UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Cricket Valley Energy Center, LLC	)	
Empire Generating Company, LLC	)	
	)	
v.	)	**Docket No. EL21-7-000**
	)	
New York Independent System Operator, Inc.	)	

ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure and the October 23 *Notice of Extension of Time*, the New York Independent System Operator, Inc. ("NYISO") respectfully submits this answer to the Complaint and Request for Fast Track Processing in this proceeding (the "Complaint"). Cricket Valley Energy Center, LLC ("CVEC") and Empire Generating Company, LLC ("Empire") (together the "Complainants") ask the Commission to replace the NYISO's established buyer-side capacity market power mitigation measures (the "BSM Rules")[1] with a variant of the Minimum Offer Price Rule ("MOPR") recently implemented in the PJM Interconnection, LLC ("PJM") region. Complainants refer to their proposed new mitigation regime as a "Clean Minimum Offer Price Rule" ("Clean MOPR").

The Complaint is wrong to claim that the NYISO currently faces the "same problem"[2] that existed in the PJM region in 2018. While New York State is supporting an increasing number of resources, that support is not resulting in price suppression. This is because

[1] The BSM Rules are set forth in Attachment H to the NYISO's Market Administration and Control Area Services Tariff. The Complaint refers to them as the "Offer Floor Rules."

[2] Complaint at 2.

conditions in the NYISO-administered capacity market are fundamentally different than they were in PJM. Unlike PJM, which told the Commission that failing to expand its MOPR was "not an option" in 2018, the NYISO opposes changing the BSM Rules at this time. Similarly, unlike PJM's Independent Market Monitor ("IMM") in 2018, the independent Market Monitoring Unit ("MMU") for the NYISO opposes expanding mitigation in this proceeding. The MMU will make a separate filing opposing the Complaint.

This Answer demonstrates that Complainants' price suppression claims are overstated, one-sided and incomplete. Complainants focus only on the impact of state initiatives that support resources while ignoring other state actions that are causing resources to exit.[3] They overlook material regional differences between the NYISO and PJM. They try to use their concerns regarding the potential price effects of Zero Emission Credits ("ZECs") in the Rest-of-State ("ROS")[4] region to sweep away BSM Rules that have nothing to do with ZECs. Complainants attempt to avoid their obligation to demonstrate that the greater part of the BSM Rules are unjust and unreasonable by pointing to the Commission's "standard solution" precedent. But their interpretation of that policy is overly simplistic, inconsistent with earlier rulings (including the "standard solution" precedent itself), and an impermissible collateral attack on settled Commission determinations.

[3] As discussed below in Section II.A.1, the MMU has analyzed the current impacts of New York State's actions and has determined that they are causing at least as much generation to exit as to enter at this time. The Complaint ignores these effects and thereby overstates the impact of the ZEC program on the integrity of the market.

[4] Capitalized terms that are not otherwise defined herein shall the meaning specified in the NYISO's Market Administration and Control Area Services Tariff (the "Services Tariff") or the Open-Access Transmission Tariff (the "OATT").

In short, Complainants have failed to meet their burden of proof. The BSM Rules are preventing price suppression while avoiding the risks of over-mitigation. The Commission should not grant the Complaint's requested relief or take any other action in this proceeding.

In the alternative, and at a minimum, the Commission should reject the Clean MOPR because imposing it on New York would be unjust and unreasonable. As applied to the NYISO,[5] a Clean MOPR would be excessive, would result in over-mitigation, and would artificially increase capacity prices. The Clean MOPR was designed to work with PJM's three-year ahead forward auctions, not the NYISO's "prompt" seasonal and monthly auctions. A Clean MOPR could not be quickly or easily adapted for use in New York. If the Commission decides that the BSM Rules must be changed, it should give the NYISO and its stakeholders a reasonable time to develop modifications that would be more appropriate for New York.

I. BACKGROUND

A. The NYISO-Administered Capacity Market Design, Including its Capacity Market Power Mitigation Rules, Have Evolved Over Time to Ensure the Market Sends Appropriate Investment Signals While Preserving Reliability and Revenue Adequacy

The NYISO administers three types of installed capacity auctions – the seasonal six-month "Capability Period" (winter and summer) auctions, monthly auctions, and monthly spot auctions. The monthly Installed Capacity ("ICAP") Spot Market Auctions — using Commission-approved ICAP Demand Curves — procure and assign obligations for sufficient

[5] To be clear, the NYISO's objections to the Clean MOPR are confined to its potential application to the NYISO-administered capacity market. The NYISO is not addressing the justness and reasonableness of any of the MOPR tariff provisions that were recently accepted in PJM as they apply to PJM.

installed capacity to meet the applicable reliability requirements. Unlike PJM and ISO New England Inc. ("ISO-NE") the NYISO has never implemented a three-year forward auction.[6]

Participation in the monthly ICAP Spot Market Auction is mandatory for all Load Serving Entities ("LSEs"). It is how all capacity transactions that occur in the seasonal strip auction, the monthly auctions, or the secondary bilateral markets are reconciled towards meeting LSEs' obligations. The ICAP Spot Market Auctions use separate downward sloping ICAP Demand Curves for New York City, Long Island, the G-J Locality, and the New York Control Area ("NYCA") as a whole to calculate clearing prices.

The Commission recently reiterated that, "[a]s all parties agree, the capacity market is designed to encourage new investment, retain existing needed capacity, and signal when capacity is sufficient or when additional resources are needed."[7] The NYISO-administered capacity market works in tandem with the energy and ancillary services markets to help meet long-term resource adequacy objectives in the most cost-effective manner. Together, the markets have been designed to send price signals for sufficient investment to meet reliability criteria using the most economic resources.

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[6] Studies have repeatedly shown that moving to a forward market model would not be the best option for New York. Sam Newell *et al*, *Cost-Benefit Analysis of Replacing the NYISO's Existing ICAP Market with a Forward Capacity Market*, The Brattle Group (June 15, 2009); Paul Hibbard et al., *NYISO Capacity Market Evaluation of Options*, Analysis Group (May 2015). *See also New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 (2008) (declining to require the NYISO to develop a forward capacity market.)

[7] *New York State Pub. Serv. Comm'n, et. al. v. New York Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (2020) ("NYISO Energy Storage Rehearing Order") at P 19; *citing* 153 FERC ¶ 61,022 (2015); 170 FERC ¶ 61,119 at P 4 & n.11; *see also, New York Indep. Sys. Operator, Inc*., 122 FERC ¶ 61,211 at P 103 (2008) (accepting buyer-side market power mitigation because "[m]arkets require appropriate price signals to alert investors when increased entry is needed" and "these necessary price signals may never be seen if the Commission allows price suppression.")

The BSM Rules were first implemented in 2008.[8] They are intended to prevent artificial price suppression associated with uneconomic entry. The Commission has emphasized from the beginning that the BSM Rules are meant to ensure that capacity rates are just and reasonable by balancing consumer and investor interests.[9] The NYISO must avoid "under-mitigation" because that could allow artificial price suppression.[10] Under-mitigation would ultimately harm long-term consumer interests by creating incentives that could undermine the competitive market, and result in an over-reliance on cost-based "Reliability Must Run" Agreements or transmission expansion to maintain reliability. At the same time, the NYISO must avoid the potential harms of "over-mitigation," which can unnecessarily disrupt investment signals, discourage entry by new resources, and thereby also harm consumers.[11]

Over the last twelve years, the BSM Rules have avoided both over- and under-mitigation while evolving in response to system and market changes. The rules have been shaped by the input of the NYISO, New York State, NYISO stakeholders, and Commission rulings. The BSM

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[8] *New York Indep. Sys. Operator, Inc*., 118 FERC ¶ 61,182, *order on reh'g*, 120 FERC ¶ 61,024 (2007), *order on reh'g*, 122 FERC ¶ 61,211 (2008).

[9] *New York Indep. Sys. Operator, Inc*., 122 FERC ¶ 61,211 at P103 (2008).

[10] *See, e.g.*, *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 (2008) at P 103 ("While a strategy of investing in uneconomic entry and offering it into the capacity market at a low or zero price may seem to be good for customers in the short-run, it can inhibit new entry, and thereby raise price and harm reliability, in the long-run. Under the FPA, the Commission must ensure that rates are just and reasonable. The courts have long held that establishing just and reasonable rates involves a balancing of consumer and investor interests.")

[11] *See, e.g., New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 154 FERC ¶ 61,088 at P 31(reiterating the importance of balancing "the need to mitigate the exercise of buyer-side market power to ensure just and reasonable ICAP market prices with the risk of over-mitigating new entrants."); *Consolidated Edison Co. of New York, Inc. v. New York Independent System Operator, Inc*., 150 FERC ¶ 61,139 at P 4 (2015); *New York Independent System Operator, Inc*., 143 FERC ¶ 61,217 at P 77 (2013) (noting that buyer-side market power mitigation rules must "appropriately balance the need for mitigation of buyer-side market power against the risk of over-mitigation.")

Rules are tailored to specific constrained regions in the NYCA, and are closely integrated with various aspects of the NYISO's interconnection procedures, most notably the "Class Year" process for allocating the costs of interconnecting new supply.[12]

The BSM Rules originally applied only to New York City (NYISO Load Zone J). They were subsequently extended to apply to the Load Zone G-J Locality, *i.e.*, the "Lower Hudson Valley." These two Localities are referred to as "Mitigated Capacity Zones." The NYISO has a tariff mechanism that triggers the creation of new Localities, which then automatically become Mitigated Capacity Zones, when certain transmission constraints are identified.[13] In late 2019, the NYISO conducted the required quadrennial study and confirmed that there was no justification for creating a new Locality, and thus for expanding the scope of the BSM Rules, at that time.

The BSM Rules require that new generation and transmission projects, as well as new Special Case Resources that are seeking to provide ICAP in a Mitigated Capacity Zone, be subject to an Offer Floor unless they qualify for one of the exemptions established by the Services Tariff. Originally, entrants would be exempt from mitigation if they passed one of two tests – the "Part A Exemption Test," which assesses market capacity conditions, or the "Part B Exemption Test," which evaluates units-specific costs.[14] The Part A Exemption Test allows entrants to avoid an Offer Floor at times when the market is approaching the minimum required

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[12] *See* discussion in Section II.A.2.b., *infra.*

[13] *See* discussion in Section II.B., *infra*.

[14] The NYISO recently filed enhancements to the Part A and Part B tests that would have expressly defined the Part A Exemption Test and Part B Exemption Test in the Services Tariff. However, the Commission rejected the NYISO's filing, and for now, they are commonly used informal labels for the exemptions defined in Section 23.4.5.7.2 of the Services Tariff. *See generally New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206 (2020).

level of capacity needed in a given load zone, regardless of whether approaching the minimum required level of capacity is due to load growth or the exit of existing resources. The Part B Exemption Test will exempt individual entrants if their entry is forecasted to be economic.

Since 2015, the NYISO has also had a Competitive Entry Exemption that applies to "pure merchant" entrants that certify they do not have any kind of "non-qualifying contractual relationship" with a Non-Qualifying Entry Sponsor.[15] In addition, the NYISO is in the process of implementing an exemption for certain intermittent renewable energy resources (the "Renewable Exemption")[16] and developing an exemption for certain self-supply resources (the "Self-Supply Exemption").[17] The Commission first instructed the NYISO to establish the latter two exemptions in 2015.[18]

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[15] *Consolidated Edison Co. of New York, Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, *on reh'g*, 152 FERC ¶ 61,110 (2015); s*ee also* NYISO, Services Tariff, Attach H. § 23.4.5.7.9. The Competitive Entry Exemption rules were modified in early 2020 to allow generator owners and developers to fully participate in the robust competitive energy hedging secondary market that takes place in New York and allows loads to procure short term energy hedging. *See* Letter Order, *New York Independent System Operator, Inc.*, Docket No. ER20-663-001, Proposed Enhancements to the Competitive Entry Exemption, (March 11, 2020).

[16] *See, e.g., New York Independent System Operator, Inc.*, 172 FERC ¶ 61,058 at P 7 (2020).

[17] *Id.*

[18] *New York State Public Service Commission, et. al. v. New York Independent System Operator, Inc.*, 153 FERC ¶ 61,022 (2015). The NYISO's Renewable Exemption and Self Supply Exemption tariff provisions were initially filed in April 2016. *See Compliance Filing and Request for Commission Action Within Sixty Days*, New York Independent System Operator, Inc., Docket No. ER16-1404-000, filed April 13, 2016. The Renewable Exemption provisions were fully accepted by the Commission in October 2020 and the NYISO is implementing these provisions for the first time in the Class Year 2019. The Commission has conditionally accepted the Self-Supply Exemption, but the NYISO has an outstanding compliance directive from the Commission to further revise its tariff due at the end of this year. *See Notice of Extension of Time*, New York Independent System Operator, Inc., Docket No. ER16-1404-000, issued September 17, 2020.

B. The Commission Has Consistently Allowed Different Regions to Adopt Different Market Structures that Reflect Their Differences, Including with Respect to Resource Adequacy and Capacity Market Power Mitigation

The Commission has allowed different regions to have different market structures and rules since the inception of the organized wholesale markets in the late 1990s. The Commission reaffirmed its commitment to this policy when it abandoned the Standard Market Design ("SMD") initiative in 2005.[19]

The Commission has consistently allowed different Independent System Operators and Regional Transmission Organizations to have different resource adequacy arrangements. For example, the Commission has accepted "mandatory" centralized capacity auction models in the NYISO, ISO-NE, and PJM while still accepting regional differences among them. In fact, the Commission has recognized that it may be appropriate even for different Mitigated Capacity Zones within the NYISO to have different variants of the BSM Rules because of local differences.[20]

Similarly, in the 2018 *CXA La Paloma* decision, the Commission refused to require the California Independent System Operator Corporation ("CAISO") to replace its resource adequacy regime, which relies on bilateral contracts, with an "eastern-style" auction model.[21] The Commission emphasized that it "has consistently rejected a one-size fits all approach to

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[19] *See Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Order Terminating* Proceeding, Docket No. RM01-12-000 at PP 5-6 (2005) (noting opposition to the SMD initiative from parties that "preferred that the Commission take a more regional approach that would allow markets to develop on a voluntary basis, instead of the mandatory approach to RTOs proposed by the Commission" and that "region-specific proceedings" were succeeding in developing appropriate regional market solutions.")

[20] *See New York Indep. Sys. Operator, Inc*., 143 FERC ¶ 61,217 at P 41, 77 (2013) (recognizing that there should be consistency across zones but that there might also be a need for modifications).

[21] *CXA La Paloma, LLC v. California Independent System Operator Corporation*, 165 FERC ¶ 61,148 (2019) ("*CXA LA Paloma*").

resource adequacy in the various RTOs/ISOs due, in large part, to significant differences between each region . . . ." [22] This approach is consistent with the principle that multiple alternative rates and rules may all simultaneously be just, reasonable, and not unduly discriminatory under the Federal Power Act ("FPA").[23] Other Commission decisions have: (i) rejected requests to impose a centralized capacity markets and a MOPR on the Midcontinent Independent System Operator ("MISO");[24] and (ii) accepted a resource adequacy construct for the Southwest Power Pool based on bilateral contracting.[25]

In 2018, the Commission issued an order accepting ISO-NE's "Competitive Auctions with Sponsored Resource" ("CASPR") rules (the "CASPR Order").[26] That ruling explained that the "first principles" of capacity markets were that:

> A capacity market should facilitate robust competition for capacity supply obligations, provide price signals that guide the orderly entry and exit of capacity resources, result in the selection of the least-cost set of resources that possess the attributes sought by markets, provide price transparency, shift risk as appropriate from customers to private capital, and mitigate market power.

The CASPR Order expressed concern about the potential that widespread state support of preferred resources could violate these principles. It noted that:

> [T]here can be more than one valid method of managing such impacts [of out-of-market payments on capacity markets], and . . . methods may be tailored to the specific challenges posed by the state policies in a given region. Accordingly,

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[22] *Id*. at P 76.

[23] It is well established that different versions of market rules may simultaneously be just, reasonable, and not unduly discriminatory. *See, e.g., Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 470-71 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010) ("there is not a single 'just and reasonable rate' but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone.")

[24] *Midcontinent Indep. Sys. Operator, Inc*., 162 FERC ¶ 61,176 (2018) at PP 14-17, 56-58, 67, 75.

[25] *Southwest Power Pool, Inc.*, (2018) at P 78. SPP also does not have a centralized capacity market.

[26] *ISO New England, Inc.*, 162 FERC ¶ 61,205 (2018) ("CASPR Order.")

> while we will use the MOPR as our standard solution, we will consider supplemental or alternative proposals to manage the impact of state policies, provided that those proposals are sufficiently consistent with the above-mentioned principles of capacity markets.[27]

The Commission then upheld ISO-NE's CASPR rules as "an acceptable means of managing the impact of state policies in the New England region while maintaining just and reasonable rates.[28]

The CASPR Order's statement that the Commission would use mitigation to address state subsidies unless an individual ISO/RTO adopts a suitable regional alternative came to be informally known as the "standard solution" holding. The Commission has not used the term "standard solution" very often, and some have argued that no "standard solution" holding was ever actually adopted by a majority of the Commission.[29] Part of the CASPR Order's reasoning was referenced in the subsequent series of Commission orders that resulted in the adoption of a Clean MOPR for PJM (collectively the "MOPR Orders").[30]

C. The NYISO and the Independent MMU Actively Monitor the Market Impacts of ZECs and Other New York State Clean Energy Initiatives and Have Not Identified Any Need to Make Major Changes to the BSM Rules at this Time

The New York State Public Service Commission issued its "Clean Energy Standard" ("CES") in 2016 to help support New York State's ambitious climate clean energy objectives.[31]

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[27] *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 22 (2018).

[28] *Id.*

[29] *See* CASPR Order, Glick Dissent at n. 1 ("My colleagues' separate statements indicate that paragraph 22 of today's order did not receive the votes of a majority of the Commission.")

[30] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (the "2018 MOPR Order"); 169 FERC ¶ 61,239 (2019) (the "2018 MOPR Order"); 171 FERC ¶ 61,034 (2020) ("2018 MOPR Rehearing Order"); 171 FERC ¶ 61,035 (2020) ("2019 MOPR Rehearing Order"); 173 FERC ¶ 61,061 (2020) ("October 2020 MOPR Compliance Order") (collectively the "MOPR Orders").

[31] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (Aug. 1,

The CES launched the state's new renewable energy credit ("REC") and ZEC programs to support renewable entry and the retention of certain nuclear units with environmental attributes that New York State values. New York State also recently enacted the Climate Leadership and Community Protection Act ("CLCPA").[32] The law 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 produced by emissions free sources by 2040. Various rules and policies aimed at implementing the CLCPA, and other New York State policies, are in the process of being developed.[33]

Consequently, an increasing level of existing and new capacity in New York State is expected to receive state support going forward. Neither the NYISO nor the MMU have determined that state supported resources will cause price suppression or otherwise undermine the market. This distinguishes New York from the PJM region, where, as noted below, PJM and its IMM both concluded that state subsidies were harming the PJM capacity market's ability to send appropriate investment signals. The reasons why state policies in New York will not have the same effects as in PJM are described in Section II.A.1 below and in the attached Affidavit of Rana Mukerji, Senior Vice President, NYISO Market Structures ("Mukerji Affidavit").

2016), The New York Public Service Commission recently approved an expansion of the Clean Energy Standard. *See also* Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting Modifications to the Clean Energy Standard (October 15, 2020).

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

[33] 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/>.

The independent MMU's annual *State of the Market Reports* have consistently recognized that the NYISO's markets, including the capacity market and the BSM Rules, are working well. While the *State of the Market Reports* have recommended continuous improvements,[34] many of which have been adopted by the NYISO, they have never proposed changes as radical as those set forth in the Complaint. The *State of the Market Reports* have also emphasized that although New York State is taking actions to support clean energy development, some of those initiatives have economic merit and should not be blocked by NYISO rules.[35]

II. THE COMPLAINANTS HAVE NOT MET THEIR BURDEN OF PROOF AND HAVE NOT SHOWN THAT ANY COMMISSION ACTION IS NEEDED AT THIS TIME

Complainants bear the burden of proof to demonstrate that the existing BSM Rules are unjust, unreasonable, or unduly discriminatory before the Commission may direct any changes.[36]

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[34] *See, e.g.*, Potomac Economics, *2018 State of the Market Report for the New York ISO Markets* at ix (May 2019), *available at* https://www.potomaceconomics.com/wp-content/uploads/2019/05/NYISO-2018-SOM-Report__Full-Report__5-8-2019_Final.pdf; ("The NYISO electricity markets generally performed well in 2018 and the NYISO has continued to improve its operations and enhance its market design.") ("2018 State of the Market Report"); Potomac Economics, *2019 State of the Market Report for the New York ISO Markets* at xi (May 2020), *available a t*https://www.nyiso.com/documents/20142/2223763/NYISO-2019-SOM-Report-Full-Report-5-19-2020-final.pdf/bbe0a779-a2a8-4bf6-37bc-6a748b2d148e?t=1589915508638, ("The NYISO electricity markets generally performed well in 2019 and the NYISO has continued to improve its operations and enhance its market design.") ("2019 State of the Market Report") (collectively, "*State of the Market Reports*").

[35] *See 2018 State of the Market Report* at 20 ("[w]e also recognize that states have public policy goals that may entail support for certain types of resources, and we recognize that the current markets do not fully price many externalities of electricity generation, including environmental emissions. Thus, state subsidies that can be justified by the cost/value of the externalities could be reasonable."); *2019 State of the Market Report* at 21 ("The State of New York has ambitious public policy goals for decarbonizing the electricity sector. Robust market incentives will be needed for New York State to satisfy its goals at a reasonable cost . . . The BSM measures were originally designed to prevent entities from suppressing capacity prices below competitive levels by subsidizing uneconomic new entry of a conventional generator. The BSM measures are not intended to deter states from promoting clean energy and other legitimate public policy objectives.")

[36] 16 U.S.C. § 824e(b) (stating that under section 206, "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon . . . the complainant"); *see also Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) (stating that proponent of rate change under section 206 has the burden of proving

Precedent is clear that, "[w]hen a person, as opposed to the Commission, initiates a section 206 complaint, the burden of proof falls on the complainant. The party bearing the burden of proof will prevail only if, when the record is closed, the preponderance of the evidence supports its position."[37] Further, "[w]ithout a showing that the existing rate is unlawful," the Commission "has no authority to impose a new rate."[38]

As discussed in this Section II, Complainants have fallen short of proving their case by a preponderance of the evidence. The Complaint does not meet the FPA's burden of proof and should be denied in its entirety.

A. THE COMPLAINT SHOULD BE DENIED BECAUSE CONDITIONS IN THE NYISO-ADMINISTERED CAPACITY MARKET ARE FUNDAMENTALLY DIFFERENT THAN IN PJM

1. The Complaint's Price Suppression Claims Are Based on a Flawed and One-Sided Assessment of State Actions that Support Resources While Ignoring Offsetting State Actions that Encourage Resources to Exit the Market

The Complaint alleges that there is "little doubt" that, as the Commission found in PJM, the "integrity and effectiveness" of the NYISO-administered capacity market "have become untenably threatened by out-of-market payments . . . supporting the entry or continued operation of preferred generation resources . . . ."[39] Complainants claim that "NYISO's capacity market is facing a threat at least as dire, if not more dire than, that which prompted the Commission's

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the rate is unlawful); *Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017) (quoting 16 U.S.C. § 824e(a))).

[37] *TransSource, L.L.C. v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,119 at P 50 (2019) (internal citations omitted); *citing Puget Sound Energy, Inc. v. All Jurisd. Sellers,* Opinion No. 537, 151 FERC ¶ 61,173 at P 98; *aff'd in relevant part on reh'g*, 153 FERC ¶ 61,386 (2015).

[38] *CXA La Paloma* at P 69 (*citing Emera Maine v. FERC*, 854 F.3d 9, 24-25 (D.C. Cir. 2017)).

[39] Complaint at 14.

decisive action in the PJM MOPR Orders . . . ."[40] They suggest that this is the case because the level of existing and expected subsidies in New York is comparable to the level of subsides in PJM at the time of the 2018 MOPR Order.[41] They allege further that there cannot "be any question" that the BSM Rules are inadequate to protect the New York capacity market.[42] Dr. Shanker presents an analysis of the claimed impact of ZECs on capacity prices in the ROS region. He argues that his findings alone are sufficient to justify replacing the BSM Rules with a Clean MOPR.

These claims are incomplete and inaccurate. Complainants' assessment of market conditions in New York is one-sided. They focus on New York State policies, such as ZECs, that support the retention of existing resources. But they ignore the impact of New York State initiatives that have encouraged existing resources to exit the market. Consequently, the Complaint presents a misleading picture of the impact of New York State policies on the integrity of the NYISO-administered capacity market and on the effectiveness of the BSM Rules.

New York State's policies are causing resources to exit the market to an extent that at least offsets the impact of ZECs and other State policies that support resources. Among other things,[43] New York State reached an agreement with the owners of the Indian Point Units 2 and 3 nuclear power stations that brought about the deactivation of those facilities. The closing of Indian Point Unit 2 in April 2020 removed 1011.5 MW of summer capability from the market.

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[40] *Id.* at 15.

[41] *Id.* at 16-17.

[42] *Id*. at 14.

[43] *See, e.g.*, 2020 RNA Report, Table 6 *available at* < https://www.nyiso.com/documents/20142/16333532/06%202020RNA_Report.pdf/3b1b3d18-ea28-22cd-5d80-a3f49dee3a44>. ("2020 RNA").

Unit 3's departure in 2021 will result in a slightly greater amount of capacity being removed, which brings the total loss of capacity from the market to approximately 2050 MW. The New York State Department of Environmental Conservation's ("DEC") "Peaker Rule"[44] will cause the loss of approximately 1500 MW of installed capacity in the State from the NYISO's peak Summer Capability Period. Available compliance plans indicate that over 600 MW of this capacity is expected to permanently retire by 2025.[45] Similarly, the DEC's *CO2 Performance Standards for Major Electric Generating Facilities* contributed to the deactivation of 860 MW of the coal-fired generation remaining in the State. In total, the NYISO estimates that New York State has caused the retirement of approximately 3500 MW of installed capacity, with an additional 1500 MW unable to participate during the summer peak Load months. With the bulk of these retirements and seasonal deactivations occurring in the Mitigated Capacity Zones, the regulatory actions taken by the state can be seen to push prices both up and down, with recent State actions creating more upward pressure at this time.

The MMU has performed an analysis of the total impacts of all New York State actions in various regions of the State. It has forecasted the capacity prices for the 2021/2022 Planning Year under the current BSM Rules accounting for all State actions and compared them to forecasted prices for the same year in a scenario without any State action to either retain or deactivate resources. The MMU concluded that capacity prices would be lower in the latter scenario than the former. The MMU also shows that capacity prices would be twice as high under a Clean MOPR as under the status quo. These analyses demonstrate that Dr. Shanker's

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[44] In 2019 DEC adopted new regulations to limit the emissions of nitrogen oxides ("NOx") from simple cycle combustion turbines operating in New York State. The rule phases in compliance between 2023 and 2025. See 6 NYCRR Part 227-3. https://www.dec.ny.gov/regulations/116131.html.

[45] *See* 2020 RNA at 2.

price suppression claims are flawed because they do not consider the net impact of New York State actions. Granting the Complaint would not remedy ongoing price suppression but would instead unnecessarily increase prices. The Mukerji Affidavit explains that the NYISO has reviewed and supports the MMU's calculations and conclusions concerning these offsetting price impacts.

It is consistent with Commission precedent to look to the net impact of New York State actions when determining whether the BSM Rules should apply to particular resources. Earlier this year, the Commission accepted the NYISO's proposed formula for calculating the Renewable Exemption Limit ("REL"), *i.e.*, the maximum number of MWs that would be eligible for the Renewable Exemption from the BSM Rules in a given Mitigated Capacity Zone for a given period. The REL formula accounts for "Incremental Regulatory Retirements," *i.e.*, incremental retirements attributable to "direct" regulatory action that has occurred since the prior study period. When it proposed this component of the REL formula, the NYISO explained that:

> The core issue or concern associated with State policies that result in sizable new entry of renewable energy resources is that they result in an out-of-market supply increase that can depress capacity prices. The BSM Rules seek to protect the market from the full effects of this artificial supply-demand disequilibrium. However, when out-of-market actions are taken that *reduce supply*, these actions can offset the effects of the renewable resource policies that increase supply. Recognizing that out-of-market retirements offset the effects of out-of-market investment is the principle underlying the [CASPR] rules accepted by the Commission and implemented in ISO-NE.[46]

The Commission accepted the NYISO's position in July 2020. It agreed "that the proposed definition of Incremental Regulatory Retirements appropriately recognizes that out-of-

[46] *See Compliance Filing and Request for Commission Action No Later Than June 8, 2020*, New York Independent System Operator, Inc., Docket No. ER16-1404-002, filed April 7, 2020, at 8 (*citing ISO New England, Inc.*, 162 FERC ¶ 61,205 (2018)).

market actions that reduce the supply of renewable resources in the capacity market offset the effects of renewable resource policies that increase the supply of renewable resources in the capacity markets."[47]

Similarly, the NYISO's Part A Exemption Test is designed to "identify whether the market has a sufficiently small surplus so that new entry should not be subject to an Offer Floor."[48] It "generally allows any resource to receive an exemption," without regard for its individual economics, "as long as its entry would not raise the capacity surplus to more than five to six percent of the capacity requirement."[49] ISO-NE's CASPR rules are fundamentally based on the same kind of net impact evaluation. That is, the CASPR rules allow state-sponsored resources in ISO-NE to enter the market without mitigation by "carefully coordinating the entry of those resources into the FCM with the exit of an equal quantity of retiring capacity."[50] Nothing in the MOPR Orders contradicts or overturns these precedents.

The MMU has also informed the NYISO that Dr. Shanker's assessment of ZEC price impacts is overstated even without reference to the offsetting impacts of other state initiatives. This is in part because Dr. Shanker did not account for market responses to higher prices, such as the additional imports or the re-entry of other units. Moreover, Dr. Shanker has relied on an economically flawed conception of what constitutes an impermissible subsidy. According to the MMU, the definition of "State Subsidy" adopted by the MOPR Orders should not be used to

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[47] *New York Independent System Operator, Inc.*, 172 FERC ¶ 61,058 at P 50 (2020).

[48] *See Proposed Enhancements to the "Part A Exemption Test" Under the "Buyer-Side" Capacity Market Power Mitigation Measures*, New York Independent System Operator, Inc., Docket No. ER20-1718-000, filed April 30, 2020, at 12.

[49] *Id.* at 5.

[50] CASPR Order at P 25.

evaluate whether price suppression is undermining the integrity of a market.[51] That definition is overly broad because it does not properly distinguish between: (i) efficient compensation by a State that reflects the value of a service or outcome; and (ii) payments that exceed the value of a service or outcome that is being procured. This is a critical distinction because payments that are efficient and consistent with the underlying value of a service being provided are not distortionary and do not adversely affect the integrity of competitive markets. The Mukerji Affidavit explains that the NYISO has reviewed and supports the MMU's analysis on this point. Consequently, the fact that ZECs have had a tendency to maintain the balance between supply and demand does not mean that they are causing price suppression or threatening the integrity of the market. Capacity market prices and the BSM Rules continue to be just and reasonable for suppliers and consumers alike.

Complainants also miss the mark when they assert that the BSM Rules must be overhauled because New York State is supporting, and has future plans to support "significantly more renewable generation in both a relative and an absolute sense"[52] than PJM states. Counting up the MWs of resources that may receive state support in the two regions and comparing them without showing that they will have comparable price-suppressing impacts in the both regions results in a superficial and incomplete evaluation.

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[51] To be clear, the NYISO is not challenging the Commission's adoption of the "State Subsidy" definition that has been used to determine the scope of the Clean MOPR in PJM. The PJM "State Subsidy" definition was adopted after lengthy proceedings that began with PJM conceding that state subsidies were compromising the integrity of its capacity market. The NYISO is not a party to the MOPR Order proceedings. The NYISO believes however that the PJM definition of "State Subsidy" should not be used in the first instance to determine whether allegations of unaddressed price suppression are significant enough to warrant revising the BSM Rules.

[52] Complaint at 17.

In addition, the Complaint does not consider that the NYISO's future capacity requirements are likely to increase at a rate roughly commensurate with the growth of intermittent resources. Correctly modeling intermittent and limited duration resources in the Installed Reserve Margin setting process will also ensure that capacity requirements increase appropriately as such suppliers become a larger part of the resource mix. Similarly, payments to limited duration and intermittent resources are being adjusted to reflect the contribution of these resources to meet the reliability criterion. The recently adopted "Tailored Availability Metric"[53] and "Expanded Capacity Eligibility" [54] rules have improved the NYISO's ability to measure the performance of renewables (and other resources) and compensate resources appropriately. Enhancements to the requirement-setting and compensation mechanisms that are being implemented in the NYISO markets will provide the appropriate framework to maintain the integrity of capacity market prices. As long as the NYISO is appropriately reflecting the increase in capacity demand requirements, it should allow much of the expected future renewable entry to be exempt from mitigation.

[53] *See New Tailored Availability Metric Rules, Letter Order*, Docket No. ER20-2337-000 (Sept. 3, 2020) (accepting rules to "enhance the calculation of capacity ratings for resources that participate in the NYISO-administered Installed Capacity Market to better align with the reliability needs of the system.)

[54] *See New York Independent System Operator, Inc.*, 170 FERC ¶ 61,033 (2020) (accepting proposed new participation model for aggregations of resources including revised capacity eligibility rules.)

2. The Complaint Fails to Address Important Regional Differences Between the NYISO and PJM

a. Complainants are Wrong to Claim that the Standard Solution Holding Overrides Precedents that Respect Regional Market Differences

Dr. Shanker suggests that the Commission has "consolidated" its thinking on mitigation over time. In his account, the standard solution holding supersedes all prior rulings and requires that State actions be addressed the same in all regions with the Clean MOPR as the universal remedy.[55]

This interpretation is overly simplistic and exaggerates the scope of the standard solution holding. As noted above, the Commission has consistently allowed different regions to have different market designs, including different capacity market power mitigation measures that reflect their differences.[56] Complainants cannot dispense with decades of Commission precedent simply by asserting that regional differences are no longer relevant after the CASPR Order.

If the standard solution holding truly required that regional differences be ignored, then the Commission presumably would have invoked it at some point over the last two and a half years in any of its various orders addressing the BSM Rules. For example, the Commission could have acted on the Electric Power Supply Association's 2018 *Renewed Request for Expedited Action* in Docket No, EL13-62-000 and cited the "standard solution" to justify

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[55] *See* Complaint at 28-29 (*citing* Shanker Affidavit at PP 21-29).

[56] *See, e.g., New York Pub. Serv. Comm'n*, 153 FERC ¶ 61,022 at P 38 (stating that "[w]hether the Commission has found certain exemptions from buyer-side market power mitigation in . . . any other region to be just and reasonable is not dispositive of whether the Commission should find NYISO's buyer-side market power mitigation rules to be unjust and unreasonable absent similar exemptions"); *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 47 ("As the Commission has stated many times before, we allow for each region to develop rules to address the differing concerns of the regions."), *order on clarification, reh'g, & compliance*, 152 FERC ¶ 61,110 (2015).

expanding the BSM Rules to existing resources. Similarly, the Commission's February 2020 Order re-affirming that the BSM Rules should include a Renewable and Self-Supply Exemption, stated that:

> This order addresses buyer-side market power mitigation for renewable resources and self-supply resources in a different way than the Commission recently addressed such resources in PJM Interconnection, L.L.C. (PJM). . . . Moreover, the Commission has explained that "regional markets are not required to have the same rules. Our determination about what rules may be just and reasonable for a particular market depends on the relevant facts.[57]

In support of this statement, the Commission cited language from the December 2019 MOPR Order[58] which acknowledged the continued significance of regional differences. The fact that the MOPR Orders express deference for regional differences fully refutes Complainants' notion that they, or the CASPR Order, somehow invalidate deference to regional differences. Indeed, the CASPR Order itself acknowledged that regional alternatives could justify avoiding mitigation under the "standard solution."

b. There are Material Regional Differences Between the NYISO and PJM that Militate Against Granting the Complaint

The Complaint asserts that there are no regional differences between the NYISO and PJM that would justify having different capacity market mitigation rules in the two regions.[59] In fact, Complainants argue that the most commonly discussed differences, *i.e.*, the fact that NYISO

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[57] *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121, at n. 39.

[58] *Calpine et al. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) at P 204, n.431 ("As the Commission has previously explained, regional markets are not required to have the same rules. Our determinations about what rules may be just and reasonable for a particular market depends on the relevant facts.")

[59] Complaint at 19.

is a single state entity that does not have forward auctions, actually support their requested relief.[60]

In reality, there are multiple significant differences between the NYISO and PJM that the Complaint mischaracterizes or overlooks. Accounting for these variations makes it clear that the Complaint has not met its burden of proof to establish that the BSM Rules are unjust, unreasonable, or unduly discriminatory.

First, as discussed above, the Complaint ignores the fact that New York State actions that encourage resources to exit the market are having offsetting impacts that outweigh New York State actions to support resources. Complainants have not shown that PJM state policies had comparable offsetting effects. In the absence of such an evidentiary showing, the Complaint has not demonstrated that the MOPR Orders support its proposed transformation of the BSM Rules.

Second, the MOPR Orders were clear that the Commission acted to expand mitigation in the MOPR Orders in large part because PJM itself called on the Commission to intervene.[61] PJM told the Commission in 2018 that "[t]he time has come . . . to fill this gap in the PJM Tariff" and "[d]oing nothing . . . is not an option."[62] It explained that PJM had tried to solve the problem for more than two years but had exhausted its ability to address the underlying issues on

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[60] *Id.* at 20.

[61] Specifically, the 2018 MOPR order was prompted by a Calpine complaint in 2016 in Docket No. EL16-49-000 seeking a limited expansion of the MOPR and PJM's subsequent 2018 "jump ball" filing in Docket No. ER18-1314-000 proposing alternative remedies to address subsidy issues in PJM. The 2018 MOPR Order indicated that PJM effectively agreed with Calpine's complaint. The Commission also described the "jump ball" filing as follows. "While PJM does not explicitly contend that its Tariff is unjust and unreasonable, PJM states that taking no action in this proceeding is not an option because its current Tariff has no means to address the increasing use of state-supported out-of-market subsidies to resources to which its current MOPR does not apply: non-natural gas fired resources and existing resources."

[62] 2018 MOPR Order at P 22.

its own. The various MOPR Orders relied heavily both on the fact that PJM made this request and on evidence presented by PJM demonstrating the need for expanded mitigation to preserve the integrity of its capacity market.[63]

By contrast, the NYISO's position in this proceeding is that the Commission should not revise the existing BSM Rules. The NYISO does not agree that New York State's actions will suppress prices in the NYISO-administered market at this time. An unnecessary expansion of the BSM Rules would be a much greater concern because it result in over-mitigation and substantial unjustified price increases. The difference between the NYISO's views and PJM's is a function of the differing market rules and market conditions in the two regions. The combination of these conditions and the NYISO's market design are preventing State action from having the same adverse market impacts in New York as alleged in PJM. Consequently, the fact that roughly similar amounts of capacity receive state support in the two regions is not dispositive because the regional impacts of that support is not the same.

Unlike the Independent Market Monitor ("IMM") for the PJM region, which favored expanded mitigation, the NYISO's MMU opposes Commission action to expand mitigation at this time. The Commission has traditionally afforded great weight to market monitors' views concerning the effectiveness of mitigation measures and the seriousness of potential threats to markets. For example, the Commission recently held that the economic arguments made by the MMU constituted "substantial evidence" that the Commission could rely on to support its denial

[63] *Id.* at P 150 (emphasizing that the "evidence put forward by PJM" formed a substantial basis for the Commission's actions); 2018 MOPR Rehearing Order at P 24 (emphasizing "evidence provided by . . . PJM" as the basis for the Commission's rulings).

of a complaint proposing an energy storage exemption.[64] The Complainants themselves have argued that "reliance on economic theory is both essential and appropriate" in this proceeding.[65] The Commission should therefore accept the economic analysis in the MMU's filing. The MMU's analysis is endorsed by the Mukerji Affidavit.

Then-Chairman Chatterjee emphasized the importance of PJM's position in a June interview. He stated that the Commission acted as it did in the MOPR Orders because, "PJM came to us, and told us loudly and clearly, our capacity market can't continue this way. Not acting is not an option."[66] By contrast, in this proceeding the NYISO and the independent MMU oppose the Complaint. Unlike in the MOPR Orders, neither the NYISO nor the MMU is contending that the NYISO-administered capacity market is in imminent danger of ceasing to function properly or of failing to send appropriate investment signals. In then-Chairman Chatterjee's terms, no Commission action is the best option for New York at this time.

Third, the Complaint claims that "the fact that the NYISO's capacity market employs a mandatory, prompt spot auction while PJM has a three-year forward auction only makes it more important" to address state supported resources ostensibly because "the three year forward period used by PJM gives suppliers at least some warning about the market impacts" of subsidies which they supposedly do not receive under the NYISO's prompt auction.[67] In fact, under the BSM rules, mitigation and Offer Floor determinations are made *ex ante*, at roughly the time when

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[64] *New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 173 FERC ¶ 61,060 at P 7 (2020).

[65] *See* Complaint at 31.

[66] *See* GTPowerGroup Podcast, Episode 9, *The NOPR, the MOPR and Some Guy Named Harper: A Chat With the Chairman*, found at *gtpowergroup.com/podcast/episode-9-the-nopr-the-mopr-and-some-guy-named-harper-a-chat-with-the-chairman/* at the 28:08 mark.

[67] *See* Complaint at 20.

developers must decide whether to move ahead with their projects. Commission precedent expressly requires that exemption determinations in the NYISO be made at that point in time.[68] The Services Tariff requires the NYISO to promptly post those determinations and for the MMU to concurrently release an independent assessment of them.[69] Thus, the BSM Rules are transparent and already provide suppliers with advance information regarding determinations under the BSM Rules. In addition, if the Complaint intended for the NYISO not to make determinations under the BSM Rules until just before the prompt auctions it would be extremely disruptive. That approach is appropriate in PJM where the auctions are for a three years ahead forward period. But if applied to New York new entrants could be subjected to Offer Floors well after their investment decisions were made which would be inconsistent with Commission precedent.

Fourth, the Complaint states that "while it is true enough that NYISO is a single-state, rather than a multi-state ISO, that does not justify different treatment of state sponsored resources." It adds that "this regional difference actually militates in favor of stronger, not weaker, offer floor mitigation measures . . . . because a state in a multi-state RTO/ISO is 'much less likely' to subsidize uneconomic resources" than in a single-state entity."

The Complainants have this issue backwards. Commission precedent, including the PJM MOPR Orders themselves, indicate that there is less, not more, cause for concern about state supported resources in a single-state context because there is no possibility that one state will be

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[68] *See, e.g., New York Independent System Operator, Inc.*, 136 FERC ¶ 61,077 at P 26 (2011).

[69] *See* Services Tariff Sections 23.4.5.7.6.8, 30.4.6.2.12, and 30.10.4. *See also Assessment of the Buyer-Side Mitigation Exemption Tests for the Class Year 2017 Projects*, Potomac Economics (July 2019), *available* at <https://www.nyiso.com/documents/20142/3025517/MMU-Report-CY17--BSM-Evaluation-July-2019.pdf>.

able to impose the costs of its own energy policy choices on consumers in other states. PJM's "jump ball" filing in Docket No. ER18-1314 warned the Commission of this danger, "Simply put, a state's subsidies to wholesale market participants impose costs on market participants and customers outside such state's purview that participate in, or depend on, the wholesale markets. In effect, the state is exporting the impact of its subsidy onto other states and potentially 'crowding out' resources that other states (with different policy choices) may value."[70] The 2018 MOPR Order echoed PJM's warning when it announced that then-existing PJM mitigation regime was unjust, unreasonable, and unduly discriminatory because it "fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support . . . ."[71]

Fifth, the NYISO has repeatedly noted, and the Commission has acknowledged, that the BSM Rules are very tightly integrated with the NYISO's "Class Year" interconnection cost allocation procedures.[72] The two rule sets are so closely coordinated that changing a deadline under one has the potential to disrupt the administration of the other.[73] If the Complaint were

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[70] *See Capacity Repricing or in the Alternative MOPR-Ex Proposal; Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market*, PJM Interconnection, L.L.C., Docket No. ER18-1314-000 (April 9, 2018) at 29.

[71] 2018 PJM MOPR Order at P 150. The same order found that "PJM's Capacity Repricing proposal also represents an unjust and unreasonable cost shift to loads who should not be required to underwrite, through capacity payments, the generation preferences that other regulatory jurisdictions have elected to impose on their own constituents." *Id.* at 67. An earlier PJM order stated that "[w]e are forced to act . . . when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3 (2011).

[72] *See, e.g., Bayonne Energy Center, LLC*, 163 FERC ¶ 61,095 at PP 30-31 (2018).

[73] *See, e.g., Motion to Intervene and Comments of the New York Independent System Operator, Inc*., Docket No. ER18-1301-000 at n. 55 (April 18, 2018) ("Because the BSM Rules and Class Year Study process are so closely integrated, extending a deadline generally has the potential to cause delays

granted, the NYISO would necessarily be required to make corresponding changes to the Class Year procedures and to other rules, software, and systems that were not designed to support a mitigation scheme developed for a different market. Moreover, because the NYISO-administered capacity market works in tandem with the energy and ancillary services markets, mitigation changes that materially impact the capacity market design would necessarily have consequences for other market structures as well. The Shanker Affidavit acknowledges that these kinds of issues would need to be addressed, but fails to seriously consider the difficulties that would be involved.[74]

B. THE COMPLAINT DOES NOT MEANINGFULLY ADDRESS, LET ALONE MEET THE BURDEN OF PROOF TO JUSTIFY OVERTURNING, MOST ELEMENTS OF THE BSM RULES

As noted above, the Complaint focuses almost entirely on the claimed impacts of ZECs on ROS capacity prices.[75] It also makes broad assertions that future New York State initiatives under the CLCPA will support large amounts of new renewable entry and thereby result in price suppression.[76] Based on these claims, the Complaint asks the Commission to sweep away the BSM Rules in their entirety and replace them with a Clean MOPR. But the Complaint makes few arguments, and presents scant evidence, pertaining to the many components of the BSM

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and disruption to both. Thus, deadlines should not be altered lightly and it is important that the Commission reinforce their importance.")

[74] *See, e.g.,* Shanker Affidavit at P 34 ("Inevitably any specific implementation would have to address the particulars of each market in terms of negotiating grandfathering, classification of unit types and default values and mitigated levels (*e.g.*, 100% of Net CONE versus NYISO's 75% percent of Net CONE.")

[75] The NYISO explains in Section II.A.1 above that the Complaint's ZEC claims are overstated and that ZEC effects are offset by the effects of other State initiatives.

[76] *See* Shanker Affidavit at P 47.

Rules that have nothing to do with ZECs. Instead, the Complainants suggest that the BSM Rules are "riddled with" unjustified exemptions that undermine the integrity of the capacity market.[77]

The Complaint falls short of satisfying the burden of proof under the FPA. In *CXA La Paloma*, which involved a comparable attempt to fundamentally alter an ISO's resource adequacy arrangements, the Commission emphasized that the complainants there had failed to identify which specific tariff provisions were unjust or unreasonable or to provide material evidence to support their claims.[78] Instead, they complained generally about low prices for capacity transactions and that low prices might cause shortages.[79] The Commission found that "broad and generalized claims about revenue insufficiency" were insufficient.[80] The Complaint here likewise makes only generalized assertions regarding most features of the BSM Rules. It fails to demonstrate that the existing exemptions under the BSM Rules are, or the fact that they BSM Rules apply only within Mitigated Capacity Zones is, inappropriate.

Specifically, the Complaint makes no showing that the Part A Exemption Test should be discarded or that the Part B Exemption Test should be replaced with the analogous PJM "unit-specific exemption test."

The Part A Exemption Test ensures that entrants will not be mitigated when market conditions are such that their entry will not suppress prices. There is no comparable mechanism under PJM's Clean MOPR. The NYISO and MMU have recently explained the importance of

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[77] *See* Complaint at 18.

[78] *See CXA La Paloma* at P 70.

[79] *Id.*

[80] *Id.* at P 72.

the Part A Exemption Test.[81] Eliminating the Part A Exemption Test would subject entrants to the Offer Floor even at times when the supply-demand balance means that entry would not suppress prices. This would result in over-mitigation and unjustifiable artificial price increases. Complainants make no effort to demonstrate that it should be eliminated.

The Part B Exemption Test focuses on individual unit economics. PJM has a "resource-specific exemption" (previously called a "unit-specific exemption") that is fundamentally similar to the Part B Exemption Test but differs in various ways.[82] The Complaint does not explain why the existing Part B Exemption Test is unjust and unreasonable or why it should be modified or replaced with some variation of the version that exists under PJM's Clean MOPR.

Similarly, the NYISO's Competitive Entry Exemption ("CEE") closely resembles, but differs in several ways, from the PJM Clean MOPR's "Competitive Exemption." For example, PJM's Competitive Exemption does not apply to new natural gas turbines. It does not appear to apply to certain incremental capacity additions that would be covered by the CEE and might not be available to resources that participate in certain secondary market hedging processes.[83] The Complainants are clear that they think a Clean MOPR must include some kind of competitive

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

[82] For example, the Part B Exemption Test compares a forecast of capacity prices in the three year Mitigation Study Period, which is assumed to be the first three years of an Examined Facility's operation, to the Net CONE of the Examined Facility, so that a new entrant will be exempted "if the price forecast for the three years is higher than the Net CONE of the Examined Facility." *Id.* at 4. By contrast, under PJM's approach, "any resource subject to the MOPR can demonstrate that its actual costs are lower than the applicable default MOPR Floor Offer Price, and if so, such resource is permitted to offer at that lower price." *Compliance Filing Concerning the Minimum Offer Price Rule, Request for Waiver of RPM Auction Deadlines, and Request for an Extended Comment Period of at Least 35 Days*, PJM Interconnection, L.L.C., Docket No. ER18-1314-000 *et al.* (March 18, 2020) at 73.

[83] *See* 2019 MOPR Order at P 161.

exemption,[84] but do not indicate whether they think the NYISO CEE should continue as it is or become more like PJM's version. To the extent that they wish to modify the NYISO CEE they have offered no justification for doing so.

The NYISO's Renewable Exemption was only recently accepted by the Commission in July 2020 after the partial rejection of an earlier compliance proposal in February 2020.[85] Both of these orders upheld the Commission's 2015 ruling[86] that entry by certain state-supported intermittent renewable resources should not be mitigated because it will not result in price suppression as long as the amount of entry is less than an appropriate MW cap. The July 2020 Order accepted the NYISO's REL formula which is designed to ensure that renewables are only allowed to avoid Offer Floor mitigation to the extent that their entry will not, in the aggregate, result in capacity market price suppression. The Complaint does not demonstrate why the structure of the just-approved NYISO Renewable Exemption is unjust and unreasonable or why it should be eliminated under a Clean MOPR.

Moreover, the Renewable Exemption is only being implemented for the first time now in the NYISO's ongoing Class Year 2019 process. It, therefore, could not possibly have contributed to any claimed price suppression in the past. The Complaint focuses on the expectation that the CLCPA will foster the entry of substantial amounts of offshore wind and other renewables by 2040. But the Complaint does not address the fact that under the approved REL formula the Renewable Exemption will only exempt renewable entry in Mitigated Capacity

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[84] *See* Complaint at 24. CVEC itself received a CEE, *See* Complaint at 3-4, but it is not immediately clear to the NYISO whether CVEC's facility would qualify under PJM's Competitive Exemption because it is a natural gas-fired generator.

[85] *See New York Independent System Operator, Inc.*, 172 FERC ¶ 61,058 (2020).

[86] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015).

Zones to the extent that doing so will not result in price suppression. In the same vein, it will be years before substantial CLCPA-induced renewable entry occurs. Many changes to the NYISO's market rules, including the BSM Rules, may be made before those resources arrive. The Complaint simply has not met the burden of proof to justify setting aside the Renewable Exemption.

Similarly, the NYISO's Self-Supply Exemption has not even been finalized and is not being implemented for Class Year 2019. The NYISO must make another compliance filing to establish a complete Self-Supply Exemption. Clearly, the Self Supply Exemption could not have made any contribution to claimed past price suppression in New York. The Complaint fails to show that it has caused harm, or to explain how it could pose any threat of price suppression in the future.

The Complaint would expand the geographic scope of the BSM Rules to encompass all of New York State. It does not address the fact that the Services Tariff already contains a mechanism for identifying when the BSM Rules should be extended to new regions. Specifically, Section 5.16 of the Services Tariff requires the NYISO to conduct a quadrennial deliverability study, in connection with the ICAP Demand Curve Reset process. The purpose of the study is to ascertain whether "Highway" transmission interfaces are constrained, in which case the NYISO is obliged to make a tariff filing to create a New Capacity Zone ("NCZ").[87] When an NCZ is established the NYISO will calculate a separate ICAP Demand Curve. Furthermore, the NCZ would automatically become a Mitigated Capacity Zone and the BSM

[87] The NYISO's most recent study concluded that there were no constraints that would justify creating an NCZ. *See https://www.nyiso.com/documents/20142/6004104/2019-2020-NCZ-Study-Report.pdf/780f36e1-cee5-a174-5e7d-f5d2dbcaffd7*.

Rules would apply within it. [88] The Complaint has not explained why this established mechanism for expanding the scope of the BSM Rules is no longer just and reasonable.

With respect to existing resources, the Commission first held in 2008 that New York City resources that existed as of March 7, 2008 should be grandfathered from the BSM Rules.[89] When the BSM Rules were expanded to the G-J Locality the Services Tariff was revised to adopt a comparable grandfathering provision for future Mitigated Capacity Zones. Resources that were already in existence, or that had "Commenced Construction" and met certain other specified requirements, by March 31 of the ICAP Demand Curve Reset Filing Year in which a Mitigated Capacity Zone was implemented would also be grandfathered.[90] The Complaint makes no attempt to demonstrate why these grandfathering determinations should effectively be reversed years after they were made. Complainants therefore have not met their burden of proof to demonstrate that the NYISO's established grandfathering rules should be overturned.

Moreover, the Commission recently reaffirmed the principle that resources that have previously received a final exemption or Offer Floor determination under the BSM Rules should

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[88] *See New York Independent System Operator, Inc.*, 143 FERC ¶ 61,217 (2013) at P 2 (explaining NYISO's rationale as "NYISO asserts that because new capacity zones are not expected to have significant amounts of surplus capacity in equilibrium, relatively small amounts of withholding or uneconomic entry can cause market clearing prices to deviate from a competitive level." and at P 39 ("In a new capacity zone with effective supplier-side market power mitigation, an efficient market outcome – one not affected by either buyer- or supplier-side market power—must include effective buyer-side market power mitigation measures to ensure a competitive outcome."

[89] *See* Services Tariff § 23.4.5.7.7(a).

[90] *See* Services Tariff § 23.4.5.7.8. *See also* Services Tariff § 23.4.5.7.7(b) (establishing a June 20, 2012 grandfathering cut-off date for resources outside of New York City that were previously exempted form deliverability requirements under OATT Attachment S).

only be re-tested in very narrow circumstances expressly prescribed in the Services Tariff.[91] The Complaint does not address this precedent or justify overruling it.

In short, the Complaint has not met the burden of proof to justify changing, let alone replacing, multiple core features of the BSM Rules that should not be at issue in this proceeding.

C. THE COMPLAINT IS AN IMPERMISSIBLE COLLATERAL ATTACK ON NUMEROUS COMMISSION ORDERS

The Complaint should also be denied because it is an impermissible collateral attack on Commission precedent dating back to 2008, including decisions issued this year, which established the BSM Rules, adjudicated their application, and addressed proposed exemptions under them.[92] The Complaint has also not justified its collateral attack on the Commission's regional differences precedents.

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[91] *See, e.g.*, *New York State Public Service Commission, et. al. v. New York Independent System Operator, Inc.*, 170 FERC ¶ 61,120 at P 21 (2020).

[92] For example, regarding the Part A and Part B Exemptions, *see New York Independent System Operator, Inc.*, 118 FERC ¶ 61,182 (2007); *New York Independent System Operator, Inc.*, 120 FERC ¶ 61,024 (2007); *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211 (2008); *New York Independent System Operator, Inc.*, 124 FERC ¶ 61,301 (2009); *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 (2010); *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 (2010); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,083 (2011); Letter Order, *New York Independent System Operator, Inc.*, Docket No. ER10-3043-003, issued March 17, 2011; Letter Order, *New York Independent System Operator, Inc.*, Docket No. ER10-3043-005, issued May 15, 2011; *New York Independent System Operator, Inc.*, 150 FERC ¶ 61,208 (2015); *New York Independent System Operator, Inc.*, 158 FERC ¶ 61,127 (2017). Regarding the Competitive Entry Exemption, *see New York Independent System Operator, Inc.*, 150 FERC ¶ 61,139 (2015), *order on clarification, rehearing, and compliance*, 152 FERC ¶ 61,110 (2015); Letter Order, *New York Independent System Operator, Inc.*, Docket No. ER15-1498-001, issued November 18, 2015. Regarding the Renewable and Self-Supply Exemptions, *see New York Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 153 FERC ¶ 61,022 (2015), *order on reh'g*, 154 FERC ¶ 61,088 (2016); *New York Independent System Operator, Inc.*, 170 FERC ¶ 61,121 (2020), *order on reh'g. and compliance*, 172 FERC ¶ 61,058 (2020); Letter Order, *New York Independent System Operator, Inc.*, Docket No. ER16-1404-003, issued October 20, 2020.

The Commission has a well-established policy against unnecessary relitigation that is based upon,[93] but is ultimately broader than, judicial preclusion doctrines such as collateral estoppel and res judicata.[94] The Commission has repeatedly held that "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency; for these reasons, collateral attacks and relitigation are strongly discouraged."[95] "[I]n the absence of new or changed circumstances requiring a different result, it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined."[96] The Commission has frequently enforced its policy against unnecessary relitigation in complaint proceedings.

Complainants have failed to demonstrate that the circumstances that have governed the evolution of the BSM Rules over the past twelve years have meaningfully changed in a way that would justify the relief they seek. Simply invoking the "standard solution" holding is insufficient.

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[93] *See, e.g., Pacific Gas & Electric Co.*, 121 FERC ¶ 61,065 (2007) at P 39 ("Both the courts and the Commission have previously found that, to the extent that "new evidence" is not presented or "changed circumstances" are not demonstrated, preclusion doctrines such as collateral estoppel apply to administrative rate cases.")

[94] *Id*. at P 40 ("In *Alamito Co.*, the Commission expressly stated that its policy against relitigation of issues is not constrained by the limits of the doctrine of collateral estoppel.") *citing Alamito Co.*, 41 FERC ¶ 61,312 at 61,829 (1987), *order denying reconsideration and granting request for clarification*, 43 FERC ¶ 61,274 (1988). In *Alamito*, a utility asserted it was not subject to collateral estoppel because it was not a party to the previous case – an element that would have been required by federal courts. Nevertheless, the Commission responded that its "long standing" policy against relitigation of issues disposed of the dispute.

[95] *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 134 FERC ¶ 61,229 at P 15 (2011); *Southern Co. Servs., Inc.*, 129 FERC ¶ 61,253, at P 37 (2009); *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co.*, 112 FERC ¶ 61,117, at P 12 (2005).

[96] *Alamito Co.*, 43 FERC ¶ 61,274, at 61,753 (1988); *see also Central Kansas Power Co.*, 5 FERC ¶ 61,291, at 61,621 (1978)).

Accordingly, the Complaint should be denied as an impermissible collateral attack on numerous settled precedents.

D. THE COMPLAINT IS INCONSISTENT WITH RELEVANT COMMISSION AND JUDICIAL PRECEDENT

As noted above, the Complaint essentially argues that the MOPR Orders' application of the "standard solution" holding is the only relevant precedent concerning the justness and reasonableness of the BSM Rules. This interpretation undergirds Complainants' theory that ISOs/RTOs must comprehensively mitigate any State action that causes, or has the potential to cause, price suppression in the capacity market.

Complainants' fail, however, to address applicable Commission and judicial precedents that establish that price suppression is not *per se* unjust or unreasonable. Complainants cannot simply dispense with this precedent by making blanket assertions that it is no longer relevant under the "standard solution" policy.

As noted above in Section I, the Commission has been clear that the BSM Rules must be structured and applied in a manner that avoids both under- and over-mitigation.[97] Just last month, the Commission reiterated that while "[u]nder-mitigation of uneconomic entry can suppress capacity prices; over-mitigation discourages new entry" and that "both extremes jeopardize long-

[97] *See, e.g., New York State Public Service Commission, et al. v. New York Independent System Operator, Inc*., 154 FERC ¶ 61,088 at P 31(reiterating the importance of balancing "the need to mitigate the exercise of buyer-side market power to ensure just and reasonable ICAP market prices with the risk of over-mitigating new entrants."); *Consolidated Edison Co. of New York, Inc. v. New York Independent System Operator, Inc*., 150 FERC ¶ 61,139 at P 4 (2015); *New York Independent System Operator, Inc*., 143 FERC ¶ 61,217 at P 77 (2013) (noting that buyer-side market power mitigation rules must "appropriately balance the need for mitigation of buyer-side market power against the risk of over-mitigation.")

term consumer interests."[98] The Commission has made the same point in mitigation-related proceedings involving other ISOs/RTOs.

In pre-CASPR Order decisions addressing ISO-NE's proposals to exempt limited amounts of renewable entry from its mitigation rules, the Commission emphasized that it "must strike a balance between, on one hand, setting a price that will retain enough existing resources to maintain reliability and, on the other hand, protecting consumers from overpaying for that capacity and minimizing price volatility that could undermine both investor and consumer confidence in the market."[99] The Commission then went on to "find that even though some price impact could occur from the renewable exemption," the exemption was "consistent with the purpose of the [ISO-NE capacity market]– namely, ensuring that price signals are sufficient to incent existing resources to stay in the capacity market, and new resources to enter, so that ISO-NE meets its reliability requirements at least cost."[100] The proposed renewable exemption "struck an appropriate balance of competing interests on this issue and [ISO-NE] presented evidence that the impact on price from the limited renewables exemption would not be significant."[101] The Commission concluded that the renewable exemption proposed by ISO-NE could result in some degree of price suppression but held that: "[i]n accepting the renewables

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[98] *See* NYISO Energy Storage Rehearing Order at P 19; *citing* 122 FERC ¶ 61,211 at P 103 (finding the Commission has the statutory obligation to ensure prices are just and reasonable, which involves a balancing of customer and investor interests and preventing price suppression, which can harm customers' long-term reliability interests).

[99] *ISO New England Inc. et al.*, 155 FERC ¶ 61.023 at P 34 (2016) (citing *New England Power Generators Association, Inc. v. ISO New England Inc.*, 146 FERC ¶ 61,039 at P 52 (2014)).

[100] *Id.* at P 35.

[101] *Id.* at P 36.

exemption, the Commission recognized the potential of such an exemption to suppress capacity prices and based its acceptance in part on factors that would limit the price impact."[102]

The United States Court of Appeals for the District of Columbia Circuit upheld these decisions as consistent with earlier Commission rulings.[103] The court observed that "[i]n those cases in which the Commission has considered exemptions to the minimum offer price rule, it considered exemptions using a fact-specific balancing test, factoring in the scope of the exemption, the existence of sloped demand curves, and the overall impact on the market, and only accepted exemptions that were appropriate based on the specific features of the market."[104] The court went on to approve the Commission's application of that balancing approach with respect to the ISO-NE renewable exemption even though there was some risk that they would result in price suppression.

The NYISO respectfully submits that none of the Commission's subsequent mitigation rulings, including the CASPR Order and MOPR Orders, have invalidated the balancing approach described above or required that any and all price suppressive impacts must always be subject to mitigation.[105] The CASPR Order clearly reaffirmed the Commission's approach of evaluating

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[102] *Id.*

[103] *See NextEra Energy Resources, LLC v. FERC,* 898 F.3d 14 (D.C. Cir. 2018). The court stated: "FERC has, at various times, considered exemptions to the minimum offer price rule in other markets. *See Remand Order* at PP 32-34. In some cases, the Commission accepted an exemption, despite the potential for price suppression. *See, e.g., New York Pub. Serv. Comm'n,* 153 FERC ¶ 61,022 at P 10 (Oct. 9, 2015); *PJM Interconnection,* 135 FERC ¶ 61,022 at P 152 (Apr. 12, 2011). In some cases, the Commission rejected an exemption because of the potential for price suppression and market distortions. *See, e.g., PJM Interconnection,* 135 FERC ¶ 61,022 at P 139; *New England Complaint Order* at PP 32-35; *New York Indep. Sys. Operator, Inc.,* 122 FERC ¶ 61,211 at P 110 (Mar. 7, 2008)." 808 F.3d at 23.

[104] 808 F.3d at 23.

[105] In fact, the NYISO referenced the ISO New England renewable exemption precedent in its April 7, 2020 compliance filing in Docket No. ER16-1404-002. *See Compliance Filing and Request for*

Offer Floor exemptions on a case-by-case basis, that balance the dangers of under- and over-mitigation. The MOPR Orders also are fully consistent with the balancing approach. The MOPR Orders hold that the "purpose of the MOPR is to address price suppression that renders capacity market prices unjust and unreasonable."[106] In short, the "standard solution" holding does not override earlier precedents and the Complaint should not be granted simply because it invokes the "standard" solution concept.

E. GRANTING THE COMPLAINT WOULD RAISE SERIOUS COOPERATIVE FEDERALISM ISSUES

The Complaint suggests that there are no grounds to "rehash" claims that the determinations made in the MOPR Orders impermissibly intrude on authority reserved to the states under Section 201 of the FPA because the MOPR Orders have already rejected any such objection.[107]

This assertion overlooks the fact that the jurisdictional determinations in the MOPR Orders have been controversial and have been challenged on multiple grounds on appeal. Beyond that, the MOPR Orders are distinguishable from this proceeding because they involved a multi-state RTOs, not a single-state entity such as the NYISO.

The Commission has frequently acknowledged that Section 201 of the FPA establishes a "cooperative federalism" framework.[108] The FPA expressly gives states jurisdiction over, *inter*

Commission Action No Later Than June 8, 2020, New York Independent System Operator, Inc., filed April 7, 2020, at 8.

[106] *Calpine Corporation, et al. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61.034 at P 55 (2020).

[107] *See* Complaint at 26-27.

[108] *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.")

alia, "facilities used for the generation of electric energy . . . ." including resource adequacy and resource mix determinations. The Commission has traditionally acknowledged state authority in this area and sought, whenever practicable, to avoid unnecessary interference with state resource decisions.

The NYISO is not an instrumentality of New York State. It does not have a direct interest in the jurisdictional disagreements between the Commission and the State and generally does not take a position on them. Nevertheless, it seems apparent that imposing a Clean MOPR on the NYISO would raise different cooperative federalism concerns than in a multi-state market. As noted above, there is less justification for Commission action in the single-state case because the Commission need not be concerned about interstate cost shifts. Moreover, by enacting the CLCPA and other actions, New York State has committed to transitioning over the next few decades to 100 percent clean energy. This was not true of any of the states in PJM, let alone all of them.

New York State has the authority to make resource mix decisions under Section 201 of the FPA. The Commission oversees wholesale markets and has acted to protect them in the MOPR Orders. But imposing a Clean MOPR on New York would be abandoning any possible concept of "cooperative" federalism under Section 201. The Commission would be compelling New York to choose between accepting a Commission-jurisdictional market structure that over-mitigates, and thereby increases consumer costs,[109] or attempting to undo the capacity market framework altogether in order to avoid any interference with achieving State policy mandates.[110]

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[109] *See* NYISO Energy Storage Rehearing Order at P 19.

[110] *See* Case 19-E-0530, Proceeding on Motion of the Commission to Consider Resource Adequacy Matters, New York State Public Service Commission, *Order Instituting Proceeding and Soliciting Comments* (August 8, 2019).

The MOPR Orders also argued that although some resources (or states) might withdraw from the PJM capacity market, the ultimate result would be a capacity market that was smaller but free from subsidies.[111] Whether or not this vision was realistic for PJM, it is clearly inapplicable to a single-state context. If New York State were to move away from market-based resource adequacy arrangements then the NYISO capacity market would be gone, not smaller. Consumers in New York would be deprived of the benefits of competitive markets. The Commission should not take steps that could jeopardize the capacity market's existence in the name of "protecting" the market.

F. COMPLAINANTS HAVE NOT SHOWN THAT ALLEGED FLAWS IN THE BSM RULES ARE THE CAUSE OF THEIR CLAIMED FINANCIAL HARDSHIPS OR THAT THEY HAVE BEEN DENIED AN OPPORTUNITY TO RECOVER THEIR COSTS

The Complainants' claims that they have suffered serious financial hardships because of defects in the BSM Rules do not satisfy the burden of proof. CVEC claims that it made its investment in its generating facility in "reliance on price signals for the then recently established G-J Locality."[112] But it asserts that just a few years later, the capacity prices that it expected to receive were "crushed" "in no small part" by the retention of nuclear units in the ROS as a result of ZEC payments.[113] CVEC's assessment of the impact of ZEC payments is overstated and ignores the impacts of New York State policies that encourage the exit of resources, as specified in Section II.A.1 above. Moreover, CVEC has not addressed other market factors that may have impacted its expected revenues, even though its description of its difficulties being "in no small part" related to ZECs clearly implies that there were other causes. In any event, the Commission

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[111] *See* 2018 MOPR Order at P 162.

[112] Complaint at 32.

[113] *Id.*

should not be overly inclined to change the mitigation on CVEC's behalf. Its facility is a merchant project that obtained a CEE. It was expected to assume the economic risks of market entry, including the risk of unfavorable regulatory developments.[114] As the Commission noted when it established the CEE, the purpose of the BSM Rules is not to "protect a merchant resource from making a poor investment decision with its own capital."[115]

Similarly, the Complaint claims that Empire "had been anticipating increased market energy and capacity prices with the anticipated retirement of coal-fired and nuclear powered generating facilities" but that "the expected price rebound did not occur, in no small part because certain of the facilities expected to retire have remained in service by virtue of ZECs subsidies . . . ."[116] The declaration cited by the Complaint is more qualified. It states that Empire expected a number of coal and nuclear retirements to occur that would reduce supply and increase prices. However, "while some coal and nuclear facilities have retired, they have not retired in an amount sufficient to increase energy prices to the extent previously anticipated."[117] The cited declaration also indicates that Empire's business was "affected negatively by sustained periods of below normal winter temperatures between December 2017 and February 2018," as well as "both

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[114] *See Consolidated Edison Company of New York, Inc.*, 150 FERC ¶ 61,139 (2015) at P 46 (Subjecting competitive, unsubsidized merchant projects to "an offer floor serves no competitive objective or market efficiency, regardless of whether they are judged uneconomic according to NYISO's existing buyer-side mitigation exemption test, because customers do not bear the risk or costs of uneconomic entry of such resources. The competitive market process alone is sufficient to discipline competitive unsubsidized merchant entry.")

[115] *See Consolidated Edison Company of New York, Inc.*, 150 FERC ¶ 61,139 (2015) at P 3; *citing PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 at P 57 (2013).

[116] Complaint at 33.

[117] *See* Declaration of Garrick F. Venteicher (I) in Support of Chapter 11 Petitions and First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2 at P 29, Case No. 19-23007 (RDD) (Bankr. S.D. N.Y. filed May 19, 2019) ("Venteicher Declaration"), https://casedocs.omniagentsolutions.com/cmsvol2/pub_47271/737164_3.pdf. The Complaint cites the Venteicher Declaration at n. 136 and 137.

availability and price fluctuations for natural gas" which was the Empire facility's primary fuel.[118] Empire stated that it was under financial pressure due to "the lack of progress in development of natural gas pipelines in the Northeast . . . ."[119]

The Complaint also points to unfavorable price impacts on Empire of New York State policies supporting renewable resources.[120] But these effects must have occurred years before the Commission accepted, and the NYISO implemented, the Renewable Exemption. As noted above, that exemption limits the amount of renewable entry that may be exempted in a manner that will prevent future renewable entry from suppressing prices. Thus, even if New York State renewable policies harmed Empire in the past, the Complaint has not shown that they will in the future. Finally, the Complaint notes that Empire emerged from bankruptcy in November 2019.[121] The Complaint does not demonstrate that the financial problems allegedly related to the BSM Rules that Empire experienced before bankruptcy will have the same impact afterwards.

Complainants assert that the Commission has a duty not just to preserve the integrity of markets but also to protect suppliers. They assert that suppliers are entitled to an opportunity to recover their costs and that allegedly inadequate mitigation by the NYISO is depriving them of their "statutory and constitutional rights."[122] However, Complainants have not presented evidence that satisfies their burden of proof on this issue. In *La Paloma* the Commission reiterated the well-settled point that "suppliers in competitive wholesale electricity markets are

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[118] Veneteicher Declaration at P 30.

[119] Veneteicher Declaration at P 30.

[120] *See* Complaint at 33.

[121] *See* Complaint at 33.

[122] *See* Complaint at 22-23.

not guaranteed full cost recovery, but only the opportunity to recover their costs."[123] Complainants have not shown that their compensation from the NYISO-administered markets will be at a level so low as to deny them an opportunity to recover their costs under the Commission's standards, or that the BSM Rules are depriving them of that opportunity.

G. THE COMPLAINANTS FAILED TO RAISE THEIR ISSUES IN THE NYISO STAKEHOLDER PROCESS BEFORE FILING THE COMPLAINT

Finally, the Complainants state that they previously "discussed" the issues raised in the Complaint with the NYISO.[124] The NYISO does not dispute that Complainants may have informally conveyed that they had certain concerns with the BSM Rules at some point in the past. To be clear, however, at least in recent years, the Complainants never presented their issues at a stakeholder meeting and never proposed that the NYISO adopt a Clean MOPR. Parties have a statutory right to file complaints. Complainants' failure to work through the NYISO's shared governance process is not itself a sufficient basis for denying the Complaint. At the same time, decades of Commission precedent strongly encourages parties to work through ISO/RTO stakeholder processes and discourages "end-runs" around them.[125] The Commission therefore

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[123] *La Paloma* at P 71; *citing Bridgeport Energy, LLC,* 113 FERC ¶ 61,311 at P 29 (2005) ("[T]he Commission has no obligation in a competitive marketplace to guarantee Bridgeport its full traditional cost-of-service. Rather, in a competitive market, the Commission is responsible only for assuring that Bridgeport is provided the *opportunity* to recover its costs.") *See also ISO New England, Inc.*, 158 FERC ¶ 61,138 at P 58 (2017) ("No individual supplier has an entitlement to a specific capacity price. The Commission's aim when using competitive markets as a regulatory mechanism is to protect competition to ensure just and reasonable rates, not to protect individual competitors.")

[124] *See* Complaint at 36.

[125] *See Niagara Mohawk Power Corp.*, 114 FERC ¶ 61.098 (2006) at P 22 (Commission exercised discretion to dismiss a complaint without prejudice so that issues could be considered by NYISO stakeholder committees). The Commission has also traditionally discouraged "end-runs" around ISO/RTO stakeholder processes. *See, e.g., ISO New England, Inc.*, 130 FERC ¶ 61,145 at P 34 (2010) ("we encourage parties to participate in the stakeholder process if they seek to change the market rules") and *ISO New England, Inc.*, 125 FERC ¶ 61,154 at P 39 (2008) (directing that unresolved issues be addressed through the stakeholder process).

may, and ought to, look with disfavor on the Complainants because they failed to avail themselves of the stakeholder process.

III. EVEN IF THE COMMISSION DETERMINES THAT THE BSM RULES MUST BE CHANGED, THE CLEAN MOPR PROPOSAL SHOULD BE REJECTED BECAUSE APPLYING IT TO THE NYISO WOULD NOT BE JUST AND REASONABLE

If the Commission were to determine, notwithstanding the arguments in Section II above, that Complainants have met their burden of proof, and thus that BSM Rules must be revised in some way, it should not adopt the Clean MOPR. The FPA is clear that any replacement rate must be just, reasonable, and not unduly discriminatory. Although a complainant is not required to put forward a just and reasonable replacement rate, any remedial action that it proposes must be shown to be just and reasonable. Complainants in this proceeding have not made such a showing with respect to their Clean MOPR concept.

The Complaint is unclear about exactly what form its proposed Clean MOPR would take. Complainants appear to prefer a variation on the now-accepted PJM Clean MOPR that would be even broader in scope, would allow even fewer exemptions, and would not make the same allowances for investments previously made in reasonable reliance on earlier Commission rulings.[126] But Complainants themselves acknowledge that they have not worked through all of the details of their proposal.[127] It would not be just and reasonable for the Commission to accept such an incomplete and under-developed proposal as a replacement rate. Nor would it be appropriate to accept a "conceptual" remedy and then compel the NYISO to flesh out the details. Such an approach would beg the question by effectively presuming that a Clean MOPR proposal

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[126] *See* Complaint at 24-25.

[127] *See* Shanker Affidavit at P 34.

would be just and reasonable in the NYISO context and without considering whether it could be practicably implemented in New York.

Complainants' suggest that a NYISO Clean MOPR should not exempt existing resources that arguably made investment decisions based on earlier Commission rulings that excluded them from mitigation.[128] The MOPR Orders made the expanded PJM Clean MOPR applicable prospectively to various categories of resource, *e.g.*, existing renewables, storage, and demand-side resources when prior "affirmative guidance" from the Commission had indicated they would not be mitigated.[129] The Commission took this approach because of its concern that the developers of many existing resources made investments in reliance on years of Commission precedents that restricted the scope of the PJM MOPR principally to new natural gas-fired power plants.

The same reasonable reliance considerations exist to at least the same extent in New York. Complainants are splitting hairs when they claim otherwise. For example, owners of existing resources in New York City were told in 2008 that they would be grandfathered under BSM Rules. Challenges to that exemption were made and rejected both in the Commission's initial order and on rehearing. Years later, in Docket No. EL13-62, some parties argued that a small number of existing resources should be mitigated. But the Commission rejected those arguments, most recently in February 2020.[130] The Commission has also upheld the use of, and rationales for having, the Renewable Exemption, Competitive Entry Exemption, and Self-Supply

[128] *See* Complaint at 24-25.

[129] *See* 2019 MOPR Order at P 17.

[130] *Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.*, 170 FERC ¶ 61,118 (2020).

Exemption as recently as this year. Given all of this, it would only be reasonable to make a Clean MOPR in New York effective prospectively from the date of a hypothetical Commission order directing the NYISO to establish one, exactly as was done in PJM.

In addition, the NYISO understands that the MMU has conducted an analysis demonstrating that a Clean MOPR would be an inefficient barrier to efficient investment, result in artificial capacity surpluses, and raise prices above competitive levels. Imposing a Clean MOPR on the NYISO would, therefore, disrupt the balance that currently exists under the BSM Rules and lead to systematic over-mitigation. The MMU will discuss its findings in its own comments. The Mukerji Affidavit confirms that the NYISO has reviewed the MMU's assessment and agrees with its conclusions.

It is also already apparent that there would likely be other substantive problems with adopting a Clean MOPR for the NYISO. The Clean MOPR was designed to work within PJM's capacity market structure and three-year forward auction. It was not designed to complement the NYISO's prompt capacity auction model.

Moreover, notwithstanding what the Complaint suggests, adapting a Clean MOPR for use in New York would not be easy or fast. Doing so would unquestionably require more than "several months."[131] The Clean MOPR was developed through litigated Commission proceedings that date back to 2016 and produced a voluminous record. PJM's extensive Clean MOPR compliance tariff provisions were only accepted by the Commission a month ago in the October 2020 Compliance Order. Not all details have yet been fully resolved**.** The NYISO was not a party to the proceedings that produced the MOPR Orders. It is not well-versed in the

[131] *See* Shanker Affidavit at P 35.

technical details of the PJM software or systems that implement the Clean MOPR. It is unclear to what extent the NYISO's own procedures and software would need to change to accommodate a Clean MOPR. The NYISO would need to evaluate the extent to which adopting a Clean MOPR would require corresponding changes to the Class Year process and capacity market design, as well as adjustments to the energy and ancillary services markets.

If the Commission determines that the BSM Rules must be changed, the NYISO will need to take a reasonable time to develop modifications that would be consistent with regional circumstances and market conditions in New York. Stakeholders should be involved in any such effort. As noted above, the current situation in New York is not "dire" and there is no need to adopt an unrealistic timetable for developing a replacement rate. The CLCPA's mandates will take years to come into full effect. Complainants' preference that these changes be implemented quickly cannot outweigh the interest of the Commission, New York State, the NYISO, and all stakeholders in having just and reasonable mitigation rules that continue to allow the capacity market to send efficient investment signals.[132] This is especially true given that the Complaint could have been filed at any time after the Commission's February 2020 orders refused to expand the BSM Rules and reaffirmed the Renewable Exemption. Those orders made it clear that the Commission would not force impose a Clean MOPR on the NYISO on its own initiative.[133] The fact that Complainants did not file the Complaint until October does not justify rushing the development of a replacement rate (if one is required)..

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[132] The concerns that then-Commissioner LaFleur expressed in her dissent from the 2018 PJM MOPR Order about the market design and legal dangers of attempting to resolve complex capacity market power mitigation issues too quickly are just as valid in this proceeding.

[133] *See Motion of the New York Independent System Operator, Inc. for Extension of Time to Answer Complaint*, Docket No. EL21-7-000, filed October 16, 2020, at 4-5.

In short, the Clean MOPR would not be a just and reasonable option for New York. It almost certainly could not be implemented in the near future. The Commission should not accept it as a replacement rate.

IV. COMPLIANCE WITH COMMISSION RULE 213(c)(2)(i)

Attachment I to this Answer addresses the formal requirements of Commission Rule 213(c)(2) in order to ensure the NYISO's full compliance with them.

V. CORRESPONDENCE AND COMMUNICATIONS

Communications regarding this proceeding should be sent to:

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***Designated to receive service.**

VI. LIST OF DOCUMENTS SUBMITTED

The NYISO respectfully submits the following documents with this Answer:

1. Admissions and denials consistent with Commission Rule 213(c)(2) (Attachment I); and

2. Affidavit of Rana Mukerji (Attachment II).

VII. CONCLUSION

For the reasons set forth above, the Complaint should be denied in its entirety. The Commission should take no further action and should not initiate any further proceedings. In the

alternative, if the Commission determines that the BSM Rules must be changed, it should reject the Clean MOPR and allow the NYISO a reasonable time to work with its stakeholders to develop changes that would be more appropriate for New York.

Respectfully submitted,

/s/ Ted J. Murphy
Ted J. Murphy
Counsel for the
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cc: Jignasa Gadani
Jette Gebhart
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Attachment I

Admission and Denials of Material Allegations

of the New York Independent System Operator, Inc.

Pursuant to Rule 213(c)(2)(i) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(c)(2)(i) (2020), the NYISO sets forth the following admissions and denials to the material factual and legal allegations in the Complaint. To the extent that any fact or claim in the Complaint is not specifically addressed here or elsewhere in the NYISO's answer, it is denied.

1. The NYISO denies that the BSM Rules are unjust, unreasonable or unduly discriminatory, that they "fail adequately to address price suppression in NYISO's installed capacity ("ICAP") Spot Market Auctions", and that they should be replaced with a "Clean MOPR." Complaint at 1-2.

2. The NYISO admits that Commission precedent requires that price suppression that impacts "the integrity and the effectiveness of the capacity market" must be addressed but denies that price suppression is threatening the integrity or the effectiveness of the NYISO-administered capacity market. Complaint at 2.

3. The NYISO denies that the NYISO-administered capacity market is "confronted with the same problem" that resulted in the adoption of a Clean MOPR in PJM. Complaint at 2.

4. The NYISO admits that it is an Independent System Operator, and that it operates the New York State transmission system and administers organized wholesale energy, ancillary services, and capacity markets in New York State pursuant to its Commission approved tariffs. Complaint at 4.

5. The NYISO admits that the NYISO's buyer-side capacity market power mitigation measures ("BSM Rules") were first developed in response a 2007 Commission order but clarifies that they originally only applied to New York City, *i.e.*, the BSM Rules were only later expanded to apply in the G-J Locality. Complaint at 5.

6. The NYISO admits that the BSM Rules currently apply only to new entrants, or, to be clear, to new entrants and to certain incremental new capacity additions to existing resources, in Mitigated Capacity Zones but denies any imputation that the BSM Rules are inadequate as a result. Complaint at 5-7.

7. The NYISO admits that the Complaint's description of the BSM Rules and its existing exemptions are generally accurate with the caveats that: (i) the Part A

Exemption Test is focused on whether the market is approaching the minimum required level of capacity needed in a given load zone, rather than on individual unit economics; and (ii) the NYISO must make another compliance filing before the Self-Supply Exemption can become effective. Complaint at 6-7.

8. The NYISO admits that the NYISO and the independent Market Monitoring Unit for the NYISO-administered markets, *i.e.,* Potomac Economics, Ltd., disagreed on the need for a structural mitigation measure to address concerns about certain uneconomic resource retention agreements in the latter stages of the proceedings in Docket No. EL13-62-000. The NYISO emphasizes, however, that the Commission agreed with its preferred approach in that proceeding and did not require the NYISO to take any additional mitigation action. Complaint at 8-9.

9. The NYISO admits that the Complaint's quotes from the CASPR Order are accurate but emphasizes that: (i) the NYISO-administered capacity market continues to meet the CASPR Order's "first principles;" and (ii) the CASPR Order's statements regarding the use of mitigation as a "standard solution" does not dictate that the currently effective BSM Rules are no longer just and reasonable or must be replaced with a Clean MOPR. Complaint at 10-11.

10. The NYISO admits that the Commission began the process of expanding the PJM MOPR starting with its the June 29, 2018 order because it concluded that PJM's mitigation rules were failing "to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts . . ." associated with state subsidies. However, the NYISO denies that this holding is applicable to the NYISO because the BSM Rules are adequate to protect the integrity of competition in the NYISO-administered capacity market. Complaint at 11.

11. The NYISO denies that the impact of existing and anticipated New York State initiatives to support resources "dwarf" the impact of state subsidy programs in PJM. Complaint at 14.

12. The NYISO denies that "as in PJM," the "integrity and effectiveness of the capacity market . . . have become untenably threatened by out-of-market payments . . . supporting the entry or continued operation of preferred generation resources . . . ." Complaint at 14.

13. The NYISO denies that the BSM Rules are "woefully inadequate to protect the New York capacity market from this threat, ..." Complaint at 14.

14. The NYISO denies that "NYISO's capacity market is facing a threat at least as dire as, if not more dire than, that which prompted the Commission's decisive action in the PJM MOPR Orders, and that the [BSM Rules] do not adequately address this threat." Complaint at 15.

15. The NYISO denies that state support of resources in New York poses an immediate threat to the competitiveness of the capacity market. Complaint at 15.

16. The NYISO admits that the percentage of resources eligible to receive ZECs, and the percentage of renewable (including offshore) resources that may receive support from New York State may be comparable to the percentages in PJM but denies that the impact of this support will be comparable to impact in PJM. Complaint at 16-18.

17. The NYISO admits that it stated that "Public Policy Resources" were more likely to be built in New York in the future because of New York State mandates and policies but denies any imputation that such entry will threaten the integrity of the NYISO-administered capacity market. Complaint at 18.

18. The NYISO denies that the BSM Rules are inadequate or will leave price suppression unaddressed. Complaint at 18.

19. The NYISO denies the Complaint's mischaracterization of the BSM Rules as "riddled with exemptions." In fact, the BSM Rules only include appropriate and narrowly-tailored exemptions that avoid over-mitigating resources that should not be subject to an Offer Floor either because of their own attributes or because of prevailing market conditions. Complaint at 18.

20. The NYISO denies that the Commission's 2018 ruling directing that mitigation be expanded in PJM "compels" the Commission to reach the same conclusion in New York, because conditions and circumstances in New York and PJM are materially different. Complaint at 18-19.

21. The NYISO denies that "there are no regional differences" that make the market impacts of state support for resources different in New York than in PJM. Complaint at 19.

22. The NYISO denies that regional differences between New York and PJM strengthen the case for expanded mitigation in New York. Complaint at 19-21.

23. More specifically, the NYISO denies that the fact that the NYISO does not have a three-year forward auction and is a single state entity militates in favor of expanded mitigation in New York. Complaint at 20-21.

24. The NYISO admits that the Commission has held that intent to exercise market power is no longer relevant to determining whether the BSM Rules should apply. The NYISO also clarifies that this point is irrelevant to the disposition of the Complaint. The NYISO's position in no way depends on claims about the intent behind New York State's actions. Complaint at 21-22.

25. The NYISO denies that Complainants, or any other party, are impermissibly being denied an opportunity to recover their costs due to claimed flaws in the capacity market or the BSM Rules. Complaint at 22-23.

26. The NYISO denies that a Clean MOPR is a necessary, let alone "the best and most obvious," "solution" to purported price suppression issues in New York. Complaint at 23.

27. The NYISO denies that "[n]o exemptions of the kinds required in the PJM MOPR Orders would be justified for resources receiving ZECs or other subsidies" not addressed by the existing BSM Rules. Complaint at 24-26.

28. The NYISO denies that stakeholders have been "on notice" since "at least" 2014 that the BSM Rules could be expanded to apply to existing resources in a way that would invalidate a "reasonable reliance" claim by such resources. Complaint at 25-26.

29. The NYISO denies that the Complaint does not raise serious jurisdictional issues concerning the permissibility of the Commission imposing MOPR rules that conflict with state resource policies under Section 201 of the FPA. Among other things, the Commission has not previously addressed these issues in the context of a single-state ISO or, to the best of the NYISO's knowledge, with respect to a state that has committed to a 100 percent clean energy system by 2040. Complaint at 26-27.

30. The NYISO denies that the Clean MOPR would be a just and reasonable replacement rate. Complaint at 28.

31. The NYISO denies that it "has not lifted a finger" to address potential price suppression threats in New York. Complaint at 28.

32. The NYISO denies that the Commission should deploy what Complainants characterize as the "standard solution" and impose a Clean MOPR on New York. Complaint at 28-29.

33. The NYISO denies that the Complaint has met its burden to show that the BSM Rules are unjust and unreasonable and therefore also denies that the Commission has an obligation to adopt a replacement rate at this time. Complaint at 29-30.

34. The NYISO denies that "below cost offers from state-subsidized resources are having a profound impact" on capacity prices in the NYISO. Complaint at 30.

35. The NYISO denies that New York State actions are harming the integrity of capacity market price signals. Complaint at 31.

36. The NYISO denies that Complainants have shown that flaws in the BSM Rules have had a "profound effect" on them or on other resources. Complaint at 32-34.

37. The NYISO denies that the issues in this proceeding are suitable for fast-track processing. Commission precedent is clear that fast-track processing should only be used in simple and straightforward cases; not complex disputes that involve numerous substantive and controversial legal questions. Complaint at 35.

38. The NYISO denies that the Complainants "discussed the issues raised" in the Complaint with the NYISO. The Complainants may have informally conveyed that they had concerns about the BSM Rules in the past. But they never proposed that the NYISO adopt a Clean MOPR either directly to the NYISO or through the stakeholder process. Complaint at 36.

39. The NYISO denies the Complaint's characterization of the geographic limits on the scope of the BSM Rules, and of existing exemptions, as somehow "vestigial" or otherwise unjustified. Shanker Affidavit at P 18.

40. The NYISO denies Dr. Shanker's claim that the Commission's views have "consolidated" into a simplistic version of the Clean MOPR policy under which any claim of unaddressed price suppression in a market would justify discarding established mitigation mechanisms and imposing a Clean MOPR. Shanker Affidavit at Section IV.A.

41. The NYISO denies that a "Clean MOPPR" is the universally preferred or "go to" solution. Shanker Affidavit at Section IV.B.

42. The NYISO denies that imposing a Clean MOPR on New York "is not that difficult a task." Shanker Affidavit at P 35.

43. The NYISO denies that the "enormous focus" that the Commission, PJM, and PJM stakeholders have dedicated to developing a Clean MOPR for the PJM region means that the effort to adopt a New York version of a Clean MOPR would be materially easier, let alone that such a task could realistically be filed with the Commission within "several months." Shanker Affidavit at P 36.

Attachment II

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Cricket Valley Energy Center, LLC	**)**	
Empire Generating Company, LLC	**)**	
	)	
v.	**)**	**Docket No. EL21-7-000**
	)	
New York Independent System Operator, Inc.	**)**	

AFFIDAVIT OF RANA MUKERJI

Mr. Rana Mukerji declares:

1. I have personal knowledge of the facts and opinions herein and if called to testify could and would testify competently hereto.

2. I am Rana Mukerji, Senior Vice President Market Structures, of the New York Independent System Operator ("NYISO"). My business address is 10 Krey Boulevard, Rensselaer, NY 12144.

3. I have been in my current role as Senior Vice President Market Structures of the NYISO for over a decade. I have responsibility for Market Design of Energy, Capacity and Ancillary Services including mitigation regimes; Product and Project Management; Strategic and Business Planning; Research and Development; and Market Training. In this capacity, I oversaw the evolution of the Capacity Market over the last fourteen years and led the development and enhancements of the "buyer side" capacity market power mitigation measures in New York (the "BSM Rules") since their inception. I also have a key role in shaping the evolution of wholesale electricity market design in New York State to address major clean energy policy reforms consistent with New York State's Climate Leadership and Consumer Protection Act of 2019.

4. The purpose of this affidavit is to support the attached Answer of the NYISO to the Complaint and Request for Fast Track Processing filed by Cricket Valley Energy Center, LLC and Empire Generating Company, LLC (together the "Complainants") in the above-captioned proceeding (the "Answer").

5. In particular, I have read the Answer, and I hereby verify that all of the factual assertions set forth in it are correct to the best of my knowledge and belief. I also verify and endorse the Answer's arguments and analyses. There are a number of key points in the Answer that are particularly important, and that I wish to highlight in this Affidavit.

6. The core point that I wish to emphasize is that the NYISO-administered markets, including the Installed Capacity ("ICAP") Market and the BSM Rules, are operating as intended and consistent with competitive principles.

7. Both the NYISO and the independent Market Monitoring Unit ("MMU") for the NYISO-administered markets, *i.e.*, Potomac Economics, Ltd., closely observe the markets and evaluate the impact of New York State initiatives on them. To date, neither the NYISO nor the independent MMU have determined that state-supported resources will cause price suppression or otherwise undermine the market. The annual *State of the Market Report* issued by the independent MMU reflects this assessment. The independent MMU's reports have consistently concluded that the NYISO-administered markets, including the ICAP Market and the BSM Rules, are working well.

8. These facts underscore a key difference between the circumstances in the NYISO and those in PJM Interconnection, L.L.C. ("PJM") that led to the adoption of a "Clean MOPR" in that region. Both PJM and its Independent Market Monitor concluded that the existing market rules were not producing competitive outcomes because of out-of-market state actions, and, therefore, that mitigation needed to be drastically expanded. PJM expressly asked the Commission to intervene to protect its market. By contrast, neither the NYISO nor the independent MMU have done so in New York and both oppose the Complaint.

9. I would also emphasize that the Complaint focuses solely on the aspects of New York State policies that support resources while ignoring other State policies that are causing resources to exit and that tend therefore to offset the impacts of Zero Emissions Credits ("ZECs") and other clean energy initiatives. The impacts of all New York State policies must be considered when evaluating whether the BSM Rules are just and reasonable. The Complainants' analysis is incomplete and inaccurate.

10. I have discussed these issues with the independent MMU. I am aware that it has performed calculations demonstrating that, when the offsetting rate impacts of State actions are fully considered, ICAP Market prices for the 2021/2022 Planning Year under the existing BSM Rules would be higher than prices in a scenario without any State action to either retain or deactivate resources. I understand that the independent MMU will make these points in its own filing in this proceeding. I fully support the independent MMU's analysis and conclusions concerning these offsetting price impacts.

11. The Complaint appears to ignore that in the future the NYISO's capacity requirements will increase in an amount roughly commensurate with the growth of intermittent renewable resources. Correctly modeling intermittent and limited duration resources in the Installed Reserve Margin-setting process will ensure that capacity requirements increase appropriately as such suppliers become a larger part of the resource mix. Similarly, payments to limited duration and intermittent resources are being adjusted to reflect the contribution of these resources to meet the reliability criterion. The NYISO's recent and ongoing enhancements to the requirement-setting and compensation mechanisms will provide the appropriate framework to maintain the integrity of capacity market prices going forward. In particular, ensuring that capacity requirements increase in step with greater entry by intermittent renewables means that much of that entry will not have price suppressive effects and therefore will not require mitigation.

12. Furthermore, although the NYISO is not challenging the definition of "State Subsidy" used in the PJM MOPR proceedings (and, indeed, the NYISO has not been a party to those proceedings), I believe that Dr. Shanker's analysis of ZEC price impacts is overstated because it is based on a flawed definition of "subsidy." Simply put, the Complainants seek to target all out-of-market payments to a resource, irrespective of whether such payments are for a specific service or outcome. This approach to defining "subsidy" means that payments to generators that are for services or outcomes that are of value, like providing rights-of-way to other entities, or reducing emissions or addressing other externalities, are considered to be "subsidies," even though they are not in excess of the value of the services being provided by those generators. This definition of "subsidy" is not economically valid; a "subsidy" should consist only of payments to a generator that are in excess of the value of the services or outcomes provided by that generator. I have discussed this issue with the MMU. I understand that the MMU will expand on this point in its own filing in this proceeding. I fully support the independent MMU's analysis on this issue.

13. I am also concerned that the Complaint seeks to overturn the BSM Rules in their entirety. The Complaint does not offer any evidence showing that the NYISO's established Part A Exemption Test, Part B Exemption Test, Renewable Exemption, or (still developing) Self-Supply Exemption should be changed. These exemptions prevent over-mitigation of resources that have attributes that prevent them from causing capacity price suppression or that enter the market during periods when market conditions are such that such resources will not suppress prices. The Complainants' concerns about ZEC payments, and their fears about the potential impacts of anticipated future State clean energy initiatives, do not justify eliminating the established exemptions.

14. Moreover, there are key operational differences between the NYISO's ICAP Market and the three-year forward capacity market used in PJM. These differences highlight the difficulties of extending a "Clean MOPR" solution to the NYISO. A key design feature of the BSM Rules is that developers should know how the rules will impact their projects before they determine whether to invest money in a new resource. In PJM, that determination is made at the time that the forward capacity market is run, three years ahead of the delivery of capacity. In the NYISO, that determination under the current BSM Rules also is made several years in advance of capacity delivery, and at approximately the same time that an investor determines whether to invest money in a project. However, unlike PJM's forward capacity market, the NYISO's ICAP Market is a "prompt market," meaning that it operates either right before, or within, the year when capacity is being delivered by suppliers. If the Complaint intended for the NYISO not to make determinations under the BSM Rules until just before the prompt auctions, such an approach would be extremely disruptive. In that scenario, entrants could be subjected to Offer Floors well after their investment decisions were made. I have discussed this issue with the independent MMU, and I understand that the independent MMU will address this issue in its own filing. I share and fully support the independent MMU's view that a Clean MOPR would not be compatible with the NYISO's market design.

15. Finally, the adoption of a Clean MOPR in New York would be a barrier to efficient investment, resulting in artificial capacity surpluses, and capacity prices that are above

competitive levels. This would result in substantial capacity price increases without any economic justification. I do not believe that the Commission should require changes to the BSM Rules at this time. But, if the Commission does require changes, it should give the NYISO a reasonable amount of time to work collaboratively with stakeholders to develop revised mitigation measures that are better suited than a Clean MOPR for New York.

16. This concludes my Affidavit.

Respectfully submitted,

/s/ Rana Mukerji

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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 18th day of November 2020.

/s/ Joy A. Zimberlin

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