

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

New York Public Service Commission,)	
New York Power Authority, and)	
New York State Energy Research and)	
Development Authority)	
)	
COMPLAINANTS,)	
)	
v.)	Docket No. EL15-64-000
)	
New York Independent System)	
Operator, Inc.)	
)	
RESPONDENT.)	

REQUEST FOR REHEARING

INTRODUCTION AND SUMMARY

The New York Public Service Commission (NYPSC), New York Power Authority (NYPA), New York State Energy Research and Development Authority (NYSERDA), City of New York (City), Multiple Intervenors, and Natural Resources Defense Council (NRDC; collectively, the Petitioners) respectfully request rehearing of the Federal Energy Regulatory Commission's (FERC or Commission) Order on Complaint and Directing Compliance Filing, issued on October 9, 2015.¹ The Order addressed various buyer-

¹ Docket No. EL15-64-000, New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority v. New York Independent System

side mitigation (BSM) exemptions that Petitioners proposed on May 8, 2015.² In the Order, the Commission adopted a renewable generation exemption that is unduly restrictive because it is limited to a narrowly-defined population of intermittent renewable resources, and further constrains the exemption with an annual cap on new eligible renewable capacity. Moreover, the Commission declined to adopt a general exemption for demand response (DR) resources.

The Commission erred in making the foregoing determinations. The exceedingly narrow exemption granted for renewables will impede State efforts to increase reliance on renewable generation. This will have a particular impact on State and City efforts to accelerate the development of large-scale renewable projects that otherwise would serve a key role in helping the State and City meet their goals of drastically reducing the emissions of harmful pollutants that contribute to climate change and cause adverse public health impacts. This determination also creates inconsistent federal policies by impeding State efforts to increase reliance on renewable

Operator, Inc., Order on Complaint and Directing Compliance Filing (issued October 9, 2015) (Order).

² Docket No. EL15-64-000, supra, Complaint of the New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority (dated May 8, 2015) (Complaint).

generation, which is a key element of the Clean Power Plan mandated by the U.S. Environmental Protection Agency (EPA). The Commission instead should approve a general, uncapped exemption for all new renewable resources. If, however, FERC declines to grant this relief, the Commission should (i) expand the exemption set forth in the Order to include a broader population of renewable resources, (ii) direct the New York Independent System Operator, Inc. (NYISO) to establish an annual cap set at a level that is sufficient to avoid frustrating the development that is essential to achieving State, City, and federal policy objectives; and (iii) clarify that the cap that the NYISO establishes should be expressed in terms of Unforced Capacity (UCAP) to better address the actual contribution of different types of renewable resources and their actual impact on capacity markets.

The Commission further erred by declining to adopt a general BSM exemption for DR resources. Mitigating DR resources will act as a disincentive to current and prospective DR providers and restrict the growth of DR programs in New York. At a minimum, the Commission should recognize that distribution-level DR programs serve legitimate State objectives without threatening the wholesale Installed Capacity (ICAP) market.

To address these errors, the Petitioners seek rehearing of the Order pursuant to Section 313 of the Federal

Power Act (16 U.S.C. §8251) and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713).³

BACKGROUND

On May 8, 2015, NYPSC, NYPA, and NYSERDA (collectively, the Complainants) filed the Complaint against the NYISO seeking revisions to the BSM measures contained in section 23.4 of Attachment H of the NYISO's Market Administration and Control Area Services Tariff (Market Services Tariff). The Complaint explained that the mitigation measures are imposed arbitrarily in an overbroad manner on all new entrants into the NYISO's mitigated ICAP market zones, regardless of whether the new entrant has the intention, incentive, and ability to exercise buyer-side market power to inappropriately depress market clearing prices.⁴

The Complaint detailed why renewable and DR resources are unlikely to be selected as a means of exercising buyer-side market power. Renewable resources typically have high development costs and many have low capacity factors. This combination substantially increases the likelihood that any economic advantage potentially reaped from a temporary reduction

³ The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

⁴ See Complaint at 13-37 and attached Affidavits.

to ICAP prices caused by the resource entering the market will be exceeded by the cost of developing, operating, and/or maintaining the resource. Although certain renewable generation facilities, such as hydroelectric, biomass,⁵ and offshore wind have more robust capacity factors as compared to more intermittent technologies, they are subject to additional costs and risks that similarly negate their utility as tools for the intentional exercise of buyer-side market power. Improperly mitigating these resources would undermine the important policies New York has adopted to date, and expects to adopt in the future, to accelerate the deployment of large-scale renewable generation based on the substantial environmental attributes those resources provide.⁶

The Commission's Order acknowledged that applying the BSM rules to renewable resources is unjust, unreasonable or

⁵ Although NRDC agrees with the other Petitioners that renewables generally should be exempt from the BSM rules, it does not agree that all biomass generation facilities should be considered "renewable" for the purpose of the exemption. NRDC will participate actively in subsequent NYISO stakeholder processes refining renewable resource eligibility definitions for the BSM exemption, during which NRDC will further clarify its position.

⁶ Multiple Intervenors' decision to join in this submission should not be construed as support for State policies that would accelerate the deployment of renewable generation, but Multiple Intervenors agrees fully with the other Petitioners that renewable generation should be exempted from buyer-side mitigation.

unduly discriminatory or preferential pursuant to section 206 of the Federal Power Act (FPA) because “intermittent renewable resources,” as defined in the Order, “have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.”⁷

The Commission, however, defined eligibility criteria for this exemption on an exceedingly narrow basis, and directed the NYISO to propose an annual megawatt cap on the aggregate amount of renewable capacity that may receive the exemption.⁸ As to the former limitation, the Commission ruled that the renewables exemption would be available only to renewable resources that are purely intermittent, have relatively low capacity factors and high development costs, display variability that is beyond the control of the owner or operator, and produce energy that cannot be stored by the owner or operator.⁹

As to the annual cap, the Commission noted its approval of a similar limitation on exempt renewable capacity additions in ISO-NE. There, the Commission approved a 200 megawatt cap, “tied to load growth,” on the annual amount of new renewable capacity that may receive the mitigation exemption.¹⁰

⁷ Order at ¶47.

⁸ Id.

⁹ Id. at ¶47, 51.

¹⁰ Id. at ¶51.

According to the Commission, the intent of the cap was to limit the addition of exempt new renewable resources to the new entry that would be needed to satisfy increased load.¹¹ The Commission further directed the NYISO to consider whether the cap should be applied on a zonal or statewide basis.¹²

The Order also declined to grant a general BSM exemption for DR resources.¹³ While it posited that an exemption may be available for subsidized DR programs on a case-specific basis if mitigation of the BSM rules would “interfere[] with a legitimate state objective,” the Commission did not explain how DR resources threaten the competitive operation of the wholesale ICAP market, thus warranting mitigation.

¹¹ Order at ¶51.

¹² Id.

¹³ Id. at ¶105.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUES

- A. Whether the Commission erred in failing to adopt a general BSM exemption for renewable resources, broadly defined.
- B. Whether the Commission erred in failing to adopt a general BSM exemption for DR resources.

II. DISCUSSION

- A. The Commission Failed To Grant A General BSM Exemption For Renewable Resources, Broadly Defined, Thereby Establishing Inconsistent Federal Energy Policies That Will Interfere With The Clean Power Plan

The Order determined that the NYISO's BSM rules should apply to certain renewable resources, "narrowly defined," subject to an annual megawatt cap on exempt renewable resources.¹⁴ In so ruling, the Commission explained that whether a resource potentially should be subject to mitigation turns on the presence of both an incentive and ability to exercise market power.¹⁵ Nonetheless, the BSM exemption for renewable resources was narrowed based on the concern that renewable facilities not sufficiently intermittent would see an incentive and ability to exercise buyer-side market power in the ICAP market.

¹⁴ Order at ¶47 and n.116.

¹⁵ Id. at ¶36.

There are two flaws in this reasoning. First, the Commission erred by concluding that developers of all renewable resources ineligible for the exemption have both an incentive and the ability to exercise buyer-side market power to inappropriately suppress ICAP prices. This conclusion is not supported by the record in this docket. Second, the narrowly-drawn BSM exemption for renewables results in inconsistent federal energy policies by erecting an arbitrary and artificial barrier to the objectives of the Clean Power Plan promulgated by the EPA and curtailing the flexibility that is supposed to be a central feature of the Plan.

i. The Commission Erred By Limiting The BSM Exemption To Only A Limited Class Of Renewable Technologies

The Commission's exemption from the NYISO's BSM rules for a "narrowly defined" class of renewable generation projects, subject to an annual megawatt cap on new renewable capacity,¹⁶ was premised on the finding that the eligible renewable projects "provide their developer with limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices."¹⁷ The Commission, however, did not expand the exemption beyond the narrowly defined class,

¹⁶ Order at ¶47, 50 and n.116.

¹⁷ Id. at ¶47 (citations omitted) and ¶49.

reasoning that the Complainants failed to demonstrate that the Market Services Tariff would be unjust, unreasonable or unduly discriminatory or preferential pursuant to FPA section 206 if the BSM rules continued to apply to "additional types of renewable resources."¹⁸ The Commission, however, did not explain why "additional types of renewable resources" provide their developers with sufficient incentive and ability to exercise buyer-side market power so as to warrant mitigating them.

Renewable technologies generally have higher development costs than "traditional" generation sources regardless of whether they rely on an intermittent fuel source. The Complaint explained that the higher development cost and substantial siting and permitting challenges associated with renewable resources makes it "unlikely" that they could suppress ICAP market prices by an amount sufficient to recover the resource's high development costs.¹⁹ For this reason, renewable resources are "particularly unlikely" to be selected as tools for the exercise of buyer-side market power.²⁰ Commentators also noted that, based on the high cost of developing hydroelectric and other renewable generation resources, no "entity reasonably

¹⁸ Order at ¶50.

¹⁹ Complaint, Affidavit of Thomas S. Paynter at 19, 11.3:8.

²⁰ Id. at 19, 11.8:9.

would attempt to develop renewable resources for the purposes of profitably exercising market power.”²¹

Hydroelectric and biomass generation resources are two examples of renewable technologies that do not have either the incentive or ability to profitably exercise buyer-side market power. The Order is unclear as to whether the renewables exemption includes these resources. The following discussion focuses on these resources to explain why the BSM exemption should be expanded to include all renewable technologies. If, however, FERC declines to grant such relief, then it should clarify that hydroelectric and biomass resources are included within the renewables exemption specified in the Order.

Developers of less intermittent renewable resources, such as hydroelectric generation projects, assume the same substantial operating cost and risk in addition to the high development cost confronted by more intermittent resources, even if the project does not call for a new impoundment. The cost of complying with extensive state and federal regulations pertinent

²¹ See, e.g., Docket EL15-64-000, supra, Comments of the City of New York, Multiple Intervenors, New York State Department of State Utility Intervention Unit, and Natural Resources Defense Council (dated June 29, 2015) at 9, n.20 (referencing the report of a consultant retained by the NYISO which concluded that the capacity value of renewable generation resources generally is so low in relation to their cost that it is “hard to conceive” how an effort to use those resources to exercise buyer-side market power would be profitable) and n.21 (Consumers Comments).

to hydroelectric facilities, and ensuring the integrity of the impoundment whether existing or new, is substantial and does not abate over time. Hydroelectric facilities also are subject to weather and climate variability, risks which are difficult to forecast and mitigate. Hydroelectric developers thus assume operating costs and risks just as great as solar and wind developers assume. These characteristics support a finding that hydroelectric resources also should be exempt from the BSM rules.

Offshore wind projects similarly face unique development and operating risks. These characteristics support a BSM exemption for this technology for analogous reasons.

Biomass facilities, another form of less intermittent resource, nonetheless rely on feedstocks that are costly to procure and combust. In fact, the cost and difficulty of securing a reliable supply of biomass feedstock has challenged the sustained operation of those resources in New York.²² Biomass facilities also have siting issues due to odor, air pollution, and soot/ash removal.

²² A series of petitions filed by Niagara Generation, LLC and its successors-in-interest in a biomass generation facility located in New York State illustrate these issues. See, e.g., Case 03-E-0188, Retail Renewable Portfolio Standard, Order Denying Request to Adjust Contract Price (issued November 19, 2010) at 2 (noting that "one of the chief obstacles to greater success of biomass facilities is the difficulty of obtaining long-term fuel supply contracts").

It is difficult to conceive of circumstances where a buyer would conclude that the cost and risk of developing a hydroelectric, biomass, or offshore wind facility would be outweighed by the potential short-term reduction in ICAP market prices that might result from its addition to the market.²³ The Commission did not justify the conclusion that less intermittent renewable resources such as hydroelectric and biomass have both the incentive and ability to exercise buyer-side market power that might warrant mitigation. In contrast, the Complaint presented expert testimony explaining that the cost and risk of developing any renewable resource -- i.e., more intermittent or less intermittent -- makes it unlikely that either form would be selected as the tool to exercise buyer-side market power.²⁴ The Consumers agreed, elaborating more reasons why these resources

²³ FERC recently examined the issue of whether renewable resources generally are infused with sufficient incentive and ability to exercise buyer-side market power as to warrant mitigation. (See Docket No. ER15-535-000, PJM Interconnection, L.L.C.) There, FERC concluded that renewable resources (including hydroelectric) participating in the PJM-administered capacity market generally should not be subject to mitigation. As detailed, infra, the economic and project characteristics of renewable resources in PJM are not sufficiently different from the economics and project characteristics of renewable resources in NYISO to warrant a different outcome here.

²⁴ Paynter Affidavit at 19, 11.3-14.

would not be developed in an attempt to profit from buyer-side market power.²⁵

Finally, in supporting the renewables exemption proposed in the Complaint, the Large Public Power Council noted that the Commission reached a contrary conclusion in PJM that hydroelectric generation and other renewable resources are unlikely to be used for exercises of buyer-side market power.²⁶ In that proceeding, PJM proposed numerous changes to the minimum offer price rule (MOPR) that applies to capacity market bids.²⁷ PJM explained that the then-current MOPR applied "to resources of all types" but included mechanisms that effectively would exempt sell offers based on nuclear, hydroelectric, and certain other generation technologies.²⁸ PJM proposed to limit the MOPR so that it would apply "only to the gas-fired resources that are most likely to be associated with offers that raise price suppression concerns, i.e., combustion turbine, combined cycle, and [Integrated Gasification Combined Cycle (IGCC)]."²⁹ The

²⁵ Consumers Comments at 10.

²⁶ Docket EL16-54-000, supra, Motion to Intervene and Comments in Support of the Complaint of the Large Public Power Council (dated June 29, 2015) at 5.

²⁷ Docket No. ER15-535-000, PJM Interconnection, L.L.C., Tariff Filing Cover Letter (dated December 7, 2012) at 1.

²⁸ Id. at 27.

²⁹ Id.

proposed MOPR changes were intended to clarify the resources to which the MOPR should apply.³⁰

The Commission approved PJM's proposal to limit application of the MOPR to gas-fired combustion turbine, combined-cycle, and IGCC resources while generally excluding renewable resources from the MOPR.³¹ In so ruling, FERC agreed with PJM that the MOPR "may be focused on those resources that are most likely to raise price suppression concerns."³² The Commission explained that the resources to which the MOPR would apply "have the shortest development time and thus are resources capable of suppressing capacity clearing prices."³³ These resources also have low construction costs and, therefore, "may be the most cost effective resources with which to suppress market prices."³⁴

The Order does not set forth a rational basis for making a finding here inconsistent with the Commission's prior reasoning. The economics and operation of renewable project development in NYISO are not sufficiently distinguishable from

³⁰ Id.

³¹ Docket Nos. ER13-535-000 and ER13-535-001, PJM Interconnection, L.L.C., Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Provisions, Subject to Conditions (issued May 2, 2013) at ¶166.

³² Id.

³³ Id. at ¶167.

³⁴ Id.

renewable project economics and operation in PJM to justify disparate and inconsistent findings regarding the incentive and ability for renewable resources in New York to exercise buyer-side market power.

For the foregoing reasons, the Commission erred in determining that renewable resources eligible for the BSM exemption should be defined narrowly. The Commission should therefore grant rehearing to expand the exemption to all renewable resources as proposed in the Complaint.

ii. The Narrowly-Tailored BSM Exemption For Renewable Resources Is Inconsistent, And Interferes, With Federal, State, And Local Public Policies

The Clean Power Plan announced by President Obama and the EPA directs the states to reduce carbon pollution from power plants while developing a clean energy economy that increasingly is driven by renewable energy.³⁵ The Clean Power Plan established emissions reductions guidelines that rely on the “best system of emissions reduction ... adequately demonstrated (BSER) to reduce carbon dioxide from the power sector.”³⁶ Significantly, one of three core “building blocks” that comprise the BSER is “[s]ubstituting increased generation from new zero-

³⁵ See, e.g., FACT SHEET: Overview of the Clean Power Plan, available at <http://www2.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan>.

³⁶ Clean Power Plan Final Rule, Federal Register, Vol. 80, No. 205 at 64,663-64 (CPP Final Rule).

emitting renewable energy generating capacity for generation from affected fossil fuel-fired generating units.”³⁷

State flexibility to determine the optimum path to compliance also is a bedrock principle underlying the Clean Power Plan.³⁸ The CPP Final Rule explains that its guidelines afford states with “substantial flexibility and latitude in achieving” mandated reductions.³⁹ Notwithstanding this flexibility and latitude, states are encouraged to increase reliance on renewable generation, as evidenced by the building block quoted above.⁴⁰

Additionally, subsequent to the Order the EPA adopted new, more stringent air quality standards for ozone that should reduce ozone-forming pollution. Reductions in ozone will improve public health, particularly in children and the elderly, and they also will benefit the nation’s ecosystems.⁴¹ One method

³⁷ Id. at 64,4667.

³⁸ FACT SHEET: Clean Power and the Role of States, available at <http://www2.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-and-role-states> (stating that the Plan has been designed with “inherent flexibility” to allow states to “choose their own path”).

³⁹ CPP Final Rule at 64,663.

⁴⁰ See also FACT SHEET: Renewable Energy in the Clean Power Plan, available at <http://www3.epa.gov/airquality/cpp/fs-cpp-renewable-energy.pdf>.

⁴¹ National Ambient Air Quality Standards for Ozone Final Rule, Federal Register, Vol. 80, No. 206 at 65,292 (October 26, 2015).

of reducing ozone-forming pollution is to rely more heavily on renewable sources of generation which do not emit NO_x and volatile organic compounds. The Commission's limited renewables exemption from buyer-side mitigation unnecessarily will operate at cross-purposes with the EPA's new rules.

In addition to these federal policies, New York State and New York City public policy currently encourage and foster the expansion of reliance on renewable resources.⁴² At the State level, the New York State Energy Plan (SEP) calls for vast increases in the production of electricity from renewable resources in order to reduce greenhouse gas emissions.⁴³ These goals are supported by a long-term regulatory process aimed at reforming the energy system in the State, and significant long-term investments in programs that will spur expansions of the renewable energy and energy efficiency markets.

⁴² It is anticipated that the State and City will continue to implement policies that encourage and foster the expansion of renewables in New York.

⁴³ See generally The Energy to Lead: 2015 New York State Energy Plan, Vol. 1, New York State Energy Planning Board (issued June 2015) at 69 (stating that "renewable resources will indeed play a critical role in shaping New York's energy future, providing resilient power, reducing fuel cost volatility, and lowering GHG emissions") (SEP) (issued June 2015), available at <http://energyplan.ny.gov/>. The SEP established the following goals for New York to achieve by 2030: (a) increasing the penetration of renewable generation to 50 percent of supply; and (b) reducing energy-sector greenhouse gas emissions by 40 percent. (Id. at 112.)

The SEP planning process is mandated by Article 6 of the New York Energy Law. Article 6 obligates a consortium of State agencies and other stakeholders periodically to conduct a comprehensive examination of all fuels and end-uses in New York, and to describe the State's energy policy objectives on a four-year planning cycle. By law, all energy-related decisions made by State agencies must be reasonably consistent with the SEP.⁴⁴ Transitioning the State to a low-carbon supply portfolio is a central theme of the current SEP.⁴⁵ That is, a substantial part of the SEP pertains to New York's efforts to plan and procure generation resources, activities which the FPA placed under State jurisdiction.⁴⁶ Mitigating renewable resources in New York, therefore, improperly will interfere with the State's lawful energy planning processes.

⁴⁴ New York Energy Law §6-104(5)(B).

⁴⁵ SEP at 69, 111-12.

⁴⁶ 16 U.S.C. §824(b)(1).

The City has announced sustainability plans known as "One City: Built to Last" and "OneNYC."⁴⁷ These policies are intended to achieve ambitious energy policy objectives, including a long-term goal of achieving a total transition from fossil fuels to renewable sources of energy and to reduce greenhouse gas emissions in 2050 by 80% as compared to 2005 levels.⁴⁸

The Complaint explained that the application of the NYISO's BSM rules to renewable resources protects incumbents while impeding New York's ability to satisfy both its public policy goals and the Clean Power Plan.⁴⁹ Commentators affirmed this point. The Consumers explained that the development of renewable generation projects is driven by public policy initiatives including, but not limited to, the Clean Power Plan.⁵⁰ The American Wind Energy Association and Alliance for

⁴⁷ See *One City: Built to Last* (issued September 2014), available at <http://www.nyc.gov/html/builttolast/pages/home/home.shtml> at 7; *One New York: The Plan for a Strong and Just City* (issued April 2015) available at <http://www.nyc.gov/html/planyc/html/publications/publications.shtml>.

⁴⁸ See *One City: Built to Last* (issued September 2014), available at <http://www.nyc.gov/html/builttolast/pages/home/home.shtml> at 7; *One New York: The Plan for a Strong and Just City* (issued April 2015) available at <http://www.nyc.gov/html/planyc/html/publications/publications.shtml>.

⁴⁹ Complaint at 16, 25.

⁵⁰ Consumers Comments at 9.

Clean Energy, Inc. also agreed that a general BSM exemption for renewable resources is needed to enable compliance with the Clean Power Plan.⁵¹

The Order ignored these arguments and neither considered nor explained why a determination that creates inconsistent federal policies and impedes the ability to promote vital state, local, and federal policy objectives is just and reasonable. The Commission should therefore grant rehearing to adopt a general BSM exemption for renewables that is consistent with the Clean Power Plan, and enables its implementation.

iii. If The Commission Declines To Grant Rehearing On The BSM Exemption, It Should Modify Or Clarify The Criteria That Limit The Exemption

If, arguendo, the Commission declines to adopt a broad BSM exemption for renewables on rehearing, it should modify and/or clarify the limitations on the exemption that are specified in the Order. Specifically, the Commission should (i) expand the scope of renewable resources eligible for the exemption, (ii) clarify that the annual megawatt cap on renewable capacity eligible for the exemption will be set at a level that reasonably will accommodate the rapid deployment of renewable technologies, (iii) clarify that the cap that the

⁵¹ Docket EL15-64-000, supra, Comments of the American Wind Energy Association, Inc. and Alliance for Clean Energy (dated June 29, 2015) at 4.

NYISO establishes will not be tied to load growth, and (iv) clarify that the cap should be expressed in UCAP figures to better address the actual contribution of different types of renewable resources.

Since, as discussed above, renewable resources generally should be exempt from the BSM rules because they lack both the incentive and ability to artificially suppress ICAP market prices, at a minimum, the exemption should be expanded to include hydroelectric, biomass, offshore wind and other facilities. These resources have high development and operating costs and are subject to substantial operating risk as compared to a gas-fired generator. These characteristics prevent these resources from either finding an incentive to exercise buyer-side market power or exercising the ability to profitably suppress ICAP market prices.

Any cap that limits the quantity of exempt renewable capacity that may be added to the market should be set at a level that does not interfere with the expanding renewable energy market in New York. The cap should reflect historic annual additions of renewable capacity, as well as forecasts of new additions that account for accelerated deployments in response to State and federal policy initiatives, including the Clean Power Plan. The cap also should be sized to accommodate the addition of offshore wind being developed in the Atlantic

basin, which is a federal⁵² and State policy priority - and, potentially, a significant new source of clean power.⁵³

In addition, the Order noted that the ISO-NE renewables exemption cap is tied to load growth. If the Commission declines to eliminate the cap in the NYISO market, it should clarify that the cap will not be tied to load growth. The NYISO projects flat load growth in New York through 2025.⁵⁴ An annual cap tied to flat load growth would create an additional impediment to increasing the deployment of renewable resources in New York. This impediment, combined with the overbroad application of buyer-side mitigation rules and a

⁵² The U.S. Department of Energy recently granted NYSERDA, on behalf of several North Atlantic States, an award to advance offshore wind to scale. (DE-EE0007220; A Roadmap for Multi-State Cooperation on Offshore Wind Development: A Strategy to Achieve a Regional Market of Scale.) Abigail Ross Hopper, Director, Bureau of Ocean Energy Management, recently announced that achieving an operational wind farm off the coast of New York City and Long Island is a top priority. *Obama official says offshore wind in NY is "No. 1 priority,"* TIMES UNION (October 29, 2015), available at <http://blog.timesunion.com/business/obama-official-says-offshore-wind-in-ny-is-no-1-priority/70107/>.

⁵³ The Commission also should clarify that offshore wind qualifies as an "intermittent renewable resource" that is eligible for the BSM exemption. This clarification would be consistent with current federal energy policy.

⁵⁴ 2015 Load & Capacity Data: A report by The New York Independent System Operator, Inc. at 11, available at http://www.nyiso.com/public/webdocs/markets_operations/service_s/planning/Documents_and_Resources/Planning_Data_and_Reference_Docs/Data_and_Reference_Docs/2015%20Load%20and%20Capacity%20ata%20Report.pdf.

narrowly-tailored BSM exemption for renewables, would impair the State's ability to satisfy the Clean Power Plan and achieve analogous State policy objectives.

Finally, any cap on new renewable capacity eligible for the BSM exemption should be defined in UCAP terms, rather than ICAP terms, to be consistent with the NYISO's capacity auctions, which rely on UCAP values. Both capacity purchaser obligations and available supply are defined in UCAP terms. The derived UCAP value is the amount of capacity that the resource is expected to produce, based on its capacity factor. Renewable resources have different ICAP/UCAP translations depending on the technology type; many are intermittent resources with relatively low capacity factors. If the cap were defined in ICAP terms, the NYISO would have to assume an average capacity factor to translate that cap into UCAP values. However, the actual resources selected might have much different capacity factors. This would introduce uncertainty and inaccuracy in the cap, which can be avoided by setting any cap based on UCAP values in the first place.

For the foregoing reasons, if the Commission declines to grant rehearing on expanding the BSM exemption to include renewable resources, it should modify the exemption and associated cap to avoid interfering with the emerging market for renewable energy in New York.

B. The Commission Erred By Determining That DR Resources May Be Used To Exercise Buyer-Side Market Power And Should Be Mitigated

State and federal energy policies encourage programs that promote demand response resources and remove barriers to enrollment and sustained participation in them. The Clean Power Plan, for instance, recognizes that DR is one of the tools used to balance supply and demand while meeting system needs.⁵⁵ DR likely will be among the options that New York relies on to satisfy the Clean Power Plan mandate. Moreover, the Energy Policy Act of 2005 states that “[i]t is the policy of the United States that ... demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated.”⁵⁶ FERC has recognized this objective, stating that in making policies related to DR it “is not regulating retail rates or usurping or impeding state regulatory efforts concerning demand response.”⁵⁷

Robust participation in DR programs yields multiple system benefits. These resources moderate peak load, thereby helping utilities avoid costly investments in distribution

⁵⁵ Clean Power Plan at 64,6677.

⁵⁶ Pub. L. No. 109-58, Sec. 1252(f), 119 Stat. 594, 965 (2005).

⁵⁷ RM10-17-000, Demand Response Compensation in Organized Wholesale Energy Markets, Order No. 745, 134 FERC ¶61,187 (issued March 15, 2011) at ¶¶113-14.

system infrastructure, reduce the need to run comparatively inefficient and high-emitting peaking facilities, and improve overall system efficiency. That is, the purpose of DR programs subject to State jurisdiction is to secure network-level grid reliability and defer distribution infrastructure investments. The Commission should not penalize such programs by denying them credit for their additional benefits in reducing ICAP requirements.

Application of the NYISO's BSM rules to such programs is unnecessary, as Chairman Bay acknowledged in a dissent from a recent order in which the Commission reversed its policy by holding that DR resources should be subject to the NYISO's market mitigation rules.⁵⁸ In his dissent, Chairman Bay detailed how the majority failed to justify its decision to mitigate "state programs that further specific legitimate policy goals."⁵⁹ Chairman Bay explained that retail customers participating in distribution load relief programs receive payments that are designed to address local system reliability and are unrelated to participation in the ICAP market.⁶⁰ Chairman Bay concluded

⁵⁸ Docket Nos. EL07-39-006, ER08-695-004, and ER10-2371-000, New York Independent System Operator, Inc., Order on Clarification, Rehearing, and Compliance Filing (issued March 19, 2015) (2015 DR Order).

⁵⁹ Id., Bay Dissent at 1.

⁶⁰ Id.

that the “nexus between this program and the capacity market - not to mention any alleged harm to that market - is so attenuated as to amount to speculation.”⁶¹ The New York DR programs now subject to mitigation further legitimate State policies while “posing no demonstrable harm to NYISO’s” ICAP market.⁶²

Mitigating DR programs will inhibit the growth of distribution-level DR in New York, thereby interfering with State efforts to moderate peak demand, avoid infrastructure investments that will inflate utility rates, and improve system efficiency. Compliance with the Clean Power Plan also will be hindered. There is sufficient evidence and information in this and related dockets for the Commission to grant rehearing and relieve State-jurisdictional DR programs from the NYISO’s buyer-

⁶¹ Id. at 1-2.

⁶² Id. at 3.

side market mitigation rules.⁶³ At a minimum, the Commission should have sufficient information before it to find that distribution-level DR programs that do not interact with the wholesale ICAP market present no threat to that market.

⁶³ On April 20, 2015, the NYPSC sought rehearing on the order that included Commissioner Bay's dissent. (Docket Nos. EL07-39-006, ER08-695-004, and ER10-2371-000, supra, Request for Rehearing of the New York State Public Service Commission.) That request remains pending before the Commission. FERC may take notice of information submitted in support of the NYPSC's April 20 Request for Rehearing (and arguments included in Commissioner Bay's dissent to the Order underlying that Request) on substantially the same issue raised here - i.e., adopting a general BSM exemption for DR resources. The Commission can, and should, remove this contested issue from multiple dockets by (i) finding that it is unjust, unreasonable and detrimental to legitimate State and local policy objectives to mitigate resources participating in DR programs (which typically lack the ability to profitably exercise buyer-side market power), and (ii) granting rehearing as requested herein.

CONCLUSION

In accordance with the foregoing discussion, the Petitioners respectfully request that the Commission grant rehearing of its Order.

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CERTIFICATE OF SERVICE

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

Dated: Albany, New York
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