Paso Elec. Co. v. Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,182, 61,939 n.41 (Aug. 1, 1994).

¹⁸ *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 162 FERC ¶ 61,127, at P 19 (Feb. 15, 2018) (“Order No. 841”).

III. Background

A. Legal Background

The Administrative Procedure Act governs the exercise of Commission decisionmaking and “sets forth the full extent of judicial authority to review executive agency action for procedural correctness.”¹⁹ The relevant inquiry for review of Commission orders is whether it has “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²⁰

Even when not clearly erroneous, the Commission’s decisions will be reversed by a court where such action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²¹ Agency action is arbitrary and capricious if, for example, the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²²

Although agencies are allowed to change an existing position, as the Commission has done here, an agency cannot choose to not enforce laws of which it disapproves or ignore

¹⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

²⁰ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Encino Motorcars LLC v. Navarro*, 136 S. Ct. at 2125; *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999); see also *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decision-making where the Commission “weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice”). Courts “do not defer to the agency’s conclusory or unsupported suppositions,” *United Techs. Corp. v. Dep’t of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quoting *McDonnell Douglas Corp. v. Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004).

²¹ 5 U.S.C. § 706(2)(A); 16 U.S.C. § 8251(b) (providing for judicial review of Commission orders); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 968 (D.C. Cir. 2005).

²² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

statutory standards in carrying out its duties.²³ Rather, agencies changing position must “show that there are good reasons for the new policy.”²⁴

Further, an agency must “provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.’”²⁵ Any “unexplained inconsistency” between a policy and its repeal is “a reason for holding an interpretation to be an arbitrary and capricious change.”²⁶

B. Policy Background

ESRs are resources capable of receiving energy from the electric grid and storing it for later injection back onto the grid. They include technologies such as grid-scale battery systems, pumped hydropower, and flywheels. ESRs provide many critical benefits necessary for New York to achieve its legislative and policy commitments to achieve carbon-free emission energy production. Notably, the NYSPSC recognized the value of energy storage in achieving a responsive, efficient, and clean grid for its retail consumers when it adopted the Clean Energy Standard in 2016, which requires that 50% of the electricity consumed in New York be generated from renewable energy sources by 2030.²⁷

²³ *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

²⁴ *Encino Motorcars*, 136 S. Ct. at 2126 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996)); see also *Comcast Corp. v. FCC*, 600 F.3d 642, 658-59 (D.C. Cir. 2010) (applying arbitrary and capricious standard factors to an agency’s changed interpretation of regulatory authority).

²⁵ *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015) (citation omitted); *Fox Television Stations*, 556 U.S. at 515 (“a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”).

²⁶ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

²⁷ NYSPSC, *Order Adopting a Clean Energy Standard*, Case 15-E-302, Large-Scale Renewable Program and a Clean Energy Standard, at 3 (Aug. 1, 2016).

The NYSPSC explained that “[s]torage is a critically important component of the energy system that is both distributed and increasingly reliant on intermittent resources. Unlike other resources, the load shifting and fast response capabilities of various forms of storage resources allow them to provide simultaneous value as an energy and reliability resource.”²⁸

In 2018, the New York State Legislature amended the Public Service Law to direct the NYSPSC to establish an energy storage goal by 2030 and a deployment policy to meet this goal.²⁹ To implement this law, in December 2018, the NYSPSC issued an order (the “Storage Order”) adopting a statewide goal of up to 3,000 MW of qualified storage energy systems by 2030, with an interim goal of 1,500 MW of energy storage systems by 2025.³⁰ The Storage Order also adopted a suite of energy storage deployment policies designed to accelerate cost reductions, reduce barriers to monetizing ESRs that would otherwise go uncompensated, and improve project economics by sending necessary price signals to the marketplace.³¹

The Storage Order also affirmed that energy storage would play a critical role by addressing the variability and intermittency of renewable energy output, reducing the need to curtail these resources at certain periods of the day, and reducing peak load.³² Energy storage can also be flexibly deployed to store and dispatch energy where and when it is most needed, reducing the need to rely on the oldest and dirtiest power plants during peak demand periods, many of which are approaching the end of their useful lives or which soon face obsolescence due to new state environmental regulations.

²⁸ *Id.* at 103–104.

²⁹ N.Y. Pub. Serv. Law, § 74, as amended by Ch. 324 and 417 (2018).

³⁰ NYSPSC, *Order Establishing Energy Storage Goal and Deployment Policy*, Case No. 18-E-0130, In the Matter of Energy Storage Deployment Program, at 4 (“Storage Order”) (Dec. 13, 2018).

³¹ *Id.* at 12.

³² *Id.* at 1.

The Storage Order identified specific public benefits resulting from the achievement of the 2030 goal, including over \$3 billion in gross lifetime benefits to consumers, the creation of approximately 30,000 jobs, the avoidance of approximately 2 million metric tons of greenhouse gas emissions, and public health improvements resulting from the avoidance of criteria air pollutants such as nitrogen oxide (“NO_x”), sulfur oxide (“SO_x”) and particulate matter.³³

The Storage Order also determined that utility-scale storage procurement is necessary to provide the flexibility for bulk-level storage applications to provide maximum benefits to ratepayers.³⁴ Electric investor-owned utilities were therefore directed to hold competitive procurements for storage resource services within their territories to provide benefits that include reliability services, local load relief, local environmental benefits derived by reducing the use of peaking units for contingency purposes, and wholesale services (e.g., capacity, spinning reserves, frequency regulation), all of which will allow utility grid operators and system planners the opportunity to use storage to meet system needs at scale.³⁵

On July 18, 2019, Governor Cuomo signed into law the Climate Leadership and Community Protection Act (the “CLCPA”), which requires New York to reduce statewide greenhouse gas emissions by 40% from 1990 levels by 2030 and 85% by 2050.³⁶ With respect to the electricity sector, the CLCPA incorporates the Energy Storage Order’s goal of 3,000 MW of energy storage by 2030, as well as requiring that 70 percent of the state’s electricity come from renewable energy by 2030 and 100 percent of the state’s electricity supply be emissions free by 2040. The efficient and widespread deployment of ESRs at scale is critical to meeting the

³³ *Id.* at 3.

³⁴ *Id.* at 53.

³⁵ *Id.*

³⁶ S.B. S6599 (July 18, 2019).

CLCPA's requirement of 3,000 MW of energy storage as well as the law's broader renewable electricity and greenhouse gas reduction requirements.

New York's storage deployment goal also supports other state environmental and public policy objectives. These include the New York State Department of Environmental Conservation's ("DEC") recently finalized rules to impose more stringent NOx emissions limits to simple cycle and regenerative combustion turbines ("SSCTs"), also referred to as "peaking units," which typically run to meet electric load during peak demand period.³⁷ The primary purpose of these rules is to lower allowable NOx emissions from SSCTs during high ozone days.³⁸ Older SSCTs, which account for the vast majority of all NOx emissions from these generation sources, are likely to retire because it would be uneconomic for them to comply with the reduced NOx emission limits.³⁹

ESRs are particularly important in alleviating air quality concerns in environmental justice communities. This is because the location of SSCTs is highly correlated with potential environmental justice areas, especially in the New York City region, where many SSCTs are present.⁴⁰ Although these plants have annual capacity factors under 10% and run primarily during the summer months, their emissions contain as much as 20 times the amount of NOx as a typical thermal plant.⁴¹ In addition, because they operate at peaks coincident with extreme heat

³⁷ N.Y. State Dept. of Env'tl. Prot., *Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Exh. Simple Cycle and Regenerative Combustion Turbines, Subpart 227-3* (Oct. 7, 2019).

³⁸ *Id.*

³⁹ NYSPSC Complaint at 22.

⁴⁰ NYSPSC, *Exh. 9-5: Location of Peaker Plants and Environmental Justice Areas in the Greater New York City Area*, Case No. 18-E-0130, In the Matter of Energy Storage Deployment Program, at 9–12 (June 25, 2018).

⁴¹ The New York State Energy Storage Roadmap and Department of Public Service / New York State Energy Research and Development Authority Staff Recommendations ("Storage Roadmap"), at 64 (June 21, 2018), <https://www.ethree.com/wp-content/uploads/2018/06/NYS-Energy-Storage-Roadmap-6.21.2018.pdf>.

events, the plants emit NO_x, SO₂, and particulates during times when they are most harmful. These pollutants form ground-level ozone, which can cause and exacerbate asthma and other health issues that are common in environmental justice communities.⁴² DEC's rules to impose more stringent NO_x emissions limits to these facilities will likely lead to the retirement of many of these facilities, particularly older, higher emitting units, and are prime candidates to be replaced with ESRs. However, the application of BSM to ESRs makes it less economic to do so, meaning that ESRs that would otherwise replace these high-emitting units may not be sited where they are needed most.

C. Procedural Background

On February 15, 2018, the Commission issued Order No. 841, which found that “existing RTO/ISO market rules are unjust and unreasonable in light of barriers that they present to the participation of electric storage resources in the RTO/ISO markets, thereby reducing competition and failing to ensure just and reasonable rates.”⁴³ Consequently, Order No. 841 required “each RTO/ISO to revise its tariffs to remove barriers to the participation of electric storage resources in the RTO/ISO markets.”⁴⁴ As noted above, NYS has also prioritized the integration of ESRs into the grid, and welcomed Order No. 841's support of ESRs.⁴⁵

On December 3, 2018, NYISO submitted a compliance filing (“NYISO Compliance Filing”) containing various tariff changes that purported to comply with the requirements of

⁴² *Id.*

⁴³ Order No. 841 at P 19.

⁴⁴ *Id.* at P 20.

⁴⁵ *See supra* at Point III.B; *See also* Protest and Interventions of the NYSPSC and NYSERDA, at 5, Docket No. ER19-467 (Feb. 7, 2019) (“Federal and State policy objectives regarding the need to enable ESR market participation converged in Order No. 841.”).

Order 841.⁴⁶ The NYISO Compliance Filing stated, *inter alia*, that NYISO would apply BSM to ESRs.⁴⁷

On February 7, 2019, NYSPSC and NYSERDA filed a protest opposing the NYISO Compliance Filing for numerous reasons, including its application of BSM to ESRs.⁴⁸ On April 1, 2019, the Commission sent NYISO a set of information requests to aid the Commission's review of the NYISO Compliance Filing.⁴⁹ NYISO submitted responses on May 1, 2019.⁵⁰

On July 29, 2019, the NYSPSC and NYSERDA filed a complaint⁵¹ pursuant to Sections 206 and 306 of the Federal Power Act.⁵² The Complaint argued that NYISO's application of BSM to ESRs is unjust and unreasonable, and requested that the Commission order a blanket exemption of all ESRs from BSM, or, in the alternative, approve a megawatt ("MW") cap exemption that would enable up to 300 MW of ESRs to enter the market each calendar year without mitigation.⁵³

⁴⁶ NYISO, Compliance Filing and Request for Extension of Time of Effective Date, Docket No. ER19-467 (Dec. 3, 2018).

⁴⁷ *Id.* at 51.

⁴⁸ Protest and Interventions of the NYSPSC and NYSERDA, Docket No. ER19-467 (Feb. 7, 2019).

⁴⁹ FERC, Letter requesting New York Independent System Operator, Inc. to provide additional information re the Compliance Filing to Order No. 841, Docket No. ER19-467 (Apr. 1, 2019).

⁵⁰ NYISO, Response to April 1, 2019 Letter and Notification of Implementation Issues that Necessitate Additional Limited Compliance Tariff Revisions in Docket No. ER19-467-000, Docket No. ER19-467 (May 1, 2019).

⁵¹ NYSPSC Complaint.

⁵² 16 U.S.C. §§ 824e and 825e (2012).

⁵³ NYSPSC Complaint at 4.

On December 20, 2019, the Commission issued an order approving the NYISO Compliance Filing, including the application of BSM to ESRs.⁵⁴ On February 20, 2020, the Commission denied the Complaint.⁵⁵

IV. Request for Rehearing

A. **The February 2020 Order is Arbitrary and Capricious Because it Fails to Consider New York’s Legitimate State Regulatory Objectives**

1. Collaborative Federalism and New York’s Legitimate Regulatory Role

The FPA assigns to the Commission and state governments complementary, but distinct, regulatory roles. For this reason, the FPA has been characterized as a statute of “collaborative federalism” that “envisions a federal-state relationship marked by interdependence.”⁵⁶ The Commission’s role is to regulate “the sale of electric energy at wholesale in interstate commerce.”⁵⁷ A “wholesale” sale of electricity is defined as a “sale of electric energy to any person for resale.”⁵⁸ The FPA charges the Commission with the task of ensuring that wholesale sales of electricity occur at rates that are “just and reasonable” and not “unduly discriminatory or preferential.”⁵⁹

However, the FPA leaves to state governments the regulation of “any other sale of electric energy,” as well as “facilities used for the generation of electric energy.”⁶⁰ This state regulatory

⁵⁴ *New York Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,225, at PP 57, 74–75 (Dec. 20, 2019).

⁵⁵ *New York State Pub. Serv. Comm’n & New York State Energy Research & Dev. Auth.*, 170 FERC ¶ 61,119 (Feb. 20, 2020).

⁵⁶ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring).

⁵⁷ 16 U.S.C. § 824(b)(1).

⁵⁸ 16 U.S.C. § 824(d).

⁵⁹ 16 U.S.C. § 824e(a).

⁶⁰ 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292, (“[T]he [FPA] places beyond FERC’s power, and leaves to the States alone, the regulation of ‘any other sale’—most notably, any retail sale—of electricity.”); *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 775, 193 L. Ed. 2d 661 (2016), *as revised* (Jan. 28, 2016).

authority encompasses “questions of need, reliability, cost, and other related state concerns”⁶¹ as well as “environmental and social impacts.”⁶²

States can exercise this authority by “direct[ing] the planning and resource decisions of utilities under [the state’s] jurisdiction.”⁶³ Notably, states’ “role as regulators of generation facilities” can include “the right to forbid new entrants from providing new capacity, to require retirement of existing generators, [and] to limit new construction to more expensive, environmentally-friendly units.”⁶⁴

States may exercise these regulatory prerogatives even if such regulations “incidentally affect” wholesale electricity markets.⁶⁵ The Supreme Court has emphasized that “[s]tates, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC’s domain.”⁶⁶

As the Court has explained, “[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known market, are not hermetically sealed from each other.”⁶⁷ The Court has also noted with respect to the Natural Gas Act, a statute closely analogous to the FPA, it would “strange indeed” if states could only regulate natural gas

⁶¹ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 2015 (1983).

⁶² *Californians for Renewable Energy, Inc. v. CAISO*, 117 FERC ¶ 61,072, at P 10 (2006); *Re S. California Edison Co.*, 159 P.U.R.4th 381 at (Feb. 22, 1995) (“We respect the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways.”).

⁶³ *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted).

⁶⁴ *Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

⁶⁵ *Hughes*, 136 S. Ct. at 1298.

⁶⁶ *Id.*

⁶⁷ *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776, (2016).

production “in furtherance of legitimate conservation goals” if doing so had no “effect on interstate rates.”⁶⁸

The Court’s observations make sense, given that it would not be feasible for the Commission to attempt to cancel out the effect of all state actions on wholesale rates, however legitimate the action or minor its effects. As Commissioner Glick has noted, quoting former Commission Chairman Norman Bay, an “idealized vision of markets free from the influence of public policies ... does not exist, and it is impossible to mitigate our way to its creation.”⁶⁹

More broadly, beyond the FPA’s division of authority over the electric grid between FERC and the states, states have the independent authority reserved to them under the U.S. Constitution to legislate for the general welfare of its people. “The power to promote the general welfare is inherent in government,” and the “states in their sovereign capacity” possess this power for “all subjects jurisdiction of which is not surrendered to the federal government.”⁷⁰ This power extends to legislation to promote the health of a state’s people and natural environment—“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”⁷¹ State policies that regulate the negative externalities of power generation, including policies - such as the Storage Order and regulations to replace peaker plants - that aim to replace polluting resources in the generation mix with clean ones—fall

⁶⁸ *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 512–13 (1989).

⁶⁹ *New York State Pub. Serv. Comm’n & New York State Energy Research & Dev. Auth.*, 170 FERC ¶ 61,119 (Feb. 20, 2020) (Glick, Comm’r, dissenting at P 11).

⁷⁰ *Nebbia v. People of New York*, 291 U.S. 502, 524 (1934); *see also New York v. United States*, 505 U.S. 144, 156 (1992) (“The States unquestionably do retain a significant measure of sovereign authority ... to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”).

⁷¹ *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960).

squarely within states' inherent power to protect the health and welfare of their citizens, and its sovereignty over those police powers is independent of its authority under the Federal Power Act.

Here, New York's policy to promote the deployment of ESRs, as expressed in the Storage Order, is a legitimate regulatory action aimed at environmental and social impacts, one that falls well within "the domain Congress assigned"⁷² to New York to regulate.⁷³ As such, it is perfectly consonant with the role prescribed for state regulation under the FPA.

2. The February 2020 Order Will Thwart the New York's Legitimate Regulatory Goals

The February 2020 Order's application of BSM to ESRs will impede New York's progress towards its legitimate regulatory goals. As stated in the Affidavit of Mr. Adam B. Evans submitted by the NYSPSC:

[B]uyerside mitigation plays an enormous role in [ESR] project development decisions...Subjecting Energy Storage Resources to potential mitigation in the ICAP market creates a powerful barrier to market entry because project owners know they may not be compensated for the capacity value their resources provide to the system. This market barrier will significantly reduce the magnitude and rate of Energy Storage Resource deployment in the Mitigated Capacity Zones, thereby interfering with and impeding legitimate State policy objectives designed to increase reliance on a cleaner energy resource portfolio.⁷⁴

In sum, while New York has sought to accelerate amount and the rate of ESR deployment by providing financial incentives, the February 2020 Order's application of BSM to ESR will impede those objectives by removing a portion of the financial incentive through mitigation.

Additionally, the February 2020 Order will thwart New York's geographic distribution goals for ESRs. This issue was raised in the affidavit of Mr. Evans. Mr. Evans states that one of

⁷² *Hughes*, 136 S. Ct. at 1298.

⁷³ *See supra* at Point III.B.

⁷⁴ NYSPSC Complaint, Attach. A, Affidavit of Adam B. Evans at PP 18–19 ("Evans Aff.").

the benefits of storage resources sought by New York is that they would be “connected at locations on the transmission and distribution systems that will alleviate constraints.”⁷⁵ However, Mr. Evans states that BSM “creates a circumstance in which mitigated Energy Storage Resources may be viable only outside Mitigated Capacity Zones. Consequently, Energy Storage Resource developers may avoid locating in Mitigated Capacity Zones even though those are the locations where these resources would provide the most reliability benefits.”⁷⁶

The American Wind Energy Association also pointed out that application of BSM to ESRs will cause deployment to be steered away from optimal locations:

Generally, capacity is needed in down-state New York where transmission import constraints have limited imports of energy, capacity, and ancillary services from other NYISO zones. Thus, additional storage resources provide the most reliability support down-state. Yet BSM – which only applies in down-state zones – would steer storage resources away from this area, and towards the up-state unconstrained NYISO zones. Thus, BSM rules themselves can create inefficient market distortions.⁷⁷

Key Capture Energy made similar points in the Affidavit of Rob Gramlich that it submitted:

[C]apacity market revenues alone cover around 60-80% of the Zones G-J cost premium indicates that they are the most important price signal driving the incentive to deploy batteries there...BSM tends to remove or reduce the price signal to locate storage resources in capacity-constrained parts of the grid where they provide the most reliability value. BSM therefore mostly eliminates the price signal of NYISO capacity markets for these resources and encourages less efficient location decisions. In this way, BSM reduces efficiency and distorts markets.⁷⁸

⁷⁵ Evans Aff. at P 5.

⁷⁶ Evans Aff. at P 18.

⁷⁷ Motion for Leave to Answer and Answer of the American Wind Energy Association, at 8, Docket No. EL19-86-000 (Sept. 6, 2019).

⁷⁸ Key Capture Energy, LLC, Comments in Support of Complaint, Attach. A, Affidavit of Rob Gramlich in Support of Comments by Key Capture Energy, LLC, at P 6 (Aug. 19, 2019) (“Gramlich Aff.”).

Thus, the February 2020 Order will have negative impacts on the magnitude, rate, and geographic distribution of ESRs, all impeding the legitimate regulatory objectives of New York.

Notably, the February 2020 Order's negative impacts on the speed, magnitude, and location of ESR deployment will have negative impacts on the achievement of New York's air quality objectives, because New York intends to rely on ESRs to reduce the use of highly polluting peak generating plants. As the NYSPSC stated in the Storage Order, "Energy storage will also allow New York to meet its peak power needs without solely relying on the oldest and dirtiest peak generating plants, many of which lay mostly idle and are approaching the end of their useful lives."⁷⁹ As a result, one of the benefits that New York intends to realize through its ESR policy is reduced emissions of criteria air pollutants such as nitrogen oxide ("NOx"), sulfur oxide ("SOx") and particulate matter.⁸⁰ This is consistent with the New York's recently finalized NOx regulations for SSCT power plants, which aim to limit the NOx emissions of SSCT power plants typically used to meet peak demand.⁸¹ Increased ESR deployment can help speed the retirement of SSCTs and can help replace SSCTs that do retire, driving down NOx emissions while maintaining reliability.⁸²

The February 2020 Order's negative impacts on the geographic distribution of ESRs will also impede New York's goal of alleviating air quality problems for environmental justice communities.⁸³ This is because there is a large concentration of peaking plants in New York City, the locations of which are highly correlated with the location of environmental justice

⁷⁹ Storage Order at 4.

⁸⁰ Storage Order at 3.

⁸¹ N.Y. State Dept. of Env'tl. Prot., *Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines, Subpart 227-3* (Oct. 7, 2019).

⁸² Storage Roadmap at 64–65.

⁸³ Storage Roadmap at 6.

communities.⁸⁴ As discussed *supra*, these plants emit high levels of NO_x, SO₂, and particulate matter, which can cause and exacerbate asthma and other health problems common in environmental justice communities.⁸⁵ Consequently, the February 2020 Order's effect of skewing the geographic distribution of ESRs away from New York City will impede the ability of ESRs to reduce the air quality impacts of peaking generation on environmental justice areas in New York City.

Additionally, ESRs are needed to help New York comply with the Clean Air Act.⁸⁶ The United States Environmental Protection Agency has designated the New York City area as a non-attainment area for ozone under the Clean Air Act.⁸⁷ Reducing the emission of ozone precursors such as NO_x from peaking generating plants is part of New York's plan to resolve the non-attainment status of the New York City area.⁸⁸

3. The Commission Failed to Consider or Balance the Impacts of the February 2020 Order on New York's Legitimate Regulatory Goals

As the Commission has recognized, part of its inquiry into the justness and reasonableness of a rate includes "the ability of states to pursue their policy goals."⁸⁹ However, although the February 2020 Order noted that commenters raised the issue of the Order's impacts on New York's regulatory goals, the Order made no effort to assess or weigh those impacts.⁹⁰

⁸⁴ NYSPSC, *Exh. 9-5: Location of Peaker Plants and Environmental Justice Areas in the Greater New York City Area*, Case No. 18-E-0130, In the Matter of Energy Storage Deployment Program, at 9–12 (June 25, 2018).

⁸⁵ See *supra* at 8.

⁸⁶ See NYSPSC Complaint at 21–22.

⁸⁷ N.Y. State DEC, *Adopted Subpart 227-3 Revised Regulatory Impact Statement Summary*, <https://www.dec.ny.gov/regulations/116180.html>.

⁸⁸ Complaint at 22.

⁸⁹ *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61023 (Apr. 8, 2016). See also *PJM Interconnection, LLC*, 135 FERC ¶ 61,022, at P 143; *PJM Interconnection, LLC*, 137 FERC ¶ 61,145, at P 3 (2011).

⁹⁰ Commission's February 2020 Order at P 37.

The Order states that it will remain *possible* to build ESRs in any zone in New York,⁹¹ but the ability to locate anywhere is not the issue; rather it is the effects on New York’s policy goals of the incentives created by the Order that were not addressed by the Commission. As such, the Order is arbitrary and capricious as it “entirely failed to consider an important aspect of the problem” of developing a just and reasonable rate.⁹²

Since the Order did not analyze the nature or scope of the proposed BSM’s impacts on New York’s regulatory goals, it was not possible for the Order to have engaged in any form of meaningful balancing of those impacts against the purported benefits of applying BSM. As such, the Commission had no reasoned basis to conclude that the application of BSM would be just and reasonable under the circumstances.

Moreover, the record indicates that any wholesale price impacts of New York’s ESR policy would be minor and would not justify the Order’s harm to New York’s legitimate regulatory objectives. As indicated in the Complaint, New York’s ESR policy is “anticipated to elicit only short-lived price fluctuations”⁹³ because the market in New York’s mitigated capacity zones “tends to respond quickly” to small changes in supply or demand.⁹⁴ Notably, NYISO has furnished no evidence, because none exists, that any such incidental and short-term price fluctuations could constitute the exercise of any form of market power by any entity.⁹⁵

4. The Commission’s Mitigation Reach Exceeds Its Statutory Grasp

⁹¹ The February 2020 Order states 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.” Commission’s February 2020 Order at P 44.

⁹² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁹³ NYSPSC Complaint at 28.

⁹⁴ Evans Aff. at P 21.

⁹⁵ NYSPSC Complaint at 10 n.16.

The Commission’s broad decision exceeds its proper role under the FPA by intentionally frustrating state climate regulations and expenditures and forcing a skewed playing field on market participants where products compensating emissions avoidance, future system reliability, and other environmental benefits have no value, even when state property law says they do. To the contrary, the FPA explicitly reserves the authority of states to act as environmental regulators of generation. As Commissioner Glick states in his dissent:

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.⁹⁶

Without a statutory basis for its decision to value payments made by a state for environmental services at zero in calculating capacity market offers, the Commission’s decision to do so renders rates unjust and unreasonable and unduly discriminates against resources that earn revenue from selling such services.

a. The Commission’s Order Usurps States’ Role under the Federal Power Act

Under the FPA, the Commission does not set its own environmental policies. Rather, the FPA allows the Commission to recognize the actions of environmental regulators and to provide for the efficient administration of markets when accounting for their policies. Rather than facilitating efficient market operation given the choices of other regulators, the February 2020 Order frustrates the decisions of state environmental regulators by undoing their economic consequences.⁹⁷

⁹⁶ See February 2020 Order, Glick Dissent at P 10.

⁹⁷ See *supra* at Point IV.A.2.

That was not what was envisioned when grid operators created capacity markets and the Commission approved them. As the D.C. Circuit explained in upholding the Commission’s authority to create capacity markets, the markets were designed to take state regulation of generation mix as an input. Rather than forcing a particular generation mix on states, capacity markets were designed merely to ensure a reserve margin is hit so as to reduce the likelihood of future blackouts:

The “Installed Capacity Requirement” is misnamed because increasing it doesn’t actually “require” anyone to “install” any new “capacity” at all. State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission. Of course, those choices affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity.⁹⁸

By taking the extraordinary step of upending this market organization, the Commission replaces the environmental regulatory choices of state regulators to address climate change and replaces them with its own decision to ignore the costs of pollution and the benefits of avoiding it. This infringes on the states’ explicitly reserved authority to regulate generation under the Federal Power Act.⁹⁹ As explained by the Second Circuit:

While FERC’s authority extends to “rules or practices affecting wholesale rates,” this affecting jurisdiction is limited to “rules or practices that directly affect the [wholesale rate]” so that FERC’s jurisdiction does not “assum[e] near-infinite breadth.” However, “the law places beyond FERC’s power, and leaves to the States alone, the regulation of ‘any other sale’—most notably, any retail sale—of electricity. . . . The states

⁹⁸ *Connecticut Dep’t of Pub. Util. Control*, 569 F.3d at 481.

⁹⁹ See *Grand Council of the Crees v FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000); *ISO New England, Inc.*, 138 FERC ¶ 61,027, at P 91 (2012); *ISO New England, Inc.*, 155 FERC ¶ 61,023, at P 23 (2016); *PJM Interconnection LLC*, 135 FERC ¶ 61,022, at P 143; *PJM Interconnection LLC*, 137 FERC ¶ 61,145, P 3 (2011) (States and localities have their own policies and objectives, which may not be reflected in the wholesale market design and with which the Commission intends to not “unreasonably interfere”).

are thus authorized to regulate energy production, 16 U.S.C. § 824(b), and facilities used for the generation of electric energy, 16 U.S.C. § 824(b)(1).”¹⁰⁰

In holding that New York’s Zero Emissions Credit program was a valid exercise of state authority under the FPA and not pre-empted by FERC, the Court continued: “[t]o the extent the ZEC program distorts an efficient wholesale market, it does so by increasing revenues for qualifying nuclear plants, which in turn increases the supply of electricity, which in turn lowers auction clearing prices. But that is (at best) an incidental effect resulting from New York’s regulation of producers. In any event, ZECs do not guarantee a certain wholesale price that displaces the NYISO auction price.”¹⁰¹ So too, here: where the state decides to expend its revenues to pay for environmental services provided by generators, independent of their participation in the capacity market, those valuations are within the state’s authority to make.

¹⁰⁰ *Coal. for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41, 49-50 (2d Cir. 2018) citing *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 774 (2016) and *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm’n*, 461 U.S. 190, 205 (1983) (“Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.”)

¹⁰¹ *Id.* at 57. The Court also noted that “FERC itself has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction. Thus, states may “grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds,” *Cal. PUC*, 133 FERC ¶ 61,059, P 31 n.62, including when that makes clean generation “more competitive in a cost comparison with fossil-fueled generation” or “allow[s] states to affect” the price, *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995). States may “require retirement of existing generators” or construction of “environmentally-friendly units, or ... take any other action in their role as regulators of generation,” even though it may “affect[] the market clearing price.” *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009); see also *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108, 61,490 (2013) (LaFleur, Comm’r, concurring) (“[S]tates have the unquestioned right to make policy choices through the subsidization of capacity.”); *N.Y. State PSC*, 158 FERC ¶ 61,137, 2017 WL 496267, at *11 (2017) (Bay, Comm’r, concurring) (observing that “all energy resources” receive subsidies, and that “an idealized vision of markets free from the influence of public policies ... does not exist”). Similarly, FERC told the Supreme Court in *Hughes* that states are “free” to adopt such programs, “even if the price signals in the regional wholesale capacity market indicate that no [such] resources are needed.” Brief For The United States As Amicus Curiae, p. 33, *Hughes v. Talen Energy Mktg. LLC*, 136 S.Ct. 1288 (2016).

Any impact state support for ESRs may have on the NYISO ICAP is incidental at best and not within FERC's authority to nullify through mitigation.¹⁰²

Critically, the conditions that trigger mitigation of ESRs are explicitly tethered to New York's exercise of powers reserved to states in the Federal Power Act. The problem mirrors those identified in multiple Supreme Court decisions¹⁰³: FERC has determined that New York has failed to consider the wholesale market impacts of its storage policies, and FERC therefore seeks to prevent New York from realizing the full value of storage built under those policies. Such an attempt to second-guess state decisions over matters reserved to them by Congress exceeds FERC authority. That the Commission is acting using its power to regulate wholesale markets does not save it: what matters is that the Storage Order is aimed directly at subjects left for the States to regulate.

- b. *The Commission's inconsistent treatment of other revenue sources is arbitrary capricious, unduly discriminatory and reflects the Commission's improper purpose of interference with state policy*

While the Commission applies BSM to ESRs on the theory that the out-of-market subsidies that these resources receive unfairly distort the capacity market, there are a number of other revenue sources (or benefits that effectively act as revenue) that resources receive that have many common characteristics and have the same impact on capacity market bidding behavior as do out-of-market payments that the Commission considers price suppressive. For example, combined heat and power ("CHP") facilities regularly sell electricity and capacity into wholesale

¹⁰² *Id.* ("FERC 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. Accordingly, the ZEC program does not cause clear damage to federal goals," and is not preempted.).

¹⁰³ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

markets while separately selling steam heat to customers for use in industrial and other processes. A number of federal and state policies encourage the production and sale of steam heat.¹⁰⁴ Similarly, state siting laws like New York's Article X provide an expedited permitting process for all generation facilities over 25 MW.¹⁰⁵ The law acts as a revenue enhancer by allowing these resources to more quickly come to market than they might otherwise if subject to balkanized local permitting procedures.

These payments or benefits alter the outcomes of the wholesale markets by lowering the revenue resources need from the capacity markets. As a result, these resources can make lower capacity market bids than they would have without the payments and, consequently, can lower the overall market-clearing price of capacity auctions. Yet, the existence of these non-market payments has never been raised as an existential threat to capacity markets. On the contrary, over the years, capacity markets have co-existed with many different market payments and subsidies, both corrective and distortive, without leading to concern or action regarding market distortion. The inconsistent treatment of these other revenue sources is arbitrary and capricious, unduly discriminatory, and amounts to improper influence with New York's policy decisions.

B. The February 2020 Order's Application of Buyer-Side Mitigation to ESRs is Unlawful Because it Lacks a Reasoned Basis

1. The Purpose of Buyer-Side Mitigation is to Prevent Buyers from Exercising Market Power to Suppress Capacity Prices

Until recently, the Commission's application of BSM has been narrowly and appropriately focused on preventing buyers from exercising market power to lower the capacity

¹⁰⁴ See U.S. Env'tl. Protect. Agency, Combined Heat and Power Partnership, dCHPP (CHP Policies and Incentives Database), <https://www.epa.gov/chp/dchpp-chp-policies-and-incentives-database/>.

¹⁰⁵ See 16 NYCRR Part 338.

market clearing price.¹⁰⁶ In other words, BSM was intended to address scenarios in which “buyers or their agents can exercise market power to reduce capacity market prices below competitive levels by paying out-of-market subsidies to support new capacity, and then offer that capacity into the organized capacity market at prices below costs to drive down the market price.”¹⁰⁷ Thus, the Commission limited its application of mitigation to those resources that had both the incentive *and* the ability to depress capacity market clearing prices.¹⁰⁸ This limitation is consistent with the FPA’s cooperative federalism structure and the Commission’s primary role as a regulator of market power.¹⁰⁹

Here, NYISO’s current BSM rules provide that, unless exempted, new capacity resources must enter the mitigated capacity zones, which include New York City and Zone G-J,¹¹⁰ 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.¹¹¹ A new entrant is exempt from this offer floor if NYISO determines that it passes either Part A or Part B of its mitigation exemption test.¹¹² Under Part A,

¹⁰⁶ See, e.g., *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 104 (Dec. 22, 2006) (“The Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply.”); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 106 (Mar. 7, 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.”).

¹⁰⁷ FERC, Order Granting Complaint in Part and Denying in Part, at P 34, Docket No. EL 16-92-000 (Feb. 3, 2017).

¹⁰⁸ See, e.g., *PJM Interconnection, LLC*, 117 FERC ¶ 61,331, at PP 34, 103–104 (Dec. 22, 2006).

¹⁰⁹ See, e.g., *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 constraining exercises of market power . . .”).

¹¹⁰ Under NYISO’s Installed Capacity market rules, mitigation measures are applied in Zone J (New York City) and Zones G-I (the Lower Hudson Valley). See NYISO Market Administration and Control Area Services Tariff § 2.12 Definitions – L (Feb. 27, 2020).

¹¹¹ *Id.* § 23.4.5.7 Buyer-Side Market Power Mitigation Measures for Installed Capacity.

¹¹² *Id.* § 23.4.5.7.2.

NYISO will exempt a new resource from BSM if its capacity price forecast for the first year is higher than the default offer floor, which is 75% of the net cost of new entry (“CONE”) of the hypothetical unit used in NYISO’s most recent demand curve reset. Under Part B, NYISO will exempt a new resource from BSM if the average price forecast for the next three years is higher than the net CONE of the new resource. As discussed below, these exemptions are inadequate because they do not allow for an exemption for ESRs on the basis of their lack of market power.

2. The Order Lacks a Reasoned Basis Because ESRs Do Not Have the Incentive or the Ability to Suppress Prices and Therefore Lack Market Power

In this instance, the Commission should approve the exemptions requested in the Complaint because ESRs have neither the incentive nor the ability to suppress capacity market clearing prices and thus lack market power, which is the basis for the Commission’s authority to approve mitigation. These resources are not being acquired to suppress capacity market prices, and their procurement will occur at levels and prices completely removed from what happens in NYISO’s Installed Capacity (“ICAP”) market. There is no individual load serving entity paying “out of market” prices to these resources in order to benefit from the price drop for its remaining load, and there is no proof in the record to the contrary. In addition, given that ESRs do not have load, they have no incentive to lower capacity market prices. Instead, ESRs will be procured to satisfy New York’s need for new, advanced technology resources with valuable reliability, energy and environmental attributes to satisfy the goals and requirements of the state’s enacted consumer energy and environmental protection laws.

In addition to the lack of incentive to suppress capacity prices, ESRs also lack the ability to do so. First, as a general matter, the Commission has observed that renewable resources are

unlikely tools of market manipulation because of their small capacity value.¹¹³ Like renewable resources, ESRs tend to be of significantly smaller scale than fossil fuel-fired resources. It would therefore be very difficult for a net-buyer to lower its overall costs by bidding new ESRs into an auction at artificially low prices.

Second, the Commission has previously held that units with limited capacity credit “have limited or no incentive and ability to exercise buyer-side market power. . . .”¹¹⁴ ESRs, which are already significantly time-limited, will not be assigned their full capacity value. For example, in its market participation aggregation model that was recently adopted by the Commission,¹¹⁵ the NYISO assigned initial values of 90% installed capacity value for four-hour storage resources, and 45% for two-hour resources, dropping to 75% for four-hour resources and 37.5% for two-hour resources after the first 1,000 MW have been installed.¹¹⁶ There also will be additional derating factors applied to these resources based on their actual availability during qualifying periods. Depending on which type of resources enter and the derating factors applied to them, the total quantity entering in the mitigated zones could be well under 1,500 MW. The comparatively small capacity value for ESRs capacity severely limits their ability to compete in the wholesale market. Independent Power Producers of New York (“PPNY”) admits as much, stating that the impending retirement of 3,500 MW of peaking facilities in New York City and Long Island by

¹¹³ *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 33 (citing *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 36 (2015); see also *PJM Interconnection, LLC*, 135 FERC ¶ 61,022, at P 153 (2011) (noting that “wind and solar resources would need to offer as much as eight times the [] capacity [of other resources] in order to achieve the same price suppression effect”).

¹¹⁴ *New York Pub. Serv. Commn., et al.*, 54 FERC ¶ 61,088, at P 31 (Feb. 5, 2016).

¹¹⁵ See NYISO, Proposed Tariff Revisions Regarding Establishment of Participation Model for Aggregations of Resources, Including Distributed Energy Resources, and Proposed Effective Dates, at 8, Docket No. ER19-2276-000 (June 27, 2019).

¹¹⁶ *New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,033 (Jan. 23, 2020).

2025 will lead to significant system duration needs of up to 15 hours that “*ESRs alone indisputably cannot satisfy . . .*”¹¹⁷

Third, the evidence in the record demonstrates that the impact on ICAP market prices from ESRs is likely to be minimal if felt at all. First, of the 3,000 of MWs of energy storage resources contemplated in the Order, only some are likely to be in the zones currently subject to mitigation – New York City and the Lower Hudson Valley. The New York State Energy Storage Roadmap and Department of Public Service / New York State Energy Research and Development Authority Staff Recommendations (“Storage Roadmap”) postulated that out of 2,800 MW of Energy Storage Resources to be deployed by 2030, 1,111 MW will be in New York City and 388 MW will be in the Lower Hudson Valley, resulting in 1,499 MW in the mitigated zones, which is essentially half of the total supply to be procured over the next decade.¹¹⁸ IPPNY’s argument that ESRs will so depress the market clearing price that it will be insufficient to support the entry of “the very resources needed to fill the gap the ESRs will leave unaddressed” makes no sense: given that non-ESR resources are clearly needed to reach capacity needs, those resources will likely set the clearing price.¹¹⁹

Fourth, other New York state standards and market influences also will affect ICAP prices. According to NYISO analysis,¹²⁰ the DEC’s peaking unit rule¹²¹ could affect as much as

¹¹⁷ Protest of IPPNY, at 28–29, Docket No. EL19-86-000 (Aug. 19, 2019) (emphasis added) (“IPPNY Protest”).

¹¹⁸ Storage Roadmap, at pdf page 164 (2018), <https://www.ethree.com/wp-content/uploads/2018/06/NYS-Energy-Storage-Roadmap-6.21.2018.pdf>.

¹¹⁹ IPPNY Protest at 29.

¹²⁰ NYISO, *2019-2028 CRP: Peaker Scenario* (Mar. 19, 2019), https://www.nyiso.com/documents/20142/5552484/2018CRP_NYISO_PeakerScenario_pptMarc_h19ESPWG.pdf/871cdd4d-963a-4a81-38f6-f60a063b1d21.

¹²¹ N.Y. State Dept. of Env’tl. Conservation, *Adopted Subpart 227-3, Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines* (Jan. 16, 2020), <https://www.dec.ny.gov/regulations/116131.html>.

840 MW of generation in the New York City zone by 2024 and another 580 MW of generation in 2025 and beyond. Some peaker plant generation is likely to retire rather than make the investments necessary to comply with the rule. For illustration, the Ravenswood plant in New York City filed a petition with the NYSPSC to deploy 316 MW of storage and remove a corresponding amount of peaking capacity.¹²²

3. The Order Lacks a Reasoned Basis Because It Does Not Allow for ESRs to Bid Based on their True Costs

The Order also lacks a reasoned basis because it bars ESRs from bidding based on their true costs. As Commissioner Glick noted,

[W]idespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit . . . A capacity construct that ignores . . . 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.¹²³

Thus, in order to enable markets to function efficiently, a resource's true costs should account for costs net of any receipts from any source, including non-FERC jurisdictional activities. The Order's imposition of BSM on ESRs lacks a reasoned basis to depart from this approach and to obscure the actual costs of ESR deployment in New York.

4. The Order Lacks a Coherent Theory of Harm or Substantial Evidence to Support its Extraordinary Reordering of Market Outcomes

Although, as demonstrated above, ESRs have neither the intent nor the ability to influence capacity market prices, the Commission is no longer requiring a resource to have market power or an incentive to depress capacity market prices and simply requires that such

¹²² NYSPSC, *Petition for Order Granting Certificate of Public Convenience and Necessity and Establishing Lightened Regulatory Regime*, Case No. 19-E-0122, In the Matter of Ravenwood Development LLC (Feb. 21, 2019).

¹²³ Commission's February 2020 Order (Glick, Comm'r, dissenting at P 13).

resource receive an out-of-market payment to be subject to BSM before subjecting it to buyer-side mitigation, stating that mitigation of ESRs “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.”¹²⁴ Like its December 19 order applying mitigation in the PJM capacity market, the Commission fails to explain how those market outcomes correspond to harm to customers.¹²⁵ Instead, the Commission asserts that its role is to “ensure that wholesale rates are just and reasonable” when state policies “allow uneconomic entry in the capacity market”¹²⁶ Like its previous order, FERC again fails to define key terms, such as “uneconomic entry” or “out-of-market support” or to lay a clear theoretical path linking either its theory to consumer harm or how this theory applies to the specifics of applying BSM to storage resources. Nor does the Commission provide any – much less substantial – evidence required under the FPA to support its theory or its analysis.

This approach is wholly unrooted in the FPA or in prior precedent and as such lacks a reasoned basis. The FPA charges the Commission with ensuring rates that are “just and reasonable” and “not unduly discriminatory or preferential.”¹²⁷ It does not charge the Commission with safeguarding competitiveness or other abstract notions of market functioning divorced from the resulting rates. Thus, courts have upheld the Commission’s use of market-based forces *because* the Commission connected the use of markets to the outcome that matters:

¹²⁴ Commission’s February 2020 Order at P 37 (“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.”).

¹²⁵ See *Calpine Corp., et al. v. PJM Interconnection, LLC*, 169 FERC ¶ 61,239 (Dec. 19, 2019).

¹²⁶ Commission’s February 2020 Order at P 37.

¹²⁷ 16 U.S.C. §§ 824d (a)-(b).

rates.¹²⁸ By refusing to articulate how certain policies more or less directly affect the efficiency of the market or its ability to ensure reliability at lowest cost, the Commission is advancing “competition” in name without accountability to its statutory north star: an actual impact on rates.

Consequently, BSM rules that were intended to prevent the exercise of market power have now morphed into a scheme to prop up prices, protect incumbent fossil-fuel generators, and impede state clean energy policies.¹²⁹ In sum, the Order errs because it fails to examine the actual market impacts (or lack thereof) of the state policies at issue and instead takes a highly formalistic approach that abandons the Commission’s duty to examine economic realities. Such a course change by the Commission without a reasoned basis for doing so is arbitrary and capricious.

C. The February 2020 Order Fails to Comply with the Commission’s Statutory Duty to Protect Consumers Against Excessive Prices

The Commission’s core purpose under sections 201 and 206 of the Federal Power Act is to protect the public interest and ensure “just and reasonable rates” that protect customers against

¹²⁸ See e.g., *Blumenthal v. FERC.*, 552 F.3d 875, 882–83 (D.C. Cir. 2009) (listing cases holding that FERC shirks its statutory mandate where it “resorts to largely undocumented reliance on market forces as the principal means of rate regulation.”) (internal quotation omitted); *Env’tl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991) (“Competition is valued not for its own sake but because it is most likely to maximize the satisfaction of consumer wants.”); see also *California ex rel. Lockyer v. FERC.*, 383 F.3d 1006, 1012–13 (9th Cir. 2004) (“The principle justifying this approach as ‘just and reasonable’ was that ‘[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment.’”), *review granted, cause remanded sub nom. California ex rel. Harris v. FERC.*, 784 F.3d 1267 (9th Cir. 2015).

¹²⁹ *Calpine Corp., et al. v. PJM Interconnection, LLC*, 169 FERC ¶ 61,239 (Dec. 19, 2019) (Glick, Comm’r, dissenting at P 4).

excessive prices.¹³⁰ Yet the February 2020 Order ignores entirely the increase in costs to consumers and lost system reliability benefits that will come from mitigation of ESRs. Rather than fulfill its statutory obligation to consider and weigh the costs of the mitigation it is imposing against potential benefits to the consumer, the Commission would shift blame for the costs of its actions on the State’s decision to pursue legitimate policy goals within its authority under the Federal Power Act. The Commission’s failure to analyze the increased costs of mitigation for ratepayers or acknowledge the important system reliability benefits at stake, much less balance those costs and lost benefits against the perceived interests of generators is inconsistent with the Federal Power Act, court precedent, and its own decisions.

1. The Commission Has a Statutory Duty to Protect NYISO Ratepayers from Overpaying for Capacity

“It is long-established that the ‘primary aim [of the Federal Power Act] is the protection of consumers from excessive rates and charges.’”¹³¹ Ensuring a “competitive” marketplace is one

¹³⁰ *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) (“That the purpose of the power given the Commission by [section] 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in [section] 201 of the Act that the scheme of regulation imposed ‘is necessary in the public interest.’”); *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (“A major purpose of the whole Act is to protect power consumers against excessive prices.”); *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm’n*, 558 U.S. 165, 174 (2010) (“[T]he public interest standard is not . . . a standard independent of, and sometimes at odds with, the ‘just and reasonable’ standard, . . . rather, the public interest standard defines ‘what it means for a rate to satisfy the just-and-reasonable standard’” (citations omitted)); *NextEra Energy, Inc., et al., v. Pac. Gas and Elec. Co. Exelon Corp., et al.*, 167 FERC ¶ 61,096, at P 12 (May 1, 2019); *Duke Energy Carolinas, et al., LLC*, 156 FERC ¶ 61,201, at P 36 (Sept. 22, 2016).

¹³¹ *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952–53 (D.C. Cir. 2016) (quoting *Mun. Light Bds. of Reading & Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972)); *FERC v. EPSA*, 136 S. Ct. 760, 781 (2016) (citing *Penn. Water & Power Co. v. FPC*, 343 U.S. 414, 418); *Atl. Ref. Co. v. Public Svc. Comm’n of NY*, 360 U.S. 378, 388 (1959) (FPA charges Commission with providing consumers a “complete, permanent, and effective bond of protection from excessive rates and charges”).

means to this end, but not an end in itself.¹³² Accordingly, the Commission and federal appellate courts have long held that ensuring just and reasonable rates entails balancing investor and customer interests, and that the Commission has a duty to engage in this balancing when setting rates.¹³³ Specifically, in the context of capacity markets, the Commission must consider the impact of rate design choices on customers *and* the effect of price signals on entry and exit of capacity resources.¹³⁴ Rates must avoid establishing artificial price signals that discourage new entry or delay necessary exit from the market.¹³⁵ “[T]he Commission must strike a balance between, on one hand, setting a price that will retain enough existing resources to maintain reliability and, on the other hand, protecting consumers from overpaying for that capacity....”¹³⁶

¹³² See *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991) (“Competition is valued not for its own sake but because it is most likely to maximize the satisfaction of consumer wants.”).

¹³³ See e.g., *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262–63 (D.C. Cir. 2007) (per curiam) (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, (1944)); *New England Power Generators Ass’n, Inc.*, 146 FERC ¶ 61,039, at P 52 (Jan. 24, 2014); *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211, at P 103 (Mar. 7, 2008) (“The courts have long held that establishing just and reasonable rates involves a balancing of consumer and investor interests.”).

¹³⁴ See e.g., *New York Indep. System Operator, Inc.*, 122 FERC ¶ 61,064, at P 54 (Jan. 29, 2008), *order on reh’g*, 125 FERC ¶ 61,299 (Dec. 18, 2008) (rejecting use of updated demand curve factors that “do not recognize the need to balance the impact on consumers with the need to provide correct price signals for new generation entry.”). Rates must avoid establishing artificial price signals that discourage new entry or delay necessary exit from the market. *New York Indep. System Operator, Inc.*, 143 FERC ¶ 61,217, at P 77 (June 6, 2013) (mitigation rules must “appropriately balance the need for mitigation of buyer-side market power against the risk of over-mitigation.”); *New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 154 FERC ¶ 61,088, at P 31 (Feb. 5, 2016); *Consolidated Edison Co. of New York v. New York Independent System Operator, Inc.*, 150 FERC ¶ 61,139, at P 5 (Feb. 26, 2015).

¹³⁵ *New York Indep. System Operator, Inc.*, 143 FERC ¶ 61,217, at P 77 (2013) (mitigation rules must “appropriately balance the need for mitigation of buyer-side market power against the risk of over-mitigation”); *New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 154 FERC ¶ 61,088, at P 31; *Consolidated Edison Co. of New York v. New York Independent System Operator, Inc.*, 150 FERC ¶ 61,139, at P 5 (2015).

¹³⁶ See *New England Power Generators Ass’n, Inc.*, 146 FERC ¶ 61,039, at P 52 (Jan. 24, 2014).

A rate that does not account for, and justify, increased costs to consumers is not “just and reasonable” and is inconsistent with the Commission’s duties under the Federal Power Act.

2. The Order will Over-Mitigate the NYISO Capacity Market, Causing Needless Cost Increases and Reduced Reliability for Ratepayers

The evidence in this case only flows in one direction: against mitigation. As discussed *supra*, the extensive record in this matter establishes that ESR programs have no incentive or ability to suppress capacity market prices.¹³⁷ Further, system reliability has been upheld as an important factor in ratemaking,¹³⁸ and in this instance, there is considerable evidence that reliability of the NYISO system requires increasing the number of ESRs, as storage resources are particularly integral to NYISO system reliability because they address the variability and intermittency of renewable resources, relieve constrained areas on the transmission system, and shave peak load.¹³⁹

The February 2020 Order is unlawful because it implements an unjust and unreasonable rate that will result in over-mitigation. Several parties explained how the Order would result in over-mitigation,¹⁴⁰ but the Commission failed to even acknowledge these arguments, much less

¹³⁷ See *supra* at Point IV.B.2.

¹³⁸ *Advanced Energy Management Alliance v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017).

¹³⁹ Evans Aff. at P 5.

¹⁴⁰ See *e.g.*, Comments of Clean Energy Parties, at 13–14, Docket No. EL19-86-000 (Aug. 19, 2019) (“Clean Energy Parties Comments”); Key Capture Energy, LLC, Comments in Support of Complaint, Attach. A, Aff. of Rob Gramlich in Support of Comments by Key Capture Energy, LLC, at PP 5–6 (Aug. 19, 2019) (“Gramlich Aff.”).

analyze whether it had struck the appropriate balance between over-mitigation and under-mitigation.¹⁴¹

The imposition of BSM on storage resources in NYISO constitutes over-mitigation. As Commissioner Glick stated in his dissent, “To the extent that buyer-side market power mitigation rules apply to buyers without market power, they are per se unjust and unreasonable.” Here, as discussed *supra*, ESRs have not been demonstrated to have market power, thus rendering the imposition of BSM (which itself distorts market incentives) harmful over-mitigation.¹⁴²

Although estimates of the precise magnitude may differ, it is undisputed that mitigation of ESRs has the purpose of and will in fact increase capacity costs and thus the rates paid by customers.¹⁴³ While hyperbolic in its projected demise of the capacity market, even IPPNY’s unsupported cost estimations it claims predict its doom should BSM *not* be applied to ESR also are an admission that consumer rates will be significantly higher if BSM *is* applied.¹⁴⁴ Publicly available expert analysis by Grid Strategies, an independent expert firm, concluded that applying the BSM policy to battery storage alone could cost consumers over \$332 million per year starting in 2025 and over \$664 million in 2030.¹⁴⁵

¹⁴¹ *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 43.

¹⁴² *See supra* at Point IV.B.2; *See also* Gramlich Aff. at P 10 (“[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.”).

¹⁴³ *See e.g.*, Gramlich Aff. at PP 6–7.

¹⁴⁴ IPPNY Protest at 36–37.

¹⁴⁵ *See* Grid Strategies, LLC, *Too Much of the Wrong Thing: The Need for Capacity Market Replacement or Reform* (Nov. 2019), <https://gridprogress.files.wordpress.com/2019/11/too-much-of-the-wrong-thing-the-need-for-capacity-market-replacement-or-reform.pdf> (Cost estimates of this report were also cited in U.S. Senator Charles E. Schumer et al. submits letter regarding potential policy shift at the Federal Energy Regulatory Commission under EL16-49 et al., at 1, Docket Nos. EL16-49, EL18-178 (Aug. 29, 2019)).

Whatever the amount, the increased cost of BSM is by design; its very purpose is to raise capacity market offers of certain resources, thereby increasing the overall clearing price, which has the effect of making all capacity more expensive. Additionally, because ESRs are a new technology and therefore still relatively expensive, applying BSM means that most of these resources will not clear the market auction, and will not count against the IRM requirements.¹⁴⁶ As a result, consumers will have to pay for the procurement of redundant capacity, which is highly likely to result in propping up the types of fossil fuel plants the State is trying to retire.¹⁴⁷ As explained by Commissioner Glick in his dissent:

[T]he 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 customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.¹⁴⁸

Critically, the costs incurred by the combination of increased market-clearing prices and the purchase of redundant capacity will eventually be paid by ratepayers.

Such an increase is only “just and reasonable” if the Commission can explain why it is not an overpayment or windfall—that consumers are getting what they are paying hundreds of millions of additional dollars for. Specifically, if the Commission believes that this increase is necessary to retain sufficient existing resources to maintain resource adequacy, it must explain why *that level* of increased rates is required to meet that goal, especially where, as is the case here, the resource it targets for mitigation is one focused on enhancing resource adequacy.¹⁴⁹

3. The Commission Ignored these Costs in Violation of its Statutory Duty to Protect Ratepayers from Overpaying for Capacity

¹⁴⁶ *Id.*; see also Evans Aff. at PP 6–7.

¹⁴⁷ See e.g., Evans Aff. at PP 8–9.

¹⁴⁸ Commission’s February 2020 Order at P 12 (emphasis in original); See also Clean Energy Parties Comments at 16–17.

¹⁴⁹ *New England Power Generators Ass’n, Inc.*, 146 FERC ¶ 61,039, at P 52 (Jan. 24, 2014).

The Commission’s February 2020 Order provides no such explanation. Not only does the Commission decline to offer its own estimate as to how much ESR mitigation will increase consumer rates, or to acknowledge (much less evaluate) how these costs weigh against the mitigation policy the Commission has chosen to adopt, its implicit finding that such (unknown) costs are justified is not supported by substantial evidence. As discussed *supra*, the record is devoid of any evidence that capacity market prices are, or may soon be, suppressed to a degree that the market no longer sends price signals that attract new entrants and retain economic existing resources as needed to ensure resource adequacy.¹⁵⁰ The purpose of the capacity market is not simply to provide revenue for generators, it is to provide the level of revenue needed to attract the resources needed to ensure resource adequacy. The Commission points to no evidence that the price increases its Order will engender are necessary to ensure resource adequacy. This absence of both factual findings and policy reasoning render the Order arbitrary, capricious, and contrary to law.

The February 2020 Order’s discussion mentions the effects of mitigation on consumers only once.¹⁵¹ The Commission does not dispute that the mitigation of ESR could require ratepayers to pay twice for capacity, but contends (wrongfully, as explained *infra* at Point IV.C.4) that this outcome has court approval.¹⁵² Having implicitly accepted this conclusion, however, the Commission does not attempt to quantify or estimate the total increased capacity

¹⁵⁰ See *supra* at Point IV.B.2. As pointed out by the NYSPSC, “[i]t is notable that, notwithstanding the entry of renewables and other resources that further State policy objectives, the NYISO’s latest analyses have shown no reliability needs over a ten-year horizon.” Motion for Leave to Answer and Answer of the New York State Public Service Commission and the New York State Energy Research and Development Authority, at 11, Docket No. EL19-86-000 (Oct. 1, 2019) (“NYSPSC Answer”).

¹⁵¹ See Commission’s February 2020 Order at P 42.

¹⁵² *Id.*, citing *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014) (“*NJBPU*”).

costs of its February 2020 Order or the likely increase in market-clearing prices, or to examine the expert evidence as to these increases submitted to it. The Commission does not acknowledge, much less attempt to balance, the increased consumer costs and loss of system benefits against the purported benefits to investors.

The Commission’s neglect of this analysis is even more striking in light of its earlier admonition to NYISO, in its February 3, 2017 Special Case Resources (“SCR”) Order, that the “Commission seeks to ensure that buyer-side market power mitigation rules strike a careful balance between over-mitigating and under-mitigating new capacity resources.”¹⁵³ This failure to account for customer costs is a dereliction of the Commission’s duty.¹⁵⁴ The Commission’s decision that applying BSM to ESR is just and reasonable thus “[c]annot be sustained in light of [its] failure to make findings as to the impact [the revised rate] would actually have on ultimate consumers.”¹⁵⁵ This failure to address the effects of mitigating ESR on ratepayers is by itself a basis for rehearing.¹⁵⁶

Finally, we note that the Commission cannot use the theoretical ability of ESRs to utilize NYISO’s competitive entry or self-supply exemptions as a means to avoid hard questions about whether its rates are just and reasonable.¹⁵⁷ In 2013, the Commission rejected arguments that the availability of the Fixed Resource Requirement (“FRR”) in PJM obviated the need for a self-supply exemption, noting that “[a]t issue here, however, is not the adequacy, or inadequacy, of

¹⁵³ Order Granting Complaint in Part and Denying in Part, 158 FERC ¶ 61,137, at P 34 (Feb. 3, 2017) (“SCR Order”).

¹⁵⁴ See *TransCanada Power Mktg., Ltd. v. FERC*, 811 F.3d 1, 11-13 (D.C. Cir. 2015); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984); *State of N.C. v. FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Commission’s February 2020 Order at P 38.

the FRR option for vertically-integrated utilities. Rather, the issue is whether PJM’s proposed Tariff changes are just and reasonable.”¹⁵⁸ The Commission has not explained why it now believes it can dodge the question of whether its rate is just and reasonable by pointing to a way for certain affected generators to potentially avoid the consequences of it.

4. The Commission’s Reliance on the Third Circuit’s Opinion in *NJBPU* to Deflect Responsibility for these Increased Costs is Misplaced

Rather than weigh these increased costs to customers against the purported investor benefits of the BSM, as it is statutorily required to do, the Commission deflects responsibility to the state, arguing that while the possible exclusion of ESRs from the capacity 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” because “double-payment is a risk that states are free to take when crafting legislation.”¹⁵⁹ Any increase in consumer prices, the Commission suggests, are simply the consequence of states’ policy decisions, and thus it is “‘appropriate[.]’” that states “‘bear the costs of [those] decision[s]’” by “‘having to pay twice for capacity.’”¹⁶⁰

The Commission’s “Pay to Play” jurisdictional scheme finds no support either in the Federal Power Act or in the Third Circuit’s decision in *NJBPU*, on which the Commission purports to rely.¹⁶¹ Simply insisting that states must bear the costs of its own policy preferences

¹⁵⁸ See *PJM Interconnection, LLC*, 143 FERC ¶ 61,090, at P 108 (May 2, 2013), vacated in part on other grounds by *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017).

¹⁵⁹ Commission’s February 2020 Order at P 42.

¹⁶⁰ *Id.* (quoting *NJBPU v. FERC*, 744 F.3d 74 (3d Cir. 2014)).

¹⁶¹ *NJBPU*, 744 F.3d at 97.

does not address the Commission's core responsibility to consider and weigh these increased costs before imposing them.

Moreover, the Commission's reliance on *NJBPU* as having "directly addressed" the issue of increased prices under a minimum offer price rule ("MOPR") that includes *all* subsidized resources is misplaced. In *NJBPU*, the Third Circuit found that the Commission did not exceed its jurisdiction under the FPA by ordering the application of mitigation requirements to new resources that had contracts with states whereby the resource was required to participate in the PJM market but guaranteed to be paid (by the state) for the difference "between the contract price and the amount they were able to receive from the auction" on the back-end of the auction.¹⁶² New Jersey objected to such mitigation on the grounds that it would "prevent[] New Jersey from using the resources it has chosen to promote."¹⁶³ The Court responded that states were still free to use any resource they chose, they would just have to buy capacity from resources subject to mitigation that did not clear the PJM capacity market *in addition to* their capacity requirements, *i.e.*, "pay twice for capacity."¹⁶⁴

But the Third Circuit's conclusion that the Commission *has jurisdiction* to order mitigation that will have the effect of forcing states to pay for contracted-for capacity outside the capacity market does not eliminate the Commission's obligation to protect consumers from excessive rates when *exercising* that jurisdiction. In other words, while *NJBPU* held that FERC does not exceed its jurisdiction by imposing a tariff that requires a state to pay twice for capacity, it did not hold that doing so necessarily results in just and reasonable rates. The Commission must still fulfill its statutory duty to consider whether the enormous additional costs associated

¹⁶² *Id.* at 87–88.

¹⁶³ *Id.* at 97.

¹⁶⁴ *Id.*

with applying BSM to this particular resource category are necessary to incent sufficient entry into the capacity market. That states may have chosen to compensate certain generators for avoiding emissions and increasing grid stability does not absolve the Commission of its responsibility for addressing the increased costs to *all* NYISO ratepayers of its decision to exclude state-supported resources from the market. *NJBPU*, which addresses *whether* the Commission may impose those costs consistent with the limits on its jurisdiction, does not hold otherwise. Nor does *NJBPU*'s holding that the Commission may prevent states from using the capacity market as a means of fulfilling their back-end contractual capacity obligations allow the Commission to ignore the effects of its price manipulation on customers *throughout* NYISO who benefit from states' front-end subsidies to encourage environmentally responsible generation. It is the Commission's choices, not the states', that will make capacity more expensive to ratepayers through the application of BSM.

But the Commission's February 2020 Order does not reckon with, let alone justify this choice. The Commission's February 2020 Order completely fails to explain why the Commission's desire "to protect capacity market prices from price suppression" outweighs a dramatic increase in consumer costs.¹⁶⁵ Nowhere in the record is there evidence that rates with unmitigated storage would be inadequate to ensure continued resource adequacy.¹⁶⁶ Conversely, the Commission explicitly acknowledges that NYISO does not claim that the capacity market's ability to provide resource adequacy is threatened by the potential price-suppressive effects of

¹⁶⁵ Commission's February 2020 Order at P 44.

¹⁶⁶ *See also* NYSPSC Answer at 11 ("It is notable that, notwithstanding the entry of renewables and other resources that further State policy objectives, the NYISO's latest analyses have shown no reliability needs over a ten-year horizon.").

subsidized ESRs entering the capacity market.¹⁶⁷ However, the Commission breathtakingly describes this lack of support for the theoretical underpinnings at the heart of its intervention as “extraneous.”¹⁶⁸ In the absence of evidence proving its theory of harm, the Commission would require the state to prove evidence of its absence.¹⁶⁹ This abdication of the Commission’s core statutory duty of consumer protection cannot be blamed on states exercising their authority under the FPA to control their internal generation mix, especially when the purported legal analysis for that deflection rests on the misapplication of a single case.

The Commission’s repeated emphasis of the need to “protect capacity market prices from price suppression” in order to “the capacity market can operate as designed,” and total silence on the corresponding impacts on consumers and the public prioritizes prices for market competitors over its responsibility to ensure that the rates are just, reasonable, and in the public interest.¹⁷⁰ Courts overseeing the Commission’s role pursuant to 16 U.S.C. § 824 have been clear that “competition” is not valued “for its own sake,” but “because it is most likely to maximize the satisfaction of consumer wants.”¹⁷¹ Accordingly, the Commission “misconceives” its purpose

¹⁶⁷ Commission’s February 2020 Order at P 43. In fact, if anything, NYISO has too much capacity. The North American Reliability Electric Corporation (NERC) has estimated that the NYISO region will have over 2,400 MW in excess capacity by 2023. *See* NERC 2018 Summer Reliability Assessment, available publicly at https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2018_12_202018.pdf.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at P 37 (“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.”).

¹⁷⁰ *Id.* at 43.

¹⁷¹ *El Paso Elec. Co. v. Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,182, 61,939 n.41 (Aug. 1, 1994) (explaining that the role of the “Commission is to protect competition in the bulk power markets, not individual competitors in those markets”) (citing *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991)); *Questar Pipeline Co.*, 142 FERC ¶ 61,127, at P 17 (Feb. 21, 2013).

when it looks to the interests of competitors rather than consumers.¹⁷² As the Commission recently stated when rejecting implementation of mitigation in MISO, “low prices, in and of themselves, do not demonstrate that a market is not just and reasonable.”¹⁷³ But that is exactly what the Commission has inappropriately assumed here.

The Commission’s extremely thin justification for denying the Complaint makes no mention of these critical elements of the public interest at stake in its decision. By ignoring the costs of mitigating ESRs along with its commensurate benefits to system reliability, the Commission has ordered a rate that is neither just nor reasonable. It has done so, moreover, in an arbitrary and capricious manner, without any findings – much less substantial evidence – estimating or weighing the magnitude of these costs against the putative benefits the BSM is intended to provide.¹⁷⁴ For this reason, the Commission must reconsider, and should reverse, its February 2020 Order.

D. The February 2020 Order is Unlawful Because it Fails to Comply with Order No. 841

The Commission’s Order No. 841, issued on February 15, 2018, found that “existing RTO/ISO market rules are unjust and unreasonable in light of barriers that they present to the participation of electric storage resources in the RTO/ISO markets, thereby reducing competition and failing to ensure just and reasonable rates.”¹⁷⁵

Such barriers, the Commission found, “inhibit[] developers’ incentives to design their electric storage resources to provide all capacity, energy, and ancillary services that these

¹⁷² *Env’tl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991).

¹⁷³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229, at P 110 (Nov. 20, 2015).

¹⁷⁴ *See Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 43 (finding agency action arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem”).

¹⁷⁵ Order No. 841 at P 19.

resources could otherwise provide.”¹⁷⁶ Notably, barriers to ESR participation impair progress towards improved bulk power system resilience because ESRs’ potential to both receive and inject energy is not fully integrated into the grid.¹⁷⁷ As a result, the Commission ordered “each RTO/ISO to revise its tariffs to remove barriers to the participation of electric storage resources in the RTO/ISO markets.”¹⁷⁸ The Commission specifically noted that “market rules designed for traditional resources can create barriers to entry for emerging technologies.”¹⁷⁹

Subjecting ESRs to NYISO’s BSM rules violates Order No. 841 because it would erect a significant barrier to the participation of ESRs to their fullest technical capabilities. New York’s Energy Storage Order contains a carefully planned out a regulatory program to facilitate ESR deployment in targeted areas in order to meet State decarbonization, environmental, and public health goals.¹⁸⁰ This program of support is a critical part of meeting the State’s goals of 70% renewable energy by 2030.¹⁸¹

Applying BSM to ESRs in NYISO would prevent ESRs from clearing in a capacity auction and would thereby nullify the regulatory program outlined in the Energy Storage Order, throwing the planning of both the State and of private developers into disarray, and rendering substantial numbers of projects unviable.¹⁸² It is simply nonsensical for the Commission to argue that a measure that effectively prevents ESRs from participating in those sections of the capacity

¹⁷⁶ *Id.* at P 20.

¹⁷⁷ *Id.* at P 2.

¹⁷⁸ *Id.* at P 20.

¹⁷⁹ *Id.* at P 10.

¹⁸⁰ *See supra* at Point III.B

¹⁸¹ *Id.*

¹⁸² *Evans Aff.* at PP 18–19.

market where they are most needed “is not inconsistent” with its order to “reduce or eliminate barriers to electric storage participation in [RTO] markets.”¹⁸³

As a result of such a barrier, ESRs would be prevented not only from contributing capacity that they would otherwise be able to contribute to the NYISO wholesale market, but also from contributing the other types of technical services ESRs can provide, such as resiliency and frequency regulation.¹⁸⁴ This effect would be in direct contradiction of Order 841’s mandate to maximize the ability of storage to contribute to its fullest technical capability.¹⁸⁵ Even worse, NYISO’s proposed BSM measures are targeted to hit ESRs in precisely the geographic area (New York City and its environs)¹⁸⁶ where New York has determined ESRs will have the broadest range of potential contributions due to the congested nature of local distribution grid.¹⁸⁷

Imposing such a significant barrier to ESRs in New York is inconsistent with Order No. 841, which, having found such barriers unjust and unreasonable, orders RTOs and ISOs to dismantle them.¹⁸⁸ Accordingly, NYISO is out of compliance with Order No. 841, and should be ordered to implement the relief requested in the Complaint as part of its compliance plan.

V. Conclusion

For the foregoing reasons, the Clean Energy Parties respectfully request rehearing and reversal of the Commission’s determination in its February 2020 Order to deny the relief requested in the Complaint.

Respectfully submitted,

/s/ Devin McDougall
Staff Attorney

¹⁸³ Order No. 841 at P 40.

¹⁸⁴ NYSPSC Complaint at 35.

¹⁸⁵ Order No. 841 at P 20.

¹⁸⁶ *See supra* at Point III.B.

¹⁸⁷ Evans Aff. at P 18.

¹⁸⁸ Order No. 841 at P 20.

Earthjustice
1617 John F. Kennedy Blvd., Suite 1130
Philadelphia, PA 19103
Tel: (215) 717-4520
dmcdougall@earthjustice.org

/s/ Danielle Fidler

Staff Attorney
Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
Tel: (202) 667-4500
dfidler@earthjustice.org

/s/ Cullen Howe

Senior Renewable Energy Advocate
Natural Resources Defense Council
40 W. 20th St.
New York, NY 10011
Tel: (212) 727-2700
chowe@nrdc.org

/s/ John Moore

Director
Sustainable FERC Project
20 N. Wacker Street, Suite 1600
Chicago, IL 60201
Tel: (212) 727-2700
moore.fercproject@gmail.com

/s/ Jeff Dennis

Managing Director and General Counsel
Advanced Energy Economy
1000 Vermont Ave. NW, Suite 300
Washington, DC 20005
Tel: (202) 380-1950
jdennis@aee.net

/s/ Gabe Tabak

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

CERTIFICATE OF SERVICE

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

Dated at this 23rd day of March, 2020.

/s/ Mario A. Luna
Mario A. Luna
Supervisory Litigation Paralegal
Clean Energy Team, Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
Tel: (202) 797-5259

Document Content(s)

2020-03-23_Clean Energy Parties_NYISO Storage Brief.PDF.....1-48