173 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council	Docket Nos. EL16-92-001 EL16-92-003
v.	
New York Independent System Operator, Inc.	
New York Independent System Operator, Inc.	ER17-996-003

ORDER ON COMPLIANCE AND PAPER HEARING, ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued October 7, 2020)

1. In the February 2020 Order,[1] the Commission granted in part and denied in part the Independent Power Producers of New York's (IPPNY) request for rehearing of the Complaint Order. In doing so, the Commission reversed the blanket exemption for Special Case Resources (SCR) from the New York Independent System Operator, Inc.'s (NYISO) buyer-side market power mitigation rules in NYISO's Market Administration and Control Area Services Tariff (Services Tariff).

2. Several parties filed timely requests for rehearing of the February 2020 Order. Pursuant to *Allegheny Defense Project v. FERC*,[2] the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act,[3] however, we are modifying the discussion in the February 2020 Order and continue to reach the same result in this proceeding, as discussed below.[4]

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[1] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (Complaint Order), *order on reh'g*, 170 FERC ¶ 61,120 (2020) (February 2020 Order).

[2] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

3. After the issuance of the February 2020 Order, NYISO submitted a Notice of Compliance Plan and Request for Conditional Waiver (Notice). In the Notice, NYISO explained what it understood to be the effective language in its Services Tariff governing the calculation of SCRs' offer floors, and its plan for implementing the directives contained in the February 2020 Order using that language. The Commission treated NYISO's Notice as a request for clarification and directed NYISO to file, within 45 days of the date of the May 2020 Order,[5] a compliance filing implementing the Commission's directives. As discussed below, we accept NYISO's compliance filing to be effective May 12, 2020, and direct NYISO to submit a further compliance filing, within 45 days of the date of this order.

4. In the February 2020 Order, the Commission also reopened the record in this proceeding for a paper hearing to begin the Commission's evaluation of individual retail-level demand response programs for the purpose of determining whether payments from those programs should be excluded from the calculation of SCR offer floors.[6] As discussed below, we find that the payments received under the Distribution Load Relief Programs (DLRP) submitted for consideration in this proceeding qualify for exclusion from the calculation of SCR offer floors. We find, however, that payments received under the Commercial System Distribution Load Relief Programs (CSRP) submitted for consideration in this proceeding do not qualify for exclusion from the calculation of SCR offer floors.

I. Background

5. NYISO's application of its buyer-side market power mitigation rules to SCRs, demand response resources that provide capacity in NYISO, has been modified through various proceedings before the Commission.[7] Relevant here, in 2016, the Complainants[8]

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[3] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[4] *Allegheny Def. Project*, 964 F.3d at 16-17.

[5] *N.Y. Pub. Serv Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,114, at PP 19-20 (2020) (May 2020 Order).

[6] February 2020 Order, 170 FERC ¶ 61,120 at PP 16, 19, 20.

[7] *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, *order on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *order on reh'g and compliance*, 131 FERC ¶ 61,170 (2010), *order on reh'g and compliance*, 150 FERC ¶ 61,208 (2015), *order on*

filed a complaint against NYISO, alleging that the application of NYISO's buyer-side market power mitigation rules in the Services Tariff is unjust and unreasonable because the rules limit full participation of SCRs in NYISO's Installed Capacity (ICAP) market and interferes with federal, state, and local policy objectives. The Complainants requested that the Commission establish a blanket exemption from NYISO's buyer-side market power mitigation rules for all SCRs or, in the alternative, exclude payments received from certain retail-level demand response programs, as specified in the complaint, from the calculations of SCRs' offer floors.

6. In the Complaint Order, the Commission granted in part the complaint to allow a blanket exemption for new SCRs from NYISO's buyer-side market power mitigation rules, and denied in part so that the blanket exemption would not include SCRs currently subject to mitigation.[9] The Commission found that SCRs have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.[10] The Commission required NYISO to revise its Services Tariff to exempt new SCRs from NYISO's buyer-side market power mitigation rules and did not address the Complainants' alternative request to exclude payments from the retail-level programs from the calculation of SCRs' offer floors.

7. On February 20, 2020, the Commission reversed that finding, granting in part and denying in part IPPNY's request for rehearing of the Complaint Order.[11] Specifically, the Commission found that a blanket exemption does not appropriately recognize that certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels and, therefore, all new SCRs should be subject to NYISO's buyer-side market power mitigation rules.[12] The

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reh'g and compliance, 158 FERC ¶ 61,127 (2017); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 105 (2015), *order on reh'g*, 154 FERC ¶ 61,088 (2016).

[8] The Complainants, referred to throughout this order, include the New York State Public Service Commission (New York Commission), New York Power Authority (NYPA), Long Island Power Authority (LIPA), New York State Energy Research and Development Authority (NYSERDA), City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council (NRDC).

[9] Complaint Order, 158 FERC ¶ 61,137 at PP 1, 30.

[10] *Id.* PP 31-32.

[11] February 2020 Order, 170 FERC ¶ 61,120.

[12] In the same order, the Commission granted NYISO's request for clarification, noting that NYISO will not re-run any mitigation exemption tests for resources

Commission found that SCRs' offer floors should include only the incremental costs of providing wholesale-level capacity services and that "payments from retail-level demand response programs designed to address distribution-level reliability needs are not properly considered to be received 'for providing Installed Capacity,' and therefore should be excluded from the calculation of SCRs' offer floors."[13] The Commission stated that payments from retail-level demand response programs that are designed to address distribution-level reliability needs are for providing a service that is distinct from providing ICAP.

8. In the same order, the Commission reopened the record in this proceeding for a paper hearing to begin its individual evaluation of retail-level demand response programs in NYISO, beginning with the programs described in the underlying complaint in this proceeding.[14] The Commission noted that the information contained in the record regarding the retail-level demand response programs listed in the underlying complaint was both stale and limited.[15] The Commission explained that the paper hearing would enable the Commission to gather current and comprehensive information necessary to evaluate and determine on a program-specific basis whether payments from those programs should be excluded from the calculation of SCRs' offer floors.[16] Accordingly, the Commission invited parties to submit evidence on the retail-level demand response programs addressed in the underlying complaint regarding whether the programs "are designed to address" and "solely address distribution-level reliability needs" and, therefore, whether payments from those programs should be excluded from the calculation of SCRs' offer floors.[17] The Commission noted that "this information is important to assess whether payments made outside of the ICAP market provide SCRs with the ability to suppress ICAP market prices below competitive levels."[18]

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previously subject to mitigation and rejected, as moot, NYISO's compliance filing to the Complaint Order. *Id.* P 21.

[13] *Id*. P 18.

[14] *Id.* P 20.

[15] *Id.*

[16] *Id.* PP 16, 19.

[17] *Id.* P 19.

[18] *Id.* P 20.

II. Requests for Rehearing of the February 2020 Order

9. On March 20, 2020, the New York Commission, NYSERDA, NYPA, LIPA, and the City of New York (collectively, NY Parties) filed a request for rehearing of the February 2020 Order. On March 23, 2020, Indicated New York Transmission Owners (Indicated NYTO)[19] and the NRDC submitted requests for rehearing of the February 2020 Order.

10. As discussed below, we modify the discussion in the February 2020 Order and continue to reach the same result in this proceeding.

A. Substantive Matters

1. Program-Specific Review

a. Rehearing Request

11. NY Parties argue that the February 2020 Order erred by initiating a paper hearing. NY Parties argue that the record in the underlying complaint proceeding clearly demonstrates that SCRs should not be subject to NYISO's buyer-side market power mitigation rules.[20] NY Parties further disagree with the February 2020 Order's finding that the information in the record before the initiation of the paper hearing was "stale and limited."[21] NY Parties argue that is it "unfair" for the Commission to delay rehearing for three years before reversing the Complaint Order on the grounds that the record had become "stale."[22] NY Parties contend that the program-specific review requested in the underlying complaint was conducted before issuing the Complaint Order, which correctly implemented a blanket exemption for SCRs.[23]

12. Indicated NYTOs claim that the February 2020 Order finds, "contrary to record evidence" and "by negative implication" that all programmatic benefits stemming from

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[19] The Indicated NYTOs are: Central Hudson Gas & Electric Corporation (Central Hudson); Consolidated Edison Company of New York, Inc. (Con Edison); NYPA; New York State Electric & Gas Corporation (NYSEG); Orange and Rockland Utilities, Inc. (Orange and Rockland); LIPA and its wholly-owned subsidiary Long Island Light Company d/b/a Power Supply Long Island; and Rochester Gas and Electric Corporation.

[20] NY Parties Rehearing Request at 20-24.

[21] *Id.* at 24.

[22] *Id.* at 25.

[23] *Id.* at 25-26.

demand response programs other than retail-level demand response programs are linked to ICAP and must be mitigated.[24] Indicated NYTOs argue that this finding does not strike a balance and is based on a "false and conjectural premise."[25] To remedy this, Indicated NYTOs ask the Commission to clarify that "payments for distribution-level DR programs that serve purposes other than ICAP address and reward values that are not compensated in the ICAP markets should be deducted from offer floors."[26]

13. Indicated NYTOs also argue that the field of demand response programs contemplated by the February 2020 Order to be eligible for revenue deduction or netting for purposes of calculation of applicable offer floors—i.e., those with the sole purpose of addressing distribution-level reliability concerns—is "unnecessarily and irrationally narrow."[27] Indicated NYTOs argue instead that the only demand response programs that should be included in offer floors are those that compensate demand response resources for providing benefits sought and compensated in the ICAP market or are for artificially reducing ICAP market prices.[28]

b. Commission Determination

14. We disagree with NY Parties that the Commission erred by initiating a paper hearing. Pursuant to sections 385.716(a) and (c) of the Commission's regulations, "the Commission may, for good cause . . . reopen the evidentiary record in a proceeding for the purpose of taking additional evidence," if the Commission "has reason to believe that a reopening of a proceeding is warranted by any change in conditions of fact or of law or by the public interest."[29] After reviewing the evidentiary record, the Commission made the following determinations: (1) that a blanket exemption does not appropriately recognize that certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels; (2) that the Commission will instead determine, on a case-by-case basis, whether certain payments received under retail level demand response programs should be excluded from the calculation of SCRs' offer floors; (3) that case-by-case evaluations would begin with the demand response programs listed in the underlying complaint; and (4) that the then-current record was insufficient to have made those determinations.[30] We find that the

[24] Indicated NYTOs Rehearing Request at 22.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 24.

[28] *Id.*

[29] 18 C.F.R §§ 385.716 (a), (c) (2020).

Commission properly determined, within its authority to reopen the record, that more evidence was necessary to determine which costs should be included in SCRs' offer floors. We further find that evidence aided the Commission in its responsibility to ensure a just and reasonable rate, which is in the public interest.[31] We also clarify that the blanket exemption for SCRs in NYISO was not overturned on the grounds that the record had become stale, as NY Parties suggest. As stated above, the blanket exemption for SCRs was overturned because the Commission determined that certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels.[32] We also disagree with NY Parties that the program-specific review necessary to provide the relief requested in the underlying complaint had already been conducted by the Commission before issuing the Complaint Order. Although the Commission assessed the information in the record related to the programs listed in the underlying Complaint, the Commission did not determine that SCRs required mitigation and individual assessment until it re-considered the record at rehearing. As noted in the February 2020 Order, the Commission determined that more information was necessary to perform the individual review of retail-level demand response programs requested by the Complainants in the underlying complaint.[33]

15. We disagree with Indicated NYTOs that the Commission determined, contrary to record evidence, that all demand response program benefits other than those from retail-level demand response programs are linked to ICAP and must be mitigated. The Commission based its reversal of the Complaint Order on the evidence before it at the time, which was limited to evidence concerning NYISO's SCR program and six retail-level demand response programs. This evidence supported a finding that SCRs should be subject to NYISO's buyer-side market power mitigation rules. The Commission also found, based on the record before it, that SCR offer floors should include only the incremental costs of providing wholesale-level capacity services.[34] This determination was based on record evidence demonstrating that certain retail-level programs provided SCRs with payments unrelated to the provision of wholesale-level capacity service.[35] In making that determination, the Commission did not find, as Indicated NYTOs suggests, that all demand response programs are linked to ICAP. We therefore continue to reach the same result as the February 2020 Order and find that a blanket exemption for SCRs is

[30] February 2020 Order, 170 FERC ¶ 61,120 at PP 17-20.

[31] *See* 18 C.F.R §§ 385.716 (a), (c).

[32] February 2020 Order, 170 FERC ¶ 61,120 at P 17.

[33] *Id*. P 20.

[34] *Id.* P 18.

[35] *Id.* P 17.

no longer appropriate. We also find, as discussed below, that payments from retail-level demand response programs that are designed to address and predominantly address distribution-level reliability needs are not properly considered as providing Installed Capacity, and therefore should be excluded from the calculation of SCRs' offer floors.[36]

16. We also disagree with Indicated NYTOs that the field of demand response programs eligible for revenue deduction or netting for purposes of calculation of applicable offer floors is too narrow. In the February 2020 Order, the Commission invited parties to submit evidence demonstrating that the retail-level demand response programs submitted for consideration in this proceeding "are designed to address" and "solely address distribution-level reliability needs."[37] As noted above, the Commission explained that this analysis is critical to assessing whether payments made outside of the ICAP market provide SCRs with the ability to suppress ICAP market prices below competitive levels.[38] Moreover, the Commission found that the requirement that payments received under programs that are designed to address and address solely distribution-level reliability needs strikes the appropriate balance between: (1) the need to protect NYISO's ICAP markets from the potential for SCRs to exercise buyer-side market power to suppress ICAP market prices below competitive levels; and (2) ensuring that NYISO's buyer-side market power mitigation rules do not impose inappropriate barriers to SCRs' participation in the ICAP markets.[39] We therefore continue to reach the same result as the February 2020 Order, and find that the demand response programs with payments that are eligible to be excluded from the calculation of SCR offer floors are properly limited to those retail-level demand response programs that are designed to address and address solely distribution-level reliability needs.

2. The February 2020 Order Lacks a Reasoned Basis

a. Rehearing Request

17. NY Parties, Indicated NYTOs and NRDC contend that the Complaint Order was correctly decided and that the February 2020 Order reversed the Complaint Order without a sound justification for doing do.[40] NY Parties add that there is "no indication" that the Commission's "decision to reverse the SCR exemption was based on a reevaluation of

[36] *Id.* P 18.

[37] *Id.* P 20.

[38] *Id.*

[39] *Id*. P 19.

[40] NY Parties Rehearing Request at 7; Indicated NYTOs Rehearing Request at 14; NRDC Rehearing Request at 25-30.

evidence, new evidence, or a determination that the standard used to evaluate exemption claims had to be modified."[41] NRDC states that the relevant inquiry for review of Commission Orders is whether the Commission has "articulated a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[42] NRDC and NY Parties acknowledge that agencies are allowed to change an existing position, but contend that the agency changing position must show that there are good reasons for the new policy.[43] NRDC adds that "an agency must provide substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[44] NRDC and NY Parties argue that any "unexplained inconsistency" between a policy and its repeal alone is a reason for holding a Commission change in interpretation to be arbitrary and capricious.[45] NY Parties also argue that it would be arbitrary and capricious that the Commission "disregard[] facts and circumstances that underlay or were engendered by the prior policy," when changing direction.[46]

18. NRDC contends that, until recently, the Commission's application of buyer-side market power mitigation has been "narrowly and appropriately focused" on preventing buyers from exercising market power to lower the capacity market clearing price.[47] Specifically, NRDC, NY Parties, and Indicated NYTOs state that, prior to the February 2020 Order, the Commission limited its application of buyer-side market power mitigation to those resources that had both the incentive and the ability to depress capacity market clearing prices.[48] NY Parties contend that, judged against this standard,

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[41] Indicated NYTOs Rehearing Request at 10.

[42] NRDC Rehearing Request at 6 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[43] NRDC Rehearing Request at 6 (citing *Encino Motorcars, LLC. v. Navarro*, 136 S. Ct. 2117, 2126 (2016)); NY Parties Rehearing Request at 8.

[44] NRDC Rehearing Request at 7 (citing *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015)).

[45] NRDC Rehearing Request at 7 (citing *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); NY Parties Rehearing Request at 13.

[46] NY Parties Rehearing Request at 13 (citing *Fox Television Stations*, 556 U.S. 502, 516 (2009)).

[47] NRDC Rehearing Request at 25-26.

[48] *Id.* at 26 (citing *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34,

SCRs should not be subject to mitigation.[49] NRDC contends that one reason the February 2020 Order lacks a reasoned basis is because SCRs have neither the incentive nor the ability to suppress market clearing prices and thus lack market power.[50] NRDC and NY Parties contend, however, that the Commission is no longer requiring a resource to have market power or an incentive to depress capacity market prices.[51] NRDC states that instead, the Commission requires only that a resource receive an out-of-market payment to be subject to buyer-side market power mitigation.[52] Indicated NYTOs argue that, if the Commission is seeking to justify applying NYISO's buyer-side market power mitigation rules to SCRs on a new basis, it has "impermissibly departed from precedent without explanation."[53] NRDC states that, in altering the standard for subjecting resources to NYISO's buyer-side market power mitigation rules, the Commission fails to explain how the market outcome described corresponds to harm to customers.[54] NRDC asserts that this approach lacks a reasoned basis because it is "wholly unrooted in the FPA or prior precedent."[55] NRDC also argues that the February 2020 Order lacks a reasoned basis because it bars SCRs from bidding into NYISO's ICAP market based on their true costs.[56]

19. Indicated NYTOs also contend that the Complaint Order "fixed" the new just and reasonable rate, and argue that the February 2020 Order's reversal of the Complaint Order, in conjunction with the establishment of the Paper Hearing, essentially "launch[ed]" a *sua sponte* section 206 proceeding. Therefore, according to Indicated NYTOs, before overturning the SCRs' blanket exemption, the Commission was required to prove that: (1) the SCR exemption established in the Complaint Order was no longer just and reasonable; and (2) the February 2020 Order's directed program-by-program protocol for calculating SCRs' offer floors is just and reasonable.[57] Indicated NYTOs

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103-04 (2006)); NY Parties Rehearing Request at 11; Indicated NYTOs Rehearing Request at 14.

[49] NY Parties Rehearing Request at 11.

[50] NRDC Rehearing Request at 27.

[51] *Id.* at 29; NY Parties Rehearing Request at 15.

[52] NRDC Rehearing Request at 29; NY Parties Rehearing Request at 16.

[53] Indicated NYTOs Rehearing Request at 14.

[54] NRDC Rehearing Request at 29.

[55] *Id.*

[56] *Id.* at 28.

argue that, on rehearing, the Commission should either rescind its reversal of the Complaint order or provide a reasoned conclusion, based on the original record, for the reversal.[58]

b. Commission Determination

20. We disagree with NRDC, NY Parties, and Indicated NYTOs that the February 2020 Order's reversal of the Complaint Order lacks a reasoned basis. The Commission articulated a satisfactory explanation for its action by finding that a blanket exemption for SCRs does not appropriately recognize that certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels.[59] Based on that finding, the Commission determined that all new SCRs should be subject to NYISO's buyer-side market power mitigation rules.[60] Recognizing that SCRs can provide both wholesale and retail-level services, the February 2020 Order determined that although all SCRs should be subject to mitigation, SCRs' offer floors should include only the incremental costs of providing wholesale-level capacity services. We find that this reasoning constitutes sufficient justification for the reversal of the blanket exemption for SCRs in NYISO.

21. The Commission did not base its decision on market conditions. Rather, the Commission based its determination on evidence already in the record demonstrating that a blanket exemption would not appropriately mitigate the threat to capacity prices posed by certain out-of-market payments. Thus, there is no "unexplained inconsistency" between the previous blanket exemption and its repeal.[61] We also find that the Commission did not "disregard[] facts and circumstances that underlay or were engendered by the prior policy," when changing direction.[62] In the February 2020 Order,

[57] Indicated NYTOs Rehearing Request at 17 (citing *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017)).

[58] *Id.* at 18.

[59] February 2020 Order, 170 FERC ¶ 61,120 at P 17.

[60] In the same order, the Commission granted NYISO's request for clarification, noting that NYISO will not re-run any mitigation exemption tests for resources previously subject to mitigation and rejected, as moot, NYISO's compliance filing to the Complaint Order.

[61] NRDC Rehearing Request at 7 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); NY Parties Rehearing Request at 13.

[62] NY Parties Rehearing Request at 13 (citing *Fox Television Stations*, 556 U.S. at 516).

the Commission addressed the facts and circumstances that led to the reconsideration of the issue.[63] We also note that any circumstances "engendered by the prior policy" are not a part of the record in this proceeding and therefore cannot be considered.

22. NRDC, NY Parties, and Indicated NYTOs are correct that the Commission has historically limited the exemptions from buyer-side market power mitigation in the NYISO market to those resources that lack the incentive and ability to depress ICAP market clearing prices. The Commission has held that "[w]hether to grant an exemption is based on each case's unique facts."[64] As NRDC and NY Parties point out, the Commission's reversal of the blanket exemption for SCRs in NYISO is based on the finding that certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels. Thus, the Commission's decision to subject SCRs to NYISO's buyer-side market power mitigation rules is explicitly tied to SCRs' ability to depress ICAP market clearing prices. Moreover, the Commission has held that uneconomic entry must not be permitted to suppress market prices, regardless of intent, finding that "all uneconomic entry has the effect of depressing prices below the competitive level," and that "this was the key element that mitigation of uneconomic entry should address."[65] Thus, even if we were to assume that SCRs lack the incentive to suppress ICAP market prices, the Commission reasonably relied on IPPNY's analysis that certain payments provide SCRs with the ability to suppress ICAP market prices below competitive levels. Therefore, we find that the February 2020 Order provides a reasoned basis for its reversal of the Complaint Order's blanket exemption.

23. We disagree with Indicated NYTOs' argument that, by reversing the Complaint Order's blanket exemption and establishing a paper hearing, the Commission essentially launched a *sua sponte* section 206 proceeding. Although the Commission modified its initial findings and directives, which section 313(a) of the FPA expressly allows,[66] the findings and directives remained within the scope of the Complaint and were based on evidence bearing upon the allegations and request for relief in the Complaint as submitted by the parties. The Commission found that the Complainants satisfied their burden under FPA section 206 to show that NYISO's tariff was unjust and unreasonable and appropriately established further briefing to explore the appropriate remedy.

[63] February 2020 Order, 170 FERC ¶ 61,120 at P 17.

[64] *See ISO New England Inc.*, 158 FERC ¶ 61,132, at P 7 (2017) (quoting *ISO New England Inc*., 138 FERC ¶ 61,029, at P 171 (2011), *reh'g denied in pertinent part*, 138 FERC ¶ 61,027 (2012)).

[65] *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008).

[66] *See* 16 U.S.C. § 825*l*(a) (stating that "the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing").

3. State and Federal Policy Concerns

a. Rehearing Request

24. NRDC argues that the February 2020 Order ignores collaborative federalism under the FPA and ignores New York State's legitimate regulatory role in promoting SCRs.[67] NRDC explains that the Commission's role is to regulate the sale of electricity at wholesale in interstate commerce and that the FPA charges the Commission with the task of ensuring that wholesale sales of electricity occur at rates that are just and reasonable and not unduly discriminatory or preferential.[68] On the other hand, NRDC continues, the FPA leaves to the states the regulation of "any other sale of electric energy," as well as "facilities used for the generation of electric energy . . . ."[69] NRDC asserts that states exercise their authority, as relevant here, by "direct[ing] the planning and resource decisions of utilities under [the state's] jurisdiction."[70] NRDC adds that states are free to exercise these regulatory prerogatives even if such regulations "incidentally affect" wholesale electricity markets.[71] NRDC contends that New York State's policy to promote demand response resources is a legitimate regulatory action that is well within the State's domain under the FPA and that the February 2020 Order infringes on the states' explicitly reserved authority to regulate generation.[72] NRDC states that the Commission has recognized that part of the Commission's inquiry into the justness and reasonableness of a rate includes the ability of states to pursue their policy goals.[73] NRDC asserts that, contrary to this requirement, the February 2020 Order made no reference to New York State's regulatory goals with regard to demand response resources and made no effort to assess the impacts of applying buyer-side market power mitigation rules to those goals.[74] By failing to do so, NRDC contends that the Commission failed to

[67] NRDC Rehearing Request at 15 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring)).

[68] *Id.* (citing 16 U.S.C. §§ 824(b)(1); 824e(a)).

[69] *Id.* at 16 (citing 16 U.S.C. § 824(b)(1)).

[70] *Id.* (citing *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013)).

[71] *Id.* (citing *Hughes*, 136 S. Ct. at 1298.)

[72] *Id.* at 18, 22.

[73] *Id.* at 19 (citing *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023, at P 23 (2016)).

[74] *Id.*

consider an important aspect of the problem of developing a just and reasonable rate.[75] NRDC contends that the Commission's failure to assess the nature and scope of the February 2020 Order's impact on New York State's regulatory goals made it impossible for the Commission to balance the impacts of mitigation against any purported benefits.[76] NY Parties also argue that, if not reconsidered, the February 2020 Order will also pose barriers to the deployment of SCRs contrary to Congressional decree and Commission precedent.[77] NRDC also argues that subjecting SCRs to buyer-side market power mitigation imposes an artificial barrier that increases customer costs and reduces the effectiveness of demand response in NYISO.[78]

25. NRDC adds that the Commission, in the February 2020 Order, exceeds its proper role under the FPA by intentionally frustrating state climate regulations.[79] Specifically, NRDC argues that "[w]ithout a statutory basis for its decision to value payments made by a state for environmental services at zero in calculating capacity market offers, the Commission's decision [] renders rates unjust and unreasonable and unduly discriminates against resources that earn revenue from selling such services."[80] NRDC continues that, rather that setting its own environmental policies, the FPA allows the Commission to recognize the actions of environmental regulators.[81] NRDC explains that capacity markets were designed to take state regulation of generation mix as an input.[82] According to NRDC, the Commission's attempt to second-guess state decisions over matters reserved to the states by Congress also exceeds Commission authority.[83] NRDC continues that the Commission erred by not providing a statutory basis for its decision to value payments made by a state for environmental services at zero when calculating capacity market offers.[84] NRDC argues that this failure renders rates unjust and

[75] *Id.* at 20.

[76] *Id.*

[77] NY Parties Rehearing Request at 18.

[78] *Id.* at 18.

[79] *Id.* at 20.

[80] *Id.* at 20-21.

[81] *Id.* at 21.

[82] *Id.*

[83] *Id.* at 23.

[84] *Id.* at 20.

unreasonable and unduly discriminates against resources that earn revenue from selling such services.[85]

26. NRDC further contends that the February 2020 Order's treatment of SCRs is inconsistent with Commission treatment of other resources in NYISO that receive out-of-market support.[86] NRDC contends that this inconsistent treatment is arbitrary, capricious, and unduly discriminatory, and amounts to improper influence with New York State's policy decisions.[87] NRDC also contends that it is inappropriate to apply buyer-side market power mitigation rules to SCRs because the programs are not subsidized.[88] Instead, according to NRDC, the programs pay a fee in exchange for a service provided by the demand response provider.[89] NRDC argues that there is no basis, in law or in policy, to impose buyer-side market power mitigation rules on demand response providers because they sell services to parties other than NYISO.[90]

b. Commission Determination

27. We disagree with the NRDC's arguments. We find that the Commission's determination in the February 2020 Order does not improperly intrude on the state's authority to determine its energy resource mix and the development of new generation merely by implementing wholesale rules affecting matters within the state's jurisdiction.[91]

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[85] *Id.* at 21.

[86] *Id.* at 22-23.

[87] *Id.* at 23.

[88] *Id.* at 25.

[89] *Id.*

[90] *Id.*

[91] *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 ("When FERC regulates what takes place on the wholesale market, as part of its charge to improve how that market runs, then no matter the effect on retail rates, §824(b) imposes no bar."); *ISO New England Inc.*, 135 FERC ¶ 61,029, at P 170 (2011), *reh'g denied*, 138 FERC ¶ 61,027 (2012), *aff'd sub nom. New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 295 (D.C. Cir. 2014) (finding that load serving entities are "free to shape their portfolios as they choose . . . 'provided these new resources clear the auction,'" and approving the Commission's discretion to determine that "encouraging renewable energies was less important than allowing [] out-of-market entrants to depress capacity prices"); *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (finding that the Commission's Installed Capacity Requirement affects capacity prices

The Commission recognizes that the FPA reserves to the state decisions concerning generation, but the FPA provides the Commission with the jurisdiction and authority to regulate rates for wholesale sales by those generation resources and we are obligated to ensure that such rates are just and reasonable and not unduly discriminatory.[92] In applying buyer-side market power mitigation rules to SCRs, the Commission has not stopped the state from supporting preferred resources.[93] New York State remains free to support preferred resources. However, the Commission cannot overlook uneconomic entry even when designed to promote state policy preferences because doing so distorts the market price signals that are necessary to encourage investment in new resources, and the maintenance of existing resources, in order to meet reliability standards over the long term.[94] We also find that there is no evidence to substantiate the claim that the Commission intentionally frustrates state climate regulations and disagree with NRDC's contention that the Commission erred by not providing a statutory basis for its decision to value payments made by a state for environmental services at zero when calculating capacity market offer floors. Rather, the Commission's decision in the February 2020 Order is appropriately based on SCRs' ability to suppress ICAP market prices and our requirement to ensure that rates, terms and conditions are just, reasonable and not unduly discriminatory or preferential.

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but not necessarily new capacity construction and, therefore, the Commission does not engage in impermissible regulation of generation facilities when it sets the price of capacity to incentivize procurement of resources adequate to meet forecasted peak load).

[92] *See N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,119, at P 37 (2020) (Electric Storage Complaint Order) (finding "where state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable"); *see also N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014) (*NJBPU*) (affirming the Commission's decision to eliminate the state mandate exemption because "below-cost entry suppresses capacity prices . . . [the Commission is] statutorily mandated to protect the [PJM capacity auction] against the effect of such entry").

[93] *Conn. Dep't of Pub. Util. Control v. FERC*, F.3d 477, 481 (D.C. Cir. 2009) (holding that the Commission did not directly regulate generation facilities by requiring resources to meet installed capacity requirements).

[94] *See, e.g.*, *NJBPU*, 744 F.3d 74 at 100-01 (D.C. Cir. 2014) (affirming the Commission decision to eliminate a broad exemption for any state-mandated resources where there was mounting evidence that the risk of price suppression would send the wrong signals regarding the need for new market entrants and providing a narrowly-tailored exemption for wind and solar resources.).

28. We also disagree that the Commission impermissibly failed to assess the nature and scope of the February 2020 Order's impact on New York State's regulatory goals, as NRDC contends. The Commission precedent NRDC cites in support of its contention that the Commission must assess states' ability to pursue their policy goals does not include a mandate for assessment, as NRDC suggests. Rather, the cases simply include an acknowledgement of a state's authority to pursue its policy goals.[95] We also find that the Commission's determination in the February 2020 Order appropriately balances the impacts of mitigation of SCRs against the purported benefits. The Commission stated that its findings strike the appropriate balance between: (1) the need to protect NYISO's ICAP markets from the potential for SCRs to suppress ICAP market prices below competitive levels; and (2) ensuring that NYISO's buyer-side market power mitigation rules do not impose inappropriate barriers to SCRs' participation in the ICAP markets.[96]

29. We disagree with NRDC's contention that the Commission's treatment of SCRs is impermissibly inconsistent with Commission treatment of other resources in NYISO that receive out-of-market support. The Commission based the decision to mitigate SCRs on the finding that out-of-market payments from certain demand response programs support the provision of ICAP services. We also find the February 2020 Order does not impose buyer-side market power mitigation rules on demand response providers because they "sell services to parties other than NYISO."[97] As previously stated, the February 2020 Order based its decision to mitigate SCRs on their ability to suppress ICAP market prices.

4. Failure to Protect from Excessive Rates

a. Rehearing Requests

30. NRDC and Indicated NYTOs argue that the February 2020 Order will over-mitigate the NYISO capacity market, which will increase costs and reduce reliability for ratepayers.[98] NRDC contends that this result fails to comply with the Commission's statutory duty to protect ratepayers from excessive rates.[99] NRDC continues that the Commission has long held that ensuring just and reasonable rates entails balancing

[95] *See ISO New England Inc.*, 155 FERC ¶ 61,023, at P 23 (2016); *see also PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 143 (2011); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 3 (2011).

[96] February 2020 Order, 170 FERC ¶ 61,120 at P 19.

[97] NRDC Rehearing Request at 25.

[98] *Id.* at 32; Indicated NYTOs Rehearing Request at 23.

[99] NRDC Rehearing Request at 31.

investor and customer interests, and that the Commission has a duty to engage in this balancing when setting rates.[100] NRDC contends that the February 2020 Order fails to acknowledge or articulate the costs and benefits to the parties in this proceeding.[101] NRDC argues that "no external (e.g., State or State-approved) demand response program has the ability to meaningfully . . . suppress capacity prices in New York" and that applying BSM to new SCRs would result in over-mitigation."[102] NRDC also asserts that there has been no evidence that SCR programs have caused price suppression in NYISO's capacity market.[103] Indicated NYTOs note that, to the extent SCRs have the opportunity to participate in distribution-level demand response programs, SCRs will be forced to bid prices that are not reflective of the SCRs' incremental costs.[104] According to Indicated NYTOs, this will tend to undermine efficient price discovery and artificially inflate market prices.[105] NRDC argues that in order to justify this increase, the Commission must explain why the increased rates are required.[106] Indicated NYTOs contend that if payments for distribution-level demand response programs that compensate for benefits provided outside of the ICAP market are included in SCR offer floors, the effect will be to "prop up artificially high ICAP prices."[107]

b. Commission Determination

31. We disagree with arguments that the Commission's determination in the February 2020 Order will lead to the over-mitigation of SCRs in NYISO's capacity market. The Commission did not focus its analysis concerning whether SCRs should be subject to NYISO's buyer-side market power mitigation rules on the resulting rate. Rather, the Commission's analysis concentrates on maintaining an efficient market with meaningful price signals.[108] Buyer-side market power mitigation rules are NYISO's primary tool to

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[100] *Id.*

[101] *Id.* at 32.

[102] *Id.* at 34.

[103] *Id.* at 33-34.

[104] Indicated NYTOs Rehearing Request at 24.

[105] *Id.*

[106] NRDC Rehearing Request at 35.

[107] Indicated NYTOs Rehearing Request at 23.

[108] *See* Electric Storage Complaint Order, 170 FERC ¶ 61,119 at P 43 (explaining that it is important to protect capacity market prices from suppression and to ensure that

ensure that uneconomic ICAP supply that enters the market does not suppress ICAP market prices. We find that the February 2020 Order ensures just and reasonable rates by balancing the risk of over-mitigation with the need to address uneconomic offers. Moreover, as discussed above, the Commission appropriately balanced investor and customer interests.

32. We also disagree that SCRs will be forced to bid prices that are not reflective of the SCRs' incremental costs. In fact, the purpose of the paper hearing is to ensure that retail-level demand response programs in NYISO have the opportunity to explain to the Commission which of their costs should be excluded from the calculation of SCRs' offer floors. As discussed below, parties are invited to file for exemption of their relevant costs when applicable.

III. Compliance Filing

A. Background

33. On March 11, 2020, NYISO submitted its Notice in response to the Commission's February 20, 2020 order. In the Notice, NYISO explained what NYISO believed to be the effective language in its Services Tariff governing the calculation of SCRs' offer floors. Specifically, NYISO explained that the following language was included in NYISO's then-effective Services Tariff:

> The Offer Floor calculation shall include any payment or the value of other benefits that are awarded for offering of supplying In-City Capacity, except for payments or the value of other benefits provided under programs administered or approved by New York State or a government instrumentality of New York State.[109]

This language is herein referred to as the State Program Language. Although NYISO did not explicitly seek clarification in its Notice, the Commission treated NYISO's Notice as a request for clarification. On May 12, 2020, the Commission granted in part and denied in part the request for clarification, finding that NYISO's effective Services Tariff should not include the State Program Language.[110] Therefore, the Commission directed NYISO to submit a compliance filing to remove the State Program Language from its Services Tariff.[111]

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the capacity market can operate as designed.).

[109] NYISO, Services Tariff, Attach. H § 23.4.5.7.5 (0.0.0).

[110] *N.Y. Pub. Serv Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,114, at PP 19-20 (2020) (May 2020 Order).

B. May 2020 Compliance Filing

34. In response to the May 2020 Order, NYISO proposes to delete the "State Program Language" in its entirety from section 23.4.5.7.5 of its Services Tariff.[112] NYISO asserts that, by ordering the deletion of this language, the Commission is requiring NYISO to include in the calculation of an SCRs' offer floor all payments or benefits received by the SCR or Responsible Interface Party "under programs administered or approved by New York State or a government instrumentality of New York State."[113] NYISO adds that it implemented the rule in this manner for new SCRs enrolled for the June 2020 Capability Month and will continue to do so pending the outcome of the paper hearing.[114] NYISO adds that after the removal of the State Program Language, section 23.4.5.7.5 of its Services Tariff will continue to specify that SCR offer floors must include "the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resource."[115]

35. NYISO notes that the February 2020 Order held that the Commission would evaluate certain retail-level demand response programs on a program-specific basis to determine whether payments from those programs should be excluded from the calculation of SCRs' offer floors.[116] NYISO contends, therefore, that payments and benefits under retail-level state programs must be included in SCR offer floors unless the Commission orders NYISO to exclude such payments.[117] NYISO requests that the Commission accept the proposed compliance revision effective, as directed, on May 12, 2020.[118]

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[111] *Id.* P 20.

[112] *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER17-996-003, at 3 (filed May 29, 2020) (May 2020 Compliance Filing).

[113] *Id.* Responsible Interface Party is defined as "[a] Customer that is authorized by the ISO to be the Installed Capacity Supplier for one or more Special Case Resources and that agrees to certain notification and other requirements as set forth in this Services Tariff and in the ISO Procedures." NYISO, Services Tariff, § 2.18 (0.0.0).

[114] May 2020 Compliance Filing at 3.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 3-4.

C. Notice of Filing and Responsive Pleadings

36. Notice of the May 2020 Compliance Filing was published in the *Federal Register*, 85 Fed. Reg 34,614 (Jun. 5, 2020), with interventions or protests on or before June 19, 2020. Advanced Energy Management Alliance, IPPNY, E. Cubed Company, Energy Spectrum, Inc., and Helix Ravenswood, LLC submitted timely motions to intervene. The Complainants filed a timely protest. IPPNY filed a timely answer.

37. The Complainants do not challenge NYISO's removal of the State Program Language and state that, by removing the language, NYISO complied with the Commission's directive in the May 2020 Order.[119] However, the Complainants argue that NYISO's proposal to include revenues from retail level distribution system demand response programs when calculating SCR offer floors should be rejected.[120] The Complainants contend that this inclusion contradicts the Commission's explicit instructions in its February 2020 Order and NYISO's Services Tariff.[121] The Complainants state that the remaining language in section 23.4.5.7.5 of NYISO's Services Tariff does not provide NYISO with any justification to include revenues from utility-managed, distribution-level demand response programs in the calculation of SCRs' offer floors.[122] The Complainants contend that the February 2020 Order found that revenues from distribution-level demand response programs were not revenues for providing Installed Capacity.[123] The Complainants continue that, until the Commission rules on the Paper Hearing, the February 2020 Order clearly directs NYISO to exclude revenues received from retail-level demand response programs in calculating the SCR offer floor.

38. The Complainants claim that the Commission's directive to remove the State Program Language from NYISO's Services Tariff was based on the Commission's analysis of the correct tariff language in effect at the time NYISO's Notice was filed.[124] The Complainants contend that unless and until the Commission finds that retail-level, distribution-system demand response programs are for providing Installed Capacity,

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[118] *Id.* at 4.

[119] *Id.*

[120] Complainants Protest at 6.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* at 8.

Services Tariff section 23.4.5.7.5 does not allow NYISO to include payments from retail-level demand response programs in calculating the SCR offer floor.[125] The Complainants add that if, in the future, there are payments from third parties that are for providing Installed Capacity, NYISO could then include such payments in the calculation of the Offer Floor.[126]

39. IPPNY disagrees with the Complainants' contention that the Commission intended that payments received under specific retail-level demand response programs must be excluded from SCRs' offers floors unless and until the Commission rules otherwise.[127] IPPNY argues that this interpretation is contrary to the February 2020 Order's invitation to parties wishing to request payment exclusions, and that the Commission's statement that "payments from retail-level demand response programs designed to address distribution-level reliability needs are not properly considered to be received 'for providing Installed Capacity'" was generic and was not intended to apply to any specific program.[128] IPPNY continues that the Commission must determine that specific programs "are designed to address distribution-level reliability needs and . . . address [] distribution-level reliability needs" before the NYISO may begin excluding payments received under such specific programs from SCR Offer Floors.[129] IPPNY emphasizes that NYISO has made no such determination with respect to the specific programs that are the subject of the paper hearing.[130] Thus, according to IPPNY, NYISO is correct in its May 2020 Compliance Filing that payments received under the retail-level demand response programs should be included in SCR offer floors unless and until the Commission orders otherwise.[131]

D. Procedural Matters

40. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[132] the motions to intervene serve to make the entities that filed them parties to this proceeding.

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[125] *Id.*

[126] *Id.*

[127] IPPNY Answer at 3-4.

[128] *Id.*

[129] *Id.* at 5.

[130] *Id.*

[131] *Id.*

[132] 18 C.F.R. § 385.214 (2020).

41. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[133] prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept IPPNY's answer because it provided information that assisted us in our decision-making process.

E. Substantive Matters

42. We find that NYISO complied with the Commission's directives in the May 2020 Order. Specifically, we find that NYISO complied with the May 2020 Order's requirement to remove the State Program Language from its Services Tariff.

43. We agree with NYISO's interpretation of its Services Tariff and its action to include payments and benefits under retail-level state program in the calculation of SCR offer floors unless the Commission orders NYISO to exclude these payments or benefits on a program-specific basis. We therefore disagree with the Complainants' contention that payments received under retail-level demand response programs should be excluded from SCR offer floors unless and until the Commission orders otherwise. As IPPNY points out, the February 2020 Order's finding that "payments from retail-level demand response programs designed to address distribution-level reliability needs are not properly considered to be received 'for providing Installed Capacity'"[134] was not intended to apply to any specific demand response program. Rather, the Commission established a paper hearing, discussed in detail below, to determine whether individual retail-level demand response programs make such payments, and whether those payments should therefore be excluded from the calculation of SCR offer floors. The purpose of the paper hearing would be nullified if all payments from retail-level demand response programs were presumptively excluded from the calculation of SCR offer floors. However, to provide clarity in the Services Tariff, we direct NYISO to submit a compliance filing, within 45 days of the date of this order, to revise section 23.4.5.7.5 of the Services Tariff to explicitly exclude from the calculation of SCRs' offer floors "the monthly value of any payments or other benefits the Special Case Resource receives from a retail-level demand response program designed to address distribution-level reliability needs that the Commission has, on a program-specific basis, determined should be excluded." This revision will be effective as of the date of this order. To the extent the Commission determines, in this or future orders, that any of the retail-level demand response programs are designed to address and predominantly address distribution-level reliability needs, NYISO should at that time begin excluding payments from such programs from the calculation of SCRs' offer floors, consistent with the Services Tariff language directed herein.

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[133] *Id.* § 385.213(a)(2) (2020).

[134] February 2020 Order, 170 FERC ¶ 61,120 at P 18.

IV. Paper Hearing

44. In response to the February 2020 Order, the New York Commission, NYSERDA, the City of New York, the NRDC, and Energy Spectrum, Inc. (collectively, the Complainants), and Con Edison and Orange and Rockland (collectively, the Companies) submitted initial briefs. IPPNY submitted a reply brief.

45. The threshold issue before the Commission is determining whether the retail-level demand response programs presented in this proceeding comply with the Commission's requirement as stated in the February 2020 Order. In the February 2020 Order, the Commission stated that, in the paper hearing, it would evaluate whether retail-level demand response programs submitted to the Commission for consideration are "designed to address" and "address solely distribution-level reliability needs," and therefore whether payments from those programs should be excluded from the calculation of SCRs' offer floors. Pursuant to these requirements, we find that the DLRPs under consideration in this proceeding are designed to address and address solely distribution-level reliability needs, and therefore payments received under the programs should be excluded from the calculation of SCR offer floors in NYISO. We find, however, that the CSRPs under consideration are not designed to address and do not address solely distribution-level reliability needs, and therefore payments received under the programs must be included in the calculation of SCR offer floors in NYISO.

A. Initial Briefs

46. The Complainants and the Companies argue that retail-level demand response programs provide distinctly different services than SCRs participating as capacity resources under the NYISO-administered wholesale markets. Therefore, according to the Complainants and the Companies, any payments received from those programs should be excluded from the calculation of SCRs' offer floors.[135] The programs under consideration in this proceeding can be broadly categorized as either CSRPs or DLRPs. The Complainants specify the list of programs to include: (1) Con Edison's CSRP; (2) Con Edison's DLRP; (3) Orange and Rockland's CSRP; (4) Orange and Rockland's DLRP (5) Central Hudson's CSRP; and (6) NYSEG's CSRP.[136] The Companies also note that they have each filed plans with the New York Commission to operate two similar demand response programs in the future: Day-Ahead Dynamic Load Management (DLM) and auto-DLM.[137]

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[135] Complainants Br. 5-6; Companies Br. 7.

[136] Complainants Br. 6.

[137] *Id.*

47. The Complainants' explain that because the CSRPs and DLRPs are designed solely to meet distribution system reliability needs, program participants are compensated solely for meeting those needs and not for meeting NYISO-level needs.[138] The Companies explain that if CSRPs and DLRPs produce collateral, unintended benefits to NYISO beyond Con Ed's and Orange and Rockland's purpose, for example by contributing ICAP to NYISO's wholesale markets, such benefits are: (1) purely happenstance or incidental in nature, as the production of such benefits is not the purpose or design of the Companies' programs; (2) immaterial as a factual matter; and (3) payments do not compensate for those collateral benefits.[139] The Complainants elaborate, through the use of expert testimony, that the NYPSC has specifically directed that utilities not include compensation for avoided wholesale market capacity costs in their CSRP and DLRP payments both because those programs are not directed at reducing wholesale capacity costs and because the NYISO's SCR program is the appropriate venue for providing call signals and compensation for provision of wholesale capacity.[140] Additionally, the Companies assert that when they call a distribution-level demand response event, they do so without any consideration whatsoever to whether SCR will be called or if NYISO can use the resources their retail distribution programs provide.[141] For example, the Complainants' affidavit testimony explains that Con Edison's demand response programs are activated when localized demand in Zone J taxes Con Edison's feeders, substations, and/or distribution circuits.[142] Affidavit testimony further states that, while Zone J may have a general installed capacity need overall, a particular neighborhood, or street, could experience localized demand that exceeds the capability of the distribution system in that area.[143] The Complainants' expert clarifies that this problem is not related to the total capacity of the electric system within New York City.[144]

48. Expert testimony provided by the Companies explains that NYISO's SCR program is a bulk system reliability program that is activated only during periods of reserve shortages or when there is an unplanned event, such as severe weather, or an unplanned outage.[145] The Companies' expert continues that that SCRs are: (1) demand

[138] *Id.*

[139] Companies Br. 6.

[140] Complainants Br., Evans Aff. 5.

[141] Companies Br. 7.

[142] Complainants Br., Ahrens Aff. 8.

[143] *Id.*

[144] *Id.*

response resources whose load is capable of being interrupted at the direction of NYISO; and/or (2) demand response resources that have a behind the meter generator which is not visible to NYISO's market system and is rated 100 kW or higher and that can be operated to reduce load from the bulk transmission system and/or the distribution system at the direction of NYISO.[146] According to the Companies' expert, SCRs are not subject to daily bidding, scheduling and notification requirements and determinations as to whether and when to call SCRs are made by NYISO Operations department consistent with NYISO's Emergency Operations Manual.[147] Specifically, the Companies' expert states that NYISO can only call on an SCR to perform if one of two events occur: (1) if NYISO's market-clearing software indicated that NYISO will be short of operating reserves in the day-ahead market; or (2) the market-clearing software is already completed and conditions then change such that the forecast indicated there will be an operating reserve deficiency.[148] The Complainants' expert testimony notes that in reviewing NYISO's records, he found that SCR/Emergency Demand Response Program events were called only once in 2016 and three times in 2018.[149]

49. The Complainants' expert testimony asserts that, in contrast to NYISO's SCR program, DLRPs and CSRPs were designed to relieve constraints on the local distribution system that often do not occur at the same time that the bulk system is near peak load.[150] The Complainants' expert explains that utility-administered demand response programs have providers that are typically large industrial plants (i.e., factories), apartment complexes, large retail stores, shopping malls, or other businesses whose primary concern is something other than supporting grid reliability by curtailing energy usage.[151]

50. The Complainants' expert testimony explains that the primary purpose of DLRPs is to maintain reliability by reducing distribution system demands in response to contingencies and other emergencies.[152] The Companies add that the DLRPs under consideration are designed exclusively to provide distribution system reliability benefits

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[145] Companies Br., Hilowitz Aff. 9.

[146] *Id.* at 9-10.

[147] *Id.* at 10.

[148] *Id.* at 11.

[149] Complainants Br., Ahrens Aff. 3-4.

[150] Complainants Br., Evans Aff. 11.

[151] *Id.* at 3.

[152] Complainants Br., Evans Aff. 5.

to mitigate or prevent critical distribution conditions on the Companies' electric grids.[153] The Complainants add that activations of the DLRP are based on forecasted or actual contingencies and emergencies.[154] The Complainants' expert testimony also points out that Con Edison's tariff governing its demand response programs requires that a DLRP event only be called "when the next contingency, excluding breaker failure, either will result in an outage to more than 15,000 customers or will result in some equipment being loaded above emergency ratings."[155] The Complainants' expert adds that Orange and Rockland's tariff governing its demand response programs states that a load relief period, "may be designated... in specific feeders or geographical areas if the Company's distribution control center declares an emergency or if a voltage reduction of five percent or greater has been ordered."[156]

51. The Complainants' expert states that the primary purpose of CSRPs is to reduce the need for investments in local distribution systems by reducing distribution system peak demand.[157] The Companies' expert asserts that Con Edison's CSRP enables Con Edison to avoid local transmission and distribution infrastructure investment.[158] The Complainants' expert further explains that program participants have the option to enroll either as mandatory or voluntary, with mandatory participants being eligible to receive reservation payments and performance payments, while voluntary participants are only eligible for performance payments.[159] The Complainants also describe that with the exception of NYSEG's CSRP, the CSRPs under consideration are available throughout their respective utility's service territory. The Complainants explain that each CSRP is dispatched in order to relieve distribution system peak loads when the day-ahead forecasted peak across the utility's service territory exceeds a certain percentage of the distribution system peak across the utility's services territory. The Complainants note that dispatches in the CSRP are based purely on forecasted distribution system demand.[160] The Complainants contend that, unlike the SCR program in Zone J (which has a single

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[153] Companies Br. At 6.

[154] Complainants Br., Evans Aff. 5.

[155] Complainants Br. at 10.

[156] *Id.* at 12.

[157] Complainants Br., Evans Aff. 5.

[158] Companies Br., Reilly Aff. 4.

[159] Complainants Br., at 9, 11, 13, and 14.

[160] Complainants Br., Evans Aff. 5.

activation period that applies to all program participants), activation periods for the CSRPs under consideration will vary based on the physical location of the participant.

52. The Complainants' expert testimony also contends that the fact that both SCR and CSRP or DLRP could be activated on the same day should not be interpreted as meaning that they are designed to achieve the same purpose.[161] The Complainants' expert testimony further explains that instead the sometimes-concurrent activations mean that NYISO and the utility are dealing with problems on their respective systems likely caused by the same underlying conditions.[162] The Complainants' expert testimony elaborates that during periods of high demand, it is very possible that simultaneous needs exist.[163]

53. The Complainants argue that inclusion of retail-level demand response program payments by NYISO in its buyer-side market power mitigation offer floor calculation will result in demand response providers being forced to choose between wholesale and retail programs to avoid the risk of mitigation.[164] The Complainants explain that this will result in neither the SCR program nor the utility-administered demand response programs being able to maximize potential enrollments.[165] The Complainants elaborate that this will further result in negative impacts to both wholesale and distribution reliability and, through diminished competition, unnecessary increases to ratepayer costs.[166] The Complainants also note that this will impair state authority over local electric distribution systems, retail electric sales and electric reliability.[167]

B. Reply Brief

54. IPPNY does not dispute the February 2020 Order's finding that retail-level program payments may be excluded from the calculation of an SCR's offer floor if the program at issue addresses solely distribution level needs.[168] IPPNY also does not

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[161] Complainants Br., Shabalin Aff. 10.

[162] *Id.*

[163] *Id.* at 11.

[164] Complainants Br. 7.

[165] *Id.* at 8.

[166] *Id.*

[167] *Id.*

[168] IPPNY Reply Br. 6.

contest the evidence provided by the Complainants and the Companies that demonstrates that DLRPs are designed to address and address solely distribution-level reliability services.[169] IPPNY argues, however, that the CSRPs under consideration do not provide for solely distribution-level reliability needs, as required by the February 2020 Order.[170] Rather, IPPNY notes, the CSRPs under consideration are explicitly intended to reduce peak load, which is the very purpose of NYISO's SCR program.[171] IPPNY adds that the programs also have the same core design elements.[172] In support of these argument, IPPNY points out that NYISO's Services Tariff defines SCRs as resources "whose Load is capable of being interrupted upon demand at the direction of the [NY]ISO" and "can be operated to reduce Load from the NYS Transmission System or the distribution system at the direction of the ISO."[173] As noted above, IPPNY also states that the CSRP applies across the entire Con Edison service territory and is a distribution-level peak reduction program.[174] IPPNY adds that the CSRPs and the SCR program have the same participation prerequisites, carry the same four-hour performance requirement, and that in both cases, notification is given 21 hours in advance of the event start time.[175] IPPNY also notes that the "vast majority of parties" participate in both programs.[176]

55. IPPNY also disagrees with the Companies and Complainants that the CSRPs under consideration and NYISO's SCR program's activations rarely overlap.[177] Rather, IPPNY argues that, upon examination of the evidence presented, "while Con Edison calls its CSRP program more often than the NYISO does, there is a 100% overlap between when the NYISO called its SCR program for an event and the CSRP was called for an event."[178] IPPNY continues that while NYISO calls the SCR program based on expectations that is might be short of reserves without the SCR resources, high loads—

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 8.

[173] NYISO, Services Tariff, § 5.12.11.1 (28.0.0).

[174] IPPNY Reply Br. 8.

[175] *Id.* at 8-9.

[176] *Id.* at 9.

[177] *Id.* at 8.

[178] *Id.* at 9.

like those that trigger the activation of CSRPs—are a significant contributor to a likelihood of running short of reserves.[179] This evidence, IPPNY argues, supports the argument that the programs are called for the same peak load reduction purposes.[180] IPPNY also contends that the expert testimony submitted by the Complainants demonstrates that the primary benefit of the CSRP is to reduce capacity payments made to NYISO market participants.[181] Specifically, IPPNY cites the statement that "over the last decade, an estimated $4.5 billion of ratepayer money – in 'capacity payments' – have gone to the owners of the city's Peaker plants. Effective demand response should reduce those costs."[182] IPPNY argues that this statement proves that one of the primary purposes of demand response programs is to incent resources to reduce capacity costs.[183] IPPNY notes that the ability for certain payments made to SCRs outside of the ICAP market to provide SCRs with the ability to suppress ICAP market prices below competitive levels was the exact reason that the Commission directed that new SCRs should be subject to NYISO's buyer-side market power mitigation measures.[184] Thus, IPPNY argues, the CSRPs under consideration clearly do not and were never intended to address solely distribution level system needs and their payments must be included in SCR offer floor calculations.[185]

56. IPPNY also argues that the Day-Ahead DLM and auto-DLM programs, submitted for consideration by the Companies, should not be considered as a part of this proceeding.[186] IPPNY states that these programs fall outside of the scope of this proceeding because they were not listed in the underlying Complaint in this proceeding as required by the February 2020 Order.[187] IPPNY adds that, presuming these programs are approved by the New York Commission, the February 2020 Order allows the Companies to proceed under FPA section 206 requesting program evaluation.[188]

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[179] *Id.* at 9-10.

[180] *Id.* at 10.

[181] *Id.* at 11.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 12.

[186] *Id.*

[187] *Id.* at 13.

C. Commission Determination

57. As noted above, we agree with the parties to this proceeding that the DLRPs under consideration are designed to address and address solely distribution-level reliability needs, and therefore meet the requirement established in the February 2020 Order. Accordingly, we find that payments received under those programs should be excluded from the calculation of SCR offer floors in NYISO. The record in this proceeding demonstrates that the purpose of the DLRPs under consideration is to maintain distribution-level reliability by reducing distribution system demands in response to contingencies and other emergencies.

58. We find, however, that the CSRPs under consideration are not designed to address and do not address solely distribution-level reliability needs, and therefore payments received under those programs must be included in the calculation of SCR offer floors in NYISO. We find that any program that provides reliability benefits to the transmission system does not solely address distribution-level reliability needs. As the Companies' affiants admit, the Con Edison and Orange and Rockland's CSRPs are designed to meet transmission and distribution infrastructure investment needs.[189] Moreover, both Con Edison and Orange and Rockland state that the CSRPs under consideration provide network load relief to the system during peak hours to address system-wide needs under peak load operating conditions. For instance, the four CSRPs under consideration are dispatched by their respective operating utilities to address each utility's system-wide peaks (i.e. the system peak within each utility's service territory). We find that this fact indicates that the programs are concerned with utility system-wide reliability and not just distribution-level reliability.

59. For these reasons, based on the evidence presented, we find that the record indicates that the CSRPs were designed in part to offset transmission investment, and thus, were not designed solely to address distribution-level reliability needs. Accordingly, we find that the Complainants and the Companies failed to demonstrate that the CSRPs under consideration are designed to address, and address solely, distribution-level reliability needs and therefore, pursuant to the standard set in the February 2020 Order, payments received under the CSRPs cannot be excluded from the calculation of offer floors for new SCRs under NYISO's BSM rules.

The Commission orders:

(A) In response to NRDC's, Indicated NYTOs', and NY Parties' requests for rehearing, the February 2020 Order is hereby modified and the result sustained, as discussed in the body of the order.

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[188] *Id.* at 13-14.

[189] Companies Br., Reilly Aff. at 4.

(B) NYISO's May 2020 Compliance Filing is hereby accepted, effective May 12, 2020, subject to further a compliance filing, as discussed in the body of this order.

(C) NYISO is hereby directed to submit a further compliance filing, within 45 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council v. New York Independent System Operator, Inc.	Docket Nos.	EL16-92-001 EL16-92-003
New York Independent System Operator, Inc.		ER17-996-003

(Issued October 7, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because it once again perverts buyer-side market power mitigation into a series of unnecessary and unreasoned obstacles to New York's efforts to shape the resource mix. Buyer-side market power mitigation should be all about and only about buyers with market power. Applying buyer-side market power mitigation to entities that are not buyers or that lack market power is nonsensical. Moreover, even when applied to buyers with market power, mitigation must be tailored to and reasonably address their potential to exercise that market power.

2. In this order, the Commission continues to apply buyer-side market power mitigation where it does not belong. In addition, as part of that regime, the Commission imposes illogical offer floors on demand response resources that punish them for earning revenue through retail-level demand response programs. In so doing, today's order creates far more problems than it solves by approving unworkable rules that will only prop up prices and place the Commission in direct conflict with the State of New York.

I. Buyer-Side Market Power Mitigation Should be Limited to Buyers with Market Power

3. When first introduced, buyer-side market power mitigation rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise monopsony power to lower capacity market clearing prices. To the extent the Commission required buyer-side mitigation of capacity market offers, it limited that mitigation to resources that could be used effectively for the purpose of depressing capacity market prices or to resources with

both the incentive and ability to depress capacity market clearing prices.[1] In short, buyer-side market power mitigation was all about, and only about, the exercise of buyer-side market power.[2]

4. The Commission has abandoned that narrow focus. It no longer requires a resource to be a buyer, much less a buyer with market power, before subjecting that resource to buyer-side market power mitigation. Buyer-side market power rules—often referred to as minimum offer price rules or MOPRs—that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decisionmaking.[3] The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the basis that it promotes competition.[4] But, in reality, it is not competition that the Commission is promoting.[5]

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[1] *See, e.g.*, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34, 103-04 (2006) (discussing the buyer-side market power mitigation provisions imposed as part of the settlement that created the Reliability Pricing Model); *see also* Richard B. Miller, Neil H. Butterklee & Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity Markets: Time for a Change?*, 33 Energy L.J. 449, 460-61 (2012) (*Time for a Change?*) (discussing the Commission's early approach to buyer-side market power mitigation).

[2] *See, e.g.*, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 ("The Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply."); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 106 (2008) (explaining that buyer-side market power "mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost.").

[3] *See Calpine Corp. v. PJM Interconnection L.L.C.*, 169 FERC ¶ 61,239 (*Calpine v. PJM*), *r'hrg denied*, 171 FERC ¶ 61,035 (2020) (*Calpine v. PJM Rehearing*) (Glick, Comm'r, dissenting at P 4); *see also* Miller, Butterklee & Comes, *Time for a Change?*, 33 Energy L.J. at 461 ("[B]uyer mitigation has effectively become new entrant mitigation under which all new entrants are subject to mitigation unless otherwise exempted because they have somehow demonstrated that their new facility is not 'uneconomic.'").

[4] *See, e.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 38 (discussing the Commission's finding on the need to maintain the "integrity of competition"); *id.* P 17 n.38 ("This Commission determined many years ago that the best way to ensure the most cost-effective mix of resources is selected to serve the system's capacity needs was to rely on competition."); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 (2018) (asserting that states' exercise of their authority over generation facilities "raises a

5. The basic premise of market competition is that sellers should compete to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the "missing money" that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.[6] That means that capacity market competition should follow a single "first principle": Enabling resources to vie with each other to require as little missing money as possible to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly competitive, resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance, and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. True competition can produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient

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potential conflict with . . . competitive wholesale electric markets").

[5] *See Calpine v. PJM Rehearing*, 171 FERC ¶ 61,035 (2020) (Glick, Comm'r, dissenting at P 3) (explaining that the Commission's [PJM MOPR orders] "turned the 'market' into a system of bureaucratic pricing so pervasive that it would have made the Kremlin economists in the old Soviet Union blush"). It is also worth noting that this Commission's infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power. One example is the Chairman's premature termination of the enforcement process regarding the nearly 1,000% year-over-year increase in prices in MISO Zone 4 and the Commission's failure to provide any justification for its finding that such a rate is just and reasonable. *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm'r, dissenting at PP 4-5). Another example is the Commission's failure over the course of the last year to take any action on the complaints regarding PJM's Market Seller Offer Cap. Those complaints allege that PJM's current rules allow for the exercise of market power, which increase the total cost of capacity by more than a billion dollars. *See* PJM Independent Market Monitor Complaint, Docket No. EL19-47-000 at 11-12 (Feb. 21, 2019). That complaint has now sat before the Commission for more than 20 months, and it has been more than 15 months since the last substantive filing was made in that docket.

[6] *See, e.g.*, James F. Wilson, *"Missing Money" Revisited: Evolution of PJM's RPM Capacity Construct* 1 (2016), https://www.publicpower.org/system/files/documents/markets-rpm_missing_money_revisited_wilson.pdf (discussing the concept of missing money and the origin of capacity markets in the eastern RTOs); Roy J. Shanker Comments, Docket No. RM01-12-000 (Jan. 10, 2003) (discussing the idea of missing money).

ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

6. Instead of promoting true competition, the Commission's approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.[7] Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate[8] of what a new resource "should" cost, while existing resources are permitted to bid at a lower level.[9] In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity markets tend to disproportionately be new technologies and resources needed to satisfy state or federal public policies, the Commission's use of MOPRs also has the unmistakable effect (and, recently, the intent[10]) of slowing the transition to a cleaner, more advanced resource mix.

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[7] *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

[8] In previous orders, the Commission has made much out of so-called unit-specific exemptions, which permit a resource to bid below the default offer floor if it can convince the relevant market monitor that its estimated net going-forward costs are below that floor. If the resource succeeds, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing. *See Calpine v. PJM Rehearing*, 171 FERC ¶ 61,035 (Glick, Comm'r, dissenting at P 86).

[9] In ISO New England and NYISO, existing resources are exempt from mitigation. *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, *Inc.*, 170 FERC ¶ 61,119, at P 38 (2020) (*NYPSC v. NYISO*) ("NYISO's buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones[.]"); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 3 ("ISO-NE utilizes a minimum offer price rule, or MOPR, that requires new capacity resources to offer their capacity at prices that are at or above a price floor set for each type of resource[.]"). The Commission's recent order in PJM applied the MOPR to existing resources, but makes them subject to a different—and generally more favorable—pricing regime than new resources. *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 2 ("[T]he default offer price floor for applicable new resources will be the Net Cost of New Entry (Net CONE) for their resource class; the default offer price floor for applicable existing resources will be the Net Avoidable Cost Rate (Net ACR) for their resource class." (footnotes omitted)); *id.* (Glick, Comm'r, dissenting at PP 32-35) (criticizing the Commission for using different offer floor formulae for existing and new resources).

[10] *See, e.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 4).

7. That type of quasi-competition does not lead to an efficient market outcome. To achieve an efficient outcome, resources' capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly from Commission-jurisdictional markets.[11] If the market ignores some of those costs and revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues, rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

8. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.[12] However, as explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is at the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

9. The FPA is clear. The states, not the Commission, are responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity, as well as practices affecting those wholesale sales,[13]

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[11] The periodic demand curve resets that occur in the eastern RTOs illustrate the variety of factors that go into determining the missing money. For example, the development of Net CONE in NYISO's most recent demand curve reset addressed factors ranging from federal, state, and local requirements related to environmental considerations, regional differences in capital and labor costs, as well differences in social justice requirements. *See* NYISO Transmittal, Docket No. ER17-386-000, Ex. D (Nov. 18, 2016) (Analysis Group, Inc. study addressing demand curve parameters). Those factors affect not only what resource you build and where you can build it, but also how you can operate that resource and, therefore, what revenues you can expect to earn and what costs you can expect to incur. Considering all those factors is necessary to produce efficient price signals guiding when and where to site new capacity, notwithstanding the fact that they are not derived from Commission-jurisdictional markets.

[12] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a MOPR to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support[.]").

[13] Specifically, the FPA applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject

Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy."[14] Congress instead gave the states exclusive jurisdiction to regulate generation facilitates.[15]

10. But while those jurisdictional lines are clearly drawn, the spheres of jurisdiction themselves are not "hermetically sealed."[16] One sovereign's exercise of its authority will inevitably affect matters subject to the other sovereign's exclusive jurisdiction.[17] For example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.[18]

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to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification." 16 U.S.C. § 824e(a); *see also id*. § 824d(a) (similar).

[14] *See id.* § 824(b)(1); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947) (recognizing that the analogous provisions of the NGA were "drawn with meticulous regard for the continued exercise of state power"). Although these cases deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission's role under the FPA.

[15] 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States").

[16] *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the Natural Gas Act).

[17] *See EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission "uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets").

But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation"[19] and the natural result of a system in which regulatory authority over a single industry is divided between federal and state government.[20] Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the cooperative federalism regime that Congress made the foundation of the FPA.

11. When the Commission tries to prevent a state public policy from having an inevitable, but indirect effect on a capacity market, it takes on the role that Congress reserved for the states. That is true even where the Commission claims that its only "policy" is to block the *effects* of state public policies, not the state policies themselves. After all, a federal policy of eliminating the effects of state policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

12. Moreover, as former Commission Chairman Norman Bay correctly observed, an "idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation."[21] Instead, public policy and

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[18] *Zibelman*, 906 F.3d at 57 (explaining how a state's regulation of generation facilities can have an "incidental effect" on the wholesale rate through the basic principles of supply and demand); *id.* at 53 ("[I]t would be 'strange indeed' to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates." (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that proceeding "can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close . . . . A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.").

[19] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *id.* ("recogniz[ing] the importance of protecting the States' ability to contribute, within their regulatory domain, to the [FPA]'s goal of ensuring a sustainable supply of efficient and price-effective energy").

[20] *Cf. Star*, 904 F.3d at 523 *(*"For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.").

[21] *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC

energy markets are inextricably intertwined.[22] Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.[23] Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a "competitive" market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission's goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition, much less one that is insulated from public policy.

13. And the end result will be profoundly inefficient, no matter how many times my colleagues use the words "market" and "competition." The resources procured through that market will require considerably more missing money than would the set of resources procured in the absence of this kind of over-mitigation.[24] Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, capacity markets will procure unneeded capacity and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

14. In addition, widespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries

¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

[22] As the FPA itself recognizes, "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. § 824.

[23] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 27-28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (Glick, Comm'r, dissenting at 6-9) (explaining how "[g]overnment subsidies pervade the energy markets and have for more than a century"); *ISO New England Inc.*, 162 FERC ¶ 61,205 (Glick, Comm'r, dissenting in part and concurring in part at 3) ("Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation.").

[24] That is particularly true given that the Commission permits a resource to increase its estimated costs due to state policy and environmental goals (*e.g.*, the increased fixed and variable costs associated with selective catalytic reduction, *see* NYISO Transmittal, Docket No. ER17-386-000 at 2), but not its revenue derived from state public efforts that may happen to be aimed at the exact same environmental goals.

to frustrate those efforts, especially given the ever-growing threat posed by climate change.[25] A capacity construct that ignores state public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the wrong types of resources or resources that are not needed at all. It is hard for me to see how a price signal that encourages redundant investment is a "competitive" or desirable outcome, much less a just and reasonable one.

15. The Commission has suggested that if it succeeds in blocking state policies, then capacity markets will become efficient little islands unto themselves.[26] But a capacity market is a means to an end, not an end in itself. It is a construct that is supposed to minimize the amount of money that customers spend on capacity in order to meet a target reserve margin.[27] A capacity market that does not serve that purpose and is "efficient" only if you disregard the fact that, in the real-world, it produces inefficient results is a "market" that we ought to reject out-of-hand.

16. Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should be all about—and only about—buyers with market power. In the event that a resource is not a buyer with market power, its capacity market offer should not be subject to buyer-side market power mitigation.[28] That result is both more consistent with the FPA's federalist foundation and the Commission's core responsibility as a regulator of monopoly/monopsony power.[29] That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level. In short, I believe that buyer-side

[25] *See, e.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 55); *see also N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206 (2020) (Glick, Comm'r, dissenting at P 1) ("The Commission's approach is both deeply misguided and will ultimately doom NYISO's current capacity market construct by forcing New York to choose between the Commission's constant meddling and the state's commitment to addressing the existential threat posed by climate change.").

[26] *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5; *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21.

[27] *See supra* P 5.

[28] State polices that exceed the states' jurisdiction because they set or aim at wholesale rates would, of course, remain preempted. *See, e.g.*, *Hughes*, 136 S. Ct. at 1298.

[29] *Cf. Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting that "FERC's authority generally rests on the public interest in constraining exercises of market power").

market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.[30]

17. "Actual" is an important distinction here. The Commission has at times justified extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.[31] We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is an exercise of market power fundamentally misunderstands the role Congress reserved for the states under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission's regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.[32]

18. Some argue that Commission intervention is necessary to "protect" the market from states' exercise of their authority under the FPA. But if we ever reach a point where the only way to "save" a capacity market is to unmoor it from reality by blocking the effects of state policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-world outcomes or the Commission usurping the role that Congress reserved for the states.

[30] In dissents from previous Commission orders addressing MOPRs, I have also argued that the Commission's policy in those particular cases exceeded its jurisdiction because it directly targeted state policies. *E.g.*, *Calpine v. PJM Rehearing*, 171 FERC ¶ 61,035 (Glick, Comm'r, dissenting at PP 5-25). I still believe that to be true. But my point today is a broader one: The Commission should altogether abandon the use of buyer-side market power mitigation regimes to address something other than actual buyer-side market power, even putting aside whether the Commission's application of those regimes exceeds its jurisdiction in the first place.

[31] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at PP 37, 39; *see also N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (Bay, Chairman, concurring at 3) ("The MOPR is not applied to the state, which may not actually be a buyer and which is acting on behalf of its citizenry, but to the resource, which is offering to sell capacity to the market and which may be a commercial entity. The theory, in other words, assumes such a congruence of interests between the state and the resource that the resource is mitigated for the conduct of the state.").

[32] *See Hughes*, 136 S. Ct. at 1298 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates[.]"); *see also New England Ratepayers Ass'n*, 168 FERC ¶ 61,169, at PP 41-46 (2019) (finding a state policy preempted because it sets a wholesale rate).

19. Indeed, the Commission's efforts to "save" capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. New York provides the perfect example as the Public Service Commission has begun a proceeding to consider "taking back" from NYISO the responsibility for ensuring resource adequacy.[33] And numerous states are considering leaving the other eastern RTOs' capacity markets, which also have rules that hinder states' exercise of their resource decisionmaking authority. The Commission's overreach, affirmed in today's order, will no doubt create greater momentum in that direction.

II. Today's Order Is Arbitrary and Capricious

20. I believe that the foregoing analysis compels the Commission to go back to the basics on buyer-side market power mitigation.[34] Where entities are not buyers, they categorically should not be subject to buyer-side market power mitigation.[35] End of discussion. And where entities are buyers, the Commission should impose buyer-side market power mitigation only when those buyers possess actual market power.[36]

21. Demand response resources are, by definition, buyers and may conceivably possess market power.[37] As a result, buyer-side market power mitigation of demand response resources is not *per se* unjust and unreasonable. Nevertheless, any mitigation must be limited to those resources with actual market power and must also be appropriately tailored to the potential exercise of market power if it is to be just and reasonable and not unduly discriminatory or preferential.[38]

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[33] N.Y. State Pub. Serv. Comm'n, Case 19-E-0530, *Order Instituting Proceeding and Soliciting Comments* (Aug. 8, 2019), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b1D25F4BE-9A05-463F-A953-790D36E318BC%7d.

[34] *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,120 (2020) (February 2020 Order) (Glick, Comm'r, dissenting at PP 1, 18-19).

[35] *Id.* (Glick, Comm'r, dissenting at P 19).

[36] *Id.* (Glick, Comm'r, dissenting at P 19).

[37] *Id.* (Glick, Comm'r, dissenting at P 19).

[38] *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020) (Glick, Comm'r, dissenting at P 1).

22. Today's order falls short of that standard. As an initial matter, the buyers in NYISO's demand response programs (Special Case Resources or SCRs) now subject to mitigation have not been shown to have market power. To the contrary, SCRs are generally individual end-users—e.g., office buildings, industrial facilities, and the like—that lack anything remotely close to market power. As such, they should be categorically excluded from buyer-side market-power mitigation, at least absent a showing to the contrary.

23. Both the NY Parties and NRDC raise this point on rehearing, arguing that the Commission failed to explain why it is reasonable to subject resources that do not possess both the incentive and the ability to suppress prices to buyer-side market power mitigation.[39] The Commission responds that the payments SCRs receive from retail demand response programs may reduce their capacity market bids and, in turn, the resulting capacity market prices, meaning that, according to the Commission, those SCRs must be subject to mitigation.[40] That cursory response fails to wrestle with the arguments on rehearing that the Commission should not be applying buyer-side market power mitigation to entities that are not buyers with market power or that the Commission's about-face in the underlying order was an unreasoned departure from its previous policy. Simply reasserting the underlying conclusion is not a reasoned response to specific, carefully crafted and well-supported requests for rehearing.

24. In addition, the Commission's approach to establishing the mitigation regime's offer floors is arbitrary and capricious. In general, the theory behind an offer floor is that it prevents a resource from bidding below its actual costs, which might improperly "suppress" prices, and, in turn, benefit a net buyer of capacity even if the action is otherwise uneconomic.[41] Accordingly, as the Commission observed in the February 2020 Order, offer floors should represent the "incremental costs" of providing the service in question.[42] So long as a resource is bidding above its incremental costs, the theory goes, the resource will not improperly suppress prices.

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[39] NY Parties Rehearing Request at 11-12, 15-16; NRDC Rehearing Request at 27-29.

[40] *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,022, at P 22 (2020) (Order).

[41] For the reasons discussed above, I continue to believe that this approach does not make sense when applied to resources that are not buyers with market power, but I'll work within the Commission's premise for the moment.

[42] February 2020 Order, 170 FERC ¶ 61,120 at P 18; *see* Order, 173 FERC ¶ 61,022 at P 20.

25. Demand response resources, however, have vanishingly small incremental costs, which makes a cost-based offer floor an ineffective tool for limiting their participation in wholesale markets. So NYISO has implemented an offer floor for demand response resources that is a function of those resources' *revenue* rather than their costs.[43] That approach makes little sense and is inconsistent with the theory of using offer floors to address buyer-side market power since a revenue-based floor is not tied to a resource's actual costs. Instead, the use of revenue-based offer floors only underscores the extent to which NYISO's buyer-side market power mitigation has become an exercise in propping up prices, not mitigating market power.

26. But it gets even worse. SCRs are now required to *add* any revenue they receive from retail-level demand response programs to their revenue-based offer floor.[44] That means that the *more* revenue a demand response resource earns outside of NYISO's demand response program, the *higher* it must offer into the NYISO market to avoid allegedly "suppressing" prices. Consider a simplistic hypothetical in which a resource splits the revenue it earns providing demand response, keeping 80% for itself and paying 20% to the entity that installs the necessary equipment and facilitates its participation in various demand response programs. Under the current mitigation regime, a demand response resource that expects to make $100 participating as an SCR in the NYISO market would have an offer floor of $80. If the same resource were to also participate in a retail-level demand response program and make $50, it would have to add $40 to its offer floor, meaning that it could not bid below $120 (its revenue) even though its costs would not change. That is simply nonsensical. There is no reason that the measure of the resource's "incremental costs"[45] should increase because the resource is earning greater revenue in a different market. Put another way, whether the resource makes $80 or $120 in revenue, its ability (and incentive) to bid below its actual costs in the capacity market has not changed. This means that the offer floor is not in any way reasonably tailored to a potential exercise of market power.

27. Making matters still even worse, if the revenue from the retail-level demand response program is at all significant, this approach will produce an offer floor for demand response resources that is well above capacity market clearing prices. That would effectively block demand response resources from participating in the NYISO capacity market on the sole basis that those resources also provide useful services through retail-level demand response programs. Not only is this outcome nonsensical in

[43] *See N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at PP 132-33 (2010), *rh'g* 150 FERC ¶ 61,208 (2015); *see also N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 at P 3 (summarizing the history of the offer floors applied to SCRs).

[44] Order, 173 FERC ¶ 61,022 at P 43.

[45] February 2020 Order, 170 FERC ¶ 61,120 at P 18.

the context of market power mitigation, it also is bad for the market and consumers. Demand response is a resource that provides New York with significant economic and reliability benefits, making SCRs exactly the types of resources that we should be encouraging to participate in the capacity market, not excluding based on pretextual justifications like mitigating buyer-side market power.

28. Finally, today's order also draws arbitrary distinctions between different types of retail-level demand response programs. As noted, the February 2020 Order concluded that demand response "offer floors should include only the incremental costs of providing wholesale-level capacity services," which means that the offer floor should not include revenue from "retail-level demand response programs designed to address distribution-level reliability needs."[46] This order applies that standard to two types of demand response programs: Distribution Load Relief Programs (DLRP) and Commercial System Relief Programs (CSRP). DLRPs and CSRPs are similar programs that New York's distribution utilities use to maintain the reliability of the distribution system by reducing demand when particular aspects of the distribution system are stressed.[47] The Commission concludes that while DLRPs are intended to address only distribution system needs, CSRPs may be intended to also address transmission system needs.[48] Accordingly, the Commission concludes that the revenues from DLRPs should be excluded from the calculation of the SCR offer floors, but that revenues from CSRPs must be included.[49]

29. That distinction is unreasoned and inconsistent with the standard articulated in the February 2020 Order.[50] The record before us suggests that both DLRPs and CSRPs are retail-level programs directed at distribution system issues. As the Complainants noted when beginning these proceedings, "[t]he primary purpose of distribution-level Demand

[46] *Id.* P 18.

[47] For example, these programs permit distribution utilities to call upon demand response to alleviate stress upon "feeders, area substations, and/or distribution circuits." *See, e.g.*, Complainants Br., Ahrens Aff. at 8.

[48] Order, 173 FERC ¶ 61,022 at PP 57-58.

[49] *Id*.

[50] For the reasons stated above, I believe the Commission should altogether stop applying buyer-side market power mitigation to resources that are not buyers with market power. But even putting those concerns aside and working within the framework laid out in the February 2020 Order, the distinction that the Commission draws between DLRPs and CSRPs is nonsense, in any case, and irrelevant. The underlying purpose of the program through which the SCR receives revenue does not change in any way the SCR's ability or incentive to exercise market power in the capacity market.

Response programs, which include utility-administered distribution-level programs analogous to [the] DLRP and CSRP, is to benefit the administering utilities' distribution system."[51] They do so by having retail customers curtail their consumption in order to reduce the stress on particular elements of the distribution system.[52]

30. That solves a very different issue than NYISO's SCR program, which addresses peak demand on and the reliability of the bulk power system by, among other things, calling on demand response to maintain adequate operating reserves.[53] To see that, one need look no further than the fact that the dispatch of DLRPs and CSRPs rarely overlaps NYISO's SCR dispatch.[54] As the Commission observed in the February 2020 Order, differing dispatch patterns is strong evidence that the different demand response programs address different needs, and therefore any revenue received through the program should be excluded from the offer floor.[55] In addition, the limited overlap in the activation of NYISO's SCR program and the distribution utilities' use of CSRPs reflects the fact that high-load days are likely to stress both the transmission and distribution

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[51] N.Y. State Pub. Serv. Comm'n., Complaint, Docket No. EL16-92-000, at 32 (June 24, 2016).

[52] *See, e.g.*, Complainants Br., Shabalin Aff. at 7 (discussing the use of Consolidated Edison's retail-level demand response programs). The Commission's unsupported and unexplained assertion that CSRPs provide "network load relief," Order, 173 FERC ¶ 61,022 at P 58, is not a reasoned conclusion in response to the heap of evidence explaining how CSRPs are designed to address reliability issues on the distribution system. *See* Companies Br., Reilly Aff. at PP 5-16, 21-27 (explaining that the "CSRP and DLRP programs are activated to provide load relief at . . . [the] distribution 'network' level"); Companies Br., Hilowitz Aff. at PP 7-19, 24-31; Complainants Br., Evans Aff. at PP 5-10, 20-30; Complainants Br., Shabalin Aff. at 7-9.

[53] *See* Complainants Br., Hamilton Aff. at P 6.

[54] *See id.*, Hamilton Aff. at P 9 ("Over the past four years since this docket was initiated, . . . [the relevant New York utilities] have dispatched their distribution-level DR programs a total of sixty-eight times to address distribution system peak demand conditions local constraints or local emergency operating conditions to maintain reliability. Over this same period, NYISO has activated the SCR program to address transmission-level issues once in 2016 across all NYISO zones and three times in 2018 in Zone J only to maintain bulk-system reliability." (citations omitted)).

[55] February 2020 Order, 170 FERC ¶ 61,120 at P 18 (noting that "the dispatch of resources enrolled in retail-level demand response programs differs significantly from dispatch under the SCR program, which reflects the fact that each category of program is designed to address needs on distinct systems").

system, not that CSRPs provide wholesale services.[56] That limited overlap does not support the conclusion that CSRPs address the same issues as the SCR program.

31. It is true that any reduction in demand, including one targeted exclusively at enhancing distribution system reliability, may provide knock-on benefits for resource adequacy and the transmission needs addressed by NYISO. But that is true of *any* reduction in end-use consumption, regardless of whether it provides "wholesale-level capacity services" or is instead "designed to address distribution-level reliability needs."[57] Contrary to the Commission's suggestion,[58] the indirect wholesale benefits of those programs cannot, under the Commission's own standard, justify mitigation and certainly not mitigation of one program but not the other. Accordingly, mitigating CSRPs because those programs may indirectly benefit the wholesale market is bothunreasoned and inconsistent with the treatment of DLRPs, which are similarly situated for the purposes of the standard articulated in the Commission's February 2020 Order and can also provide indirect wholesale benefits.[59]

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[56] Complainants Br., Ahrens Aff. at 7 ("The fact that [SCR and either CSRP or DLRP] programs are activated on the same days should not be interpreted as meaning they are designed to be complementary or achieve the same purpose. The NYISO's SCR program, as a reliability-related demand response program, is called mostly when demand has the potential to exceed supply, such as during a heat wave. . . . CSRP and DLRP, are called when local network demand is expected to be high or when there are local distribution issues, clearly for very different purposes than the SCR.").

[57] February 2020 Order, 170 FERC ¶ 61,120 at P 18; *see also EPSA*, 136 S. Ct. at 776 (recognizing that the state and federal spheres of authority under the FPA "are not hermetically sealed from each other").

[58] Order, 173 FERC ¶ 61,022 at P 58 ("We find that any program that provides reliability benefits to the transmission system does not solely address distribution-level reliability needs."). Taken seriously, that standard could potentially justify making *any* retail-based program the basis for mitigating an SCR. That is neither reasonable in its own right, nor consistent with the standard that the Commission articulated in the February 2020 Order, which recognized that revenue from demand response programs that are designed to address distribution system needs should not be included in SCR offer floors. February 2020 Order, 170 FERC ¶ 61,120 at P 18.

[59] Today's order also implies that certain utilities have conceded that their "CSRPs are designed to meet transmission and distribution infrastructure investment needs." Order, 173 FERC ¶ 61,022 at P 58 (citing Companies Br., Reilly Aff. at 4). That misreads the record. As an initial matter, the cited testimony indicated that the use of retail demand response had helped avoid "*local* transmission and distribution . . . infrastructure investment." Companies Br., Reilly Aff. at P 9 (emphasis added). Given

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32. We have been here before. Today's order is just the latest in a series of recent Commission orders that aim, clear as day, to stymie New York's efforts to promote a clean energy future.[60] I continue to believe that those efforts will ultimately fail. But I worry that, in the meantime, the Commission's quixotic campaign against New York's environmental goals will raise prices for consumers and do potentially serious damage to the organized markets that we ought to foster and protect. That, suffice it to say, would not be just and reasonable.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

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the design of the grid in parts of New York, including the relatively high operating voltage of the distribution system in New York City, it is hardly clear that that stray sentence could reasonably be construed as a concession that CSRPs are designed to address wholesale market concerns. In fact, the very next sentence in that affidavit notes that "retail [demand response] needs are distinct from wholesale needs" and that CSRPs are focused only on the former. *Id.* And, elsewhere in that document, the affiant observes that retail demand response programs provide only "distribution system reliability benefits" and help "to avoid, or at a minimum defer, construction of *distribution* infrastructure upgrades." *Id.* at P 6 (emphasis added). Simply put, the Reilly affidavit does not provide substantial evidence in support of the Commission's conclusion.

[60] *See, e.g.*, *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206 (Glick, Comm'r, dissenting at PP 10, 13); *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (Glick, Comm'r, dissenting at P 31); February 2020 Order, 170 FERC ¶ 61,120 (Glick, Comm'r, dissenting at P 18).