

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

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

**PROTEST OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”)¹ and the Commission’s Notice of Complaint in the above-captioned docket,² Independent Power Producers of New York, Inc. (“IPPNY”)³ hereby

¹ 18 C.F.R. § 385.211 (2019).

² Docket No. EL19-86-000, *New York Pub. Serv. Comm’n et al. v. New York Indep. Sys. Operator, Inc.*, Notice of Complaint (July 30, 2019).

³ IPPNY is a trade association representing companies involved in the development of electric generating facilities, the generation, sale, and marketing of electric power, and the development of natural gas and energy storage facilities in the State of New York. IPPNY member companies produce more than 60% of New York’s electricity, utilizing almost every generation technology available today, such as wind, solar, natural gas, oil, hydro, biomass, and nuclear. This pleading represents the position of IPPNY as an organization but not necessarily the views of any particular member with respect to any issue. IPPNY filed a doc-less Motion to Intervene in this docket on August 12, 2019.

protests the complaint filed under Section 206 of the Federal Power Act (“FPA”)⁴ by the New York State Public Service Commission (“NYSPSC”) and the New York State Energy Research and Development Authority (“NYSERDA”) (together, the “Complainants”) against the New York Independent System Operator, Inc. (“NYISO”) on July 29, 2019, challenging the application of the buyer-side market power mitigation measures (“BSM Measures”) to new electric storage resources (“ESRs”).⁵ Initially approved by the Commission in 2008 and refined over the past decade, the BSM Measures, which are contained in Attachment H, Section 23.4 of the NYISO’s Market Administration and Control Area Services Tariff (“Tariff” or “Services Tariff”), are a carefully structured, balanced set of rules necessary to protect the NYISO’s installed capacity market (“ICAP”) from artificial price suppression caused by uneconomic new entry. These rules are applied to all new entrants in the Mitigated Capacity Zones unless an entrant demonstrates that it is eligible for an exemption.

In their Complaint, the Complainants requested that the Commission grant a blanket exemption from the BSM Measures to all new ESRs (the “ESR Exemption”).⁶ Alternatively, if the Commission does not grant a blanket ESR Exemption, the Complainants requested that the Commission exempt up to 300 MW of ESRs from the application of the BSM Measures (the “300 MW Cap”) *each* calendar year, with unused amounts rolled forward.⁷ The Complainants requested that the Commission grant their Complaint expeditiously using the Commission’s fast-

⁴ 16 U.S.C. §§ 824e, 825e (2018).

⁵ Docket No. EL19-86-000, *supra*, Complaint on Behalf of the New York State Public Service Commission and the New York State Energy Research and Development Authority and Request for Fast Track Processing (July 29, 2019) (“Complaint”).

⁶ *Id.* at 4.

⁷ *Id.* at 4 & n.6.

track processing procedures to avoid the application of BSM Measures to ESRs that are anticipated to enter the NYISO's 2019 Class Year, which began on August 9, 2019.⁸ The Complainants argued that the BSM Measures "present a market barrier" which they allege is contrary to the Commission's directives in Order No. 841 "to ensure the full market participation of [ESRs]" and the State's objectives to encourage the market participation of ESRs.⁹

As discussed more fully below, the Commission should reject the Complaint because Complainants failed to meet their burden under Section 206 of the FPA to demonstrate that the existing BSM Measures are unjust and unreasonable, and they equally failed to provide any reasonable basis for the Commission to find that either their proposed blanket ESR Exemption or their alternative 300 MW Cap is a just and reasonable replacement structure.¹⁰ Indeed, the Complainants' request for an ESR Exemption is the latest chapter of their oft-repeated attack on

⁸ Per the Complainants, 300 MW of ESRs are expected to participate in the 2019 Class Year. *Id.* at 37.

⁹ *Id.* at 4.

¹⁰ The Complainants generally proffered these same arguments when they opposed applying the BSM Measures to ESRs in their February 7, 2019 protest of the NYISO's proposed tariff revisions filed on December 3, 2018, to comply with the Commission's Order No. 841. See Docket No. ER19-467-000, *New York Indep. Sys. Operator, Inc.*, Protest and Intervention of the New York State Public Service Commission and the New York State Energy Research and Development Authority (Feb. 7, 2019) ("February 7 Protest"); see also Docket No. ER19-467-000, *supra*, Compliance Filing (Dec. 3, 2018) (the "December 3 Compliance Filing"); *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018); Docket Nos. RM16-23-000 et al., *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Errata Notice (Feb. 28, 2018); 83 Fed. Reg. 9580 (Mar. 6, 2018) ("Order No. 841"). The December 3 Compliance Filing, which the NYISO filed in compliance with Order No. 841, proposed revisions to the NYISO's tariffs that consisted of new and amended market rules to facilitate the participation of ESRs in the NYISO-administered Energy, Ancillary Services, and ICAP markets. In its answer to the February 7 Protest, IPPNY demonstrated that Complainants' arguments are flawed and should be rejected. Docket No. ER19-467-000, *supra*, Motion for Leave to Answer and Answer of Independent Power Producers of New York, Inc. (Feb. 27, 2019) ("February 27 Answer"). Complainants also reiterated these same arguments when they challenged the NYISO's filing to implement a comprehensive set of rules for distributed energy resources, which include ESRs. See Docket No. ER19-2276, *New York Indep. Sys. Operator, Inc.*, Protest and Interventions of the New York State Public Service Commission and New York State Energy Research and Development Authority (July 18, 2019). IPPNY also refuted that filing, citing to its February 27 Answer. IPPNY's protest to the Complaint largely provides the same demonstration as it provided in its February 27 Answer, which is incorporated by reference herein if the Commission rules on the Complaint before it rules on the December 3 Compliance Filing.

the core principles underlying the Commission-approved BSM Measures—namely, that the NYISO cannot permit subsidized uneconomic entry to suppress ICAP prices artificially because doing so unsustainably distorts the market price signals that are necessary to encourage investment in new, and the maintenance of existing, generators to meet reliability standards over the long term.

During the past few years, State public policy intervention in New York has increased substantially and most recently was codified in a comprehensive State statute last month, the Climate Leadership and Community Protection Act, which was designed to address climate change.¹¹ As acknowledged in the Complaint, it is fully expected that the State of New York will be subsidizing the new entry of thousands of megawatts of ESRs and renewable generation with unduly discriminatory out-of-market subsidies to meet the requirements of the Climate Act. If the impacts of this subsidization on reliability and the New York markets are not addressed by the Commission, the effects of the State’s public policy initiatives on resource adequacy and the competitive markets will be devastating.¹²

Complainants’ proposed ESR Exemption would open a major loophole in the BSM Measures. The proposed ESR Exemption would allow unsustainably large amounts of uneconomic “Public Policy” projects to flood the market, which will severely damage the long-term reliability of New York’s electric system by undermining the necessary just and reasonable ICAP market revenue streams relied on by merchant suppliers that provide the resource

¹¹ See 2019 N.Y. Sess. Laws Ch. 106 (S. 6599) (the “Climate Act”).

¹² Assuming *arguendo* that the Commission accepted the NYISO’s pending proposal to exempt up to 1,000 MW of wind and solar resources from the BSM Measures per interconnection Class Year, the result would be even more devastating. See Docket No. ER16-1404-000, *New York Indep. Sys. Operator, Inc.*, Compliance Filing and Request for Commission Action within Sixty Days (Apr. 13, 2016) (“2016 Compliance Filing”).

adequacy services that keep the lights on. In the end, the Commission-jurisdictional competitive markets will effectively be replaced by a centrally planned and procured system.

The Complainants—one of which has opposed the BSM Measures in their entirety ever since the NYISO first proposed them to the Commission—now make the same arguments that the BSM Measures will unduly impair State public policy goals, which the Commission denied when it accepted the NYISO’s proposed BSM Measures in 2008.¹³ The Complainants have failed to show any changes since that time that warrant granting the exemption sought. Instead, they have offered nothing more than the same speculation that the BSM Measures could interfere with the State’s public policy goals. Indeed, the only significant change since the Commission’s 2008 Order is the escalated scale of the State’s out-of-market public policy subsidies.

Furthermore, the Complainants’ argument that the BSM Measures should not apply to State-subsidized resources because the State has no intent and incentive to suppress ICAP clearing prices is flawed and contrary to Commission precedent. The Commission previously held that uneconomic new entry must not be permitted to unduly suppress market prices artificially, regardless of the intent, finding that “all uneconomic entry has the effect of depressing prices below the competitive level,” that “this [was] the key element that mitigation of uneconomic entry should address,” and that attempting to limit the application of BSM Measures only to certain types of entrants “raises significant complications and provides undesirable incentives for parties to evade mitigation measures.”¹⁴ Just one year ago, the

¹³ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 110 (2008) (“2008 Order”).

¹⁴ *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008).

Commission reaffirmed that subsidized uneconomic entry resulting from ever-burgeoning State public policy programs, regardless of its intent, cannot go unchecked.¹⁵

In short, having been unsuccessful in opposing the implementation of the BSM Measures, Complainants now seek to negate them by introducing a broad-sweeping categorical exemption that swallows the rule, going so far as to characterize the BSM Measures “as both a shield to preserve the market position of incumbent generators and as a sword against new market entrants.”¹⁶ The BSM Measures are indeed a shield, but they are a just and reasonable shield necessary to protect against price distortions that would otherwise undermine resource adequacy and the NYISO’s Demand Curve model, the foundational component of the ICAP market, if left unchecked.

This threat to resource adequacy and the sustainability of New York’s competitive market is imminent. As the Complainants highlighted, pending environmental regulations are expected to impact roughly 3,500 MW of peaking facilities in New York City and Long Island by 2025.¹⁷ As addressed *infra*, studies issued this past spring reveal that the retirements of these facilities will lead to significant system needs with durations that cannot be effectively met by ESRs. As currently proposed, peaking plant owners must submit their compliance plans by next spring. If the “shield” provided by the BSM Measures is cast aside, the subsidized—and otherwise uneconomic—ESRs will prevent the entrance of new, and the maintenance of existing, economic resources needed to meet reliability standards over the long term. To ensure the long-term reliability of the system using competitive wholesale markets, the Complaint must be denied.

¹⁵ *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 155 (2018) (citation omitted) (“2018 PJM Order”), *reh’g pending*.

¹⁶ See Complaint at 3.

¹⁷ See *id.* at 21, 28.

I. BACKGROUND

The NYISO administers New York’s competitive energy, ICAP, and ancillary services markets according to the terms of its Services Tariff and reliability standards. One of the Commission’s guiding principles is “to ensure the reasonableness of the wholesale, inter-state prices determined in the markets” an independent system operator or regional transmission organization administers.¹⁸ Markets must send accurate price signals to market participants to foster competition and ensure reliability at lowest cost. In fact, the Complainants acknowledged that the ICAP market is designed to “inform retirement and entry decisions by providing a price signal that indicates when sufficient capacity is available or when additional ICAP resources are needed.”¹⁹

The BSM Measures, which have been in place for the past 11 years, are the NYISO’s primary tool to ensure that uneconomic ICAP supply that enters the market in the Mitigated Capacity Zones cannot artificially suppress ICAP prices to the detriment of resource adequacy, the competitive market, and the investors that rely on such market. In ensuring the integrity of market prices and preventing artificial price suppression, the Commission previously recognized that “mitigating an offer that is below the resource’s actual net costs is reasonable, whether that resource lowers the ultimate auction clearing price by 25 percent or by one percent,” because even “a small change in the clearing price from a below-cost offer may harm competition.”²⁰

¹⁸ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 89 (2011) (“2011 PJM Order”).

¹⁹ Complaint at 8.

²⁰ 2011 PJM Order at P 63.

History of the BSM Measures

In 2004, after targeted and unduly discriminatory out-of-market resource procurements resulted in new resources entering the market as price takers, the NYISO market participants began examining the need to revise market power mitigation rules in the New York City (“NYC”) ICAP market. Over the course of the discussions that ensued, some market participants highlighted that there were significant issues in the NYC ICAP market engendered by the exercise of buyer-side market power through new, uneconomic entry to the market (which, at that time, was not subject to any market power mitigation measures). Nevertheless, in September 2006, the NYISO’s Management Committee (“MC”) voted to make the market power mitigation rules that applied to existing suppliers even more stringent but refused to address the myriad issues related to uneconomic entry.

Ultimately, the NYISO filed an extremely prescriptive and one-sided (supplier-side mitigation only) proposal with the Commission to revise its Services Tariff over the objections of suppliers.²¹ In their protests, IPPNY, along with other market participants, demonstrated that the NYISO Initial In-City Filing was flawed and was not just and reasonable because it failed to institute the protections against buyer-side market power necessary to prevent uneconomic, new entry from harming the NYC ICAP market.

Finding that the NYISO’s proposed supplier-side revisions lacked adequate cost support and sufficient economic justification, and thus, were not shown to be just and reasonable, the Commission ultimately rejected the NYISO’s Initial In-City Filing.²² Importantly, on its own

²¹ See Docket No. ER07-360-000, *New York Indep. Sys. Operator, Inc.*, Tariff Revisions to Modify Installed Capacity Market Mitigation Measures Applicable to Certain In-City Generating Units (Dec. 22, 2006) (“NYISO Initial In-City Filing”).

²² See *New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182, at P 17 (2007).

motion, the Commission determined that significant issues had been raised concerning the ability of the NYC ICAP market to attract and retain adequate resources to maintain the long-term reliability of the system. Accordingly, the Commission instituted a proceeding to investigate the structure of New York’s ICAP markets and—after settlement efforts failed—directed the NYISO to propose a comprehensive revision of the NYC ICAP markets.²³ At that time, the Commission expressly directed that the ICAP market rules must be designed to “provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators.”²⁴ The Commission’s determination has remained the core tenet guiding the NYISO’s ICAP market design since that time.

In response to the Commission’s In-City Order, the NYISO proposed a set of comprehensive NYC ICAP market rules.²⁵ The mitigation rules in the NYISO’s In-City Compliance Filing properly included buyer-side rules to prevent artificial ICAP price suppression by new, uneconomic entrants.²⁶ Several parties, including Complainant NYPSC, challenged the need for *any* buyer-side rules in that proceeding, arguing, *inter alia*, the NYISO’s ICAP market structure should be designed to accommodate governmental public policy goals.²⁷ Specifically, the NYPSC raised what would become its oft-repeated argument that buyer-side

²³ See *New York Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,024, at P 15 (2007) (“In-City Order”).

²⁴ *Id.* at P 13.

²⁵ See Docket No. EL07-39-000, *New York Indep. Sys. Operator, Inc.*, Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure (Oct. 4, 2007) (“In-City Compliance Filing”).

²⁶ Notably, out-of-market resources that previously had entered the market continued to artificially suppress competitive market prices.

²⁷ See, e.g., Docket No. EL07-39-000, *supra*, Initial Comments of New York Power Authority (Nov. 19, 2007), at 9.

rules should be rejected in their entirety because they could interfere with New York’s resource adequacy standards, the ability to self-supply ICAP, and the State’s efforts to meet public policy goals, such as increased fuel diversity and improved environmental characteristics, and, thus, they would prevent the State from pursuing legitimate public policy goals.²⁸

The Commission found that a market which *seems* to benefit consumers by providing low-cost ICAP *in the short term* ultimately harms consumers by permanently depressing ICAP prices below the net cost of new entry (“Net CONE”), preventing the market from sending accurate price signals to new, economic entrants, and thereby discouraging investment, driving up prices, and threatening reliability *in the long term*.²⁹ The Commission further found that it had the statutory obligation to prevent such suppression and ensure prices were just and reasonable.³⁰

To prevent this means of artificial price suppression, the NYISO’s revised Services Tariff imposed an offer floor on the ICAP offers of new entrants in Mitigated Capacity Zones equal to the lesser of 75% of Net CONE (the “Default Offer Floor”) or the new entrant’s own Net CONE, unless the NYISO determined that the new entrant would be economic, and, thus, exempt from

²⁸ 2008 Order at P 92.

²⁹ *Id.* at PP 102–103.

³⁰ *Id.* at P 103.

mitigation.³¹ While the Commission approved the BSM Measures, it initially superimposed a new “net buyer” limitation, a finding it subsequently revised on rehearing, as explained *infra*.³²

Rejecting the NYPSC’s argument that the BSM Measures are harmful to the public interest because the State’s preferred new resources would not get paid for ICAP if excess capacity caused clearing prices to fall below the minimum offer requirement, the Commission ruled:

Because uneconomic entry could produce unjust and unreasonable capacity prices by artificially depressing those prices, and NYISO’s proposal provides a reasonable means to deter uneconomic entry in the in-City market, we deny NYPSC’s request that the Commission reject the proposed minimum bid requirements for new capacity suppliers. Contrary to NYPSC’s claim, we find that granting its request would adversely impact matters within the Commission’s jurisdiction - in particular, the establishment of just and reasonable wholesale electric energy rates. Adoption of NYPSC’s proposal would lead to artificially depressed capacity prices, thus both causing existing generators to be under-compensated and also directly and adversely impacting the Commission's ability to set just and reasonable rates for capacity sales in the in-City market.³³

³¹ See *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 31 (2010). In a subsequent filing, the NYISO revised its tariff to provide a Default Offer Floor of 75% of Mitigation Net CONE. See *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208, at P 46 (2015). The NYISO makes this determination by performing the Mitigation Exemption Test (“MET”), which has two separate parts collectively designed to replicate competitive pricing. Under Part A of the MET, the new entrant is exempt from offer floor mitigation if the NYISO determines that the ICAP clearing price for one year, measured three years out, is expected to be above the Default Offer Floor. Therefore, even a resource with costs in excess of the Default Offer floor is able clear the market and artificially suppress market clearing prices as system excess narrows towards equilibrium. Moreover, under Part B of the MET, the new entrant is entitled to an exemption if, starting three years out, the NYISO determines that the average expected clearing price in the first three years of its operation is expected to be higher than the new entrant’s individually calculated Unit Net CONE.

³² 2008 Order at P 106.

³³ *Id.* at P 110.

The Commission ruled that the BSM Measures included in the In-City Compliance Filing were necessary and approved those measures “to prevent uneconomic entry that would reduce prices in the NYC capacity market below just and reasonable levels.”³⁴

Several stakeholders, including IPPNY and the NYISO itself, requested rehearing of the Commission’s 2008 Order to address the Commission’s initial finding that the BSM Measures were only meant to prevent uneconomic entry by net buyers. The Commission ultimately granted rehearing and ruled that the BSM Measures should be applied to all new uneconomic entry to meet the core purpose of these rules, holding:

We find that *all* uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address. Parties requesting rehearing have convinced us that *defining net buyers raises significant complications and provides undesirable incentives for parties to evade mitigation measures.*³⁵

The Commission also denied a rehearing request filed by the NYPSC which pointed to rules in place in the adjoining regions and reiterated its arguments that the BSM Measures could interfere with its “legitimate interest in ensuring that new resources, including self-supplied resources, which are deemed appropriate from a public policy perspective” are built in New York.³⁶ The Commission ruled:

Although some concepts adopted in the PJM and ISO-New England forward capacity markets may translate to NYISO’s monthly ICAP market, not all do. In particular, in a multi-state

³⁴ *Id.* at P 100.

³⁵ *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008) (emphasis added) (“2008 Order on Rehearing”).

³⁶ *Id.* at P 34. Pointing to PJM Interconnection, L.L.C.’s (“PJM’s”) and ISO-New England’s (“ISO-NE”) tariff provisions that exempt certain new capacity constructed under a state mandate from price floors that might otherwise apply, the NYPSC argued that the NYISO should be directed to modify its tariff to allow load-serving entities to self-supply uneconomic resources while not allowing such self-supply to suppress ICAP prices. *Id.*

Regional Transmission Organization (RTO) like PJM and ISO-New England, individual state support for new entry that happens to be uneconomic translates into subsidies for customers in other states—that is, the customers of one state pay for new capacity that is bid into a capacity market at a below-market price in order to guarantee it clears the market. This drives down the market-clearing price for all market participants including those in other states. An individual state is much less likely to do this in a multi-state RTO like PJM and ISO-New England than in a single state RTO like NYISO, given the localization of costs and dispersion of benefits in the case of a multi-state RTO.³⁷

The Commission also stated that exemptions from mitigation for new resources that further specific legitimate state policy goals may be appropriate in specific cases, but it found that the NYPSC “had not provided sufficient specificity to allow us to mandate an appropriately narrow exemption at this time.”³⁸ The Commission stated that the NYPSC may seek to justify a mitigation exemption in a filing made under Section 206 of the FPA “for entry of new capacity that is required by a state-mandated requirement that furthers a specific legitimate state objective.”³⁹ However, should it do so, the Commission made it clear that the NYPSC must demonstrate an exemption is “the appropriate mechanism for supporting its goals.”⁴⁰ Nevertheless, it needs to be recognized that provisions already exist which enable subsidized public policy and other resources to clear the market as long as they do not unduly suppress clearing prices.

Since their initial implementation, the BSM Measures have been modified to ensure they continue to meet their intended purpose. For example, the NYISO, through the stakeholder

³⁷ *Id.* at P 37.

³⁸ *Id.* at P 38.

³⁹ *Id.*

⁴⁰ *Id.* The Complaint cited this Commission ruling. Complaint at 24–25.

process and in response to complaint proceedings, has filed and received authorization to implement refinements to the BSM Measures, such as requiring the MET to be conducted for all new entrants before developers must accept their interconnection cost allocation.⁴¹

In addition, in 2012, the NYISO's Market Monitoring Unit ("MMU") recommended that the NYISO "grant exemptions to suppliers engaged in purely private investment," thereby allowing pure merchant investors to make independent determinations of the likely ICAP price based on their own data regarding potential retirements.⁴² In response, on December 4, 2014, Consolidated Edison Company of New York, Inc. ("Con Edison"), Orange and Rockland Utilities, Inc., New York State Electric and Gas Corporation, Rochester Gas and Electric Corporation, and Central Hudson Gas and Electric Corporation (collectively, "Transmission Owners" or "TOs") filed a complaint pursuant to FPA § 206 that the NYISO's tariff was unjust and unreasonable in the absence of a competitive entry exemption ("CEE").⁴³ Asserting that "purely private investment" should be able to invest based on their own expectations of future retirements and other system conditions, the TOs requested that the Commission direct the NYISO to add this exemption to its Services Tariff.⁴⁴

⁴¹ *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,083, at P 23 (2011).

⁴² David B. Patton et al., *2012 State of the Market Report for the New York ISO Markets*, Potomac Economics (2013), at 24, <https://www.potomaceconomics.com/wp-content/uploads/2017/02/NYISO-2012-SOM-Report.pdf> ("2012 SOM Report"). The MMU made the same recommendation in 2013. David B. Patton et al., *2013 State of the Market Report for the New York ISO Markets*, Potomac Economics (2014), at 25, <https://www.potomaceconomics.com/wp-content/uploads/2017/02/NYISO-2013-SOM-Report.pdf> ("2013 SOM Report").

⁴³ See Docket No. EL15-26-000, *Consolidated Edison Co. of N.Y., Inc. et al. v. New York Indep. Sys. Operator, Inc.*, Complaint (Dec. 4, 2014), at 2.

⁴⁴ *Id.*

On February 26, 2015, the Commission granted the TOs' complaint, stating that "competitive entrants should not be prohibited from taking the risk of entry based on their projections of future capacity prices."⁴⁵ The rationale behind this decision, however, continued to reflect the Commission's commitment to protect the market from artificial price suppression. Specifically, while the Commission ordered the NYISO to implement a CEE to the BSM Measures "to allow for private investors, relying solely on market revenues, to enter the capacity market unmitigated upon certifying that they are a purely merchant investment, with no out of market subsidy,"⁴⁶ the CEE, by its terms, was limited to new entrants that did not receive support, directly or indirectly, from either a New York State governmental entity or a NYPSC-regulated transmission and distribution ("T&D") utility.⁴⁷

Importantly, the Commission continued its vigilance to prevent the adverse impacts on the market resulting from subsidized new entry by, *inter alia*, specifying that subsidized entry remained a concern and rejecting a proposed de minimis contract exception to the CEE.⁴⁸ As it explained, "[p]ermitting such subsidies, as part of the competitive entry exemption, may facilitate artificially depressing capacity prices to non-competitive levels because they make it

⁴⁵ *Consol. Edison Co. of New York, Inc. et al. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 19 (2015) ("CEE Order"). The Commission also found that, "[b]ecause a purely merchant generator places its own capital at risk when it invests in a new resource, any such resource will have a strong incentive to bid its true costs into the auction, and it will clear the market only when it is cost effective." *Id.* at P 46 (quoting *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 57 (2013)).

⁴⁶ *Id.*

⁴⁷ As the CEE exempts all projects that are not receiving State-supported subsidies and the BSM Measures exempt projects that pass the MET and thus are economic, the obvious purpose of the Complaint is to severely limit the NYISO's ability to impose offer-floor mitigation on State- or utility-subsidized, uneconomic new entry. As explicitly recognized by the Commission in the CEE Order, however, this is exactly the type of new entry that should trigger the highest level of scrutiny to protect the market and the market participants that rely on it against the exercise of buyer-side market power whether intended or not.

⁴⁸ *Id.* at PP 2, 64.

financially possible for a resource to offer a price into the capacity auction that is below its actual costs.”⁴⁹

On May 8, 2015, the Complainants and the New York Power Authority (“NYPA”) filed a complaint against the NYISO, under Section 206 of the FPA, alleging that the BSM Measures were unjust, unreasonable, or unduly discriminatory or preferential without the adoption of a series of broad exemptions.⁵⁰ They requested that the Commission limit the NYISO’s application of its BSM Measures solely to new (defined to explicitly exclude repowered) oil and gas-fired generation facilities that are 20 MW or greater, and, additionally, that exemptions from the BSM Measures also be granted to: (i) repowerings; (ii) reliability projects; and (iii) self-supplied resources.⁵¹

The Commission granted the 2015 Complaint with respect to just two of the requested exemptions, and even then explicitly found that such exemptions only were to be applied under narrowly defined circumstances.⁵² Specifically, the Commission directed the NYISO to make a compliance filing revising its BSM Measures “to exempt a narrowly defined set of renewable and self-supply resources that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.”⁵³ The Commission further ruled that the NYISO additionally must “limit the total amount of such renewable resources—in the form

⁴⁹ *Id.* at P 64.

⁵⁰ Docket No. EL15-64-000, *N.Y. Pub. Serv. Comm’n et al. v. N.Y. Indep. Sys. Operator, Inc.*, Complaint of the New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority (May 8, 2015) (“2015 Complaint”).

⁵¹ *See id.* at 12.

⁵² *New York Pub. Serv. Comm’n et al. v. New York Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015) (“October 2015 Order”), *order on reh’g*, 154 FERC ¶ 61,088 (2016).

⁵³ October 2015 Order at P 10.

of a megawatt cap—that may receive the exemption” for the express purpose of “further limit[ing] any risk that these exempted resources will impact NYISO’s ICAP market prices.”⁵⁴

The Commission provided parameters for the types of resources that should be eligible for a renewable exemption and the design of a megawatt cap but stated that “the specifics of the renewable resources exemption are best worked out through the stakeholder process.”⁵⁵ In its filing purporting to comply with the Commission’s October 2015 Order, the NYISO proposed revisions to the BSM Measures to exempt certain intermittent renewable (the “Renewable Exemption”) and self-supply resources (the “Self-Supply Exemption”) from the imposition of Offer Floor mitigation and to cap the amount of these intermittent renewables that could qualify for the Renewable Exemption in the Mitigated Capacity Zones at 1,000 MW of ICAP in any given Class Year (the “1,000 MW Renewable Exemption”).⁵⁶

IPPNY and the Electric Power Supply Association (“EPSA”) jointly protested the NYISO’s 2016 Compliance Filing.⁵⁷ IPPNY/EPSA demonstrated that the application of the 1,000 MW Renewable Exemption would severely, and likely irreparably, depress ICAP prices

⁵⁴ *Id.* at P 51. With respect to the megawatt cap, the Commission indicated that ISO-NE’s 200 MW control-area wide cap on the amount of renewable resources that could qualify for an exemption from Offer Floor mitigation under ISO-NE’s minimum offer price rule, which was designed to track the level of load growth, should serve as a model for the NYISO’s proposed cap. *Id.* However, after this approach proved unworkable because the level of State public policy intervention far outpaced load growth, ISO-NE subsequently filed a new proposal to replace this mechanism. The Commission has accepted ISO-NE’s proposal. *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018).

⁵⁵ October 2015 Order at P 50.

⁵⁶ 2016 Compliance Filing at 9–10, 16.

⁵⁷ Docket No. ER16-1404-000, *supra*, Joint Protest of Independent Power Producers of New York, Inc. and Electric Power Supply Association (May 31, 2016) (“IPPNY/EPSA Protest”).

given the potential for the cap to be reached each Class Year in the Mitigated Capacity Zones.⁵⁸
The Commission has not ruled on the NYISO's 2016 Compliance Filing.⁵⁹

Since the Commission's October 2015 Order, circumstances have changed significantly throughout the Northeast. State intervention to support public policy initiatives is proceeding at unprecedented levels. While the Commission previously had issued orders where it began to focus on the ability and intent of entities to exercise market power, the Commission found that "out-of-market payments by certain PJM states have reached a level sufficient to significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources" and thus, "resources receiving out-of-market support [will] significantly affect capacity prices in a manner that will cause unjust and unreasonable and unduly discriminatory rates in PJM regardless of the intent motivating the support."⁶⁰

In New York, the State's public policy efforts have culminated in the enactment of the Climate Act, which took place on July 18, 2019. By its express terms, New York's electric

⁵⁸ IPPNY/EP SA Protest at 3.

⁵⁹ As such, on July 19, 2019, the NYISO filed a motion requesting, *inter alia*, that the Commission rule on its 2016 Compliance Filing because wind and solar resources that are eligible for the NYISO's proposed 1,000 Renewable Exemption are anticipated to join the 2019 Class Year this month. *See* Docket No. ER16-1404-000, *supra*, Motion Requesting Commission Action on Compliance Filing, Notice of Implementation Plans, and Conditional Request for Tariff Waivers of the New York Independent System Operator, Inc. (July 19, 2019) ("Motion"). The NYISO also notified the Commission that it will implement the 1,000 MW Renewable Exemption as filed unless the Commission issues an order directing otherwise. *Id.* On August 5, 2019, IPPNY/EP SA answered the NYISO's Motion requesting, among other things, that the Commission issue an order in time for the NYISO's BSM Determinations, reject the proposed 1,000 MW Cap and direct the NYISO to adopt IPPNY/EP SA's 2016 proposal which would cap the amount of intermittent renewables that are eligible for the Renewable Exemption to one-half of one percent of the current minimum UCAP requirement for each Mitigated Capacity Zone at the time the Class Year begins. Docket No. ER16-1404-000, *supra*, Answer of Independent Power Producers of New York, Inc. and Electric Power Supply Association (Aug. 5, 2019).

⁶⁰ 2018 PJM Order at P 156.

system, which produced 26% of its electricity from renewable resources in 2018,⁶¹ must add unprecedented levels of renewable resources to ensure 70% of energy consumed by 2030 is produced by such resources. Ten years later, energy consumed must be entirely emissions-free. As part of achieving these levels, the Climate Act also specifically requires the entry of 3,000 MW of ESRs by 2030, 6,000 MW of photovoltaic solar generation by 2025, and 9,000 MW of offshore wind generation by 2035.

II. PROTEST

A. **The Complainants Have Failed to Meet Their Burden under Section 206 of the FPA to Demonstrate the Application of the BSM Measures to ESRs Is Unjust and Unreasonable.**

The Complainants argued that application of the BSM Measures to ESRs is unjust, unreasonable and unduly discriminatory because it impedes market entry and participation by ESRs, which obstructs “legitimate” State policy objectives, and that there is no evidence that the State seeks to suppress ICAP prices by subsidizing ESRs.⁶² Therefore, they requested that the Commission order the NYISO to exempt all ESRs from the BSM Measures.⁶³ If the Commission does not direct such an exemption, the Complainants requested that the Commission exempt all ESRs entering the market up to an annual 300 MW cap with unused exempt capacity carried forward to subsequent annual periods.⁶⁴

Contrary to these claims, application of the BSM Measures to ESRs does not unduly interfere with State policy goals. BSM Measures have been, and continue to be, necessary to

⁶¹ *Power Trends 2019: Reliability and a Greener Grid*, NYISO (2019), at 3, [nyiso.com/documents/20142/2223020/2019-Power-Trends-Report.pdf/0e8d65ee-820c-a718-452c-6c59b2d4818b](https://www.nyiso.com/documents/20142/2223020/2019-Power-Trends-Report.pdf/0e8d65ee-820c-a718-452c-6c59b2d4818b).

⁶² Complaint at 23, 29, 36.

⁶³ *Id.* at 36.

⁶⁴ *Id.* at 36–37.

ensure that State policy programs are implemented in a manner that will ensure the long-term reliability of the system and will effectively harmonize them with the ongoing development of the wholesale markets. Subsidized, uneconomic ESRs are an effective tool to artificially suppress ICAP prices and must be subject to mitigation under the BSM Measures like all other similarly situated resources.

Under Section 206 of the FPA, the Complainants bear the burden of demonstrating that the existing tariff provisions, rates, or practices they complain of are “unjust, unreasonable, unduly discriminatory, or preferential.”⁶⁵ The Complainants in the present case have patently failed to meet that burden. In past orders, the Commission has ruled that Section 206 complainants fell short of their burden by “not demonstrat[ing] harm to the market.”⁶⁶ A merely speculative harm is insufficient to meet the Section 206 burden.⁶⁷ If a Section 206 complainant cannot demonstrate that “some real harm (actual or potential) is probable, there is little point in wasting the scarce resources of the Commission.”⁶⁸ Where the Commission has previously approved a measure as just and reasonable, complainants must present a “compelling reason,” likely involving a “significant change in circumstances” to show that the measure is no longer just and reasonable and meet their burden under Section 206.⁶⁹

⁶⁵ 16 U.S.C. § 824e.

⁶⁶ *Indep. Power Producers of New York, Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, at P 65 (2015).

⁶⁷ *See, e.g., Entergy Services, Inc.*, 145 FERC ¶ 61,247, at PP 116, 184 (2013).

⁶⁸ *S. California Edison Co.*, 50 FERC ¶ 61,275, at 61,872 (1990) (“SC Edison Order”).

⁶⁹ *Am. Nat’l Power, Inc.*, 98 FERC ¶ 61,154, at 61,549 (2002); *see also Am. Transmission Sys., Inc. et al. v. PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,249, at PP 111–113 (2009) (“Each of the PJM and Midwest ISO cost allocation methodologies has been accepted by the Commission as [a] just and reasonable and not unduly discriminatory methodolog[y] for allocating the costs among the members of each RTO. [Complainant]’s voluntary choice to move from one RTO to another does not cause either of these methodologies to no longer be just and reasonable or not unduly discriminatory simply because each produces a different result.”).

The Complaint fails to demonstrate any actual harm to New York markets, but instead asks the Commission, based solely on speculation, to gut the BSM Measures it approved as just and reasonable. The Complainants admitted that they are “unable to accurately quantify the aggregate dollar impact”⁷⁰ of the alleged harm caused by the current, accepted BSM Measures. Rather, the Complainants alleged only speculative harm that ESRs will be subject to mitigation which will impede their participation in the NYPSC’s ESR deployment programs. The combined effect of the CEE and the MET together ensure that only uneconomic projects that have received State subsidies are subject to mitigation. That is, if an entrant were not subsidized, it would be eligible for the CEE, and if it were competitive, even if it were subsidized, it would avoid mitigation under the MET.

In short, the Complainants’ proposed exemptions are solely designed to exempt excessively subsidized uneconomic entry from mitigation—exactly the type of new entry that the BSM Measures are designed to mitigate. The Complainants have failed to demonstrate—nor can there be—any undue harm to ESR public policy. The ESR program will go forward with its solicitations and out-of-market payments such that resources will be developed. Accordingly, the policy will be achieved at the out-of-market cost that is the result of the targeted solicitations. This is exactly what should be expected.

The Complainants have also failed to demonstrate any specified harm to the markets or market participants that would outweigh the significant harm that would occur to the market and market participants that rely on it as a result of the artificial suppression of prices caused by uneconomic new entry if it were permitted to go unmitigated. The Commission should therefore

⁷⁰ Complaint at 39.

deny the Complaint because the Complainants have not proven that the existing NYISO Services Tariff is unjust and unreasonable. Unless the Complainants are able to demonstrate the probability of actual or potential harm, the controversy the Complainants imagine will remain demonstrably unripe, and “there is little point in wasting the scarce resources of the Commission.”⁷¹

1. Application of the BSM Measures to ESRs Does Not Interfere with State Policy Goals or Order No. 841.

The Complainants asserted that New York laws obligate them to promote ESRs and direct the NYPSC to develop an energy storage deployment policy.⁷² They pointed to both the NYPSC’s recently adopted statewide ESR deployment goal of up to 3,000 MW by 2030, with an interim deployment target of 1,500 MW by 2025, and the Climate Act’s subsequent mandate of 3,000 MW of ESRs by 2030.⁷³ The Complainants argued that subjecting ESRs to mitigation under the BSM Measures would interfere with these goals and Order No. 841’s requirement that the NYISO enable ESRs “to participate in the capacity markets to the fullest extent of their technical capability,” by making it more difficult for ESRs to participate in the wholesale market.⁷⁴

The Complainants have failed to demonstrate that the BSM Measures are a barrier to the State’s ESR policies and that the requirements of Order No. 841 support implementing a blanket exemption from competitive market rules and the BSM Measures. First, nothing in Order No.

⁷¹ SC Edison Order at 61,872.

⁷² Complaint at 14–15, 20–21.

⁷³ *Id.* at 14–15, 20–21 (citing NYPSC Case 18-E-0130, *In the Matter of Energy Storage Deployment Program*, Order Establishing Energy Storage Goal and Deployment Policy (Dec. 13, 2018) (“ESR Order”), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={FDE2C318-277F-4701-B7D6-C70FCE0C6266}>; Climate Act).

⁷⁴ *Id.* at 25.

841 prohibits the application of BSM Measures to ESRs. To the contrary, Order No. 841 expressly permitted the NYISO to apply its existing market power mitigation measures. The Commission stated in Order No. 841 that, to the extent that market power concerns arise as a result of ESRs' de-rating capacity to provide capacity or other services, each RTO/ISO may consider whether it is appropriate to update and/or apply existing market power mitigation processes to ESRs to alleviate these market power concerns.⁷⁵

Second, the BSM Measures impose no requirements whatsoever on the State with respect to policies promoting certain types of generating technology. With or without the BSM Measures, the State remains free to permit or not to permit new ESRs, or to subsidize some particular type of facility to further State policy objectives, including the reduction of greenhouse gas emissions. The sole effect of a fair, universal, and even-handed application of the BSM Measures is to ensure the price paid for ICAP remains just and reasonable once these subsidized resources enter the market—a matter undisputedly within the Commission's exclusive jurisdiction.

The NYPSC has argued before that the BSM Measures interfere with State energy policies and therefore should not be adopted. In its protest of the NYISO's proposed BSM Measures more than 10 years ago, the NYPSC argued that the Commission should reject the NYISO's proposed BSM Measures for new ICAP supplies “on the basis that they could interfere with New York's standards for resource adequacy and the ability to self-supply ICAP.”⁷⁶ The NYPSC also argued that BSM Measures “undermine[] the public interest” by “prevent[ing] new

⁷⁵ Order No. 841 at P 97.

⁷⁶ 2008 Order122 FERC ¶ 61,211 at P 92.

resources, which are preferable from a public policy perspective (*e.g.*, increased fuel diversity or improved environmental characteristics), from . . . receiving ICAP payments when excess capacity causes clearing prices to fall below the minimum offer requirement.”⁷⁷ After carefully considering this argument, the Commission rejected it as an attack on the NYISO’s BSM Measures as a whole:

Because uneconomic entry could produce unjust and unreasonable capacity prices by artificially depressing those prices, and NYISO’s proposal provides a reasonable means to deter uneconomic entry in the in-City market, we deny NYPSC’s request that the Commission reject the proposed minimum bid requirements for new capacity suppliers. Contrary to NYPSC’s claim, we find that granting its request would adversely impact matters within the Commission’s jurisdiction—in particular, the establishment of just and reasonable wholesale electric energy rates. Adoption of NYPSC’s proposal would lead to artificially depressed capacity prices, thus both causing existing generators to be undercompensated and also directly and adversely impacting the Commission’s ability to set just and reasonable rates for capacity sales in the in-City market

The NYISO’s offer floor proposal is an integral part of NYISO’s proposal, which the Commission is adopting, needed to “promote long-term reliability while neither over-compensating nor undercompensating generators.” The issue before us in this proceeding is not how to meet the resource adequacy requirements of New York State, but how prices for capacity in the wholesale markets should be determined in order to remedy identified flaws in the ICAP market. As we have found previously, issues of resource adequacy are important to the Commission in meeting our statutory mandate under the [FPA] to ensure that the rates, terms and conditions of jurisdictional transmission and sales of electric energy are just, reasonable, and not unduly discriminatory, or preferential.

⁷⁷ *Id.*

Further, we find that our action in approving NYISO's minimum bid proposal does not adversely affect NYPSC's regulation of resource adequacy in NYC. This new pricing methodology does not prescribe whether or what types of generation facilities should be built, contrary to NYPSC's concerns.⁷⁸

Despite this earlier rejection of the NYPSC's same argument, the Complainants now ask the Commission to reverse its settled position and provide the State a virtually unlimited means of distorting the competitive price levels in New York's ICAP markets to achieve the State's ESR goals. Yet, as was true in 2008, the NYPSC has again failed to demonstrate that the ESR Exemption is an appropriate mechanism for supporting its goals.⁷⁹ The Commission should thus reaffirm its determination in approving the BSM Measures and reject the Complainants' argument.

Under the BSM Measures, the Complainants retain the power to pursue whatever lawful initiatives they wish, so long as they—not the market—subsidize any uneconomic designs that may be chosen. If the State chooses to bear these costs, without distorting prices under the Commission's jurisdiction, it can do so. The resulting rates in the NYISO's competitive market, however, must remain just and reasonable for all the unsubsidized resources that rely on it for compensation. The BSM Measures are one protection to ensure that the resulting rates are just and reasonable. To eliminate it for a large quantity of subsidized resources would be unjust and unreasonable. Neither State nor rate regulated utilities are entitled to use subsidized entry to distort prices in the Commission's jurisdictional markets, regardless of whether it is intentional or not.

⁷⁸ *Id.* at PP 110–112.

⁷⁹ *See* 2008 Order on Rehearing at P 38.

2. The Scope of Subsidies to Support Public Policy Initiatives Requires These Resources to Be Subject to Mitigation Regardless of Intent.

The Complainants' argument that there is no evidence that the State intends to suppress ICAP prices by subsidizing ESRs disregards the purpose of the BSM Measures, is contrary to Commission policy, and disregards the Commission's statutory obligation under the FPA. The BSM Measures are designed to ensure that resources that are otherwise uneconomic *but for* their receipt of out-of-market compensation cannot submit offers into the ICAP market that are below their going forward costs. To do so would artificially suppress ICAP prices for, and potentially cause the premature retirement of, otherwise economic resources that do not receive out-of-market compensation. Indeed, as noted *supra*, the Commission recently addressed the substantial influx of capacity supported by State subsidies and ruled that "resources receiving out-of-market support are capable of suppressing market prices, regardless of intent."⁸⁰ Pointing to the significant changed circumstances that have resulted from the substantial increase in state intervention to support public policy programs in the PJM region, the Commission reinforced this principle in an order only a year ago, finding that it was unjust and unreasonable to continue to limit PJM's offer floor mitigation mechanism, the Minimum Offer Price Rule ("MOPR"), only to new natural-gas fired resources. The Commission ruled that PJM's tariff:

fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources, regardless of the generation type or quantity of the resources supported by such out-of-market support.⁸¹

⁸⁰ 2018 PJM Order at P 155 (citation omitted).

⁸¹ *Id.* at P 150.

The Commission further ruled that:

Price suppression stemming from state choices to support certain resources or resource types is indistinguishable from that triggered through the exercise of buyer-side market power. Under these circumstances, we no longer can assume that there is any substantive difference among the types of resources participating in PJM's capacity market with the benefit of out-of-market support.⁸²

In reaching its determination, the Commission pointed to the programs enacted in a number of PJM states that provide or require out-of-market support for thousands of megawatts of nuclear, solar, and wind resources and ruled that mechanisms were required to be implemented for the Commission to meet its statutory obligation to provide suppliers with the opportunity to receive just and reasonable rates.⁸³ The Commission stated:

Over the last few years, the integrity and effectiveness of the capacity market administered by [PJM] have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market. The amount and type of generation resources receiving such out-of-market support has increased substantially. What started as limited support primarily for relatively small renewable resources has evolved into support for thousands of megawatts (MWs) of resources ranging from small solar and wind facilities to large nuclear plants. As existing state programs providing out-of-market payments continue to grow, more states in the PJM region are considering providing more support to even more resources, based on an ever-widening scope of justifications.⁸⁴

⁸² *Id.* at P 155.

⁸³ *Id.* at PP 151–52. Review of the mechanisms to be implemented in the PJM market remains pending before the Commission at this time.

⁸⁴ *Id.* at P 1.

Thus, even assuming the State’s public policy goals are not intended to artificially suppress ICAP prices, State-subsidized uneconomic entry must continue to be subject to the BSM Measures.

3. While an Important Component of New York’s Supply Portfolio, ESRs Cannot Meet New York System Needs That Have Longer Durations, and Thus, the ICAP Market Must Continue to Provide Adequate Price Signals to, and an Opportunity to Receive Just and Reasonable Rates for, Other Dispatchable Facilities.

In their Complaint, the Complainants highlighted the fact that the State is expected to implement new environmental regulations in the near term that will required the reduction of NOx emission levels significantly by 2025 at roughly 3,500 MW of peaking facilities.⁸⁵ The Complainants also noted that the NYISO “has rigorously analyzed the reliability implications and potential costs of State policies”⁸⁶ Absent from the Complaint, however, is any information concerning the inability of ESRs to provide service for the duration that is required during peak and routine day-to-day operations if the peaking facilities retire. Because it remains critical for the ICAP market to send accurate price signals to incent new investment in other dispatchable facilities in New York City, the Complaint should be denied.

In March 2019, Con Edison, PSEG Long Island (on behalf of the Long Island Power Authority), and the NYISO each presented a study identifying the expected system effects of the pending environmental regulations.⁸⁷ Specifically, these regulations are expected to cause the

⁸⁵ See Complaint at 21, 28.

⁸⁶ *Id.* at 27.

⁸⁷ See *CRP: Peaker Scenario – Assessing DEC’s NOX Limits (Draft) Ruling for Simple Cycle and Regenerative Combustion Turbines*, Con Edison (Mar. 19, 2019), https://www.nyiso.com/documents/20142/5552484/2018CRP_Con_Edison_Slides.pdf/ee821d59-a957-d051-1070-02275773e07b; *CRP: Peaker Scenario – Assessing DEC’s NOX Limits (Draft) Ruling for Simple Cycle and Regenerative Combustion Turbines*, PSEG Long Island (Mar. 3, 2019),

retirement of roughly 3,500 MW of peaking facilities in New York City and Long Island by 2025. According to the studies, retirements will result in the need to bring hundreds of MWs on the system. In several sub-pockets in these areas, the duration of these needs spans as long as 15 hours.

ESRs alone indisputably cannot satisfy these needs.⁸⁸ Yet if the Commission grants the Complaint and exemptions are awarded to what the Complainants themselves declare will be a substantial amount of new ESR development in New York City, their participation in the ICAP market will substantially suppress the market clearing prices for the very resources needed to fill the gap the ESRs will leave unaddressed. These resources, however, will not be receiving subsidies under State public policy programs. And, because they were artificially suppressed, the market clearing prices will also not be sufficient to support their entry.

The end result is that subsidies beget more subsidies. Contracts beget contracts, albeit likely in the form of reliability must run (“RMR”) agreements for resources not subsidized by the State. Thus, while Complainants are correct that federal and State interests should be balanced so that the State’s resource adequacy needs are met,⁸⁹ the system needs in New York City

<https://www.nyiso.com/documents/20142/5552484/LIPA-Simple%20Cycle%20Retirement%20Assessment%203-03-2019.pdf/31d43e9f-d9f7-476f-605f-df31ef7d7674>; *2019-2028 CRP: Peaker Scenario – Assessing DEC’s Draft NOx Limits Rule for Simple Cycle and Regenerative Combustion Turbines*, NYISO (Mar. 19, 2019), https://www.nyiso.com/documents/20142/5552484/2018CRP_NYISO_PeakerScenario_pptMarch19ESPWG.pdf/871cdd4d-963a-4a81-38f6-f60a063b1d21. As noted in their presentations, the loss of this peaking capacity also could raise a number of operational challenges with respect to, *e.g.*, off-peak maintenance conditions, operating reserves, black start, auxiliary power, emergency generation and transient voltage recovery.

⁸⁸ In their Complaint, the Complainants asserted that “the Mitigated Capacity Zones are likely where Energy Storage Resources will have the most impact in helping to replace old peaking units and in managing transmission congestion, while also counting towards Locational Capacity Requirements.” Complaint at 34. IPPNY members own peaking plants in New York City and are actively pursuing ESR development. While IPPNY agrees there will be an important role for these resources in New York City, the market signals must put all viable options to address New York City needs on a level playing field to achieve efficient results for consumers.

⁸⁹ See Complaint at 33.

compel maintaining the balance that has been in place since 2008 by continuing to apply the BSM Measures under these circumstances.

As currently proposed, owners of the peaking plants are required to submit their compliance plans by March 2020. IPPNY, therefore, agrees with Complainants that time is of the essence to address the Complaint. IPPNY further agrees that price signals should reflect the system-wide and locational value of ESRs,⁹⁰ but they must equally reflect the value of other resources as well. To ensure the long-term reliability of the system and the ongoing development of the New York wholesale competitive markets, IPPNY respectfully urges the Commission to reject the Complaint in its entirety.

B. The Complainants Failed to Demonstrate That Their Proposed ESR Exemption is Just and Reasonable.

1. The Complainants' Proposed ESR Exemption, if Granted, Will Frustrate the Purpose of the NYISO's ICAP Market.

The Complainants' proposed ESR Exemption would frustrate the Commission's goals to ensure that, over the long-term, the ICAP clearing price should average Net CONE in each zone. Capacity markets have become an indispensable part of all three eastern RTOs.⁹¹ It has been said that these markets exist in order to provide the "missing money" produced by the inefficiencies that occur whenever there are energy price caps, while also addressing the need to

⁹⁰ *Id.* at 17.

⁹¹ See *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006), *order denying reh'g and approving settlement*, 117 FERC ¶ 61,331 (2006), *order on reh'g and clarification*, 119 FERC ¶ 61,318 (2007); *Devon Power LLC et al.*, 113 FERC ¶ 61,075 (2005), *order approving settlement*, 115 FERC ¶ 61,340 (2006), *order on reh'g and clarification*, 117 FERC ¶ 61,133 (2006), *aff'd in relevant part sub nom. Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693 (2010), *remanded by Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010); *N.Y. Indep. Sys. Operator*, 103 FERC ¶ 61,201, *reh'g denied*, 105 FERC ¶ 61,108 (2003); *N.Y. Indep. Sys. Operator*, 89 FERC ¶ 61,109 (1999), *order on reh'g and clarification*, 90 FERC ¶ 61,085 (2000).

achieve minimum requirements for ICAP, and a desire to reduce volatility in cash flows for both generators and load to reduce the risk of price fluctuations reflected in the cost of capital.⁹²

Ultimately, ICAP and its proper procurement are intended to ensure resource adequacy because reliability standards are established based on a regulatory desire to minimize loss of load and not simply allow loss of load to occur randomly based on volatile energy markets. As the Commission has long recognized, consumers benefit from appropriately designed ICAP markets through more efficient market outcomes that result in lower consumer charges over the long run than they do from prices that have been temporarily suppressed in the short-term.⁹³

On average and over time, compensation must be sufficient to attract new entry and retain economic existing generation that maintains resource adequacy levels.⁹⁴ Electric generation is a capital intensive industry, in which the cost of new entry generally exceeds the going forward costs of existing units, *i.e.* the short-run marginal cost of generation. This means that on average and over time, to attract new entry and retain needed existing generation, the bulk power markets for energy and ICAP must produce payments that equilibrate around the Net CONE, *i.e.* the long-run marginal cost of generation. Over time, the market price should rise to the cost of new entry as a result of load growth and the retirement of existing resources that are no longer economic. The market signal must remain stable with the price reaching Net CONE, unimpeded by out-of-market subsidies and price suppression, for merchant new entry to be willing to enter and provide service in accordance with reliability standards. If excess ICAP

⁹² See *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, at P 104 (2006) (noting the Commission's preference for designs that reduce price volatility).

⁹³ See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 141 (2006).

⁹⁴ See *ISO New England*, 125 FERC ¶ 61,102, at P 43 (2008), *reh'g denied*, 130 FERC ¶ 61,089 (2010).

causes prices to be lower than average some of the time, intervention cannot prevent those prices from being higher than average during other periods.

Thus, as the Commission established more than a decade ago, the exercise of market power by both sellers and buyers needs to be mitigated to ensure that prices are neither artificially inflated nor artificially suppressed to promote long-term reliability by neither under-compensating nor over-compensating generators. This principle was the Commission's core tenet when it initiated the In-City Proceeding and it has remained the core tenet of ICAP markets since that time.⁹⁵ The exercise of market power by either side of the market is destructive for competition and long-term consumer welfare.⁹⁶ For example, because going forward costs for existing generators are, as a rule, lower than Net CONE for new entrants, uneconomic entry can easily push prices back down toward levels of the existing generators' going forward costs. The market's price signals will therefore be artificially depressed, preventing the market from forecasting efficiently the need for competitive new entry, additional investments in existing facilities or adjustments to the location and/or timing of projects. Even assuming that prices eventually recover to adjust somewhat for the effect of the uneconomic entry, the market is unlikely ever to account fully for the distortion that such entry causes to the critical price signals market participants use to determine whether investment in a particular market is rational.

The exemptions to the BSM Measures sought by Complainants in this proceeding will distort ICAP market prices thereby introducing a substantially heightened and likely unviable

⁹⁵ *New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182, at P 17 (2007), *order on reh'g and compliance*, 118 FERC ¶ 61,251, at P 3 (2007); *see also New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at PP 32, 100 (2008); *Edison Mission Energy, Inc. v. F.E.R.C.*, 394 F.3d 964, 968–70 (D.C. Cir. 2005); *Midwest Indep. Transmission Sys. Operator, Inc. Pub. Utilities with Grandfathered Agreements in the Midwest ISO Region*, 111 FERC ¶ 61,043, at P 78 (2005), *order on reh'g*, 112 FERC ¶ 61,086 (2005), *aff'd sub nom. Wisc. Pub. Power v. F.E.R.C.*, 493 F.3d 239 (D.C. Cir. 2007).

⁹⁶ *See Devon Power LLC*, 115 FERC ¶ 61,340, at P 113 (2006).

level of risk to New York’s markets. The Complaint improperly disregards the harm that an increased risk of uneconomic entry will cause to NYISO administered markets. As discussed at length above, the Commission has found that robust BSM Measures—characterized by carefully structured and transparent MET rules now backstopped by the CEE—will protect the market’s ability to send accurate price signals so that investors may accurately determine when to enter and exit a truly competitive market and “investment risk will not be shifted to captive customers over time.”⁹⁷ The Complainants’ proposed ESR Exemption, if approved, would enable the State to flood the market with new, uneconomic, excessively subsidized capacity, preventing other merchant capacity from having an opportunity to recover their costs. Such a situation would frustrate the Commission’s goal of fostering a competitive market, forcing more and more merchant suppliers out and, as demonstrated *supra*, increasing the likelihood that future new entrants will require subsidization. This, in turn, will shift investment risk even further onto the backs of captive customers.

Without sufficient BSM Measures, the market will not provide adequate price signals to retain needed existing resources or incentivize new resources to enter the market in New York City to replace the retired peaking plants. To bring them online, these resources will require regulated, cost-of-service RMR agreements while operations of other otherwise economic resources in these regions will no longer be viable. Retirement of these facilities will ensue. Worse yet, reliability resources will struggle to remain in service and become unavailable unexpectedly due to lack of investment and operating issues. Reliability consequences and market failure will result. Over time, the New York system will be composed of resources

⁹⁷ See *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 91 (2009).

subsidized under State public policy programs, RMR units, and emergency actions in an attempt to maintain reliable service. The market will be effectively dead.

Whatever the intent of an uneconomic entrant, the risk that that entrant will cause irreparable harm to the NYISO's markets by artificially suppressing prices is too high to allow, particularly given that the existing BSM Measures allow an exemption for purely merchant projects as well as projects that are economic. The State could instead achieve *all* of its Climate Act mandates with economic projects if it supported the NYISO's proposed market design effort in response to the proceeding initiated by the Commission to explore how to harmonize State public policy initiatives with competitive wholesale markets.⁹⁸

Specifically, as IPPNY recently established in its answer concerning the NYISO's proposed 1,000 MW Renewable Exemption, the NYISO worked through the stakeholder process and developed a comprehensive market design and associated tariff amendments that would internalize the value of carbon emission reductions in wholesale energy prices that would much more effectively address the State's climate change goals.⁹⁹ Under this approach, the value of carbon would be added to the energy bids of carbon-emitting resources (the "Carbon Adder"). The NYISO dispatch would thereby incorporate the full carbon cost in its commitment and

⁹⁸ See Docket No. AD17-11-000, *State Policies and Wholesale Markets Operated by ISO New England, Inc., New York Independent System Operator, Inc. and PJM Interconnection, L.L.C.*, Notice of Technical Conference (Mar. 3, 2017) ("State Public Policy Proceeding"), at 1 (recognizing that "[i]n recent years, there has been increased interest by state policy makers to pursue policies that prioritize certain resources or resource attributes" and stating that "there is an open question of how the competitive wholesale markets, particularly in states or regions that restructured their retail electricity service, can select resources of interest to state policy makers while preserving the benefits of regional markets and economic resource selection"); see also Docket No. AD17-11-000, *supra*, Supplemental Notice of Technical Conference (Apr. 28, 2017).

⁹⁹ Ethan D. Avallone, *Carbon Pricing: Market Design Complete*, NYISO (June 20, 2019), at 5, https://www.nyiso.com/documents/20142/7129597/6.20.2019_MIWG_Carbon_Pricing_MDC_FINAL.pdf/cf67ebb8-d0fc-7b4b-100f-c3756d6afae8. The design and tariff work are complete and could be filed in short order.

dispatch decisions, and those costs would be included in the wholesale energy prices, which all zero-emitting resources would be paid.¹⁰⁰ Carbon emitting resources would be paid the wholesale-energy price but would be required to pay for the cost of carbon for the unit's generation and such funds collected would be returned to loads.¹⁰¹

The NYISO's proposed tariff amendments provide that the NYPSC would set the Carbon Adder to be included in the energy prices. The NYPSC would thus have the ability to significantly reduce, if not eliminate, the need for out-of-market subsidies to incent the development of either renewable resources or ESRs by effectively structuring the Carbon Adder to reflect the value of providing carbon-free generation.¹⁰² Adopting the NYISO's carbon pricing program would harmonize State public policy with the competitive markets while, at the same time, keeping the necessary protections afforded by the BSM Measures fully intact.

2. Subsidized, Uneconomic ESRs Are an Effective Tool to Artificially Suppress ICAP Prices.

As noted above, the NYPSC in its ESR Order set a goal of encouraging the deployment of thousands of megawatts of ESRs, a goal that subsequently became a mandate in the Climate

¹⁰⁰ *See id.* at 5–6.

¹⁰¹ *See id.* In its reports to Market Participants, the NYISO has reported that it has not brought the Carbon Adder proposal to a market participant vote because it is unknown whether the State supports it, even though the New York Department of Public Service Staff has been closely involved in the development of the proposal since its inception two years ago. If the State supported the Carbon Adder, IPPNY believes it is likely that the Carbon Adder would receive the necessary votes from market participants and the NYISO Board of Directors would approve its filing with the Commission. In addition to providing a more efficient means to meet the State's public policy goals, a major benefit of the Carbon Adder is that renewable resources and ESRs could be added to the system without the need for a Renewable Exemption or ESR Exemption.

¹⁰² With a sufficient Carbon Adder, the State can achieve its ESR goals as well as its renewable energy goals because ESRs, which presumably would charge during off-peak periods, stand to benefit from higher energy prices during peak periods when a high carbon-emitting generator is on the margin, without artificially suppressing ICAP prices. However, the State will have far less incentive to support the Carbon Adder if the Commission grants the ESR Exemption. Given that the State has an alternative means to meet its policy goals that can be implemented relatively quickly, is market-based, is consistent with the Commission's efforts in its State Public Policy Proceeding, and will not cause a devastating reduction in ICAP prices, there is no justification to grant the ESR Exemption.

Act. To achieve these levels, the NYPSC, *inter alia*, directed each of the State’s investor-owned utilities (“IOUs”) to competitively procure specific minimum levels of ESRs to be operational by December 31, 2022.¹⁰³ Importantly, the NYPSC required Con Edison, the IOU that serves the Zone J Mitigated Capacity Zone, to procure dispatch and scheduling rights through contracts with at least 300 MW of ESRs located in its service territory and each of the other IOUs to procure such service from at least 10 MW each in their respective service territories.¹⁰⁴ Con Edison will recover its contract costs from all of its delivery customers through cost-of-service ratemaking, meaning such costs are non-bypassable, and it will receive a return of and on such costs, net of the wholesale market revenues Con Edison earns from the NYISO markets by offering the ESRs’ output into the NYISO’s Energy, Ancillary Services, and ICAP markets.¹⁰⁵

Importantly, the NYPSC required that the IOUs “request bids for contracts for up to seven years, during which the utility will have *full dispatch rights* to the assets.”¹⁰⁶ As the IOUs will control the scheduling and dispatch of the ESRs, Con Edison has the same ability to exercise buyer-side market power whether it contracts with one 300 MW ESR, 30 ten MW ESRs or builds an entirely new generation facility.

The impact of this level of uneconomic entry into NYC is substantial—again, regardless of intent. The entry of 300 MW of ESRs capable of injecting power for only four hours per

¹⁰³ ESR Order at 53.

¹⁰⁴ *Id.* at 55. The NYPSC directed that the bids shall not exceed a utility-specific defined ceiling but did not publish the ceiling due to the competitive nature of the solicitations. *Id.* at 55 & n.49.

¹⁰⁵ NYPSC Case 18-E-0130, *supra*, Implementation Plan of Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. for a Competitive Direct Procurement of Scheduling and Dispatch Rights from Qualified Energy Storage Systems (Feb. 11, 2019), at 12–13, <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={516A0B55-DF3D-4807-8256-1DAACCFD6186}>.

¹⁰⁶ ESR Order at 54.

charge cycle would reduce ICAP clearing prices by \$2.24/kW-month in Zones G-J and \$3.81/kW-month in Zone J based on the current Demand Curve levels and the NYISO's proposed capacity eligibility structure.¹⁰⁷ If the ESRs were able to inject power for eight hours per charge cycle, they would qualify for a full ICAP payment under the NYISO's proposed valuation for energy duration limited resources, and the result would be a reduction of \$2.49/kW-month in Zones G-J and \$4.23/kW-month in Zone J. Were the Commission *arguendo* to accept the NYISO's proposed 1,000 MW Renewable Exemption and the ESR Exemption and 1,000 MW of wind and solar and 300 MW of eight-hour duration ESRs entered in a Class Year, the result would be even more extreme, resulting in a reduction of \$10.79/kW-month in Zones G-J and \$18.33/kW-month in Zone J.¹⁰⁸

Importantly, these measures alone will most certainly crash the market but do not yet take into account all of the incentives directed in the ESR Order. As noted in the Complaint, the NYPSC also authorized a \$310 million "market acceleration bridge incentive" which is intended

¹⁰⁷ Docket No. ER19-2276-000, *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions Regarding Establishment of Participation Model for Aggregations of Resources, Including Distributed Energy Resources, and Proposed Effective Dates (June 27, 2019), at 79–80 (establishing structure to permit ICAP payments to energy duration limited resources, *i.e.*, resources that are unable to provide energy continuously for at least eight hours). The NYISO proposed that a resource with a daily energy duration limitation less than 6 hours but greater than or equal to 4 hours would be paid 90% of the value received by a resource than can operate 24 hours continuously until incremental penetrations have reached 1,000 MW, at which point such resources will be paid 75% of the value of the 24 hour resource. *Id.* For purpose of this calculation, the pre-threshold percentage was used. The Demand Curves are available at <https://www.nyiso.com/documents/20142/2953344/Demand-Curve2019-2020.pdf/fbe06a61-0578-d056-5c78-dfab5b9ae74b>. Based on the current Demand Curves, each 1 MW change in supply changes the price of capacity by \$0.0141/kW-month and \$0.0083/kW-month in Zone J and Zones G-J, respectively. The indicated impacts were estimated as follows: (a) for Zones G-J, $(\$0.0083/\text{kW month per MW}) \times (300 \text{ MW ESR}) \times (0.90 \text{ partial capacity value}) = \$1.87/\text{kW-month}$; (b) for Zone J, $(\$0.0141/\text{kW-month}) \times (300 \text{ MW ESR}) \times (0.90 \text{ partial capacity value}) = \$3.81/\text{kW-month}$.

¹⁰⁸ The indicated impacts were estimated using 1000 MW of perfect ICAP: (a) for Zones G-J, $(\$0.0083/\text{kW month per MW}) \times (1000 \text{ MW Renewables}) + (2.49/\text{kW-month}) = \$10.79/\text{kW-month}$; (b) for Zone J, $(\$0.0141/\text{kW-month}) \times (1000 \text{ MW Renewables}) + (4.23/\text{kW-month}) = \$14.1/\text{kW-month}$. The devastating price impacts of this exemption upon exemption approach provides further support for proceeding with the NYISO's carbon pricing proposal.

to “accelerate the cost decline curve by almost two years and save approximately \$200 million from the projected cost of deploying 1,500 MW of energy storage by 2025, and more than \$400 million from the projected cost of deploying 3,000 MW by 2030.”¹⁰⁹ The NYPSC stated in its ESR Order that:

A bridge incentive is a proven approach, successfully applied in NY-Sun, that provides revenue certainty to the market for a defined duration and level of deployment. Such an approach provides that funding at levels of “missing money” to enable markets to work in the near term, and tapers this level of missing money predictably and transparently so as costs decline and values improve, to arrive at a point of cost reduction and economic deployment where incentives are no longer needed or appropriate.¹¹⁰

The NYSEDA program is expected to expend roughly \$350 million and bring approximately 500 MW of additional ESRs onto the system.¹¹¹ Seven-year contracts with IOUs and additional money through market acceleration bridge incentives for ESRs that cannot earn adequate revenues from the competitive market are exactly the type of out-of-market subsidies that the BSM Measures are designed to mitigate.

Entry of subsidized ESRs, if unmitigated, will have an unsustainable impact on competitive ICAP prices in the Mitigated Capacity Zones.¹¹² Further, in the ESR Order, the NYPSC ordered its staff to perform a study which includes, among other things, a determination

¹⁰⁹ Complaint at 19–20; ESR Order at 65.

¹¹⁰ ESR Order at 62.

¹¹¹ *Id.* at 66.

¹¹² February 27 Answer at 8–11. In their Complaint, the Complainants seek to downplay both the importance and severity of these price impacts, suggesting they are simply short-term changes that will be addressed by “a quick market response via the retirement of a comparable quantity of capacity resource.” *See* Complaint at 28 (citation omitted). However, what the Complainants fail to acknowledge is that the resources that will retire were *otherwise economic* resources whose value has been artificially eroded by the State’s actions.

of “how many MWs of peaking units could be replaced or repowered economically with energy storage at varying durations without threatening reliability.”¹¹³ As such, ESRs participating in the NYISO’s ICAP market are directly competing with fossil peaking facilities. It would be unduly discriminatory, unjust, and unreasonable to exempt ESRs from the BSM Measures while imposing such rules on fossil peaking facilities.¹¹⁴

3. The Complainants’ Reliance on the Commission’s October 2015 Order as a Basis for Their Proposed 300 MW Cap is Misplaced.

The Complainants’ proposed alternative 300 MW Cap erroneously relies on the Commission’s direction to the NYISO in its October 2015 Order to exempt certain new intermittent renewable resources up to an annual megawatt cap. Specifically, the Complainants’ request for a 300 MW Cap disregards crucial differences: dispatchability and capacity factors. In its October 2015 Order, the Commission ruled that only *intermittent* resources with *low* capacity factors are eligible for the exemption based on its determinations that these resources costs have little or no incentive and ability to exercise buyer-side market power.¹¹⁵ Thus, even were the Commission *arguendo* to accept the NYISO’s 1,000 MW Renewable Exemption, which it should not as IPPNY and EPSA demonstrated in the pleadings in Docket No. ER16-1404-000, it is no basis to grant an ESR Exemption subject to a 300 MW Cap. This is because an

¹¹³ ESR Order at 90.

¹¹⁴ That ESRs are considered a form of peaking facilities is demonstrated by a recent application filed with the NYPSC for a certificate to construct a 316 MW ESR project which is intended to replace 316 MW of fossil peaking plants on the same site. Case 19-E-0122, *Ravenswood Development, LLC*, Petition for an Order Granting a Certificate of Public Convenience and Necessity and Establishing a Lightened Regulatory Regime (Feb. 21, 2019), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1F6E91EA-70B8-4C7D-B1E7-6E286898DC71}>.

¹¹⁵ October 2015 Order at P 47.

intermittent resource does not have the capability to reliably operate its facility during peak periods when ICAP is most valuable.

The Commission's use of the term low capacity factor in its October 2015 Order references the NYPSC's characterization of a low value in the ICAP market relative to the MW size of the facility.¹¹⁶ For example, a 100 MW, land-based wind facility would only be permitted to sell approximately 15 to 20 MW of ICAP. Thus, it is the amount of ICAP that the resource would qualify to offer that determines whether the resource will artificially suppress prices. While intermittent resources generally have a low capacity value from an energy market perspective, ESRs are expected to have a relatively high capacity value. As explained above, under the NYISO's proposal, an ESR that can sustain injection for only 4 hours would be able to have 90% (until incremental penetration reaches 1,000 MW) or 75% (once incremental penetration reaches 1,000 MW) of the capacity value of a resource without limitations in its duration of operations, and an ESR that can sustain injection for 8 hours would have the same 100% capacity value as a resource without duration limitations.¹¹⁷ An installed MW of ESR would clearly be expected to have a much bigger impact on suppressing ICAP prices than an installed MW of intermittent generation.

¹¹⁶ *Id.* at P 40 (citing Docket No. EL15-64-000, *N.Y. Pub. Serv. Comm'n et al. v. N.Y. Indep. Sys. Operator, Inc.*, Complaint (May 8, 2015), at 19–20, 24–25 (“NYPSC Complaint”), Affidavit of Thomas S. Paynter at 18:1–5 (attached as Exhibit A to the NYPSC Complaint). The NYPSC Complaint stated that “renewable resources usually operate intermittently, resulting in a lower than average contribution to meeting capacity requirements, making it even more unlikely that a buyer could use such a resource to drive down the capacity market price sufficient to recover the substantial development costs.” NYPSC Complaint at 25 (citing Affidavit of Thomas S. Paynter, at 19:1–5 (attached as Exhibit A to the NYPSC Complaint)).

¹¹⁷ For example, a 100 MW ESR with a 4-hour duration would be permitted to sell 75 MW of capacity (as compared to a 100 MW fossil-generator which would be able to sell 100 MW without taking derating into account), and a 100 MW ESR with an 8-hour duration would be permitted to sell 100 MW of capacity.

ESRs are not intermittent resources like wind and solar resources. They do not have low capacity values. They are controllable and can be dispatched during peak periods. ESRs as a resource type, like fossil peaking facilities, are thus capable of artificially suppressing ICAP prices and, therefore, must be subject to the BSM Rules without any exemption cap.

For these reasons, the Commission should reject the Complainants' alternative request to order the NYISO to provide an exemption for ESRs entering the market up to an annual megawatt cap of 300 MW or any other level.

III. CONCLUSION

For the aforementioned reasons, the Commission should deny the Complaint and reject the Complainants' proposed changes to the BSM Measures.

Dated: August 19, 2019

Respectfully submitted,

David B. Johnson
David B. Johnson
Read and Laniado, LLP
Attorneys for Independent Power
Producers of New York, Inc.
25 Eagle Street
Albany, New York 12207
Telephone: 518-465-9313

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 Albany, NY, August 19, 2019

By: David B. Johnson
David B. Johnson