

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

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

COMMENTS OF THE CLEAN ENERGY PARTIES

Pursuant to Rule 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) rules, and the Commission’s Notice of Complaint issued on July 30, 2019, the Advanced Energy Economy (“AEE”),¹ Advanced Energy Management Alliance (“AEMA”),² The Alliance for Clean Energy New York (“ACE NY”),³ Consumer Power Advocates (“CPA”),⁴

¹ AEE is a national organization of businesses making the energy we use secure, clean, and affordable. Resources represented in AEE’s membership include, but are not limited to, energy efficiency, demand response, natural gas, solar photovoltaics, solar thermal electric, wind, energy storage, biofuels, electric vehicles, AMI, transmission and distribution efficiency, fuel cells, hydropower (including pumped storage), nuclear power, combined heat and power, and enabling software. AEE members are actively engaged in developing and deploying distributed energy resources and building business models for aggregation of these resources.

² AEMA is an alliance of providers and supporters of distributed energy resources united to overcome barriers to nationwide use of distributed energy resources, including demand response and advanced energy management, for an environmentally preferable and more reliable grid. AEMA advocates for policies that empower and compensate customers to manage their energy usage to make the electric grid more efficient, reliable, and environmentally friendly and less expensive.

³ ACE NY is a membership-based not-for-profit organization with a mission to promote the use of clean, renewable electricity technologies and energy efficiency in New York State, in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution.

⁴ CPA is a coalition of not-for-profit commercial health care and educational customers in the Consolidated Edison Company of New York service territory that advocates on behalf of consumer interests before the New York State Public Service, Commission, FERC, NYISO and elsewhere.

Natural Resources Defense Council (“NRDC”),⁵ New York Battery and Energy Storage Technology Consortium (“NY-BEST”),⁶ and Sustainable FERC Project⁷ (collectively, the “Clean Energy Parties”) respectfully submit these comments in support of the Complaint filed by the New York State Public Service Commission and New York State Energy Research and Development Authority (collectively, the “State Agencies”) against the New York Independent System Operator, Inc. (“NYISO”).⁸ The State Agencies explain why NYISO’s buyer-side mitigation (“BSM”) rules as applied to new energy storage resources creates barriers to the development of these resources in New York, and thereby will result in undue discrimination and unjust and unreasonable rates, and higher costs, all while undermining state law. For the reasons set forth below, Clean Energy Parties agree with the State Agencies and urge the Commission to grant the relief requested in the Complaint.

⁵ NRDC is a national non-profit membership organization with more than 3 million members and engaged community participants. NRDC is committed to the preservation and protection of the environment, public health, and natural resources. To this end, NRDC is actively involved in advancing policies that reduce greenhouse gas emissions and other dangerous forms of air pollution and that accelerate the deployment of clean energy resources

⁶ NY-BEST is a non-profit industry trade association dedicated to advancing, growing and catalyzing the energy storage industry to ensure a sustainable energy future. Our membership covers the full span of activities related to energy storage—from research and development, to commercialization and manufacturing, and deployment of energy storage technologies, and currently includes: technology developers, start-up companies, global energy corporations, leading energy storage and renewable energy companies, and world-class research institutions and universities.

⁷ The Sustainable FERC Project (the “Project”) is an education and advocacy initiative that represents a consortium of national and regional environmental, consumer, and energy policy non-governmental organizations with members throughout the United States. The Project focuses on accelerating the deployment of renewable energy and demand-side resources by advocating electric regulatory policies that remove barriers for these resources and ensure more just and reasonable rates.

⁸ *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*, Docket No. EL19-86-000 (filed July 29, 2019) (“Complaint”).

Energy storage is an essential piece of New York’s ambitious clean energy goals, as reflected in the State’s commitment to procure 3,000 megawatts (“MWs”) of new energy storage by 2030. Applying BSM to new energy storage resources interferes with the State’s legitimate clean energy policy goals and will adversely harm New Yorkers, especially those in environmental justice communities. Application of BSM also is contrary to the foundational justification of BSM, given the State’s intent to use storage to meet its aggressive emissions reduction goals, and not artificially suppress market prices. As we detail herein, several factors will temper the price suppressive impact of storage. Applying BSM to energy storage will create barriers to entry, frustrate technology development, and force customers to pay twice for capacity. Grid reliability will also suffer as all storage that is less than five MW could earn wholesale capacity value by participating in their utility’s value stack, and would not be dispatchable by NYISO if they are mitigated out of the auction. For these reasons, Clean Energy Parties urge the Commission to accept the State Agencies’ complaint and grant a blanket exemption from BSM measures in NYISO’s Installed Capacity (“ICAP”) market.

A. Energy Storage Resources Are Essential to Achieving Energy, Resource Adequacy, Reliability, and Environmental Policy Objectives Within New York State’s Authority.

Energy storage technologies provide many critical benefits necessary for New York to achieve its legitimate clean energy, environmental protection, and other public policy goals. The New York State Public Service Commission (“NYPSC”) recognized the value of energy storage in achieving a responsive, efficient, and clean grid for its retail consumers when it adopted the Clean Energy Standard in 2016, which requires that 50% of the electricity consumed in New

York be generated from renewable energy sources by 2030.⁹ The NYPSC explained that “[s]torage is a critically important component of the energy system that is both distributed and increasingly reliant on intermittent resources. Unlike other resources, the load shifting and fast response capabilities of various forms of storage resources allow them to provide simultaneous value as an energy and reliability resource.”¹⁰

Despite New York’s transition to a restructured regulatory environment for electricity, New York did not surrender its basic authority over resource adequacy.¹¹ New York also has the independent authority to adopt laws necessary for the protection of human health and the environment. In this context, energy storage has important environmental attributes that NYISO markets do not currently value. That market failure is precisely why incentives are necessary to motivate the development of these resources.

Pursuant to the authority reserved to it under the Federal Power Act (“FPA”), the New York State Legislature amended the Public Service Law to direct the NYPSC to establish an energy storage goal by 2030 and a deployment policy to meet this goal.¹² To implement this law, in December 2018, the NYPSC issued an order (the “Energy Storage Order”) adopting a

⁹ Case 15-E-302, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, *Order Adopting a Clean Energy Standard* at 2-3 (Aug. 1, 2016), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B44C5D5B8-14C3-4F32-8399-F5487D6D8FE8%7D>.

¹⁰ *Id.* at 103–104.

¹¹ Moreover, Section 215 of the Federal Power Act reserves to New York alone the right to take actions that exceed the FERC-jurisdictional reliability standards so long as those standards do not result in lesser reliability outside New York. 16 U.S.C. § 824o(i)(3). Given the significant reliability benefits of energy storage, New York would be well-positioned to assert that its energy storage program will enhance the State’s level of electric reliability on both the bulk power and distribution systems. *See Energy Storage Order, infra note 6*, at 90 (“Qualified energy storage systems may play a role in securing the reliability of the grid in the affected utility service territories, while advancing the State’s energy storage deployment goals.”)

¹² N.Y. Pub. Serv. Law § 74.

statewide goal of up to 3,000 MW of qualified storage energy systems by 2030, with an interim goal of 1,500 MW of energy storage systems by 2025.¹³ The Energy Storage Order also adopted a suite of energy storage deployment policies designed to accelerate cost reductions, reduce barriers to monetizing energy storage resources that would otherwise go uncompensated, and improve project economics by sending necessary price signals to the marketplace.¹⁴

The Energy Storage Order also affirmed that energy storage will play a critical role by addressing the variability and intermittency of renewable energy output, reducing the need to curtail these resources at certain periods of the day, and reducing peak load.¹⁵ Energy storage can also be flexibly deployed to store and dispatch energy where and when it is most needed, reducing the need to rely on the oldest and dirtiest power plants during peak demand demands, many of which are approaching the end of their useful lives or which soon face obsolescence due to these new environmental regulations.

The Energy Storage Order identified specific public benefits resulting from the achievement of the 2030 goal, including over \$3 billion in gross lifetime benefits to consumers, the creation of approximately 30,000 jobs, the avoidance of approximately 2 million metric tons of greenhouse gas emissions, and public health improvements resulting from the avoidance of criteria air pollutants such as nitrogen oxide (“NOx”), sulfur oxide (“SOx”) and particulate matter.¹⁶

¹³ Case No. 18-E-0130, In the Matter of Energy Storage Deployment Program, *Order Establishing Energy Storage Goal and Deployment Policy* (Dec. 13, 2018) (“Energy Storage Order”), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bFDE2C318-277F-4701-B7D6-C70FCE0C6266%7d>.

¹⁴ *Id.* at 12.

¹⁵ *Id.* at 1–2.

¹⁶ *Id.* at 3.

The Energy Storage Order also determined that utility-scale storage procurement is necessary to provide the flexibility for bulk-level storage applications to provide maximum benefits to ratepayers.¹⁷ Electric investor-owned utilities were therefore directed to hold competitive procurements for storage resource services within their territories to provide benefits that include reliability services, local load relief, local environmental benefits derived by reducing the use of peaking units for contingency purposes, and wholesale services (*e.g.*, capacity, spinning reserves, frequency regulation), all of which will allow utility grid operators and system planners the opportunity to use storage to meet system needs at scale.¹⁸

Most recently, on July 18, 2019, Governor Cuomo signed into law the Climate Leadership and Community Protection Act (the “Climate Act”), which requires New York to reduce statewide greenhouse gas emissions by 40% from 1990 levels by 2030 and 85% by 2050.¹⁹ With respect to the electricity sector, the Climate Act incorporates the Energy Storage Order’s goal of 3,000 MW of energy storage by 2030, as well as requiring that 70 percent of the State’s electricity come from renewable energy by 2030 and 100 percent of the State’s electricity supply be emissions free by 2040. The efficient and widespread deployment of energy storage resources at scale is critical in meeting the Climate Act’s requirement of 3,000 MW of energy storage as well as the law’s broader renewable electricity and greenhouse gas reduction requirements.

New York’s storage deployment goal also supports other state environmental and public policy objectives. These include the Department of Environmental Conservation’s (“NY DEC”) proposed rules to impose more stringent NOx emissions limits to simple cycle and regenerative

¹⁷ *Id.* at 53.

¹⁸ *Id.* at 53–54.

¹⁹ L. 2019, Chapter 106 (Senate Bill S6599).

combustion turbines (“SSCTs”), also referred to as “peaking units,” which typically run to meet electric load during peak demand period.²⁰ The primary purpose of the proposed rules is to lower allowable NOx emissions from SSCTs during high ozone days.²¹ Older SSCTs, which account for the vast majority of all NOx emissions from these generation sources, are likely to retire because it would be uneconomic for them to comply with the reduced NOx emission limits.²²

Energy storage resources are particularly important in alleviating air quality concerns in environmental justice communities. This is because the location of SSCTs are highly correlated with potential environmental justice areas, especially in the New York City region, where many SSCTs are present.²³ Although these plants have annual capacity factors under 10%, and run primarily during the summer months, their emissions contain as much as 20 times the amount of NOx as a typical thermal plant.²⁴ In addition, because they operate at peaks coincident with extreme heat events, the plants emit NOx, sulfur dioxide and particulates during times when they are most harmful. These pollutants form ground level ozone, which can cause and exacerbate asthma and other health issues that are common in environmental justice communities.²⁵ NY DEC’s proposed rules to impose more stringent NOx emissions limits to these facilities will likely lead to the retirement of many of these facilities, particularly older, higher emitting units,

²⁰ NY DEC, Proposed Part 227-3, Regulatory Impact Statement Summary, <https://www.dec.ny.gov/regulations/116180.html>.

²¹ *Id.*

²² *Id.*

²³ Case No. 18-E-0130, In the Matter of Energy Storage Deployment Program, *Final Generic Environmental Impact Statement* at 9-11 (Exh. 9-5) (Sept. 12, 2018), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2D2304AA-857E-429A-B17D-7335AB6D58DA}>.

²⁴ Case No. 18-E-0130, In the Matter of Energy Storage Deployment Program, *New York State Energy Storage Roadmap* at 64 (June 21, 2018) (“Energy Storage Roadmap”), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={2A1BFBC9-85B4-4DAE-BCAE-164B21B0DC3D}>.

²⁵ *Id.*

and are prime candidates to be replaced with energy storage resources. However, the application of BSM to storage resources makes it less economic to do so, requiring the State through its energy storage program to account for attributes that are not being properly priced into the market.

B. Because Storage Resources Do Not Present a Risk of Artificial Price Suppression, They Should Be Exempted from Buyer Side Mitigation Screening.

Fundamentally, storage resources should be exempted from NYISO’s BSM rules because they are not being procured to suppress NYISO’s ICAP market offers and clearing prices to benefit large net buyers of capacity. When the Commission approved an exemption from NYISO’s BSM rules for Special Case Resources in 2017, it observed that “buyer-side market power mitigation rules are intended to address ‘market power exhibited by certain entities seeking to lower capacity market prices.’”²⁶ In other words, BSM was designed to address scenarios in which “buyers or their agents can exercise market power to reduce capacity market prices below competitive levels by paying out-of-market subsidies to support new capacity, and then offer that capacity into the organized capacity market at prices below costs to drive down the market price.”²⁷ Here, storage will be procured to satisfy New York’s need for new, advanced technology resources with valuable reliability, energy, and environmental attributes to satisfy the goals and requirements of the State’s enacted consumer energy and environmental protection laws. These new resources are not being acquired to suppress capacity market prices, and their procurement will occur at levels and prices completely removed from what happens in

²⁶ *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61137 at P 30 (Feb. 3, 2017).

²⁷ *Id.* at P 34.

NYISO's ICAP market. There is no individual load-serving entity paying "out of market" prices to these resources in order to benefit from the price drop for its remaining load.

Apart from the utter lack of intent to suppress prices, any impacts on the ICAP market prices will be tempered due to several interrelated factors:

First, of the 3,000 of MWs of energy storage resources contemplated in the Energy Storage Order, only some are likely to be in the zones currently subject to mitigation now – New York City and the Lower Hudson Valley. The Energy Storage Roadmap postulated that out of 2,800 MW of energy storage resources to be deployed by 2030, 1,111 MW will be in New York City and 388 MW will be in the Lower Hudson Valley, resulting in 1,499 MW in the mitigated zones, which is essentially half of the total supply to be procured over the next decade.²⁸

Second, new energy resources may not be assigned their full capacity value. For example, in its recent market participation aggregation model proposed tariff changes,²⁹ NYISO proposed assigning initial values of 90% installed capacity value for four-hour storage resources, and 45% for two-hour resources, dropping to 75% for four hour resources and 37.5% for two hour after the first 1,000 MW have been installed.³⁰ There also will be additional derating factors applied to these resources based on their actual availability during qualifying periods. Depending on which type of resources enter and the derating factors applied to them, the total quantity entering in the mitigated zones could be well under 1,500 MW.

²⁸ Energy Storage Roadmap at 164 (PDF page).

²⁹ See Docket No. ER19-2276-000, New York Independent System Operator, Inc., *Proposed Tariff Revisions Regarding Establishment of Participation Model for Aggregations of Resources, Including Distributed Energy Resources, and Proposed Effective Dates*, at 80 (June 27, 2019), https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14781264.

³⁰ NRDC, Sustainable FERC Project, AEMA, AEE, Consumer Power Advocates, Energy Spectrum, Inc, and NY-BEST filed comments in Docket No, ER19-2776-000 regarding these proposed tariff revisions on July 18, 2019, objecting to these capacity values.

Third, the timeline for entry of these resources into NYISO system will reduce the price impact in the mitigated zones. The Energy Storage Roadmap envisions only half of the total, or about 1,500 MW, entering by 2025, and only 1,134 MW of them are expected to be in the mitigated zones.

Fourth, it is probable that many of the resources will not participate in the ICAP market. The Energy Storage Roadmap postulates that of the 1,500 MWs to be deployed by 2025, energy storage resources will be deployed equally in three segments:

- Customer-sited storage and paired on-site generation + storage including PV
- Distribution system segment, and
- Bulk system segment

While clearly the resources in the bulk system segment will participate in the ICAP market, it is unclear how many of the resources in the other two segments will participate in the ICAP market. For example, it is probable that some of the storage resources will be proposed to be used for system resiliency or distribution system applications or satisfying some other customer specific need and may or may not qualify or choose to participate in NYISO wholesale capacity market. Thus, the amount of the energy storage resources participating in the ICAP market would be even lower, making the possibility of significant effects on wholesale prices even smaller.

Fifth, other New York State standards and market influences also will affect ICAP prices. According to NYISO analysis,³¹ the NY DEC's proposed peaking unit rule³² could affect as

³¹ NYISO, *2019-2028 CRP: Peaker Scenario: Assessing DEC's Draft NOx Limits Rule for Simple Cycle and Regenerative Combustion Turbines ('Peaker Rule')* (Mar. 19, 2019), https://www.nyiso.com/documents/20142/5552484/2018CRP_NYISO_PeakerScenario_pptMarch19ESPWG.pdf/871cdd4d-963a-4a81-38f6-f60a063b1d21.

³² See *supra* note 20.

much as 840 MW of generation in the New York City zone by 2024 and another 580 MW of generation in 2025 and beyond. Some peaker plant generation is likely to retire rather than make the investments necessary to comply with the rule. For illustration, recently the Ravenswood plant in New York City filed a petition with the NYPSC to deploy 316 MW of storage and remove a corresponding amount of peaking capacity.³³

It is unclear how many of the existing resources will respond in terms of exiting the market. Correspondingly, it is unclear how much the prices will go up or down on the demand curve in the capacity market. It is reasonable to assume that any capacity price change will be accompanied by some response by existing suppliers or potential new suppliers, partially offsetting the initial price change. Therefore, any estimate of a price effect should not be done by simply sliding up or down the capacity market demand curve by a MW amount equal to the estimated MW amount of new entry. For example, the Carbon Pricing study³⁴ being conducted at NYISO assumes that the sliding on the demand curve would only be 50%,³⁵ implying that the full effect of the MWs entering will not be experienced in the price changes.

Considering the factors enumerated above, it would be entirely premature to reach conclusions on the price impacts resulting from the entry of the energy storage resources that are driven by New York's clean energy policy goals.

³³ In the Matter of Ravenswood Development, LLC, *Petition for order Granting Certificate of Public Convenience and Necessity and Reestablishing Lightened Regulatory Regime* (Feb. 21, 2019), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1F6E91EA-70B8-4C7D-B1E7-6E286898DC71}>.

³⁴ Samuel A. Newell *et al.*, *Pricing Carbon into NYISO's Wholesale Energy Market to Support New York's Decarbonization Goals*, The Brattle Group (Aug. 10, 2017) https://www.nyiso.com/documents/20142/2244202/2017-Pricing_Carbon_into_NYISOs_Wholesale_Energy_Market-Brattle-Report.pdf/ec266c79-d819-9466-77c8-66c6db8e3b53.

³⁵ *Id.* at 39.

It is worth noting that New York has taken other public policy actions that could increase market prices. For example, many coal plants in New York have retired over the last two decades, partly due to increasingly stringent state environmental rules. A major nuclear power plant in New York will be closing soon due to State actions. The NY DEC peaker rules could lead to retirement of peaker plants in New York. These actions at least temporarily reduce the supply in the market, thus raising market prices. It would be discriminatory for the Commission to ignore public policy initiatives that would increase market prices, while simultaneously endorsing mitigation policies that would have the effect of reversing price reductions that result from other public policy initiatives.

Exempting storage resources therefore is consistent with Commission precedent determining that state policies that support renewable resources do not create a net-buyer concern. The Commission approved a capped renewables exemption to the minimum offer price rule in ISO New England, Inc.'s ("ISO-NE") capacity market in 2016, noting that "with respect to market mitigation rules, the Commission has previously balanced the need for mitigating the potential exercise of market power and the risk of over-mitigation."³⁶ Citing previous orders regarding NYISO and PJM, the Commission observed that renewable resources were unlikely tools of market manipulation because of both their high upfront costs and their small capacity value.³⁷ Like renewable resources, energy storage resources tend to be of significantly smaller scale than fossil fuel-fired resources. It would therefore be very difficult for a net-buyer to lower its overall costs by bidding new storage resources into the auction at artificially low prices.

³⁶ *ISO New England Inc.*, 155 FERC ¶ 61,023 at P 33 (Apr. 8, 2016)

³⁷ *Id.* (citing *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 at P 10 (Oct. 9, 2015)); *see also PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 153 (Apr. 12, 2011) (noting that "wind and solar resources would need to offer as much as eight times the [] capacity [of other resources] in order to achieve the same price suppression effect").

Recent Commission orders in ISO-NE and PJM have found that, in aggregate, significant amounts of resources supported by state programs can have negative effects on capacity market prices.³⁸ While the Clean Energy Parties disagree with the Commission’s reasoning in those orders, NYISO’s application of BSM to energy storage resources is distinguishable from the capacity market reforms at issue in those orders. Unlike ISO-NE and PJM, NYISO has not alleged that the ICAP market’s ability to provide resource adequacy is threatened by the price-suppressive effect of energy storage resources procured under state programs. Indeed, given the likelihood of SSCT retirements mentioned earlier, as well as New York’s plans to integrate thousands of megawatts of intermittent renewable resources, energy storage resources are likely to be essential to maintaining and enhancing resource adequacy. NYISO’s application of BSM to energy storage resources seriously undermines New York’s clean energy goals without articulating any rationale, supported by evidence, that such mitigation is necessary to protect market prices or functioning. As discussed in detail above, none of the evidence of potential price suppression or other impacts on market prices relied on to impose expansive BSM in these other markets is present here.³⁹

Given the relevant facts regarding energy storage resources procured under New York State’s policies, especially the lack of any evidence to suppress market prices by net buyers or demonstration of significant impact on ICAP prices, applying BSM to them results in costly, unjust, and unreasonable over-mitigation that the Commission must address. The Commission

³⁸ *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 24 (Mar. 9, 2018); *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 at P 5 (June 29, 2018) (“PJM Order”).

³⁹ *See, e.g.*, PJM Order at PP 151–52 (noting that the various amounts of MW under state programs, including 4,760 MW of nuclear generation, 1,350 MW of offshore wind procurement, and nearly 5,000 MW of renewable energy capacity power was enough to affect the market price and thus the entry and exit of resources).

has an obligation to ensure that any mitigation scheme, including BSM, is carefully tailored to address the market harm it has identified, and does not result in unjust and unreasonable over-mitigation.⁴⁰ The Commission and the courts have consistently held that in the regulation of competitive markets, a balance must be struck between over-mitigation and under-mitigation.⁴¹ The Commission has consistently concluded that existing or proposed expansions of BSM provisions result in unjust and unreasonable rates where they apply too broadly or do not include a unit-specific review procedures sufficient to ease the risk of over-mitigation.⁴² In fact, the Commission has always recognized that “over-mitigation” in the market is costly and should be avoided, and concluded where the “potential benefits of, and thus incentive to engage in, price suppression are greatly diminished . . . a [buyer-side mitigation measure] is unnecessary.”⁴³

C. Buyer-Side Mitigation Violates the FPA’s “Cooperative Federalism” Framework.

The FPA is a “collaborative federalism statute[]” that “envisions a federal-state relationship marked by interdependence.”⁴⁴ While the Commission has exclusive jurisdiction to

⁴⁰ See, e.g., *New York Indep. Sys. Operator, Inc.*, 90 FERC ¶ 61,317 at PP 15–16 (Mar. 29, 2000) (explaining that “due process requires that generators subject to ISO mitigation have complete information on exactly what actions may trigger default bids or financial obligations”).

⁴¹ See *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005) (“[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm.”); see also *Midwest Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,157 at P 238 (Nov. 8, 2004) (explaining that assuring just and reasonable rates requires the Commission to “balance under-mitigation and over-mitigation”).

⁴² See, e.g., Brief of Respondent FERC at 20, 22, *NRG Power Marketing, LLC v. FERC*, Case Nos. 15-1452, 15-1454 (D.C. Cir., filed Sept 27, 2016) (discussing “the need to mitigate buyer-side market power against the risk of over-mitigating competitive entry”).

⁴³ *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 at P 106 (Nov. 20, 2015); see also *Consolidated Edison Co.*, 150 FERC ¶ 61,139 at P 45 (Feb. 16, 2015) (finding NYISO’s BSM rules to be “unjust and unreasonable because they are unnecessarily applied to unsubsidized, competitive entrants who have no incentive to inappropriately suppress capacity market prices”).

⁴⁴ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring).

regulate wholesale market rates, the FPA reserves to states authority “over facilities used for the generation of electric energy.”⁴⁵ States also retain their independent policymaking authority to address resource adequacy, as well as a variety of important interests, including local health and safety as well as environmental quality.⁴⁶ New York’s Climate Act—including its ambitious energy storage targets—is an exercise of this authority intended to “protect our communities, our economy and our state” against the threat of climate change.⁴⁷

Commission-regulated capacity markets, including ICAP, must respect the FPA’s careful balance of state and federal authority. In restructuring, states contemplated that competition would supplant integrated resource planning. However, states did not surrender their authority over all resource adequacy decisions, let alone their rights to continue to enact state environmental and clean energy policies. States did not give up their ability to supplement market outcomes with environmental policy decisions, nor did the Commission or the courts interpret them as having done so. In the words of the U.S. Court of Appeals for the D.C. Circuit when it first upheld FERC’s authority to oversee capacity markets:

State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission.⁴⁸

⁴⁵ 16 U.S.C. § 824(b)(1).

⁴⁶ 16 USC §824(b) and 16 USC §824o.

⁴⁷ Climate Leadership and Community Protection Act, 2019 Sess. Law News of N.Y. Legis. Memo Ch. 106 (Senate Bill S6599) (McKinney’s).

⁴⁸ *Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). These rights retained by states and municipal authorities are meaningless if RTOs/ISOs can ignore or block market access for resources preferred by states even where states are not exceeding their authority under the FPA.

The structure of the capacity markets thereby explicitly contemplates that the Commission would merely set a reserve margin to be met through competition *as influenced* by state environmental and other policies, including actions as drastic as forbidding the construction of a specific unit.

As noted in the Complaint and summarized above, the NYPSC’s Energy Storage Order seeks to achieve the State’s legitimate policy goals by “creating a regulatory framework that relies on market-based competitive procurements and incentives that compensate for benefits not valued in the wholesale market and which decline as Energy Storage Resource market penetration increases.”⁴⁹ New York’s program is completely unlinked to wholesale market rates, and the State’s incentives decline as energy storage grows, producing a program that fully respects cooperative federalism and the Commission’s jurisdiction over wholesale rates. Applying BSM to these resources is contrary to the cooperative federalism framework because it would elevate NYISO’s determination that such resources are “uneconomic” over New York’s decision to accelerate the market for an advanced energy technology to help meet the goals of the Climate Act and other policies.

D. Applying Buyer-Side Mitigation to Energy Storage Resources Raises Costs for Consumers.

Beyond conflicting with New York’s clean energy policies, applying BSM to energy storage raises costs for consumers. As the State approaches its target of 3,000 MW of energy storage by 2030, the possible exclusion of these energy storage resources from the ICAP market through BSM will lead to more and more excess capacity funded by consumers unnecessarily. To the extent mitigated resources that do not clear the ICAP nevertheless are built, it could result

⁴⁹ Complaint at 29.

in in what the Commission has described as “paying twice” for capacity.⁵⁰ In this scenario customers would be paying for (a) the energy storage resource capacity that did not clear the market and (b) generation that clears the market. Effectively, if the new storage capacity is coming in but is being mitigated, it is not being counted as a capacity resource by NYISO and extra capacity is being purchased. Application of the BSM thus would raise customer costs as they would be paying for the same capacity obligation twice.

E. Applying Buyer-Side Mitigation to Energy Storage Resources is Inconsistent with Order No. 841.

Clean Energy Parties also agree with the State Agencies’ position that applying BSM to energy storage resources is inconsistent with Order No. 841, which directed regional wholesale market operators to develop market participation models for energy storage resources.⁵¹ The Commission found that existing market rules were unjust and unreasonable because they contained barriers to participation of energy storage resources, and therefore ordered market operators to remove these barriers. Applying BSM to energy storage creates significant uncertainty because the test parameters are unknown to developers and the timeframe of completing the test is incompatible with market opportunities. The recently released Consolidated Edison Company of New York, Inc. bulk dispatch rights procurement offers an illustration of the challenge BSM poses to developers. Bids are due in November 2019 and awards are intended to be made over the winter of 2020. Projects that entered NYISO 2019 class year will not have their BSM tests completed until after both bids are due and contracts are awarded. Further, because of the complexity of applying the BSM tests to energy storage,

⁵⁰ *Indep. Power Producers of New York, Inc.*, 150 FERC ¶ 61,214 at P 45 (Mar. 19, 2015).

⁵¹ Order No. 841, 162 FERC ¶ 61,127 at PP 1-3 (Feb. 15, 2018).

developers are not able to reasonably predict the outcome. The net effect is a significant barrier to entry for energy storage.

If a new energy storage resource is not found to be economic, or subject to a Competitive Entry Exemption, its offer into the ICAP auction may exceed the Offer Floor requirement and not “clear” the auction. As the Complaint explains, these restrictive bid requirements may cause an energy storage resource to be “precluded from clearing the capacity market and receiving ICAP capacity market revenues if the auction clearing price is below the resource’s Offer Floor.”⁵² Losing the ability to be fairly compensated for capacity provided in support of system reliability creates a powerful barrier to market entry and participation and is inconsistent with the policy objectives of Order No. 841. Conversely, as Order No. 841 states, the “effective integration of electric storage resources into the RTO/ISO markets would enhance competition and, in turn, help to ensure that these markets produce just and reasonable rates.”⁵³

CONCLUSION

Applying buyer-side mitigation to energy storage resources interferes with New York State’s legitimate clean energy policy goals, upsetting the balance between state and federal authority enshrined in the Federal Power Act. Like Special Case Resources, storage resources do not present a risk of artificial price suppression and should be exempted from buyer-side mitigation screening. Applying buyer-side mitigation to these resources will raise capacity costs for consumers and is contrary to Order No. 841. For these reasons, Clean Energy Parties urge the Commission to accept the State Agencies’ Complaint and grant a blanket exemption from buyer-side mitigation measures in the New York Independent System Operator, Inc.’s Installed Capacity market.

⁵² See Complaint at 10.

⁵³ Order No. 841 at P 12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document on each of the persons on the Commission's service list for this proceeding.

Dated at Washington, DC this 19th day of August 2019.

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