

NEW YORK STATE
PUBLIC SERVICE COMMISSION

Case 19-E-0530 - Proceeding on Motion of the Commission to
Consider Resource Adequacy Matters.

COMMENTS OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.

David B. Johnson
READ AND LANIADO, LLP
Attorneys for Independent Power Producers
of New York, Inc.
25 Eagle Street
Albany, New York 12207
(518) 465-9313 (tel)
(518) 465-9315 (fax)
dbj@readlaniado.com

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On August 8, 2019, the New York State Public Service Commission (“Commission”) issued an order initiating the above-captioned proceeding to address issues it identified with the New York Independent System Operator, Inc.’s (“NYISO”) installed capacity (“ICAP”) market structure which it believes will impede the achievement of the State’s clean energy mandates.¹ The Commission asserted that the ICAP product that load serving entities (“LSEs”) are required to procure pursuant to the NYISO’s ICAP market rules “is an incomplete resource adequacy instrument because it fails to recognize and provide compensation for many important factors, such as environmental and local reliability benefits.”² As a result, resources that are economically chosen to provide ICAP in the NYISO’s markets may not be all the same resources that the State has chosen to meet its clean energy mandates.³ Specifically, as the Commission has acknowledged in initiating this proceeding and in its previous actions, because resources

¹ Case 19-E-0530, *Proceeding on Motion of the Commission to Consider Resource Adequacy Matters*, Order Instituting Proceeding and Soliciting Comments (Aug. 8, 2019) (“Instituting Order”). As the Commission noted, these mandates were codified by the Legislature in the Climate Leadership and Community Protection Act (“Climate Act”) this past July and require 70% of energy consumed in New York State by 2030 to be produced by renewable resources. Ten years later, energy consumed in New York must be entirely emissions-free. As part of achieving these levels, the Climate Act specifically requires the entry of 3,000 MW of energy storage resources (“ESRs”) by 2030, 6,000 MW of photovoltaic solar generation by 2025, and 9,000 MW of offshore wind generation by 2035.

² *Id.* at 3.

³ *Id.* at 4.

receiving State support may not economically clear the NYISO's ICAP auction, they will not be counted as ICAP resources.⁴

This outcome may occur because these resources would be required to submit offers set at their respective Offer Floors in accordance with Federal Energy Regulatory Commission ("FERC") approved buyer-side market power mitigation measures ("BSM Measures"), which are designed to ensure all suppliers have an opportunity to earn just and reasonable rates—*i.e.*, these resources would be deemed uneconomic. If these resources are unable to clear the market based on their economics, the Commission has claimed that this outcome will cause consumers to pay more than necessary and such costs could increase significantly with the expansion of the State's clean energy goals.⁵ Pointing to its statutory obligation to ensure the safe and adequate provision of electric service at just and reasonable rates, the Commission requested that parties comment on questions related to its inquiry on "how to reconcile resource adequacy programs with the State's renewable energy and environmental emission reduction goals."⁶

Independent Power Producers of New York, Inc. ("IPPNY") hereby submits its comments on the topics and questions raised by the Commission in its Instituting Order. IPPNY is a trade association representing companies involved in the development of electric generating facilities, including renewable resources; the generation, sale, and marketing of electric power; and the development of natural gas and ESRs 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, energy storage,

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

and nuclear.⁷ IPPNY's fundamental interest remains rooted in the continued development and enhancement of reliable, efficient, and non-discriminatory integrated regional wholesale competitive electricity markets. To date, the Commission has implemented its public policy initiatives in a manner that generally has been consistent with competitive markets and has required developers to bear market risk, consistent with the Commission's long-standing policy to rely on competitive markets to provide reliable electric service at lowest cost.⁸ With respect to the Commission's inquiry on resource adequacy, IPPNY's interest continues to lie mainly in ensuring that any Commission policies developed in this proceeding do not increase market uncertainty and risk and are consistent with, and do not undermine in any respect, the functioning of non-discriminatory, competitive electricity markets in New York and its surrounding regions.

I. INTRODUCTION

IPPNY agrees that changes must be explored to address resource adequacy on the system following enactment of the Climate Act and that existing wholesale market mechanisms to date have been expressly designed to deliver reliable electric service at lowest cost, and, therefore, have not been designed to account for the value provided by certain resources to achieve the additional outcomes now envisioned by the State. While IPPNY firmly believes that the design of the wholesale markets can be enhanced to achieve the State's desired outcomes, exploration of alternative market constructs cannot effectively be undertaken in a vacuum apart from the NYISO's stakeholder process. As discussed, *infra*, the NYISO is already engaging with

⁷ IPPNY's comments do not necessarily represent the position of its individual members.

⁸ See Cases 15-E-0302 et al., *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting A Clean Energy Standard (Aug. 1, 2016), at 102 (determining that the mandated procurement of renewable energy credits ("RECs") "is a continuation of the Commission's policy of relying on markets where feasible, as the best long-run approach to reducing costs and promoting innovation").

stakeholders on changes to its energy and ancillary services markets *and* its ICAP market to ensure adequate revenues to incent new, and retain existing, renewable resources, as well as to provide the price signals necessary for flexible and controllable resources that will be critically needed to maintain reliable system operation as intermittent resources begin to comprise a larger share of the State’s generation portfolio.⁹

As discussed at length, *infra*, most notable of the NYISO’s ongoing initiatives to enhance the competitive market design to achieve the State’s public policies is the extensive work that has been conducted by the NYISO, the State, and other stakeholders over the past two years to internalize the value of carbon dioxide (“carbon”) emissions reduction in wholesale energy prices. As recently demonstrated by Dr. Susan Tierney and Mr. Paul Hibbard of the Analysis Group, one of the world’s largest international economics consulting firms, the NYISO’s proposed carbon pricing market design can help the State meet its clean energy goals faster and more cost-effectively while reducing emissions and maintaining grid reliability.¹⁰ Because carbon emissions are a result of energy production, embedding a cost on carbon in the market is the best way to assure that the benefit of avoiding carbon emissions is represented. IPPNY acknowledges that carbon pricing on its own may not be sufficient to achieve all of the State’s policies and that additional State programs may be necessary, but it is the single most effective way to attract private investment through the wholesale market in the technologies the State desires and to assure that the resource additions are added in the most efficient way to displace

⁹ See *Draft 2019 Master Plan: Reliability and Markets for the Grid of the Future*, NYISO (Aug. 2019), [https://www.nyiso.com/documents/20142/8103377/2019%20Master%20Plan%20draft%20v3%20\(for%20posting%208.26.2019\).pdf/231cc877-89f0-f410-1a4b-81576b1e1960](https://www.nyiso.com/documents/20142/8103377/2019%20Master%20Plan%20draft%20v3%20(for%20posting%208.26.2019).pdf/231cc877-89f0-f410-1a4b-81576b1e1960).

¹⁰ See Susan F. Tierney & Paul J. Hibbard, *Clean Energy in New York State: The Role and Economic Impacts of a Carbon Price in NYISO’s Wholesale Electricity Markets*, Analysis Group (Oct. 3, 2019), <https://www.nyiso.com/documents/20142/2244202/Analysis-Group-NYISO-Carbon-Pricing-Report.pdf/81ba0cb4-fb8e-ec86-9590-cd8894815231?t=1570098686835> (“Analysis Group Report”).

carbon emissions. Therefore, the State should immediately express support for the NYISO's carbon pricing proposal, as doing so will accelerate the effort to harmonize State environmental policy with wholesale market design and provide significant benefits to New York electricity consumers.

Importantly, the uncertainty the initiation of this resource adequacy proceeding has engendered comes at a critical time for the wholesale markets in New York as a whole and, particularly, in New York City. First, the State is about to embark on the Climate Act's implementation, the most aggressive and far-reaching climate change legislation in the nation. Second, as the Commission highlighted in its recent complaint filed at FERC, pending environmental regulations are expected to require roughly 3,500 MW of fossil peaking facilities in New York City and Long Island by 2025 to be repowered or retired.¹¹ Studies issued this past spring reveal that the retirement of these facilities will lead to significant system needs with durations reaching up to 15 hours in certain subpockets located within these two areas. It is indisputable that these system needs cannot be effectively met by ESRs alone.¹² Thus, near-term investments in fossil generation must be made to keep the lights on for the foreseeable future.

¹¹ Docket No. EL19-86-000, *New York Pub. Serv. Comm'n et al. v. New York Indep. Sys. Operator, Inc.*, 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) ("July 2019 Complaint"), at 21, 28.

¹² See *CRP: Peaker Scenario – Assessing DEC's NOX Limits (Draft) Ruling for Simple Cycle and Regenerative Combustion Turbines*, Consol. Edison Co. of N.Y., Inc. (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), <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 those presentations, in addition to the need to meet these long durations, the loss of this peaking capacity also could raise a number of other operational challenges with respect to, e.g., off-peak maintenance conditions, operating reserves, black start, auxiliary power, emergency generation and transient voltage recovery. At a minimum, far more ESRs would be required to meet the same MW levels, which

As the environmental regulations are currently proposed, the owners of these peaking plants must submit their compliance plans by next spring. The uncertainty created by the initiation of this proceeding alone may significantly hamper the ability of these owners to secure the necessary capital to finance these needed replacement facilities. It has long been recognized that the capacity markets are designed to be the source of “missing money,” *i.e.*, they are intended to act as the necessary complement to revenues earned in the energy and ancillary services markets to ensure suppliers in the competitive wholesale markets—entities that, importantly, have no regulatory, rate-based backstop to secure funds—are given a reasonable opportunity to earn a just and reasonable rate. The need for an efficiently structured ICAP market in New York City to ensure the long-term reliability of the system by neither undercompensating nor overcompensating suppliers has been upheld by FERC as a hallmark of the New York market design.¹³ Irrespective of the NYISO’s development of energy and ancillary service market enhancements, such as carbon pricing, that are themselves certainly important, the cost of capital to finance these needed facilities will, at best, increase—if capital is ultimately available at all—absent clear signals from the Commission in this proceeding that the NYISO’s ICAP markets will remain sound and intact.

For this and the other reasons set forth herein, IPPNY respectfully urges the Commission to reaffirm its commitment to the ongoing development of the NYISO’s energy, ancillary service, and ICAP markets by directing Department of Public Service Staff (“DPS Staff”) to work through the NYISO’s stakeholder process to develop and implement market design changes that harmonize the State’s public policy initiatives with competitive markets. If not

may prove cost prohibitive, and, given space constraints in some New York City locations, ESRs may ultimately be physically infeasible in certain circumstances.

¹³ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at PP 110–112 (2008) (“BSM Order”).

aligned with the NYISO's efforts to enhance all three of its markets holistically, the outcome of this proceeding will needlessly create uncertainty and confusion in the market at the very time when a clear path forward must be charted.

II. THE NYISO'S ICAP MARKET RULES SHOULD CONTINUE TO GOVERN THE PROCUREMENT OF RESOURCES NEEDED TO MAINTAIN THE STATE'S RESOURCE ADEQUACY REQUIREMENTS.

Based on the discussion during the August 8, 2019 Commission session announcing this case, the Commission's statements in the Instituting Order concerning its inquiry into resource adequacy, and the Commission's questions therein, it appears that the Commission could be considering a drastic change that would severely disrupt the NYISO's competitive wholesale market that the Commission and market participants have worked so hard to develop and enhance over the past 20 years. The question at the root of this inquiry is how best to value the services provided by resources being addressed in the State's public policy initiatives. Some parties have advocated that the answer lies in the manner in which the offers of these resources are addressed in the NYISO's capacity markets. Specifically, these parties assert that if FERC does not exempt State-supported resources from application of the BSM Measures to ensure they clear the NYISO's spot market ICAP auction, the State should step in and take on the resource adequacy role for such resources by removing them from the NYISO's ICAP market altogether and paying them for their ICAP outside the market.¹⁴ In a similar vein, the Commission referenced a potential alternative identified by FERC in Docket No. EL16-49-000¹⁵ in its

¹⁴ See *Comments on NYISO's Grid in Transition Draft Whitepaper*, Nat. Res. Def. Council et al. (July 1, 2019), at 4–8, <https://www.nyiso.com/documents/20142/6785167/2019701%20NYISO%20grid%20in%20transition%20comments.pdf/5e0a46e9-05eb-47c9-bdd9-adccf5aeb549>.

¹⁵ *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 157 (2018) (“2018 PJM Order”), *reh'g pending*.

Instituting Order, pursuant to which resources receiving out-of-market support could be matched with a commensurate amount of load and could be removed from PJM Interconnection, L.L.C.’s (“PJM”) ICAP market for some period of time through the creation of a resource specific Fixed Resource Requirement Alternative (“FRR Alternative”) to avoid being subject to PJM’s equivalent of the NYISO’s BSM Measures, the Minimum Offer Price Rule (“MOPR”).¹⁶ The Commission also cited to the California Public Utility Commission’s (“CAPUC”) Resource Adequacy program, which, consistent with the FERC-approved California ISO tariff, requires LSEs to meet resource adequacy requirements through either self-supply or bilateral contracts rather than through a centralized ISO-administered ICAP market.¹⁷

IPPNY understands that the Commission is strongly opposed to applying the BSM Measures to State-supported resources. The Commission protested their adoption in 2008 and has sought broad-sweeping exemptions in their application in numerous pleadings since that time. If FERC had permitted these proposed changes, however, they would have largely eviscerated the BSM Measures and rendered market clearing prices in the NYISO’s capacity markets unjust and unreasonable. Most recently, the Commission and the New York State Energy Research and Development Authority (“NYSERDA”) filed a complaint with FERC this past July requesting that FERC exempt State-supported ESRs from the BSM Measures.¹⁸

¹⁶ Instituting Order at 12.

¹⁷ *Id.* at 12 n.31.

¹⁸ July 2019 Complaint. The July 2019 Complaint largely echoed arguments made by these parties in protests to the NYISO’s proposals in its ESR compliance filing and Federal Power Act (“FPA”) Section 205 filing to address distributed energy resources (“DER”) to continue to apply the BSM Measures to these resources. *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); 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). The July 2019 Complaint remains pending before FERC as do the NYISO’s ESR compliance filing and its FPA § 205 DER filing.

IPPNY protested the July 2019 Complaint, demonstrating that the BSM Measures must continue to apply to State-supported ESRs to prevent subsidized uneconomic entry from suppressing ICAP prices artificially in derogation of FERC orders. As FERC has held, permitting such broad-sweeping uneconomic entry would unsustainably distort the market price signals that are necessary to encourage investment in new, and the maintenance of existing, generators to ensure the reliability of the system over the long term.¹⁹

As the Commission's position on BSM Measures is very unlikely to change, IPPNY will generally forego debating the need for, and the merits of, these measures in this proceeding. IPPNY recognizes the State's climate change concerns, however, and understands the underlying public policy initiatives the State is seeking to implement, which it has deemed beneficial for its citizens. IPPNY's members have substantially contributed to the significant reductions in New York's emissions levels achieved to date and IPPNY members are developing and operating renewable resources. IPPNY members are also actively pursuing the development of ESRs, including on sites in key locations in New York City load pockets. However, while the State's climate change goals are laudable and IPPNY members are working in support of them, FERC has repeatedly established that "resources receiving out of market support are capable of suppressing market prices, regardless of intent."²⁰

For this reason, IPPNY cannot and does not agree with the underlying premise of this proceeding: that the Commission can or should take on a resource adequacy role to allow State-supported resources to be removed from the market as a means to avoid the BSM Measures so

¹⁹ Docket No. EL19-86-000, *supra*, Protest of Independent Power Producers of New York, Inc. (Aug. 19, 2019) ("Protest").

²⁰ See 2018 PJM Order at P 155 (citation omitted).

that they can be assured of being paid for ICAP. In the Instituting Order’s list of questions on which the Commission seeks input, the Commission asks “[w]hat, if any, next steps should the Commission take with respect to resource adequacy matters?”²¹ Rather than seeking to take over the role of addressing resource adequacy, the Commission, through DPS Staff, should continue working with market participants in the NYISO stakeholder committee process to enhance the NYISO’s market rules. As demonstrated, *infra*, the Commission cannot unilaterally require State-supported resources be removed from the NYISO’s ICAP market. Even assuming, *arguendo*, it did have the authority to do so, it should refrain from taking this step in any event.

A. The Commission Should Direct Its Efforts to the NYISO’s Stakeholder Process to Develop and Implement Market Design Changes That Harmonize the State’s Public Policy Initiatives with Competitive Markets.

In its Draft Whitepaper addressing grid in transition issues, the NYISO described the numerous benefits competitive wholesale markets have brought to New York electricity consumers to date, stating, “[t]he NYISO’s markets have thus far met their objective of maintaining reliable service at low cost. They have attracted and retained sufficient capacity and have maintained high operational reliability with limited out-of-market interventions.”²² With that said, the NYISO recognized that New York’s economy-wide decarbonization goals and clean energy mandates will have substantial impacts on the NYISO’s wholesale markets that will

²¹ Instituting Order at 12.

²² *Reliability and Market Considerations for a Grid in Transition*, NYISO (May 2019), at 26, <https://www.nyiso.com/documents/20142/6785167/Grid%20in%20Transition%20DRAFT%20FOR%20POSTING.pdf/74eb0b20-6f4c-bdb2-1a23-7d939789ed8c> (“Draft Whitepaper”); *see also 2018 State of the Market Report for the New York ISO Markets*, Potomac Economics (May 2019), at i, <https://www.nyiso.com/documents/20142/6785167/Grid%20in%20Transition%20DRAFT%20FOR%20POSTING.pdf/74eb0b20-6f4c-bdb2-1a23-7d939789ed8c> (stating that the NYISO’s markets in 2018 performed competitively). The NYISO has indicated it is reviewing the comments submitted on the Draft Whitepaper and expects to issue its final Whitepaper later this year.

require market changes to ensure revenue adequacy for suppliers to meet reliability needs. The NYISO stated that the shift in generation mix required by the State's clean energy goals:

poses a multitude of challenges to the NYISO's primary goal of supporting a reliable and economically efficient electric grid. These new renewable resources have economic and performance characteristics that may not align well with the current wholesale market design. Additionally, . . . there may be a need for retirement of inflexible generation to support new intermittent renewable resources. Many of the new resources will be weather-dependent (e.g., wind and solar resources), which creates operational challenges and may require large amounts of flexible, controllable resources to maintain a reliable system. These renewable resources also have zero or very low variable costs, which reduces energy prices, on average and in most hours. This in turn places a greater emphasis on ancillary services and capacity market requirements and revenues to retain flexible and controllable resources to maintain reliable system operation. Absent a corresponding increase in capacity or ancillary service requirements and revenues or other wholesale market changes, investment signals for complementary resources may be insufficient to meet future reliability challenges.²³

In its 72-page Draft Whitepaper, the NYISO identified a laundry list of issues and potential market enhancements to address the successful harmonization of the State's policies with the wholesale markets, including the NYISO's ICAP market—an analysis that directly addressed the Commission's inquiries in this case as to whether the State's policies and the NYISO's markets are in alignment and, if not, the mechanisms available to drive alignment.²⁴ As the NYISO described in its Draft Whitepaper, one of its most important initiatives to harmonize State clean energy policies with wholesale markets is its comprehensive market design and associated tariff amendments that would internalize the value of carbon emission reductions in wholesale energy prices. As designed, the NYISO's carbon pricing proposal would

²³ Draft Whitepaper at 17.

²⁴ See Instituting Order at 11.

much more effectively address the State’s policies by adding the value of carbon to the energy bids of carbon-emitting resources (the “Carbon Adder”). The NYISO dispatch would thus incorporate the full carbon cost in its commitment and dispatch decisions, and those costs would be included in the wholesale energy prices, which all resources would be paid. Carbon emitting resources would be paid the wholesale-energy price, including the value of carbon emissions, but would be required to pay for the cost of carbon associated with emissions from the unit’s operation. Non-carbon emitting resources that operate at the right time and location, on the other hand, would be paid the wholesale price, inclusive of the cost of carbon, without having to pay for carbon emissions, thereby rewarding them for avoiding carbon emissions. Net receipts from charging carbon emitting resources for the carbon they emit would be returned to consumers.

The NYISO’s proposed tariff amendments provide that the Commission would set the Carbon Adder price to be included in the energy prices.²⁵ By the express provisions of the Climate Act, the State—now through the New York State Department of Environmental Conservation (“DEC”)—would have the ability to significantly reduce, if not eliminate, the need for out-of-market subsidies to incent the development of most renewable resources or ESRs by effectively structuring the Carbon Adder to reflect the value of providing carbon-free generation. Moreover, as the NYISO noted in its Draft Whitepaper, new resources will be exempt from Offer Floor mitigation so long as the surplus capacity margin in a locational capacity zone drops below 6% in Zone J or 5% for the G-J Locality.²⁶ With the Climate Act’s mandating the DEC to adopt regulations to reduce greenhouse gas emissions by 85% by 2050, the DEC can tailor its

²⁵ The design of the NYISO’s carbon pricing proposal was finalized prior to the enactment of the Climate Act, which requires the Department of Environmental Conservation to define the cost of carbon.

²⁶ See Draft Whitepaper at 52.

regulations to align retirements of emitting resources to match the entry of new non-emitting resources in the locational capacity zones below these thresholds.

In its Instituting Order, the Commission asks how to align the State’s clean energy mandates with the NYISO’s capacity market.²⁷ In its analysis of the benefits and costs of the NYISO’s proposed carbon pricing program following the State’s enactment of the Climate Act, the Analysis Group established that implementation of the NYISO’s carbon pricing program could “provide a number of benefits, including support for New York policy makers’ goals to reduce carbon emissions as quickly and as economically as possible.”²⁸ This result inures because the energy market, for the first time, would be placing value on carbon-free and lower carbon operations, a result that squares with the Climate Act and the State’s ongoing public policy initiatives. To that end, the Analysis Group highlighted the interrelationship between the carbon pricing program and the NYISO’s BSM Measures. Because the program would effectively price the value of carbon in the markets, the Analysis Group found some carbon-free resource options would be economic. Thus, the State could proceed with its initiatives, and the market would select the most effective renewable resources without the need for contracts or additional changes to the current BSM structure:

A carbon pricing policy as proposed through the NYISO stakeholder process represents a fair and transparent, competitive, market-based mechanism to compensate resources based on generating resource attributes (*i.e.*, zero-emissions or renewable resource attributes). Administration of a carbon pricing mechanism would help to align state policy with the state’s wholesale markets, and reduce the potential for FERC to impose further BSM actions by guiding the development of new clean energy resources substantially through pricing in competitive wholesale markets.²⁹

²⁷ See Instituting Order at 11.

²⁸ Analysis Group Report at 59.

²⁹ *Id.* at 40, 42–43.

The potential for carbon pricing to eliminate the need for out-of-market subsidies was demonstrated by the weighted average fixed price for RECs in the contracts awarded in NYSERDA's most recent solicitation for RECs, which was \$18.52/MWh for solar, onshore wind, and ESRs. At the NYISO average hourly marginal emissions rate of 0.5 tons of carbon emitted per MWh, \$18.52/MWh is roughly equivalent to a \$41 social cost of carbon, which is at the lower end of the range of possible Carbon Adder prices DPS Staff suggested be evaluated as part of the State's collaborative process with the NYISO to examine incorporating the social cost of carbon into the wholesale market.³⁰ Based on the recent solicitation for offshore wind RECs and NYSERDA's projections that the costs of offshore wind will drop as the nascent industry matures in the United States, it is also possible that a modest and predictable social cost of carbon could soon provide the missing market revenues needed by offshore wind developers to be economic without a need for out-of-market payments.

The significance of the potential for the Carbon Adder to eliminate the need for out-of-market payments cannot be overstated as it gets right to the heart of this proceeding, namely avoidance of the imposition of Offer Floor mitigation on the ICAP market bids of the State's preferred technologies under the NYISO's BSM Measures. Because the Carbon Adder could potentially increase energy market revenues to a level where even a nascent technology such as offshore wind could be economic without State subsidies, other more well-established technologies are likely economically viable with a Carbon Adder, such as the existing nuclear

³⁰ See Warren Myers, *Recommended CO2 Value to Use in IPPTF Analysis*, DPS (Apr. 23, 2018), at 7, <https://www.nyiso.com/documents/20142/1393516/IPPTF%20CO2%20Value%202023%202018%20final%2020pd.pdf/9b8ad8e6-8766-368e-43cd-171b55391a1d>.

facilities (which are being compensated for their zero emissions attributes), onshore wind, solar, and ESRs.

The NYISO's carbon pricing proposal thus presents a market-based means to comprehensively address the Climate Act's dictate to develop renewable resources and ESRs. Adoption of carbon pricing would provide a market-based mechanism to most efficiently recognize and compensate for the environmental and local reliability benefits the Commission has referenced in this proceeding, thereby reconciling the resource adequacy requirements with the State's renewable energy and emission reduction goals. At the same time, the BSM Measures would continue to effectively assess the economics of supply resources so the necessary protections afforded by the BSM Measures would be kept fully intact. Accordingly, the Commission should formally endorse the NYISO's carbon pricing proposal in this proceeding to harmonize State public policy with the competitive markets while, at the same time, keeping the necessary protections afforded by the BSM Measures fully intact.³¹

The NYISO also stated in its Draft Whitepaper that it plans to investigate with stakeholders a proposed revision to its ICAP market structure to further harmonize the market with the State's clean energy goals. Among efforts the NYISO has initiated, this specific investigation would study "the suitability of an orderly retirement of excess conventional resources by pairing these retirements with the entry of Public Policy based renewable resources," similar to the ISO-New England CASPR (Competitive Auctions with Sponsored

³¹ The NYISO has repeatedly established in stakeholder meetings that it seeks State support for its program. Endorsing the carbon pricing proposal in a Commission order issued in this proceeding would provide certainty and transparency to the market and a clear and important signal to the NYISO—as well as FERC—to proceed with the program.

Resources) mechanism.³² Importantly, under the CASPR approach, uneconomic State-supported resources would receive payment for their ICAP even though they had not cleared the ICAP market at their Offer Floors. Other ongoing NYISO efforts are exploring how to effectively value the capacity of resources with duration limitations and how to effectively value the capacity of resources that have limited availability during peak operating conditions. While at different stages of development, these efforts reflect a concerted effort to comprehensively address complex market and operational issues as the system's composition continues to evolve with 21st century technology and innovation.

This proceeding, however, potentially throws a wrench into the NYISO's urgently needed and focused efforts to adapt its market rules to harmonize with the Climate Act's mandated changes in the State's generation mix. Rather than examine all of the issues that impact the NYISO's energy, ancillary services, and ICAP markets holistically, the Commission's proceeding could, if it moves forward, examine just one piece of the integrated whole—resource adequacy—in isolation, and, even more problematically, potentially could seek to apply a resource adequacy construct outside of the NYISO's markets. Not only would this be an inefficient way to address market design, requiring a duplication of effort and an unwise use of scarce resources of both the State and market participants, it would create great uncertainty for market participants and investors alike as to the continued viability of the NYISO's ICAP market and whether any replacement mechanism would, in fact, provide the revenues necessary to support the operation of new and needed existing resources at the very time the State begins to implement its ground-breaking legislation.

³² Draft Whitepaper at 52. Since issuance of the Draft Whitepaper, the NYISO also has unilaterally determined it will include a comprehensive review of its BSM Measures with a market design complete milestone to allow for tariff changes if warranted after review in its list of 2020 projects. This work is expected to commence in early 2020.

B. The Commission is Preempted by the FPA from Unilaterally Asserting a Resource Adequacy Role.

The Commission cannot unilaterally remove resources and load from the NYISO's ICAP market to avoid the application of Offer Floor mitigation to State-supported resources because it is preempted by the FPA and the FERC-approved NYISO tariff which requires all unforced capacity ("UCAP") purchased to meet LSE resource adequacy needs in the State (*i.e.*, ICAP to meet the installed reserve margin ("IRM") established by the New York State Reliability Council ("NYSRC") and the locational minimum ICAP requirements established by the NYISO in the two Mitigated Capacity Zones as well as on Long Island (together, the "UCAP Obligation")) to be reflected in the NYISO's spot market auction. Under the existing, FERC-approved NYISO Services Tariff, all LSEs must participate in the NYISO's ICAP spot market auction and only supply accounted for in such auction can be used by LSEs to meet their UCAP Obligations.³³ The NYISO tariff provides that the UCAP Obligation is established for all LSEs by the NYISO ICAP spot market auction. The NYISO tariff also provides that all new ICAP suppliers in Mitigated Capacity Zones, unless exempt, are subject to Offer Floor mitigation. The UCAP of any ICAP supplier may not be used to satisfy any LSE's UCAP Obligation unless it clears the ICAP spot market auction. Significantly, the NYISO's tariff does not allow LSEs and suppliers to contract with each other for ICAP subject to an Offer Floor to circumvent the BSM Measures or to otherwise avoid the NYISO's ICAP market and associated requirements. Without approval by FERC of changes to these tariff provisions, the NYISO is required to continue procuring capacity through the ICAP market regardless of any steps the State might take.

³³ NYISO Market Administration and Control Area Services Tariff §§ 5.11.2, 5.14.4 ("Services Tariff").

While FERC has recognized that states may have a role in resource adequacy and planning and has found ISO-proposed tariffs, such as the California ISO's tariff, that provide that resource adequacy is secured through state resource adequacy constructs rather than centralized ISO-administered ICAP markets can be just and reasonable based upon the specific facts and circumstances presented, FERC has established that it has jurisdiction over resource adequacy and it is—and must, by law, be—FERC that will exercise that jurisdiction cognizant of the traditional role for state regulatory authorities. FERC ruled that:

[T]he question of jurisdiction over resource adequacy is a complex matter that represents “the confluence of state and federal jurisdiction.” While we are cognizant of the traditional role of state and local entities in regulating resource adequacy, we are also aware of our responsibility under the FPA to ensure the reliability of the system and that wholesale rates are just and reasonable. We will defer to state and local entities' decisions when possible on resource adequacy matters, but in doing so we will not shirk our congressionally-mandated responsibilities. We find that the adequacy of resources can have a significant effect on wholesale rates and services and therefore is subject to Commission jurisdiction.³⁴

Unlike the FERC-approved California ISO tariff structure and the rules implemented by the CAPUC based on that structure, the NYISO's Services Tariff mandates that ICAP procured by LSEs in New York must be reflected in the NYISO's spot market auction and otherwise contains a comprehensive set of rules establishing the rates, terms, and conditions for all LSEs in the State to meet resource adequacy requirements. The Commission is thus preempted by the FPA from establishing unilaterally its own resource adequacy program, whether couched in terms of environmental, local reliability benefits, or otherwise, that would remove load and supply from the NYISO's ICAP market. Such a program could not be established absent FERC

³⁴ *Cal. Indep. Sys. Operator. Corp.*, 119 FERC ¶ 61,076, at P 540 (2007).

approval of changes to the current ICAP market structure as set forth in the NYISO Services Tariff.

By operation of the Supremacy Clause of Article VI of the U.S. Constitution, federal law supersedes state or local laws in three important respects.³⁵ Congressional intent to preempt state or local law may be evinced (1) by express language in a federal statute, (2) implicitly, where the federal legislation is so comprehensive in scope that it fully occupies the field of its subject matter jurisdiction (field preemption), or (3) implicitly, where the state or local law actually conflicts with the federal law (conflict preemption).³⁶ Under the conflict preemption prong of the test, an actual conflict arises when either compliance with both federal and local laws is physically impossible or when the local law stands as an obstacle to the accomplishment of the full congressional purposes and objectives.³⁷ Notably, “[f]ederal regulations have no less preemptive effect than federal statutes.”³⁸

The FPA confers upon FERC the exclusive responsibility for ensuring that transmission and wholesale power sales, rates, and charges, including any rule, regulation, practice, or contract affecting them, are just and reasonable and not unduly discriminatory. Here, the rates for ICAP together with the rules and practices governing this service are inextricably inter-related and fall within FERC’s exclusive jurisdiction, and FERC has comprehensively defined a resource adequacy construct for the New York markets. Specifically, Section 201(b)(1) of the

³⁵ *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985).

³⁶ *Id.* at 713; *see also Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 42–43(1998), *abrogated on other grounds*, *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2010).

³⁷ *Hillsborough County*, 471 U.S. at 713; *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 39 (1996), *cert. denied*, 520 U.S. 1118 (1997).

³⁸ *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

FPA confers jurisdiction on FERC over the transmission of electric energy in interstate commerce and sales of electric energy at wholesale in interstate commerce.³⁹ In addition,

Section 205(a) of the FPA states that:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of [FERC], *and all rules and regulations affecting or pertaining to* such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.⁴⁰

Finally, FPA § 206 grants FERC the ability to review “any rate, charges, or classification” charged by a public utility for any transmission or sale subject to the jurisdiction of FERC, as well as “any rule, regulation, practice, or contract affecting such rate, charge, or classification . . .

.”⁴¹

FERC’s jurisdiction over wholesale sales, thus, preempts the Commission from regulating any aspect of the provision of wholesale service.⁴² With respect specifically to LSEs’ procurement of ICAP to meet resource adequacy requirements, the Commission is preempted by the FPA from defining a State-based program for LSEs to procure service from wholesale generators and wholesale generators to sell service to LSEs to satisfy resource adequacy requirements outside of the NYISO’s ICAP market and its associated rules. Such a structure, if the Commission were to attempt to apply it, would directly conflict with FERC’s regulation of the rates, terms, and conditions of wholesale service. Specifically, it would directly run afoul of the FERC-approved NYISO tariff provisions that expressly establish the ICAP market, which

³⁹ 16 U.S.C. § 824(b)(1).

⁴⁰ 16 U.S.C. § 824d(a) (emphasis added).

⁴¹ 16 U.S.C. § 824e(a).

⁴² See *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of State of N.Y.*, 63 N.Y.2d 424, 439–40 (1984).

has been designed to ensure that suppliers have an opportunity to earn a just and reasonable rate. Given FERC’s unquestionably exclusive jurisdiction over the rates for wholesale services provided by wholesale generators, such a structure could well lead to rates that are not just and reasonable in direct violation of FPA § 205.

Indeed, FERC rejected a proposal that would allow the Commission to intrude into the NYISO’s selection of resources to meet reliability needs because it would interfere with the NYISO’s procedures—circumstances directly analogous to, and inextricably interrelated with, the resource adequacy considerations at issue here. In an order issued in 2015, FERC addressed the NYISO’s proposed tariff revisions establishing procedures governing the retention of and compensation to generators that wish to deactivate but are found by the NYISO to be required to provide service to satisfy an identified reliability need on the New York electric system, commonly referred to as “reliability must run” (“RMR”) service.⁴³ FERC rejected a proposal to allow the Commission to evaluate non-generation alternatives to meet reliability needs. FERC found that the NYISO “is uniquely positioned to assess the need for RMR service” and “is the appropriate entity to assess the potential impacts RMR agreements may have on its markets in New York.”⁴⁴ FERC concluded that “NYISO should be the entity that administers RMR service in New York pursuant to the provisions of its Commission-jurisdictional [Services] Tariff”⁴⁵ FERC rejected the Commission’s rehearing request that the February 2015 Order “interferes with the [Commission]’s jurisdiction,” stating that “[t]he rates, terms, and conditions for RMR service . . .

⁴³ *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) (“February 2015 Order”), *on reh’g & compliance*, 155 FERC ¶ 61,076 (2016) (“April 2016 Order”), *on reh’g & compliance*, 161 FERC ¶ 61,189 (2017) (“November 2017 Order”), *on reh’g & compliance*, 163 FERC ¶ 61,047 (2018).

⁴⁴ February 2015 Order at P 9.

⁴⁵ *Id.*

fall squarely within [FERC]’s jurisdiction under the FPA.”⁴⁶ FERC stated that “the courts have long held that the Commission ‘clearly has jurisdiction over [wholesale rates]’ and that [FERC] ‘may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate commerce.’”⁴⁷

Indeed, due to the fact that they operate outside the markets, FERC explained that, consistent with the scope of its jurisdiction, the February 2015 Order “addresses the rates, terms and conditions of providing service under an RMR agreement to maintain the reliability and efficient operation of the interstate transmission system and NYISO’s wholesale markets.”⁴⁸ FERC also explained that RMR agreements must be limited in duration and “only entered into in the first place as a last-resort measure.”⁴⁹ Any effort by the Commission that would require LSEs to meet resource adequacy requirements primarily through what would effectively be RMR-type agreements would conflict with FERC’s order that such agreements be used only as “a last-resort measure.”

Further, contrary to the Commission’s assertion in its Instituting Order, Section 215 of the FPA does not otherwise give the Commission authority to take on a resource adequacy role that contravenes the NYISO tariff.⁵⁰ The Commission’s authority under Section 215 to adopt stricter reliability rules than those approved by FERC does not authorize the Commission to

⁴⁶ April 2016 Order at P 155.

⁴⁷ *Id.* at P 156 (citations omitted; alterations in the original).

⁴⁸ *Id.* at P 157 (citations omitted).

⁴⁹ *Id.* at P 33 (citation omitted).

⁵⁰ Instituting Order at 9–10 (citing 16 U.S.C. § 824o(i)).

impose rules that conflict with the FERC-approved NYISO tariff in areas over which the FERC has exclusive jurisdiction.⁵¹ The savings provision states:

Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.⁵²

The phrase “[n]othing in this section” indicates that the reservations of authority to the states (and New York specifically) apply to the exercise of FERC jurisdiction under FPA § 215. It does not negate or otherwise in any way hamper FERC’s jurisdiction under other provisions of the FPA.

Nor does FPA § 201’s reservation of authority to the states “over facilities used for the generation of electric energy or over facilities used in local distribution” impede FERC’s jurisdiction under other provisions of the FPA. As the courts long have held, FERC has an independent obligation under FPA §§ 201, 205, and 206 to consider whether terms and conditions affecting jurisdictional rates are just and reasonable.⁵³ In fact, FERC and the courts have rejected state utility commission claims that a MOPR infringes on state authority to make decisions regarding generation and have ruled that states must bear the cost of those decisions,

⁵¹ See *New York State Reliability Council*, 122 FERC ¶ 61,153, at P 27 (2008).

⁵² 16 U.S.C. § 824o(i)(3).

⁵³ See *Connecticut Dep’t of Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (rejecting State utility commission’s argument that FERC approval of the ICAP requirement imposed by ISO-New England amounted to direct regulation of generation facilities in violation of FPA § 201 because FERC had the duty to ensure that the mechanism employed by ISO-New England to determine the ICAP clearing price would yield rates that were just and reasonable); see also *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014) (rejecting State utility commission argument that FERC’s elimination of exemption from PJM MOPR for state-mandated resources amounted to direct regulation of generation facilities in violation of FPA § 201 because FERC’s elimination of the exemption was directly related to the wholesale price of ICAP, which is exclusively within FERC’s jurisdiction).

“including possibly having to pay twice for capacity.”⁵⁴ While FERC noted as recently as last year the right of the states to “continue to support their preferred types of resources in pursuit of State policy goals,” it emphasized that, “[a]t the same time, we have exclusive jurisdiction over the wholesale rates of both subsidized and unsubsidized resources, and a statutory obligation to ensure they are just and reasonable.”⁵⁵ FERC’s obligation preempts the Commission from issuing orders that conflict with rates, terms, and conditions of wholesale sales approved by FERC.

C. The Commission Should Not Abandon the NYISO’s ICAP Market Even If It Could Be Found to Have Authority to Take Such Action.

Assuming, *arguendo*, FERC approved changes to the NYISO tariff allowing the Commission take on a resource adequacy role, such as by allowing LSEs to remove State-supported resources and a commensurate amount of load from the NYISO’s ICAP market similar to the FRR Alternative that is under consideration for the PJM markets subject to resolution of a substantial number of open issues, the Commission should not take this approach. It would essentially require LSEs to enter into a series of long-term bilateral contracts with existing and new resources needed for resource adequacy, local reliability, and State policies to ensure they continue operations. However, as the Commission determined in its 1996 order directing the State’s utilities to create the NYISO and retail and wholesale competitive markets,⁵⁶

⁵⁴ *New Jersey Bd. of Pub. Utils.*, 744 F.3d at 97. The Commission made this very argument in its protest when the BSM Measures were first proposed in 2008. Noting it deferred to state decisions on resource adequacy matters when possible, FERC denied the Commission’s request to reject the BSM Measures, finding, “granting [the Commission’s] request would adversely impact matters within the Commission’s jurisdiction – in particular, the establishment of just and reasonable wholesale electric energy rates.” BSM Order at P 110.

⁵⁵ See 2018 PJM Order at PP 149, 156, 158 (finding substantial increase in state-supported new and existing resources to further public policy goals constituted changed circumstances rendered the existing PJM tariff’s capacity market structure unjust and unreasonable and requiring a just and reasonable replacement structure).

⁵⁶ Cases 94-E-0952 et al., *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion 96-12 (May 20, 1996).

and reiterated numerous times since,⁵⁷ competitive markets are the preferred options because they are more efficient and shift investment and performance risks from captive customers to private investors, the entities best positioned to manage such risk. It will impair the ability of the competitive ICAP market to incent the maintenance of existing, and development of new, resources on a merchant basis in an efficient and cost-effective manner over the long term. Adopting this approach would thus be entirely contrary to the Commission's long-established and oft-reiterated policy choosing competitive markets as the preferred mechanism to meet resource adequacy and State policy requirements.

While FERC suggested in its 2018 PJM Order that a resource-specific FRR Alternative that would allow subsidized resources to exit the capacity market along with a commensurate amount of load and operating reserves could be a just and reasonable mechanism for State-supported resources to leave PJM's ICAP market and avoid the MOPR, it also determined that it did not have adequate information to reach that conclusion and accordingly requested comments on a series of issues concerning that mechanism. Parties in that proceeding argued that implementation of this alternative would likely eviscerate the PJM ICAP market because removing generation and load from the ICAP market has the exact same effect, or worse, as leaving the subsidized generation in the market unmitigated. As more and more resources are subsidized, it will increase the amount of generation and load that is carved out of the ICAP

⁵⁷ See, e.g., Case 00-M-0504, *Proceeding on Motion of the Commission Regarding Provider of Last Resort Responsibilities, the Role of Utilities in Competitive Energy Markets, and Fostering the Development of Retail Competitive Opportunities*, Statement of Policy on Further Steps toward Competition in Retail Energy Markets (Aug. 25, 2004), at 18 (“Competitive markets, where feasible, are the preferred means of promoting efficient energy services, and are well suited to deliver just and reasonable prices, while also providing customers with the benefit of greater choice, value and innovation. Regulatory involvement will be tailored to reflect the competitiveness of the market.”); 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 67 (“A basic tenet underlying [Reforming the Energy Vision] is to use competitive markets and risk based capital as opposed to ratepayer funding as the source of asset development.”).

market. The inevitable end result will be a weak residual ICAP market. If permitted to occur, more and more generation will need subsidies to survive and capital investment will become scarce. This alternative also would undermine retail competition because customers will be artificially driven from the competitive market and forced to purchase capacity from subsidized generation.

Abandoning the NYISO's competitive ICAP market will ultimately harm consumers. Competitive markets require investors to determine whether market prices provide the necessary incentive to build and maintain resources. Because private investors put their own capital at risk, poor investment decisions result in losses for their shareholders, not New York consumers. Thus, as has been evidenced by the operations of the competitive electric market over the past 20 years, the rigor of the competitive market drives innovation and investments to enhance efficiency to develop, maintain, and operate facilities at the lowest cost to date. The Commission should continue to rely on the NYISO's competitive markets to facilitate renewable and ESR development with accurate market signals while maintaining the appropriate allocation of financial risk between investors and consumers.

III. CONCLUSION

In light of the foregoing, the Commission should direct DPS Staff to work through the NYISO's stakeholder process to develop and implement market design changes, such as the carbon pricing proposal and a series of capacity market enhancements, that will most efficiently and cost effectively harmonize the State's public policy initiatives with the NYISO's competitive electricity markets for the benefit of consumers in New York State.

Respectfully submitted,

READ AND LANIADO, LLP
25 Eagle Street
Albany, New York 12207
(518) 465-9313 (tel)
(518) 465-9315 (fax)

Attorneys for
Independent Power Producers
of New York, Inc.

By: David B. Johnson
David B. Johnson

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