UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER20-1718-00_

REQUEST FOR REHEARING AND CLARIFICATION OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

In accordance with Section 313(a) of the Federal Power Act ("FPA")[1] and Rule 713 of the Commission's Rules of Practice and Procedure,[2] the New York Independent System Operator, Inc. ("NYISO") requests rehearing and clarification of the September 4, 2020 *Order Rejecting Tariff Revisions* in the above-captioned proceeding ("September 4 Order").[3] The September 4 Order rejected as allegedly unjust, unreasonable, and unduly discriminatory proposed FPA Section 205 amendments to the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") that would have enhanced the "Part A Exemption Test" (the "Part A Enhancements") under the NYISO's "buyer-side" capacity market power mitigation measures (the "BSM Rules").[4]

As discussed in detail below, the September 4 Order is arbitrary, capricious, unlawful, an unjustified radical departure from precedent, and is likely to harm consumers without serving any reasonable purpose. It ignores and mischaracterizes uncontested evidence demonstrating that the Part A Enhancements are just and reasonable improvements that are not unduly discriminatory. The Commission should therefore overturn the September 4 Order on rehearing.

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[1] 16 U.S.C. § 8251(a).

[2] 18 C.F.R. § 385.713 (2020).

[3] *New York Independent System Operator, Inc.*, 172 FERC ¶ 61,206 (2020).

[4] The BSM Rules are set forth in Section 23.4.5.7 of the Services Tariff.

In the alternative, and at a minimum, the Commission should clarify that the September 4 Order does not preclude the NYISO from re-filing the Part A Enhancements with additional support or from submitting an alternative Section 205 proposal.

I. BACKGROUND

The Part A Exemption Test currently compares the forecast of capacity prices in the first year of a single Mitigation Study Period for the Class Year Study, Additional SDU Study, or the Expedited Deliverability Study to the Default Offer Floor, which is 75 percent of the Net Cost of New Entry ("CONE") of the hypothetical unit modeled in the most recent ICAP Demand Curve Reset. A new entrant is exempted if the price forecast for the first year is higher than the Default Offer Floor. The Part A Exemption Test therefore does not focus on the economics of an individual project or the timing of the project's expected market entry. Instead, it allows an entrant to avoid an Offer Floor if, in that first year of the Mitigation Study Period, the market is approaching the minimum required level of capacity needed in a Locality regardless of whether this is due to load growth or the exit of existing resources.

The Part A Enhancements were designed to update the BSM Rules to facilitate more efficient BSM determinations that more accurately reflect expected changes in the types of resources likely to enter the capacity market in light of New York State legal mandates driving a transition to clean energy resources. They included four main components.

First, the NYISO proposed to begin to conduct the Part A Exemption Test prior to the "Part B Exemption Test."[5] Currently, the Services Tariff is silent on this point, but, in practice,

[5] The "Part A Exemption Test" and "Part B Exemption Test" are currently described in Section 23.4.5.7.2 of the Services Tariff but they are not defined terms and do not appear in the current version of the tariff. The NYISO's proposed Part A Enhancements would have added definitions for, and express references to, the tests to the Services Tariff. The Part B Exemption Test allows individual resources to demonstrate that their annualized net cost of new entry is lower than expected capacity prices over the first three years of operation.

the Part B Exemption Test has been performed first. Second, the NYISO proposed to better align Part A Exemption Test evaluations with the expected in-service dates of Examined Facilities by establishing two separate three year Mitigation Study Periods.[6] Examined Facilities would be placed in either the "Group 1" or "Group 2" Mitigation Study Period based on when they were expected to complete the federal, state and local regulatory siting process and then finish construction. Third, the NYISO proposed to evaluate each Examined Facility for each Capability Year of its Mitigation Study Period, rather than for only the first year, as is done today. As such, the Part A Exemption would be conducted for each Examined Facility for each year of the applicable Mitigation Study Period but would only begin to apply for the first year that an entrant qualified for an exemption.

Finally, the NYISO proposed to modify how it orders Part A Exemption Tests, which is currently based on least to highest Net CONE values of Examined Facilities. The NYISO explained that it would evaluate all "Public Policy Resources," ("PPRs") within a Mitigation Study Period ahead of non-PPRs when conducting the Part A Exemption Test. The testing order among PPRs and non-PPRs in the same Mitigation Study Period would have continued to be based on relative costs. The NYISO's proposed change would have further enhanced the application of the Part A Exemption Test by recognizing that the PPRs will be more likely than non-PPRs to be sited, financed, constructed and placed into service in light of the State's overarching environmental laws and policy objectives.

The September 4 Order rejected the Part A Enhancements in cursory fashion notwithstanding the clear evidence in the record that they were just, reasonable, and not unduly

[6] Capitalized terms that are not otherwise defined herein shall have the meaning specified in the Services Tariff.

discriminatory. It did so despite the strong support that the proposal enjoyed from stakeholders, none of whom raised the undue discrimination theory adopted by the Commission, and the independent Market Monitoring Unit ("MMU"), Dr. David B. Patton of Potomac Economics Ltd.

II. REQUEST FOR REHEARING

The September 4 Order held that the NYISO did "not provide sufficient justification for prioritizing the evaluation of Public Policy Resources before non-Public Policy Resources, independent of cost."[7] Without citing any precedent, the September 4 Order ruled that "Public Policy Resources and non-Public Policy Resources are similarly situated resources in that they must adhere to similar requirements for interconnection and for participation in the NYISO ICAP market."[8] On this basis, the Commission held that "the proposal would unjustifiably limit non-Public Policy Resource's ability to pass the Part A test and participate on an equal footing with Public Policy Resources."[9] It rejected all of the Part A Enhancements even though its undue discrimination holding only applied to one of the four proposals. The September 4 Order also asserted that the Commission must not base its justness and reasonableness determination under the FPA "on whether the proposal is consistent with federal, state, or municipal renewable energy policies."[10]

It is a fundamental tenet of administrative law that when the Commission renders a decision it must have "examined the relevant considerations and articulated a satisfactory explanation for its actions, including a rational connection between the facts found and the

[7] September 4 Order at P 29.

[8] *Id.*

[9] *Id.*

[10] *Id.*

choice made."[11] The Commission must engage in reasoned decisionmaking based on sufficient evidence, provide reasoned explanations for its decisions, and offer reasoned justifications for any changes in policy or departures from precedent.[12] It is also bound to act in a manner consistent with the cooperative federalism principles underlying the division of federal and state regulatory responsibilities under Section 201 of the FPA.[13] The Commission must also remember that the FPA's core purpose is protecting consumers.[14]

For the reasons set forth below, the NYISO respectfully submits that the September 4 Order repeatedly falls short of all of these standards. Section II.A, below, explains why it was arbitrary and capricious to find that PPRs and non-PPRs were "similarly situated" for undue discrimination purposes. In fact, they are not similarly situated because PPRs will be more likely

[11] *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016) (citing *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983)). *See also Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 at 839 (D.C. Cir. 2006); *NorAM Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998).

[12] "Where an agency departs from established precedent without a reasoned explanation, its decision [is] arbitrary and capricious." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995). *See also Dominion Res., Inc. v. FERC*, 286 F.3d 586, 492 (D.C. Cir. 2002) ("the Compliance Order's insistence that the Standards of Conduct be imposed on 'all energy affiliates,' rather than only 'electric affiliates,' represents a sharp and unexplained break with FERC precedent and is otherwise arbitrary and capricious.")

[13] *See, e.g., FERC v. Electric Power Supply Association*, 136 S.Ct at 780 (Order No. 745's approach to allowing states to veto consumer demand response bids in organized wholesale markets reflects a "program of cooperative federalism, in which the States retain the last word . . . [and] removes any conceivable doubt as to its compliance with § 824(b)'s allocation of federal and state authority."). *See also CXA La Paloma, LLC v. California Independent System Operator Corporation*, 169 FERC ¶ 61,045 at P 44 (2019) (deferring to state resource adequacy policies, and noting that "under state authority, a state may choose to require a utility . . . to purchase power from the supplier of a particular type of resource.") (citing *Southern California Edison Company*, 70 FERC ¶ 61,215 at 61,676 (1995)).

[14] *See, e.g., Montana-Dakota Utilities Co.*, 172 FERC ¶ 61,278 (2020), *Chatterjee concurring* at n. 2 ("*See, e.g., Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the [Federal Power Act] is to protect power consumers against excessive prices."); *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (explaining that the filed rate doctrine and its companion rule against retroactive ratemaking "operate as a nearly impenetrable shield for consumers") (citations omitted).")

to enter the market because of state clean energy mandates. Ignoring this fact will contribute to increased capacity surpluses that will harm the markets and consumers. Section II.B demonstrates that the September 4 Order will needlessly prevent the Part A Exemption Test from facilitating more efficient market outcomes, is based on a fundamental misunderstanding of the Commission's FPA obligations, and contravenes principles of cooperative federalism embodied in the FPA. Finally, Section II.C notes that even if the September 4 Order's reasoning is upheld as to the NYISO's proposal to prioritize PPRs when conducting Part A Exemption Tests, it failed to provide any reasoned basis for rejecting the other three components of the Part A Enhancements.

The Commission should therefore grant rehearing and accept the Part A Enhancements in their entirety. It should acknowledge that the Part A Enhancements are not unduly discriminatory. It should likewise accept the showings made by the NYISO in the original April 30 Filing[15] and in the July 9 Response,[16] that the Part A Enhancements were just, reasonable, and would not result in capacity market price suppression.[17] The Commission should reject the notion that it may not consider the impacts of federal, state, or municipal renewable energy policy, including consumer cost impacts, when making justness and reasonableness determinations. In the alternative, the Commission should, at a minimum, grant rehearing to accept the three components of the Part A Enhancements that were not addressed by the September 4 Order.

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[15] New York Independent System Operator, Inc., *Proposed Enhancements to the "Part A Exemption Test" Under the "Buyer-Side" Capacity Market Power Mitigation Measures*, Docket No. ER20-1718-000 (April 30, 2020) ("April 30 Filing").

[16] New York Independent System Operator, Inc., *Response to Deficiency Letter in Docket No. ER20-1718-000*, Docket No. ER20-1718-001 (July 9, 2020) ("July 9 Response").

[17] No party contested the NYISO's demonstration that the Part A Enhancements would not suppress capacity prices. The September 4 Order did not address the issue.

A. THE SEPTEMBER 4 ORDER'S APPLICATION OF THE FPA'S "UNDUE DISCRIMINATION" STANDARD WAS ARBITRARY, CAPRICIOUS, AND NOT BASED ON SUBSTANTIAL EVIDENCE

1. The September 4 Order is Arbitrary and Capricious Because the NYISO Demonstrated that Reordering the Part A Exemption Test Is Not Unduly Discriminatory

The September Order was wrong to conclude that the NYISO had not provided "sufficient justification for prioritizing the evaluation of Public Policy Resources before non-Public Policy Resources, independent of cost." In fact, the NYISO's April 30 Filing, its July 9 Response, and submissions by the MMU clearly demonstrated that PPRs and non-PPRs were not "similarly situated" for purposes of the Part A Exemption Test because there were valid reasons to prioritize PPRs when conducting Part A Exemption Tests. Making reasonable distinctions between resources that are not similarly-situated does not constitute "undue discrimination."[18]

Specifically, the April 30 Filing stated that the proposed reordering under the Part A Exemption Test would "not change the core purpose of the Part A Exemption Test which . . . . is to identify whether the market has a sufficiently small surplus so that new entry should not be subject to an Offer Floor."[19] Because, "the number of exemptions available under this standard may be smaller than the number of Examined Facilities in a given Class Year" it would always

[18] *See, e.g., N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 & n.30 (2017) (*citing Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185, at P 62 (2011), *reh'g denied*, 141 FERC ¶ 61,233 (2012). *See also Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010); *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) ("[D]ifferences in rates are justified where they are predicated upon factual differences between customers . . . ."); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000) ("[D]ifferential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts).")

[19] April 30 Filing at 12.

be "necessary to establish rules to govern the order in which Examined Facilities will be eligible to receive exemptions (to the extent available)."[20]

The April 30 Filing explained that the development and entry of PPRs is increasingly likely given the recent enactment of the Climate Leadership and Community Protection Act ("CLCPA").[21] The CLCPA requires that seventy percent of energy consumed in New York State be produced by renewable resources by 2030, and that all energy consumed in the state be completely emissions free by 2040. A number of other rules and policies aimed at implementing the CLCPA are in development.[22] Given this context, it will be increasingly true that "whether or not an Examined Facility is a PPR is likely to be a better predictor of eventual market entry than its economics relative to other Examined Facilities."[23] Changing the testing order would "ensure that the Part A Exemption Test reflects the impact of New York State's environmental policy choices on the development and entry of new resources."[24] The July 9 Response reiterated that the proposed enhancement would make the BSM Rules better reflect reality and avoid excessive capacity surpluses.[25]

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[20] *Id.*

[21] S.B. 6599, 2019 Leg., 242nd Sess. (N.Y. 2019) (codified as Ch. 106, L. 2019).

[22] The April 30 Filing highlighted New York's "Peaker Rule," which is expected to result in significant retirements of conventional resources, as an example of such policies. *See* April 30 Filing at n. 24. But it was only one example. *See* April 30 Filing at 13 (describing New York's Accelerated Renewable Energy Growth and Community Benefit Act). New rules and policies have continued to evolve in the months since the April 30 Filing. *See, e.g., NYPSC Accepts CLCPA Environmental Review*, by Michael Kuser, RTO Insider (Sept. 20, 2020) *available at* < https://rtoinsider.com/nypsc-accepts-clcpa-environmental-review-173688/>.

[23] April 30 Filing at 13.

[24] *Id.*

[25] *See* July 9 Response at 14-15 ("[t]he new method should be adopted going forward because it will more accurately reflect evolving market and system conditions in New York State that are expected to result from State policy mandates, will continue to prevent artificial price suppression, and will avoid having the NYISO-administered capacity market incentivize the construction of resources that will not actually be needed in New York.")

In comments supporting the April 30 Filing, the MMU emphasized that "[t]he ranking of projects solely based on cost criteria puts state policy resources at a disadvantage, and it fails to recognize that they will enter even if mitigated."[26] Testing PPRs first "would ensure that when retirements of existing resources reduce the capacity surplus to reasonable levels, PPRs would have the opportunity to enter the market."[27] Unneeded incentives "for new entry by conventional resources would be reduced because the entry of PPRs would reduce investment signals for new entry."[28]

Dr. Patton's Affidavit supporting the July 9 Response reaffirmed that the existing testing rules "are not optimal because they are not fully effective at minimizing artificial surpluses" which can occur "because the current Part A test can provide inefficient incentives for investment in new resources that are not needed."[29] With respect to the proposed change to the sequencing of tests, he stated that "the current Part A test may grant low-Net CONE resources exemptions based solely on the perceived need for new resources.[30] But "this perceived need will be inaccurate in retrospect after the PPRs enter that have satisfied the need."[31] It was his opinion that, "the proposed reordering of evaluated resources for the Part A exemption test would result in 'efficient, competitive, economic outcomes that would benefit both consumers and existing suppliers, that would be superior to the results achieved under the current version of the Part A exemption test."' Dr. Patton explained further that the proposal would help to prevent

[26] *Motion to Intervene and Comments of the New York ISO's Market Monitoring Unit*, Docket No. ER20-1718-000 (May 21, 2020) ("MMU Comments") at 9.

[27] *Id*.

[28] *Id*. at 10.

[29] July 9 Response, Attachment II at P 8.

[30] July 9 Response, Attachment II at P 9.

[31] July 9 Response, Attachment II at P 9.

inefficient capacity surpluses that could result in higher costs to consumers, market distortions (including lower energy and ancillary services prices that would harm existing suppliers), and higher PPR costs resulting from the inability to sell capacity."[32]

As Commissioner Glick observed in his dissent, the September 4 Order disregards all of this evidence based on "perfunctory reasoning that displays not even the slightest effort to wrestle with or even correctly characterize" the arguments advanced by the NYISO and other parties.[33] The fact that PPRs and non-PPRs are subject to the same market and interconnection rules is irrelevant. It in no way invalidates the NYISO's explanation that it is reasonable to prioritize PPRs when conducting Part A Exemption Tests to account for the fact that they will be constructed and to avoid inefficient capacity surpluses.

Similarly, the Commission's assertion that it "disagree[s] that the prevalence of [PPRs] in the future composition of New York State's resource mix means they are not similarly situated to non-PPRs . . . ." [34] misses the point. The NYISO did not justify its proposal on the ground that PPRs would potentially be more numerous. It rested on the fact that New York State mandates make the future development and market entry of PPRs substantially more likely and that this reality needed to be addressed in order to avoid the harms associated with inefficient capacity surpluses.[35] As Commissioner Glick stated, "[g]iven that the purpose of the Part A Exemption

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[32] July 9 Response, Attachment II at PP 10, 11.

[33] September 4 Order, *Glick dissenting* at P 7.

[34] September 4 Order at P 30.

[35] Commissioner Glick's dissent accurately described the NYISO's proposal as making "minor, but eminently reasonable changes" intended to recognize that "a resource's cost structure is no longer the best predictor of whether it will ultimately get developed" and "the best indicator is whether the resource is consistent with New York policy goals." He also correctly noted that the NYISO was seeking to maintain the Part A Exemption Test's focus on "facilitating the entry of new resources when they are needed to address tight capacity margins" and to avoid undermining that purpose by encouraging resources to enter to address a perceived capacity "need" that will already will in fact be met by PPRs. *See* September 4 Order, *Glick dissenting* at PP 4-6.

Test is to facilitate the entry of resources when capacity margins are getting tight and additional resources are needed, the likelihood that the exempted resources actually appear is a highly relevant and distinguishing feature that would support differential treatment."[36]

Finally, it is not reasoned decisionmaking for the Commission to flatly dismiss on-the-record arguments that prioritizing testing for PPRs would "minimize surpluses and avoid inefficient incentives for investment in new resources by pronouncing them to be "unavailing."[37] The Commission has a duty to engage with those arguments and provide a reasoned explanation for rejecting them. It may not simply cite prior rulings regarding consumers having to bear the economic consequence of state policy choices. Those precedents are irrelevant in this context for the reasons specified in Section II.B.2 below.

In short, the September 4 Order failed to address the NYISO's evidence demonstrating that PPRs and non-PPRs were not similarly situated for purposes of the Part A Exemption Test. Instead, it ignored, or mischaracterized, the arguments and evidence in the record.[38] It was therefore arbitrary and capricious for the September 4 Order to find that prioritizing PPRs when conducting Part A Exemption Tests was unduly discriminatory.

2. The September 4 Order's Application of the Undue Discrimination Standard is Arbitrary and Capricious Because it Requires the NYISO to Act Irrationally

New York State's clean energy mandates will have real world impacts that the NYISO must be permitted to recognize in order to ensure that its system remains reliable, and that electricity prices remain just and reasonable. The Part A Enhancements were developed through

[36] September 4 Order, *Glick dissenting* at P 7.

[37] September 4 Order at P 30.

[38] As Commissioner Glick stated, "[t]he Commission's failures to engage the NYISO's *actual* arguments — rather than caricatures of those arguments — is another reason why today's order is arbitrary and capricious." September 4 Order, *Glick dissenting* at P 9.

the NYISO stakeholder process in order to better reflect recently enacted New York State legal mandates so that the BSM Rules would "more accurately account for the way in which the resource mix in New York State is expected to evolve over the next decade and beyond."[39] Enhancing the approach currently in place with new ranking rules for Part A Exemption Tests would simply recognize the greater likelihood that PPRs will move forward under current and expected conditions."[40]

The September 4 Order ignored these factual circumstances and effectively required that the NYISO ignore them in its administration of the BSM Rules. Rather than administer the Part A Exemption Test in a way that more accurately reflects the investment environment by accounting for the actual impacts of New York State policies, the NYISO must now act as though those policies do not exist. The NYISO must instead continue to assume that cost will continue to be the only relevant indicator of which resources will enter the market. Turning a blind eye to the effects of state policies is unlikely to result in the increased entry of non-PPRs. Given the state mandates and related incentives, non-PPRs ultimately will have a harder time securing the types of contractual arrangements needed to support such resources over the long-term.

At the same time, forcing the NYISO to ignore that the investment environment is and will continue to be influenced by state law undermines the purpose of the Part A Exemption Test. As the NYISO and MMU have explained,[41] Part A exemptions are meant to be available "at times when the market is approaching the minimum required level of capacity needed in a

[39] April 30 Filing at 1.

[40] April 30 Filing at 5-6.

[41] *See, e.g.,* April 30 Filing at 4 and Attachment III.

Locality regardless of whether this is due to load growth or the exit of existing resources." The NYISO market is currently in a time period when retirements are expected to result in lower capacity surpluses that permit new resources to enter without risking artificial price suppression. But only a limited number of Part A Exemptions will be available.[42] Awarding them to resources in an order based solely on cost is likely to result over time in exemptions being conferred on Examined Facilities that are less likely to enter the market and being denied to PPRs that are likely to enter. Those PPRs will still enter the market but denying them exemptions will make capacity prices unreasonably high compared to what they would be if the NYISO were permitted to consider the state law impacts when performing Part A Exemption Tests.

For these reasons, the September 4 Order's application of the undue discrimination standard is arbitrary and capricious, and unsupported by substantial evidence. Apart from the Commission's unfounded assertion that PPRs and non-PPRs are "similarly situated," there is no reason to require that PPRs and non-PPRs be treated the same for purposes of the Part A Exemption Test. Doing so merely makes the BSM Rules less efficient and is likely to lead to unjustifiable cost increases for consumers.

3. The September 4 Order's Application of the Undue Discrimination Standard Is Absurd Because It Would Prevent the NYISO From Drawing Reasonable Distinctions Between Capacity Resources

The September 4 Order cites no cases to support its conclusion that PPRs and non-PPRs are "similarly situated" because they are subject to the same interconnection and market

[42] *See, e.g.*, April 30 Filing at 14 ("Any exemption provided under Part A, whether for PPRs or other resources, will continue to be limited to scenarios in which entry, regardless of resource type, meets a Locality's minimum MW need so that prices do not fall below competitive levels. This limit on the scope of exemptions available under the Part A Exemption Test is currently embodied in the Services Tariff and would not be altered by the NYISO's proposal.")

participation rules, a telling omission given the order's breadth and scope. Almost all supply resources, irrespective of type, are subject to the same interconnection and market participation rules. If all such resources are now considered to be "similarly situated" for purposes of applying the undue discrimination standard under the FPA, there can be no disparate treatment of such resources under prevailing market rules. This would be a virtually impossible standard at odds not only with past precedent, but also with basic market operations. The adoption of such an irrational standard is the very definition of arbitrary and capricious decisionmaking.

The September 4 Order's approach overlooks the fact that if more resources are seeking to enter than can be exempted under the Part A test, the NYISO must issue exemptions in some order. Since the Part A Exemption Test is based entirely on the prevailing market conditions, rather than the costs of the entrants that are considered in the Part B test, any criteria used to order the issuance of Part A exemptions will involve distinguishing among potential entrants in some fashion. The rules should be structured in a reasonable way that accounts for relevant factors and supports just and reasonable market results. The NYISO's proposal was consistent with this objective. It proposed a means of distinguishing, without unduly discriminating, among potential entrants when Part A exemptions were scarce that was more reasonable, efficient and cost effective than the currently effective approach based solely on cost estimates. The September 4 Order's overly broad interpretation of "undue discrimination" would arbitrarily and capriciously makes such improvements impossible.

The illogical and unworkable nature of the Commission's ruling is illustrated by applying it to other supply issues that the Commission is addressing in the operation of organized markets. Fuel diversity and resilience have been particularly prominent issues in recent years. In 2018, the Commission addressed these issues in a proceeding involving efforts by ISO New England

Inc. ("ISO-NE") to retain the availability of certain natural gas-fired generators as capacity resources in order to ensure that the ISO-NE market retained certain minimum levels of "fuel diversity," and therefore to promote system reliability, particularly in the winter period. The Commission found that ISO-NE had "demonstrated a pressing reliability concern that the Tariff had no mechanism to address."[43] Thus, the Commission accepted the adoption of amendments to the ISO-NE tariff that modeled reliability issues triggered by reductions in fuel diversity, and that allowed for cost-of-service agreements with specific generators in order to ensure fuel diversity and system resilience.[44] Notably, in accepting these tariff changes, the Commission rejected arguments made by certain intervenors that the ISO-NE proposal unjustifiably favored certain generating resources, and thus unduly discriminated against other resources that were not eligible for compensation as fuel secure resources.

Under the undue discrimination principle set forth in the September 4 Order, the ISO-NE fuel security mechanism, which helps to ensure fuel diversity system reliability during winter peaking months, would seemingly not pass muster. Indeed, both resources that are deemed to be "fuel secure" under the ISO-NE mechanism, and resources that do not meet the "fuel secure" standard, "must adhere to similar requirements for interconnection and for participation" in the ISO-NE markets. The two categories of resources therefore are "similarly situated" under the principle established in the September 4 Order, and any disparate treatment of those resources in the market itself – *i.e.*,, giving fuel secure resources additional compensation not otherwise available to resources that do not meet the fuel secure definition – is contrary to the FPA.

[43] *ISO New England Inc.*, 165 FERC ¶ 61,202 at P 37 (2018).

[44] *Id.*

This illogical result is mirrored by an application of the September 4 Order to other market rules that the Commission has approved, and that have disparate impacts on generators that otherwise are subject to the same interconnection and market participation rules. For example, ISO-NE has implemented its Combined Auction with Sponsored Policy Resources ("CASPR") approach to addressing the impact of state subsidies for renewable generation on the ISO-NE Forward Capacity Market ("FCM").[45]

The CASPR mechanism allows "Sponsored Policy Resources" – defined as certain renewable or alternative energy resources that receive state subsidies – to clear the FCM as part of a two-phase market. In approving the CASPR mechanism, the Commission used an undue discrimination analysis that was fundamentally different from the one used in the September 4 Order. Unlike in the September 4 Order, the Commission's order on CASPR expressly noted that "the FPA does not forbid preferences, advantages, and prejudices *per se*" but rather 'undue' preferences, advantages, and prejudices."[46] Instead of focusing on the fact that Sponsored Policy Resources and non-Sponsored Policy Resources are subject to similar interconnection and market participation requirements, the Commission's undue discrimination analysis focused on the fact that Sponsored Policy Resources, because of state subsidies and other, similar state actions, were impacting the efficient operation of the FCM in ways that non-Sponsored Policy Resources were not. On this basis, the Commission found that "ISO-NE's proposed definition of Sponsored Policy Resource is narrowly tailored to meet ISO-NE's objective of limiting the

[45] Commissioner Glick's dissent also emphasizes the inconsistency between the Commission's CASPR ruling and the September 4 Order. *See* September 4 Order, *Glick dissenting* at P 8 ("Why it is appropriate to limit an entire auction mechanism to state-sponsored resources, but unduly discriminatory for an ISO to prioritize state-sponsored resources in administering a single exemption from mitigation is, of course, never explained.")

[46] *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 44 (2018).

impact of out-of-market state procurements on the FCM" and that Sponsored Policy Resources therefore were not "similarly situated" to non-Sponsored Policy Resources.[47]

As discussed below, the September 4 Order reflects a radical and unexplained departure from the undue discrimination approach used in the CASPR order. It is clear that if the Commission were to have applied the undue discrimination approach adopted in the September 4 Order to the CASPR proposal, it would not have been adopted; ISO-NE would not be permitted to adopt rules that treat Sponsored Policy Resources and non-Sponsored Policy Resources differently. Even the existing Part A Exemption rules, which order resources for evaluation based on CONE rather than on PPR status, might fall short under the standard set forth in the September 4 Order. Indeed, if all interconnected generators are "similarly situated" for purposes of applying the undue discrimination standard, then ordering those generators based on cost would appear to be unduly discriminatory, and therefore in violation of FPA Part II.

These absurd outcomes highlight the arbitrary and capricious nature of the September 4 Order's ruling. As the Commission emphasized in the ISO-NE fuel diversity mechanism case, fuel diversity and fuel security are important reliability issues in ISO-NE, and tariff mechanisms to promote fuel diversity and fuel security are essential to maintaining reliability in New England. Not all suppliers will be able to facilitate fuel diversity or fuel security, and therefore it should be permissible to compensate generators differently on this basis. Similarly, ISO-NE demonstrated that Sponsored Capacity Resources in the ISO-NE FCM are having a significant impact on the efficient operation of the FCM as a result of state subsidies and other state environmental policies, while non-Sponsored Capacity Resources are not having any kind of similar impact. The Commission recognized that it therefore made sense to implement market

[47] *Id.* at P 45.

rules that treat Sponsored Capacity Resources differently from non-Sponsored Capacity Resources in an effort to mitigate the impact of Sponsored Capacity Resources on the efficient operation of the FCM.

For purposes of the undue discrimination analysis, the Part A Enhancements are no different. That is, they simply recognize that New York State policies are designed to promote certain suppliers, and attempt to revamp the BSM Rules in a limited manner that reflects this reality without allowing for price suppression. The exceedingly broad, and indeed unprecedented, undue discrimination principle set forth in the September 4 Order makes it impossible to draw these types of justifiable and necessary distinctions between suppliers.

4. The September 4 Order's Application of the Undue Discrimination Standard is an Impermissible Unexplained Departure From Commission Precedent

As outlined above in the discussion of the CASPR mechanism, it is well-established that the "FPA does not prohibit all discrimination, only undue discrimination."[48] The Commission has long held that the prohibition on undue discrimination extends only to an "unjustified difference in treatment of similarly situated customers."[49]

The rigid and arbitrary definition of undue discrimination adopted by the September 4 Order belies the fact that the Commission generally has adopted a much more flexible, nuanced, and reasonable approach to defining undue discrimination, particularly in organized markets. The Commission generally has focused not only on the characteristics of suppliers in those markets, but also on factors that are completely unrelated to supplier characteristics in order to determine whether a market rule is unduly discriminatory.

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[48] *Southwest Power Pool, Inc.*, 160 FERC ¶ 61,115 at P 61 (2017).

[49] *American Electric Power Service Corp.*, 67 FERC ¶ 61,168, 61,490 (1994). *See also New York Independent System Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 and n.30 (2017).

The Commission's treatment of the CASPR proposal was consistent with the more reasoned approach that it has traditionally used in applying the undue discrimination standard. CASPR provides that "Sponsored Policy Resources" – defined as certain renewable or alternative energy resources that receive state subsidies – are able to clear the FCM as part of a two-phase market. Under CASPR, ISO-NE runs a primary auction in order to determine the capacity prices to be paid by ISO-NE loads, and then a second "substitution" auction in which existing resourced that cleared the primary auction transfer their capacity supply obligations to new state-sponsored renewable/non-carbon emitting resources – *i.e.*, the Sponsored Policy Resources.

Importantly, the Commission found "that the definition of Sponsored Policy Resource proposed by ISO-NE does not unduly discriminate against resources that do not fit within that definition because those two classes of resources are not similarly situated."[50] The Commission clarified its holding as follows:

> ISO-NE has provided record evidence of specific projects and megawatts of capacity that will be developed by the operation of state environmental and clean energy mandates, whether that capacity clears the FCM or not. At this time, these projects involve renewable, clean, or alternative energy resources. By contrast, there is no similar record evidence that there are currently resources that do not meet the definition of Sponsored Policy Resource, such as other self-supply resources, that will be built or procured even if those resources do not receive capacity supply obligations. Thus, rather than giving an undue preference to renewable resources in particular, ISO-NE's proposed definition of Sponsored Policy Resource is narrowly tailored to meet ISO-NE's objective of limiting the impact of out-of-market state procurements on the FCM.[51]

Thus, in this context, the Commission's undue discrimination analysis focused not on the interconnection arrangements of the various types of generators, but on the exogenous factors

[50] *See ISO New England Inc.*, 162 FERC ¶ 61,205 at P 45 (2018).

[51] *Id.*

that the CASPR proposal was trying to address – *i.e.*, the impact of state subsidies on the efficient operation of the ISO-NE FCM. Given the need to ensure that the FCM continued to operate efficiently in the face of such state subsidies, the ISO-NE proposal, which granted Sponsored Policy Resource treatment to renewable generators but not to other generators, was not unduly discriminatory.

This flexible, nuanced approach to undue discrimination has been a hallmark of the Commission's jurisprudence for many years. In fact, when ISO-NE was defending its CASPR proposal it was able to cite numerous examples of the Commission acknowledging that resources using different technologies were not similarly-situated.[52] This approach to undue discrimination also is reflected in the ISO-NE fuel security decisions cited above, where the Commission's undue discrimination analysis focused on the reliability challenges facing ISO-NE, and on the ability of certain generators (but not others) to address those reliability needs.

All of these cases illustrate the September 4 Order's stark departure from traditional undue discrimination principles. Indeed, it is clear that none of the rules accepted or approved by the Commission in these cases – rules that were deemed necessary to ensure that the relevant markets could continue to operate efficiently and reliably – would have passed muster under the

[52] *See Motion for Leave to Answer and Answer of ISO New England, Inc.*, Docket No. ER18-619-000 (Feb. 13, 2018); c*iting PJM Interconnection, L.L.C.*, 135 FERC 61,022 at PP 153-155 (2011) (accepting MOPR exemption for wind and solar resources, retaining it for gas-fired turbines and combined cycle resources, and explaining why the latter are much more likely choices for purposes of capacity price suppression); *Cal. Indep. Sys. Operator, Inc.*, 119 FERC 61,061 at PP 69-70 (2007*)* (approving different cost recovery terms for interconnections of "location-constrained resources" in reliance on "prior Commission precedent that recognizes the unique circumstances of particular types of generators and concludes that dissimilar treatment of dissimilar resources does not constitute undue discrimination."); *PJM Interconnection, L.L.C., 155 FERC 61,157 at P 125 (2016)* (approving different performance measurement and verification criteria for demand response resources relative to other types of capacity resources); and *Interconnection for Wind Energy, Order No. 661*, FERC Stats. & Regs. P31,186 at PP 1, 50, *order on reh'g*, Order No. 661-A, FERC Stats. & Regs. P31,198 at P41 (2005) (establishing interconnection terms and conditions for wind generators different from those generally applicable to other types of resources under Order Nos. 2003, et seq., and Order Nos. 2006, et seq.).

standard applied in the September 4 Order. This fact illustrates not only the illogical nature of the September 4 Order, but also the fact that its ruling represents an unexplained departure from prior Commission precedent. For this reason, the decision is arbitrary and capricious, and should be reversed on rehearing.

5. The September 4 Order's Interpretation of the Undue Discrimination Standard Is Arbitrary and Capricious Given the Statutory Framework of the FPA

Part II of the FPA divides jurisdiction over electricity matters between the Commission and the states. The Commission is granted jurisdiction over sales of electric energy for resale in interstate commerce and transmission in interstate commerce, while states are given jurisdiction over "any other sale of electric energy" as well as "facilities used for the generation of electric energy . . . facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . [and] facilities for the transmission of electric energy consumed wholly by the transmitter."[53]

This jurisdictional division has been interpreted to prohibit the states from nominally exercising jurisdiction over matters expressly reserved to the states under the FPA in a manner that "expressly disregards a wholesale rate required by FERC."[54] This same principle, however, applies to the Commission; it may not exercise its authority under FPA Part II in a manner that unduly interferes with the proper exercise of state jurisdiction. At the same time, courts have permitted the proper exercise of state authority even if it otherwise has incidental effects on

[53] 16 U.S.C. § 824(b)(1).

[54] *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016).

matters regulated by the Commission, as long as the exercise of authority "aims" at a matter that is squarely within state jurisdiction.[55]

Given this context, it is arbitrary and capricious for FERC to interpret the undue discrimination standard in a way that is certain to override state jurisdictional prerogatives. As discussed above, the Commission's application of the undue discrimination standard is illogical and an unexplained departure from precedent. But it also interferes unnecessarily with the efforts by the State of New York to promote the development and entry of non-emitting resources. The order not only undermines market efficiency and imposes unreasonable cost increases on consumers, but it presents a wholly unwarranted obstacle to the state's legitimate policy choices with respect to generation.

6. It Is Arbitrary and Capricious to Find the Part A Enhancements to be Unduly Discriminatory When No Party, Including Those with an Economic Interest in the Existing Ordering of the Part A Test, Challenged the Reordering Proposal

As a final matter, the Commission's application of the undue discrimination standard is arbitrary and capricious because no potentially impacted party raised undue discrimination concerns. Although some parties raised objections on certain secondary issues,[56] no party,

[55] *See Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591 (2015) (the "proper test . . . is whether the challenged measures are aimed directly at interstate purchasers and wholesales for resale or not."). *Cf. EPSA*, 136 S.Ct. at 776-77; *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2nd. Cir. 2018) (rejecting argument that New York Zero Emissions Credits program was preempted by the FPA and holding, among other things, that because the program was aimed solely at subsidizing favored generators, and because the subsidies were untethered to participation in FERC-jurisdictional markets, the program fell squarely within matters reserved to state jurisdiction under the FPA); *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2nd. Cir. 2017) (where Connecticut program sought only to direct procurement of renewable energy, and not to override rates set by FERC, it was properly within the bounds of jurisdiction reserved to the states under the FPA).

[56] *See Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, Docket No. ER20-1718-000 (June 5, 2020) at 2 (noting that the protests "raise narrow issues concerning: (i) the interaction between the NYISO's proposed enhancements to the "Part A Exemption Test" and pending compliance revisions to the Renewable Exemption . . . (ii) the application of the Part A Exemption Test for the G-J Locality to "nested" resources in New York City; and (iii) the April 30

including the developers of non-PPRs, protested the core features of the Part A Enhancements or asked the Commission to reject the NYISO's filing outright. No party contended that testing PPRs ahead of non-PPRs was unduly discriminatory. None contended that it was unreasonable to expect PPRs to be more likely than non-PPRs to enter the market in light of the CLCPA's mandates. These facts highlight the radical character of the September 4 Order. The NYISO is unaware of a prior instance in which the Commission rejected a filing on undue discrimination grounds when no party that might be impacted alleged undue discrimination. It is especially unreasonable for the Commission to do so when the supposed "victims" of undue discrimination, *i.e.*, the developers of new non-PPRs, are sophisticated entities that could be expected to vigorously object if discrimination actually threatened to "unjustifiably limit" their ability to pass the Part A Exemption Test.

B. THE SEPTEMBER 4 ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE IT PREVENTS THE PART A EXEMPTION FROM FACILITATING MORE EFFICIENT MARKET OUTCOMES, IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE COMMISSION'S STATUTORY OBLIGATIONS, AND IS INCONSISTENT WITH PRINCIPLES OF COOPERATIVE FEDERALISM

1. The Commission Did Not Engage In Reasoned Decisionmaking or Provide a Reasoned Explanation When It Rejected the NYISO's and Independent MMU's Demonstration that the Part A Enhancements Were Just and Reasonable and Would Help to Avoid the Economic Harm of Increased Capacity Surpluses

The September 4 Order's rejection of the Part A Enhancements should be overturned because it will prevent the Part A Exemption Test from facilitating more efficient market

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Filing's proposed definition of [PPR]." Subsequently, an additional protest was filed arguing that the NYISO's proposal to prioritize PPRs in the testing sequence did not go far enough. *See Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, Docket No. ER20-1718-001 (August 14, 2020). Again, this did not represent an argument that the NYISO's underlying proposal be rejected.

outcomes for the NYISO-administered capacity market, and harm consumers, without any rational justification. As noted above, any time the availability of Part A exemptions are limited, some criteria must be adopted that determines which resources will receive exemptions and which will not. Any such criteria must involve distinguishing the resources on some basis. Ideally, the Commission should deem such criteria just and reasonable to the extent that they foster efficient market outcomes and minimize costs and harm to the market participants. Regrettably, the Commission did not consider these factors. In rejecting the NYISO's proposal, the Commission harms both customers and the existing generators in New York by insisting that the NYISO continue to rely solely on the existing cost criterion that will foster an over-built system.

The NYISO's, and other parties' filings in this proceeding, demonstrated that the proposed Part A Enhancements were just and reasonable improvements to the BSM Rules. As was noted above, the Part A Exemption Test is designed to allow an entrant to avoid an Offer Floor at times when the market is approaching the minimum required level of capacity needed in a Locality regardless of whether this is due to load growth or the exit of existing resources. These conditions currently exist in New York because of recent and expected retirements driven in part by state policy mandates.[57] PPRs should receive Part A Exemptions under these conditions because they are likely to enter the market and their entry will not result in capacity price suppression. Furthermore, PPRs will contribute to satisfying the need for new resources, for which the Part A Exemption Test was established. Given that the PPRs will be entering in accordance with state law, even if subjected to an Offer Floor, it is irrational and inefficient to

[57] *See* April 30 Filing at 6-7, n. 24; *Motion to Intervene and Comments of the New York ISO's Market Monitoring Unit*, Docket No. ER20-1718-000 (May 21, 2020) ("MMU Comments") at 8-9.

grant Part A exemptions to other resources that will not be needed to meet NYISO's capacity needs and that are less likely to actually enter the market. The number of Part A Exemptions that can be awarded is limited. Preventing the NYISO from prioritizing PPRs in the Part A Exemption Test is thus arbitrary and capricious and must be overturned on rehearing.

In Section II.A, the NYISO summarized the arguments made in support of the proposed reordering of the Part A Exemption Test. But the NYISO and MMU also provided more than sufficient justification for all of the proposed Part A Enhancements. The April 30 Filing stated that they would "improve the BSM Rules so that they continue to be just, reasonable, and not unduly discriminatory in light of changing system and market conditions" and update them "so that they would more accurately account for the way in which the resource mix in New York State is expected to evolve over the next decade and beyond."[58] The April 30 Filing proceeded to describe the benefits that each of the four enhancements would bring.[59] The NYISO's showing for each enhancement was supported by a sworn affidavit.[60]

Dr. Patton's comments on the April 30 Filing also supported all of the proposed Part A Enhancements.[61] Referring to all four components NYISO's proposal, he explained that, "[t]aken together, these provisions ensure that when there is an emerging need for new resources, that [PPRs] will have the opportunity to satisfy the need" and "eliminate inefficient incentives to invest in conventional resources that are not needed in the face of the entry of public policy resources."[62] He warned that the current BSM Rules could prevent PPRs from obtaining Part A

[58] April 30 Filing at 1.

[59] April 30 Filing at 8-15.

[60] April 30 Filing, Attachment III, Affidavit of Shaun Johnson.

[61] *Motion to Intervene and Comments of the New York ISO's Market Monitoring Unit*, Docket No. ER20-1718-000 at 2 (May 21, 2020).

[62] *Id.*

Exemptions contributing to a larger capacity surplus and distorting energy and ancillary service markets. Dr. Patton argued that the Part A Enhancements would address these concerns and ensure that when capacity margins tighten and new investment may be needed, that PPRs have an opportunity to satisfy the need "before the markets incent investment in other resources that are ultimately not needed."[63]

The September 4 Order acknowledged and summarized these arguments, as well as the points described in Section III.A.[64] It then proceeded to summarily disregard them. The Commission asserted that it need not reach arguments concerning "price suppression" given its holding on undue discrimination. It also claimed that the MMU's arguments were "unavailing" based on its precedent that states are "free to make" policy decisions within their jurisdiction but must "bear the costs" of those decisions.[65]

The first of these assertions is arbitrary and capricious because the showings made by the NYISO and MMU went well beyond addressing price suppression. They demonstrated that the Part A Enhancements would substantially improve the functioning of the BSM Rules. This would result in more efficient outcomes in the NYISO capacity market, including in price formation and procurements.

Moreover, the Commission's undue discrimination finding was itself arbitrary and capricious for the reasons specified above in Section II.A. It therefore cannot reasonably be used to justify ignoring the arguments and evidence presented by the NYISO and the MMU. Even if the undue discrimination holding were valid it would only apply to the NYISO's proposal to

[63] *Id*. at 8.

[64] *See* September 4 Order at PP 3-12, 14-19, 24.

[65] *See* September 4 Order at P 30.

prioritize PPRs in the ordering of the Part A Exemption Test. It provides no support for the Commission's refusal to consider or, let alone, address arguments and evidence pertaining to the other three components of the Part A Enhancements.

The second assertion is also arbitrary and capricious. As noted above, the September 4 Order effectively requires that the NYISO act as though the likelihood of resource entry going forward will be based solely on relative cost. In reality it is abundantly clear, including to the investment community, that a resource's ability to help meet state environmental mandates will be an increasingly important determinant. This is not the type of scenario in which the Commission has held that consumers must bear the costs of state policy decisions, including paying twice for capacity.[66] Instead, the September 4 Order will prevent the Part A Exemption from functioning as intended by preventing likely entrants from obtaining Part A Exemption at a time when resource retirements should allow them to enter without suppressing prices. New York consumers will thus pay more for PPR capacity that will actually enter the market because of misguided adherence to an assumption that non-PPRs are more likely to enter. The precedent relied upon by the September 4 Order is therefore inapplicable and cannot reasonably be cited to support the Commission's conclusion.

2. The September 4 Order's Unprecedented Assertion that the Commission Must Ignore State Policy Considerations and their Consumer Impacts When Making Justness and Reasonableness Determinations Is Arbitrary and Capricious

The September 4 Order makes an unprecedented assertion that the Commission "must base" its "decision on our duty to ensure just and reasonable rates pursuant to the FPA, and not

[66] *See* September 4 Order at P 30.

on whether the proposal is consistent with federal, state, or municipal renewable energy policies."[67]

The NYISO is not a state entity. It does not have a direct interest in jurisdictional disagreements between the Commission and New York State and generally does not take a position on them. Nevertheless, the September 4 Order's suggestion that the Commission may not even consider New York State's renewable energy policies in making justness and reasonableness determinations is inherently incompatible with the structure of the FPA. It cannot possibly be a valid interpretation of the Commission's statutory role.

The Commission has frequently acknowledged that Section 201 of the FPA establishes a "cooperative federalism" framework.[68] As discussed above, the FPA expressly gives states jurisdiction over, *inter alia*, "facilities used for the generation of electric energy . . . ." The Commission has traditionally acknowledged state authority in this area and sought, whenever practicable, to avoid unnecessary interference with state resource decisions. At the same time, the Commission has also asserted and preserved its own authority to ensure the justness and reasonableness of Commission-jurisdictional rates. In particular, the Commission has issued numerous orders requiring mitigation to prevent state subsidies from artificially suppressing Commission-jurisdictional capacity market prices.[69]

[67] September 4 Order at P 30.

[68] *See, e.g., New York State Pub. Serv. Comm'n, et. al. v. New York Independent System Operator, Inc*., 170 FERC 61,110 at P 37 (2020) (stating that the BSM Rules must function to protect Commission-jurisdictional capacity markets while "preserving the framework of cooperative federalism established under the FPA.")

[69] *See, e.g., Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) *ISO New England Inc.*, 62 FERC ¶ 61,205 at P 24 (2018); *Calpine Corp. v. PJM Interconnection,* L.L.C., 163 FERC ¶ 61,236 at P 5 (2018).

Whatever the merits of those rulings, the September 4 Order is categorically different. The earlier mitigation rulings provide no support for the September 4 Order. The NYISO demonstrated, and no party disputed,[70] that the Part A Enhancements would not cause price suppression. The September 4 Order did not even consider the issue.[71] Accordingly, the September 4 Order represents a radical departure from precedent.[72] It goes beyond protecting markets from the economic impacts of state policies by seemingly prohibiting any effort to recognize the impacts of such policies. This approach appears to be fundamentally incompatible with cooperative federalism and represents an unexplained and unsupported departure from Commission precedent.[73]

The September 4 Order also mischaracterizes the NYISO's proposal by stating that the Commission must not consider whether proposals are "consistent" with state renewable energy policy. The NYISO did not ask the Commission to defer to States by accepting the Part A Enhancements because they were "consistent" with New York's CLCPA mandates. The NYISO argued that the Part A Enhancements were just and reasonable because they would account for the impacts of those mandates and avoid the harms that would come from ignoring them.

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[70] *See* n. 56 above.

[71] *See* September 4 Order at P 29 ("[O]ur finding that NYISO's proposal is unduly discriminatory is dispositive; we need not reach the NYISO's arguments that its proposal would not cause price suppression.")

[72] Commissioner Glick's dissent highlighted this unexplained and unjustified change. September 4 Order, *Glick dissenting* at PP 2, 10.

[73] As Commissioner Glick stated, the September 4 Order goes beyond prior orders' focus on preventing capacity market price suppression and "appears to stake out the new, and even more radical, position that it is improper for an RTO to design its tariff in a way that even acknowledges, much less accommodates, state public policies—an approach that is both fundamentally misguided and a striking departure from Commission precedent and practice. Indeed, until recently, the Commission has long asserted an interest in balancing the effects of state policies with measures to address how those policies affect capacity market prices. While reasonable minds can disagree over how effectively the Commission struck that balance in years gone by, it is hard to argue that today's order does anything but confirm that the era of respect for state decisionmaking is over." September 4 Order, *Glick dissenting* at P 11.

If applied in other cases, the September 4 Order's narrow interpretation of the permissible scope of justness and reasonableness determinations could unreasonably block various improvements to ISO/RTO capacity market power mitigation rules and potential market design enhancements. It would appear to create difficulties for various initiatives, including improvements to the BSM Rules, that the NYISO is currently discussing with stakeholders.

The September 4 Order would impose excessive capacity costs on consumers for no valid reason and without any reasoned explanation from the Commission. The order is fundamentally in conflict with the purpose of the FPA. Courts have frequently emphasized that the FPA, at its core, is a consumer protection statute.[74] The September 4 Order's insistence that the NYISO apply the Part A Exemption Test without considering state environmental policy will contravene the purpose of the FPA by increasing costs without justification. It is arbitrary, capricious, and inherently at odds with the Commission's core consumer protection responsibility for the September 4 Order to require that factual considerations that directly impact consumer costs are to be ignored when the Commission makes justness and reasonableness determinations.

The September 4 Order is therefore arbitrary and capricious and must be overturned no matter how the Commission responds to arguments addressing the undue discrimination issue.

[74] *See, e.g., Montana-Dakota Utilities Co.*, 172 FERC ¶ 61,278 (2020), *Chatterjee concurring* at n. 2 ("*See, e.g., Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) ("A major purpose of the [Federal Power Act] is to protect power consumers against excessive prices."); *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (explaining that the filed rate doctrine and its companion rule against retroactive ratemaking "operate as a nearly impenetrable shield for consumers") (citations omitted).")

C. THE SEPTEMBER 4 ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILED TO CONSIDER THE OTHER PROPOSALS INCLUDED IN THE APRIL 30 FILING

The September 4 Order acknowledges that the Part A Enhancements included four separate proposals.[75] As noted above, these were to perform the Part A Exemption Test and Part B Exemption Test, to establish two separate mitigation study periods, to evaluate resources for each year of the relevant three year mitigation study period, and finally to perform the Part A Test for PPRs before non-PPRs. The September 4 Order held that the fourth of these proposals was unduly discriminatory. But it never addressed the other three. As noted above in Section II.A, the NYISO and MMU provided arguments and evidence in support of these three proposals. No party protested them. Similarly, although the NYISO urged the Commission to expeditiously accept the Part A Enhancements in their entirety it never indicated that the rejection of one enhancement should prevent the others from being accepted as viable enhancements to the BSM Rules. There is thus no record support for the September 4 Order's rejection of the other three Part A Enhancements.

If the Commission believed that it lacked authority to accept these proposals under the *NRG*[76] decision it failed to meet its obligation to explain its reasoning. Furthermore, it seems clear that the Commission could have accepted the other parts of the Part A Enhancements under *NRG*. The case holds that the Commission may not modify a Section 205 filing in a way that "imposes an entirely new rate scheme."[77] In this proceeding, the Commission's rejection of the NYISO's proposal to prioritize PPRs did not fundamentally alter the nature of the Part A

[75] September 4 Order at P 4 ("NYISO proposes to enhance the Part A test under its buyer-side market power mitigation rules in four ways.")

[76] *NRG Power Mktg, LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017) ("NRG").

[77] *NRG*, 862 F.3d at 116.

Enhancements. The partial rejection would make the Part A Enhancements less effective but would not change their purpose, *i.e.*, to allow the NYISO to better account for the impact of New York State policy on resource entry decisions when applying the Part A Exemption Test. Allowing the NYISO to implement the other portions of the Part A Enhancements would still have been an improvement.

In short, it was arbitrary and capricious for the Commission to reject the other three parts of the Part A Enhancements without considering them or providing any kind of reasoned explanation for its action. Accordingly, even if the Commission declines to grant rehearing with respect to the sequence of Part A Exemption Tests it should grant rehearing to accept the other three components of the Part A Enhancements.

III. REQUESTS FOR CLARIFICATION AND ALTERNATIVE REQUEST FOR REHEARING

The September 4 Order stated that the NYISO's proposal was unduly discriminatory because it did not sufficiently justify prioritizing PPR over non-PPRs "independent of cost."[78] The NYISO does not interpret this statement as prohibiting the NYISO from making a future filing that would base the sequence of Part A Exemption tests on non-cost factors either wholly or in part.[79] Orders rejecting Section 205 filings do not normally preclude an applicant from re-filing the original proposal with additional support or from submitting an alternative proposal that addresses any concerns with the original. If the September 4 Order had been meant to establish that Part A Exemption Tests may only be sequenced on cost the NYISO expects that the Commission would have said so and provided a reasoned explanation for the decision.

[78] September 4 Order at P 29.

[79] The NYISO currently has no concrete plans to make such a Section 205 filing in the future but believes that nothing in the September 4 Order would prevent it from doing so.

Nevertheless, out of an abundance of caution, the NYISO asks that the Commission clarify that nothing in the September 4 Order precludes the NYISO from re-filing the Part A Enhancements in the future with additional support or from filing a new proposal that would base the ordering of Part A Exemption Tests on factors other than cost.

In the alternative, if the September 4 Order was intended to preclude such future filings, then the NYISO requests rehearing. If this was the Commission's intent, it would be arbitrary and capricious. There is no record support for a holding that Part A Exemption Tests could only reasonably be ordered based on relative costs. The September 4 Order does not expressly require or provide any kind of reasoned explanation for prohibiting future proposals to use non-cost factors. The Commission's assertion that it may not consider whether a proposal is consistent with renewable energy policies, even if not modified on rehearing, could not reasonably preclude future Section 205 proposals to use non-cost factors that do not reference such policies.

IV. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

- In accordance with Rule 713(c),[80] the NYISO submits the following statement of issues and specifications of error with respect to the September 4 Order. The September 4 Order's application of the undue discrimination standard is arbitrary, capricious, and not based on substantial evidence.

    - The September 4 Order's holding that NYISO failed to provide "sufficient justification for prioritizing the evaluation of Public Policy Resources before non-Public Policy Resources, independent of cost . . . ." is arbitrary and capricious because it disregards the substantial record evidence provided by the NYISO, and by other parties, demonstrating that PPRs and non-PPRs are not "similarly situated" for undue discrimination purposes, and that there are valid reasons for prioritizing PPRs when conducting Part A Exemption Tests such as the need to reflect the real-world impacts of State law and to avoid inefficient capacity surpluses. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

[80] 18 C.F.R. § 385.713(c) (2020).

- The September 4 Order is arbitrary and capricious because it irrationally forces the NYISO to ignore the impacts of New York State policies when it administer the BSM Rules, to ignore the fact that PPRs are more likely to enter the market than non-PPRs, and to irrationally assume that cost will be the only relevant indicator of which resources will enter the market. As a result, the September 4 Order unnecessarily will drive up the costs to New York consumers of procuring capacity, while doing nothing to facilitate the market entry of non-PPRs. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

- The September 4 Order is arbitrary and capricious because it adopts an overbroad and irrational definition of "undue discrimination" that effectively prohibits the NYISO frow drawing reasonable distinctions between capacity resources. The undue discrimination standard adopted in the September 4 Order is virtually impossible to satisfy, and is at odds with basic market operations. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

- The September 4 Order's overbroad and irrational application of the undue discrimination standard constitutes a clear and unexplained departure from the Commission's long-standing and more nuanced approach to the undue discrimination standard. *See ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 492 (D.C. Cir. 2002).

- The application of the undue discrimination standard by the September 4 Order is arbitrary and capricious because it ignores, and effectively overrides, the allocation of jurisdiction between FERC and the states set forth in FPA Part II. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018). *See also Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016); *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591 (2015); *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2nd. Cir. 2018); *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2nd. Cir. 2017).

- The finding of undue discrimination in the September 4 Order is arbitrary and capricious because it ignores the consensus support of the Part A Enhancements among NYISO stakeholders, and the fact that no entity with an economic interest in the ordering prescribed by the existing Part A Exemption Test protested the Part A Enhancements on undue discrimination grounds or claimed that it was unreasonable for the NYISO to expect PPRs to be more likely than non-PPRs to enter the market in light of New York State's clean energy mandates. *See Motor Vehicle Manufacturers*

Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co., 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

- The September 4 Order is arbitrary and capricious because it prevents the Part A Exemption from facilitating more efficient market outcomes, is based on a fundamental misunderstanding of the Commission's statutory responsibility to protect consumers, and is inconsistent with the principles of cooperative federalism embodied in the FPA.

  - The Commission did not engage in reasoned decisionmaking or provide a reasoned explanation when it rejected, without explanation, the demonstration by the NYISO and the MMU that the Part A Enhancements are just and reasonable, and will help avoid the economic harms of inefficient capacity surpluses. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

  - The Commission's unprecedented ruling that it must ignore state renewable energy policy when making justness and reasonableness determinations under the FPA is arbitrary, capricious, and incompatible with the FPA.

    - The Commission's holding ignores and overrides the cooperative federalism framework of the FPA. *See* FPA Section 201, 16 U.S.C. § 824.

    - The Commission's holding is an unexplained departure from its traditional approach of respecting state resource decisions. *See ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 492 (D.C. Cir. 2002).

    - The Commission's holding is not supported by earlier orders requiring mitigation measures to prevent state subsidies from artificially suppressing Commission-jurisdictional capacity market prices. The September 4 Order goes beyond assessing whether state policies result in price suppression to prohibiting any effort to recognize the real world impacts of such policies. *See ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 492 (D.C. Cir. 2002).

    - The Commission's holding is arbitrary and capricious because it mischaracterizes the NYISO's filing. The NYISO did not ask the Commission to accept the Part A Enhancements because they were "consistent" with New York State's legal mandates , but rather to rule on whether the NYISO's market adjustments are just and reasonable in light of the tangible impacts of those state mandates on the NYISO-administered markets. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016);

Old Dominion Electric Cooperative v. FERC, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

- § The Commission's holding is arbitrary and capricious because, by requiring the NYISO to ignore the impact of state policies on the NYISO markets, the September 4 Order will impose higher costs on New York ratepayers without any resulting market benefits. This is not reasoned decisionmaking, and ignores the consumer protection principles at the heart of FPA Part II. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018). *See also Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).

- · The September 4 Order is arbitrary and capricious because it rejects the other three elements of the Part A Enhancements – *i.e.*, to perform the Part A Exemption Test before the Part B Exemption Test, to establish two separate mitigation study periods, and to evaluate resources for each year of the relevant three year mitigation study period – without record evidence, and without explanation, even though the NYISO provided substantial evidentiary support for those proposals. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

- · If the Commission denies clarification and indicates that the September 4 Order was intended to preclude the NYISO from making a future filing that reintroduces the Part A Enhancements with additional support, or that presents a modified version of the original proposal, it is arbitrary and capricious because the September 4 Order failed to expressly establish, or reasonably explain, such a prohibition. *See Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 469 U.S. 49, 63 (1983); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016); *Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018).

V. CONCLUSION

For the reasons specified above, the NYISO respectfully urges the Commission to grant rehearing and clarification of the September 4 Order.

Respectfully Submitted,

/s/ David Allen
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October 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 5th day of October 2020.

/s/ Joy A. Zimberlin

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