

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

New York State Public Service Commission)	
New York Power Authority)	
Long Island Power Authority)	
New York State Energy Research and Development Authority)	
City of New York)	
Advanced Energy Management Alliance, and Natural Resources Defense Council)	Docket No. EL16-92-001
)	
v.)	
)	
New York Independent System Operator, Inc.)	

**REQUEST FOR REHEARING
OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.**

Pursuant to Section 313 of the Federal Power Act (“FPA”)¹ and Rule 713 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,² Independent Power Producers of New York, Inc. (“IPPNY”) hereby respectfully requests rehearing of the Commission’s February 3, 2017 order in the above-captioned docket.³ In its February 3 Order, the Commission granted, in part, the complaint of the New York State Public Service Commission (“NYSPSC”) and six other parties (collectively, “Complainants”) filed with the Commission, under FPA Section 206, against the New York Independent System Operator, Inc. (“NYISO”).⁴ The Complainants alleged in their Complaint that applying the NYISO’s

¹ 16 U.S.C. § 8251 (2016).

² 18 C.F.R. § 385.713 (2017).

³ *N.Y. State Pub. Serv. Comm’n. et al. v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (“February 3 Order”).

⁴ Docket No. EL16-92-000, *N.Y. State Pub. Serv. Comm’n. et al. v. N.Y. Indep. Sys. Operator, Inc.*, Complaint Requesting Fast Track Processing of the New York State Public Service Commission, New York Power Authority [“NYPA”], Long Island Power Authority, New York State Energy Research and Development Authority

buyer-side market power mitigation measures (the “BSM Measures”) in Section 23.4 of Attachment H of the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”) to demand response providers, referred to as Special Case Resources (“SCRs”) in the Services Tariff,⁵ is unjust and unreasonable because it limits the full participation of SCRs in the NYISO’s installed capacity (“ICAP”) market and “constitutes an impermissible extension and overreach of Federal jurisdiction” into State and local policy objectives. Complainants requested that the Commission grant a blanket exemption from the BSM Measures for all current and future SCR participants in Mitigated Capacity Zones, including SCRs that are currently subject to offer floor mitigation under the BSM Measures.⁶

Finding in its February 3 Order that SCRs lacked the ability and incentive to exercise market power, the Commission granted Complainants’ request for new SCRs to receive a blanket exemption from the BSM Measures but denied Complainants’ request to apply the blanket exemption to SCRs currently subject to mitigation.⁷ The Commission’s ruling granting the blanket exemption to new SCRs was arbitrary and capricious and not the product of reasoned decision making. Specifically, the Commission erred by failing to accord adequate weight to evidence that IPPNY offered in its protest demonstrating that Complainants had not met their burden under Section 206 of the FPA to demonstrate that application of the BSM Measures to

[(“NYSERDA”)], City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council (June 24, 2016), at 3 (“Complaint”).

⁵ The Services Tariff defines SCRs as “Demand Side Resources whose Load is capable of being interrupted upon demand at the direction of the ISO, and/or Demand Side Resources that have a Local Generator, which is not visible to the ISO’s Market Information System and is rated 100 kW or higher, that can be operated to reduce Load from the NYS Transmission System or the distribution system at the direction of the ISO.” Services Tariff § 2.19. Capitalized terms not defined in this request for rehearing shall have the meaning set forth in the Services Tariff.

⁶ Complaint at 2.

⁷ February 3 Order at P 1.

SCRs is unjust and unreasonable. The Commission should grant rehearing and reject a blanket SCR exemption from the BSM Measures.

For the reasons demonstrated herein, the Commission should act expeditiously to grant rehearing of its February 3 Order to ensure that SCRs in Mitigated Capacity Zones continue to be subject to the BSM Measures.

I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,⁸ IPPNY hereby lists the issue on which it seeks rehearing and provides representative precedent in support of its position on these issues:

1. The Commission erred in accepting Complainants' argument that "SCRs have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices." The Commission's decision was arbitrary and capricious, and not the result of reasoned decision making, because it incorrectly and unreasonably determined that buyers cannot use SCRs as a tool that has the same ability to artificially suppress ICAP market prices as a single, large market participant. *See, e.g., Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); *see also City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981).

II. REQUEST FOR REHEARING

A. The Commission's Determination That SCRs Have Limited or No Incentive and Ability to Exercise Buyer-Side Market Power to Artificially Suppress ICAP Market Prices Was Arbitrary and Capricious, and Not the Product of Reasoned Decision Making.

In its February 3 Order, the Commission ruled that new SCRs should be exempt from the BSM Measures because "the retail-level demand response program payments to SCRs do not provide SCRs with the incentive and ability to artificially suppress ICAP market prices."⁹ To support its decision, the Commission relied on Complainants' claim that retail demand response

⁸ 18 C.F.R. § 385.713(c)(2).

⁹ February 3 Order at P 31.

payments are not tied to NYISO SCR program participation because payments for retail demand response are for services that are distinct from the services that SCRs must perform under the NYISO SCR program. The Commission determined that the retail demand response and NYISO SCR programs “serve different purposes, provide different benefits, and compensate distinctly different services.”¹⁰ The Commission also noted that retail demand response payments have not caused an increase in the amount of capacity procured from SCRs at wholesale.¹¹

Courts have held that Commission orders are arbitrary and capricious if the Commission’s determinations do not rely on its technical expertise or the Commission fails to substantiate the application of its policy.¹² The Commission’s determination that “SCRs have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices” was arbitrary and capricious, and not the result of reasoned decision making, because it incorrectly and unreasonably determined that the State’s retail demand response programs serve a different purpose than the NYISO’s SCR program and that SCRs do not have the same ability to artificially suppress ICAP market prices as a single, large market participant.

The Commission’s determination is flawed because it incorrectly assumes that SCRs are small, discrete resources acting independently, without any intention to exercise buyer-side market power. Whether individual SCRs themselves may have an incentive to exercise market power is not the end of the inquiry. The BSM Measures are designed to prevent an entity, such as the State of New York, from subsidizing uneconomic resources—which could include

¹⁰ *Id.* at P 33.

¹¹ *Id.*

¹² *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 45 (5th Cir. 1989).

SCRs—to increase supply and artificially suppress capacity prices below competitive levels.¹³ The Commission must therefore look beyond the individual SCRs and consider the overall impact of the State’s policy adopting and supporting retail demand response programs. The Commission failed to acknowledge that the State may exercise buyer-side market power by subsidizing SCRs that participate in the NYISO SCR program and thereby increase supply and artificially suppress ICAP prices. The Commission erred in rejecting IPPNY’s demonstration that one of the main purposes of the State’s deployment of retail demand response is to reduce peak load on the bulk power system and thereby replace traditional wholesale electric generation with demand response providers, the very same purpose of the NYISO’s SCR program.¹⁴ Complainants stated in their Complaint that “[t]he NYPSC, through [Reforming the Energy Vision (“REV”)], is engaged in a comprehensive effort to orient distribution utilities toward increasing the deployment of [Distributed Energy Resources (“DERs”)] such as Demand Response in order to reduce distribution rates by avoiding costly distribution infrastructure *while achieving numerous State energy and environmental policy objectives.*”¹⁵

Throughout the REV proceeding, the NYPSC repeatedly established that one of its main objectives in REV is to encourage retail customers to be more demand responsive to flatten peak loads, an issue squarely within the NYISO’s province. For example, the NYPSC stated in its REV Policy Order that “[i]ncreasing the responsiveness of demand will reduce price volatility in the near term and price inefficiency in the long term. If, for example, the 100 hours of greatest peak demand were flattened, long term avoided capacity and energy savings would range

¹³ *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 101 (2008).

¹⁴ Docket No. EL16-92-000, *supra*, Joint Protest of IPPNY and Electric Power Supply Association (July 21, 2016), at 11–13 (“Protest”).

¹⁵ Complaint at 51–52 (emphasis added).

between \$1.2 billion and \$1.7 billion per year.”¹⁶ Thus, even if there has been limited overlap in the hours when demand response resources under a particular State demand response program and the NYISO’s SCR program have been activated,¹⁷ payments provided to the demand response resources under the State program have enabled SCRs to participate in the NYISO’s wholesale energy and capacity markets to replace electric generators with demand response and provide other wholesale market benefits which are, again, the very same purposes of the NYISO’s SCR program itself.

Assuming, *arguendo*, that some retail demand response programs are solely intended to compensate SCRs for their benefits to the distribution system, the Commission erred in granting a blanket exemption for *all* SCRs despite the fact that some retail demand response programs are expressly intended to impact the supply of wholesale capacity. Indeed, the structure previously approved by the Commission provided for these programs to be evaluated on an individual basis to ensure that their impacts on the wholesale markets were measured and they would be accounted for adequately when making the BSM determinations. The Commission erred in reversing its past determination and disregarding the evidence IPPNY presented that the main purpose of one of the State demand response programs for which Complainants requested a program-specific exemption is to impact the level of wholesale capacity.¹⁸ Specifically, Complainants stated that NYSERDA’s Demand Management Program (“DMP”) “administered pursuant to the [Indian Point Energy Center (“IPEC”)] Reliability Plan includes funding to

¹⁶ NYPSC Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Adopting Regulatory Policy Framework and Implementation Plan (Feb. 26, 2015), at 20.

¹⁷ When considering each identified program on an individual basis, Complainants’ data reveal that the overlap in activations between the SCR program and Con Edison’s Commercial System Load Relief Program (“CSR”) occurred in 45% of the hours, which can hardly be characterized as an inconsequential overlap. *See* Complaint at 45.

¹⁸ Protest at 13.

procure Demand Response resources and other solutions that would contribute toward the replacement capacity needed to avoid a reliability issue if IPEC were to be unavailable”—again, a program expressly designed to address wholesale market issues.¹⁹

Assuming, *arguendo*, that the Commission decides that some of the retail demand response programs identified in the Complaint can be exempt from the BSM Measures on the basis that they are not intended to reduce demand on the bulk power transmission system, the Commission should have ruled that the DMP is not eligible for an exemption because it is explicitly intended to reduce such demand. Both the CSR and the DMP are clear examples of why the Commission should not grant a blanket exemption because it would allow the State to evade the BSM Measures.

The Commission also erred in disregarding the NYISO’s independent Market Monitoring Unit’s (“MMU”) concern that a blanket exemption will not produce efficient market results because it would allow the State to develop retail demand response programs specifically designed to suppress ICAP market prices.²⁰ While the Commission stated that the NYISO has an obligation under its Services Tariff to mitigate SCRs “to the extent that the payments from the retail-level demand response programs later prove to provide SCRs with the incentive and ability to artificially suppress ICAP market prices,” it provided no guidance on how the NYISO should determine whether a retail demand response program provides an improper incentive to SCRs.²¹ Specifically, the Commission erred in rejecting the MMU’s recommendation that the Commission require the NYISO to adopt criteria that could effectively identify retail demand

¹⁹ Complaint at 59.

²⁰ Docket No. EL16-92-000, *supra*, Comments of the MMU (July 22, 2016), at 3–4.

²¹ February 3 Order at P 31.

response programs that provide improper incentives to SCRs.²² Thus, while the Commission sought to “strike a careful balance” between over- and under-mitigation,²³ it ultimately focused too heavily on avoiding over-mitigation. As a result, its February 3 Order will, in fact, lead to under-mitigation of these resources.

Likewise, the Commission’s determination that retail demand response programs are called upon at different times of the day and on different days of the year equally lacks basis in the record.²⁴ As Complainants’ own data demonstrated, there is indeed substantial program overlap. For example, Con Edison’s CSRP and the NYISO SCR program were called together 45% of the time over the 5-year study period, a fact that contradicts the Commission’s findings that the retail and NYISO programs “serve different purposes, provide different benefits and compensate distinctly different services.”²⁵ Complainants chose to provide no data concerning the Orange & Rockland, New York State Electric & Gas, or Central Hudson demand response programs.²⁶ Because Complainants bear the burden of proof, it was erroneous for the Commission to simply assume those programs do not significantly overlap with the NYISO SCR program. Thus, the Commission should find on rehearing that Complainants failed to meet their burden to demonstrate that the BSM Measures are unjust and unreasonable, or unduly

²² MMU Comments at 3–4.

²³ February 3 Order at P 34.

²⁴ *Id.* at P 33.

²⁵ *See* Complaint at 45; *see also* February 3 Order at P 33.

²⁶ *See generally* Complaint. This is surprising because in 2014 the NYPSC directed these utilities to develop dynamic load management programs, including demand response, based on Con Edison’s program. NYPSC Case 14-E-0423, *Proceeding on Motion of the Commission to Develop Dynamic Load Management Programs*, Order Instituting Proceeding and Directing Tariff Filings (Dec. 15, 2014). The NYPSC approved these programs shortly after, and they became effective July 1, 2015. NYPSC Case 14-E-0423, *supra*, Order Adopting Dynamic Load Management Filings with Modifications (June 18, 2015).

discriminatory or preferential, pursuant to Section 206 of the FPA without a blanket SCR exemption.

As IPPNY demonstrated in its protest, a blanket exemption for SCRs would allow any SCR to participate in the ICAP market without any offer floor mitigation, no matter how large the subsidy it has received and without regard to the purpose for such program.²⁷ Thus, a State-subsidized SCR that is uneconomic in the ICAP market would be allowed to freely offer its ICAP as a price taker even if its purpose, as with the DMP, is to affect the level of capacity in the wholesale market. As the Commission has found numerous times, such a subsidy would undermine the core principles behind the Commission-approved BSM Measures—namely, that the NYISO should not permit uneconomic entry to suppress capacity prices artificially because doing so distorts the market price signals that are necessary to encourage investment in new, and the maintenance of needed existing, generators to ensure the reliability of the system over the long run. On that basis, the Commission recently denied the NYPSC’s attempts to once again dust off requests for a blanket SCR exemption.²⁸

In reaching this determination, the Commission stated that a state may request program-specific exemptions pursuant to FPA Section 206 if it believes inclusion of state program benefits in the SCR’s offer floor “interferes with a legitimate state objective.”²⁹ No facts or circumstances have changed since the Commission made these determinations. Thus, the

²⁷ Protest at 16–19.

²⁸ See *N.Y. Pub. Serv. Comm’n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 105 (2015) (denying request for exemption for SCRs), *reh’g and clarification denied*, 154 FERC ¶ 61,088, at P 21 (2016) (denying rehearing request seeking exemption for SCRs). Requests to exempt SCRs date back to 2008, and until the February 3 Order, the Commission had applied the default rate that all demand response programs must be included in the SCR Offer Floor. See *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208 (2015).

²⁹ *Id.* (quoting *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208 (2015), at P 30).

Commission should, on rehearing, continue to deny these repeated requests for a blanket SCR exemption.

III. CONCLUSION

For the foregoing reasons, IPPNY respectfully requests that the Commission grant its request for rehearing of the February 3 Order and direct the NYISO to reinstitute provisions applying the BSM Measures to SCRs in Mitigated Capacity Zones.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Request for Rehearing of Independent Power Producers of New York, Inc. has been served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Albany, New York, this 6th day of March, 2017.

David B. Johnson