170 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council	Docket Nos. EL16-92-001
v.	
New York Independent System Operator, Inc.	
New York Independent System Operator, Inc.	ER17-996-000 (not consolidated)

ORDER GRANTING IN PART AND DENYING IN PART REHEARING AND CLARIFICATION AND REJECTING COMPLIANCE FILING AS MOOT

(Issued February 20, 2020)

1. On February 3, 2017, the Commission granted in part and denied in part a complaint[1] and required the New York Independent System Operator, Inc. (NYISO) to revise the buyer-side market power mitigation rules in Section 23.4 of its Market Administration and Control Area Services Tariff (Services Tariff) to exempt new Special Case Resources (SCRs) from the application of those rules.[2] The Commission directed

[1] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (Complaint Order). The Complainants included the New York State Public Service Commission (New York Commission), New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority (NYSERDA), City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council.

[2] The Services Tariff defines SCRs as: "Demand Side Resources whose Load is capable of being interrupted upon demand at the direction of the ISO, and/or Demand Side Resources that have a Local Generator, which is not visible to the ISO's Market Information System and is rated 100 kW or higher, that can be operated to reduce Load

NYISO to make a compliance filing within 30 days of the date of the Complaint Order. Independent Power Producers of New York, Inc. (IPPNY) filed a request for rehearing and NYISO filed a request for clarification. In this order, we grant in part and deny in part IPPNY's request for rehearing and grant NYISO's request for clarification. We also reject as moot NYISO's compliance filing to the Complaint Order and initiate a paper hearing to gather current and comprehensive information on the retail-level demand response programs listed in the complaint. We will use the information gathered in the paper hearing to analyze those retail-level demand response programs on a program-specific basis to determine whether payments from the programs should be excluded from the calculation of SCRs' offer floors, consistent with the standard outlined in this order.

I. Background

2. NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new Installed Capacity (ICAP) resources must enter NYISO's mitigated capacity zones at a price at or above the applicable offer floor and continue to offer at or above that price until their capacity clears 12 not necessarily consecutive monthly auctions.[3] Before the Complaint Order, SCRs were subject to this offer floor mitigation, unless the projected ICAP spot market auction price exceeded an SCR's offer floor for the first 12 months that the SCR reasonably anticipated to offer to supply unforced capacity.[4] The SCR offer floor was equal to the minimum monthly payment for providing ICAP that the SCR received, "plus the monthly value of any payments or other benefits the [SCR] receive[d] from a third party for providing Installed Capacity," or that the designated ICAP supplier for the SCR received for the provision of ICAP by the SCR.[5]

3. NYISO's application of its buyer-side market power mitigation rules to SCRs in its ICAP markets has been challenged and modified through various proceedings before the Commission.[6] As relevant here, from 2008 until the Complaint Order, SCRs were

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from the NYS Transmission System or the distribution system at the direction of the ISO . . . ." NYISO, Services Tariff, § 2.19 (22.0.0).

[3] NYISO, Services Tariff, § 23.4.5.7 (26.0.0).

[4] Complaint Order, 158 FERC ¶ 61,137 at P 2.

[5] *Id.* (quoting NYISO, Services Tariff, § 23.4.5.7.5 (3.0.0)).

[6] *See N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 120 (March 2008 Order), *order on reh'g and compliance*, 124 FERC ¶ 61,301 (2008) (September 2008 Order), *order on reh'g and compliance*, 131 FERC ¶ 61,170 (2010) (May 2010 Order), *order on reh'g and compliance*, 150 FERC ¶ 61,208 (2015)

subject to NYISO's buyer-side market power mitigation rules in the same manner as all other market participants subject to those rules.[7] In May 2010, the Commission accepted NYISO's proposed method for calculating offer floors for mitigated SCRs based on certain payments and benefits received by SCRs and, in that calculation, excluded payments an SCR receives from certain state demand response programs.[8] Subsequently, in March 2015, the Commission granted rehearing of its determination regarding the calculation of SCRs' offer floors, specifying that it did not intend to grant an exemption "for all state programs that subsidize demand response."[9] The Commission found, among other things, that the state may elect to file with the Commission pursuant to section 206 of the FPA to exclude certain payments from particular state demand response programs from the calculation of SCRs' offer floors. The Commission stated that it would make determinations for specific requests based on a full record, including public notice and the opportunity to comment.[10]

4. On June 24, 2016, the Complainants filed a complaint against NYISO, pursuant to sections 206 and 306 of the Federal Power Act (FPA)[11] and Rule 206 of the Commission's regulations,[12] in Docket No. EL16-92. The Complainants alleged that the application of NYISO's buyer-side market power mitigation rules in Section 23.4 of the Services Tariff limits full participation of SCRs in NYISO's ICAP market; interferes with federal, state, and local policy objectives; and is therefore unjust and unreasonable.[13] The Complainants requested that the Commission establish a blanket exemption from NYISO's buyer-side market power mitigation rules for all SCRs, including SCRs currently subject to mitigation.[14] In the alternative, the Complainants sought to exclude

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(March 2015 Order); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 2 (2015) (Renewables/Self-Supply Complaint Order), *order on reh'g*, 154 FERC ¶ 61,088 (2016) (Renewables/Self-Supply Rehearing Order).

[7] September 2008 Order, 124 FERC ¶ 61,301 at P 41.

[8] May 2010 Order, 131 FERC ¶ 61,170 at P 137.

[9] March 2015 Order, 150 FERC ¶ 61,208 at P 30.

[10] *Id.*

[11] 16 U.S.C. § 824e, 825e (2018).

[12] 18 C.F.R. § 385.206 (2019).

[13] Complaint Order, 158 FERC ¶ 61,137 at PP 1, 4-6.

[14] *Id.* PP 1, 7-8.

from the calculation of SCRs' offer floors payments received from certain retail-level demand response programs specified in the complaint.[15]

5. In the Complaint Order, the Commission granted in part and denied in part the complaint and required NYISO to make a compliance filing within 30 days of the date of the order.[16] The Commission found NYISO's Services Tariff to be unjust, unreasonable, and unduly discriminatory or preferential because it applied NYISO's buyer-side market power mitigation rules to SCRs, which the Commission found have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.[17] The Commission relied on evidence that the retail-level demand response program payments are not tied to participation in NYISO's SCR program, that increases in these payments have not resulted in any "corresponding, material increase in participation in NYISO's SCR program," and NYISO's contention that a further increase in these payments "would not present a credible risk for ICAP market price suppression."[18] The Commission was not persuaded by arguments that SCRs, which the Commission described as limited in nature, have the same ability to suppress ICAP market prices as a single, large market participant.[19] The Commission also emphasized that the retail- and wholesale-level demand response programs "serve different purposes, provide different benefits, and compensate distinctly different services" and that the two categories of programs are called upon at different times of the day and year.[20]

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[15] *Id.* PP 1, 9. The Complainants specifically addressed the Distribution Load Relief Program (DLRP), Commercial System Load Relief Program (CLRP), and Brooklyn Queens Demand Management Program administered by Consolidated Edison Company of New York, Inc. (ConEd); the DLRP program administered by Orange and Rockland Utilities, Inc.; the DLRP program administered by New York State Electric & Gas Corporation; the DLRP program administered by Central Hudson Gas & Electric Corporation; and the Demand Management Program administered by the NYSERDA. Complaint at 25-34.

[16] Complaint Order, 158 FERC ¶ 61,137 at P 1.

[17] *Id.* P 30.

[18] *Id.* P 31 (citing Complaint at 54-55; NYISO July 21, 2016 Answer at 6; NYISO July 21, 2016 Answer, Attach. II, Seirup Aff. ¶¶ 9-10).

[19] The Commission explained that "SCRs are limited in the sense that their performance is subject to being called by NYISO during a mandatory event; SCRs do not have the discretion to reduce load at will and expect to get paid." *Id.* P 32.

[20] *Id.* P 33 (citing Complaint at 25, n.62, 31 & n.84, 41).

6. The Commission therefore required NYISO to revise its buyer-side market power mitigation rules in Section 23.4 of the Services Tariff to exempt SCRs from the application of those rules.[21] The Commission reasoned that a blanket exemption "allows appropriate flexibility for, and avoids the creation of unnecessary barriers to, the participation of demand response in the wholesale markets" and corrects the over-mitigation of SCRs present in NYISO's Services Tariff.[22]

7. The Commission denied the complaint in part insofar as the Complainants requested that the blanket exemption apply to all SCRs currently subject to mitigation.[23] The Commission reasoned that its long-standing practice has been to apply new exemptions to NYISO's buyer-side market power mitigation rules prospectively.[24] The Commission noted that, although it "has allowed for mitigation redeterminations before a resource enters the market, the Commission has not allowed for such redeterminations after the resource enters the market."[25]

II. Requests for Rehearing and Clarification

8. IPPNY argues that the Commission erred in finding that SCRs have limited or no incentive and ability to artificially suppress NYISO's ICAP market prices because: (1) buyers can act collectively as a single, large market participant; and (2) the retail-level demand response programs do not serve a different purpose than NYISO's wholesale-level SCR program.[26] According to IPPNY, the Commission incorrectly assumed that SCRs are small, discrete resources acting independently, without any intention to exercise buyer-side market power.[27] On the contrary, IPPNY contends that

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[21] *Id.* P 1.

[22] *Id.* P 34 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at P 16 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009)).

[23] *Id.* P 30.

[24] *Id.* P 35 (citing *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,110, at P 77 (2015)).

[25] *Id.* (citing *Astoria Generating Co. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,044, at P 51 (2015)).

[26] IPPNY Request for Rehearing at 3-4.

[27] *Id.* at 4.

the Commission must look beyond the individual SCRs and acknowledge that the state may exercise buyer-side market power by subsidizing SCRs through retail-level demand response programs, thereby increasing supply and artificially suppressing ICAP market prices.[28] IPPNY claims that the Commission erred in rejecting the argument that one of the main purposes of the retail-level demand response programs discussed in the complaint is to reduce peak load on the bulk power system, thereby replacing traditional generation with demand response solutions, the same purpose as NYISO's SCR program.[29]

9. IPPNY continues that, even if some of the retail-level demand response programs are aimed at the distribution system, the Commission erred by granting a blanket exemption for SCRs because the retail-level demand response programs need to be assessed individually to determine whether to exclude payments from those programs from an SCR's offer floor.[30] IPPNY points to evidence presented in its protest that the main purpose of NYSERDA's Demand Management Program is to impact the level of wholesale capacity.[31] IPPNY argues that the Commission disregarded NYISO's market monitoring unit's (MMU) arguments that a blanket exemption would not be efficient because it would allow the state to develop retail-level demand response programs specifically aimed at suppressing ICAP market prices.[32] IPPNY also attempts to counter the determination that the retail-level demand response programs discussed in the complaint are called on at different times than the SCR program by asserting that the record shows overlap between one of the programs. IPPNY further contends that the Complainants failed to provide evidence in support of exemptions for the other programs.[33]

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[28] *Id.* at 4-5.

[29] *Id.* at 5-6 (citing IPPNY and Electric Power Supply Association July 21, 2016 Joint Protest at 11-13; Complaint at 51-52; *Proc. on Mot. of Comm'n Re: Reforming the Energy Vision*, Case No. 14-M-0101, at 20 (N.Y. Pub. Serv. Comm'n Feb. 26, 2015) (Order Adopting Regulatory Policy Framework and Implementation Plan)).

[30] *Id.* at 6.

[31] *Id.* at 6-7 (citing IPPNY and Electric Power Supply Association July 21, 2016 Joint Protest at 13; Complaint at 59).

[32] *Id.* at 7 (citing MMU July 22, 2016 Comments at 3-4).

[33] *Id.* at 8. Specifically, IPPNY states that ConEd's CLRP and NYISO's SCR program were called together 45% of the time over a five-year study period. *Id.* (citing Complaint at 45).

10. NYISO seeks clarification of the following statement in the Complaint Order: "While the Commission has allowed for mitigation redeterminations before a resource enters the market, the Commission has not allowed for such redeterminations after the resource enters the market."[34] NYISO asks that the Commission clarify that it did not intend to contradict or alter the retesting provisions of NYISO's buyer-side market power mitigation rules.[35] NYISO explains that its buyer-side market power mitigation rules establish that exemption and offer floor determinations become final after the Class Year decisional process has been completed and final determinations may only be redetermined under limited specified circumstances.[36] NYISO requests clarification that the Commission did not intend to permit redeterminations in other instances to avoid any possible future misunderstandings or disputes.[37] NYISO notes that the Commission has previously granted clarification of a similar statement.[38]

III. NYISO's Compliance Filing

11. On February 17, 2017, NYISO submitted the required compliance filing in Docket No. ER17-996-000. NYISO proposes to revise Section 23.4.5.7.5 of the Services Tariff to exempt from its buyer-side market power mitigation rules all new SCRs entering NYISO's mitigated capacity zones on or after February 3, 2017, the date of the Complaint Order.[39]

12. Notice of NYISO's compliance filing was published in the *Federal Register*, 82 Fed. Reg. 11,566 (2017), with interventions and protests due on or before March 10, 2017. The New York Commission filed a notice of intervention. NRG Power Marketing LLC and GenOn Energy Management, LLC (jointly) and Exelon Corporation filed timely motions to intervene.

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[34] NYISO Request for Clarification at 1, 3 (quoting Complaint Order, 158 FERC ¶ 61,137 at P 35).

[35] *Id.* at 1, 3-4 (citing NYISO, Services Tariff, §§ 23.4.5.7.2, 23.4.5.7.3.3, 23.4.5.7.3.5).

[36] *Id.* at 4-5.

[37] *Id.* at 5.

[38] *Id.* at 5-6 (citing *Astoria Generating Co., L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,043, at PP 53, 57).

[39] NYISO, Tariff Filing, Docket No. ER17-996-000, at 2-3 (filed Feb. 17, 2017).

13. On March 23, 2017, the Complainants filed a motion for leave to answer and answer to IPPNY's request for rehearing.

IV. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[40] the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in Docket No. ER17-996-000.

15. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.[41] Accordingly, we deny the Complainants' motion for leave to answer and reject the Complainants' answer to IPPNY's rehearing request.

V. Substantive Matters

16. We grant in part and deny in part IPPNY's request for rehearing and grant NYISO's request for clarification. As explained in further detail below, we grant rehearing, in part, and find that all new SCRs should be subject to NYISO's buyer-side market power mitigation rules. However, we will evaluate retail-level demand response programs on a program-specific basis to determine whether payments from those programs should be excluded from the calculation of SCRs' offer floors. Therefore, we reject as moot NYISO's compliance filing and initiate a paper hearing to gather current and comprehensive information on the retail-level demand response programs listed in the complaint. We will use the information gathered in the paper hearing to analyze those retail-level demand response programs listed in the complaint, consistent with the standard outlined below.

17. We grant rehearing, in part, of the Commission's decision in the Complaint Order to require NYISO to establish a blanket exemption for all new SCRs. We find that a blanket exemption does not appropriately recognize that certain payments made to SCRs outside of the ICAP market could provide SCRs with the ability to suppress ICAP market prices below competitive levels. Thus, we no longer find that applying NYISO's buyer-side market power mitigation rules to SCRs is unjust and unreasonable. Prior to the Complaint Order, SCRs' offer floors were equal to the minimum monthly payment for providing ICAP that the SCR received, "plus the monthly value of any payments or other benefits the [SCR] receive[d] from a third party for providing Installed Capacity," or that the designated ICAP supplier for the SCR received for the provision of ICAP by

[40] 18 C.F.R. § 385.214 (2019).

[41] *Id.* § 385.713(d)(1).

the SCR.[42] However, to the extent that NYISO has been including the monthly value of payments SCRs receive from retail-level demand response programs designed to address distribution-level reliability needs in the calculation of SCRs' offer floors, we find NYISO's application of Section 23.4.5.7.5 of its Services Tariff to be unjust and unreasonable.

18. We find that SCRs should continue to be subject to NYISO's buyer-side market power mitigation rules when bidding into NYISO's ICAP markets. However, SCRs' offer floors should include only the incremental costs of providing wholesale-level capacity services. At this time and based on the record before us, we find that payments from retail-level demand response programs designed to address distribution-level reliability needs are not properly considered to be received "for providing Installed Capacity," and therefore should be excluded from the calculation of SCRs' offer floors. Payments from retail-level demand response programs that are designed to address distribution-level reliability needs are for providing a service that is distinct from providing ICAP. As Complainants explain, the dispatch of resources enrolled in retail-level demand response programs differs significantly from dispatch under the SCR program, which reflects the fact that each category of program is designed to address needs on distinct systems.[43]

19. For these reasons, we will evaluate through a paper hearing the retail-level demand response programs listed in the complaint on a program-specific basis to determine whether they are designed to address distribution-level reliability needs and, therefore, whether payments from those programs should be excluded from the calculation of SCRs' offer floors. Nothing in this order precludes parties from making a filing under section 206 of the FPA to request the exclusion of payments from specific retail-level demand response programs not listed in the complaint from the calculation of SCRs' offer floors. The Commission will examine such requests consistent with the terms of this order, including as discussed below, whether the retail-level demand response program addresses solely distribution-level reliability needs.[44] We find that this determination strikes the appropriate balance between: (1) the need to protect NYISO's

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[42] NYISO, Services Tariff, § 23.4.5.7.5 (3.0.0).

[43] Complaint at 32, Ex. A, Evans Aff. ¶ 19. The Complainants note that, from 2011 through 2015, ConEd's DLRP and NYISO's SCR programs overlapped for less than six percent of the time the programs were called, and ConEd's CLRP and NYISO's SCR programs similarly overlapped during less than half of the hours called. *Id.*

[44] *See infra* P 20 (explaining the import of this analysis to assessing whether payments made outside of the ICAP market permit SCRs to suppress ICAP market prices below competitive levels).

ICAP markets from the potential for SCRs to exercise buyer-side market power to suppress ICAP market prices below competitive levels; and (2) ensuring that NYISO's buyer-side market power mitigation rules do not impose inappropriate barriers to SCRs' participation in the ICAP markets.

20. By granting rehearing, we are effectively providing, in part, the Complainants' original requested relief, namely, program-specific review of certain retail-level demand response programs. Using the paper hearing established in this order, we will begin our evaluation of retail-level demand response programs with those programs addressed in the complaint. The information currently contained in the record on these retail-level demand response programs is both stale and limited, however. We therefore reopen the record in this proceeding for a paper hearing to give parties an additional opportunity to submit evidence as to which specific retail-level demand response programs addressed in the complaint are designed to address distribution-level reliability needs and whether these retail-level demand response programs address solely distribution-level reliability needs. We note that this information is important in order for the Commission to assess whether payments made outside of the ICAP market provide SCRs with the ability to suppress ICAP market prices below competitive levels. The parties to the proceeding in Docket No. EL16-92 are invited to submit their initial round of testimony, evidence, and/or argument within 60 days of the date of this order. Reply testimony, evidence, and/or argument may be submitted 30 days thereafter (or 90 days from the date of this order).

21. The Complainants asked the Commission to re-run the mitigation exemption test for any resource that was previously subject to mitigation. NYISO asked for clarification in this proceeding that it would not re-run any mitigation exemption tests. We grant NYISO's request for clarification. The Commission's statement concerning mitigation determinations in the Complaint Order was not intended to expand the categories of Examined Facilities eligible for retesting or to allow for retesting in situations where it would not be allowed under the existing provisions of NYISO's Services Tariff.[45] As in the underlying order, the relief directed here is prospective.

22. In light of our decision to grant rehearing, in part, we reject as moot NYISO's compliance filing to the Complaint Order filed in Docket No. ER17-996-000, as we are no longer requiring NYISO to revise its Services Tariff to exempt all new SCRs from its buyer-side market power mitigation rules.

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[45] *See* Complaint Order, 158 FERC ¶ 61,137 at P 35 (discussing mitigation redeterminations); NYISO Request for Clarification at 1, 3-5 (citing NYISO, Services Tariff, §§ 23.4.5.7.2, 23.4.5.7.3.3, 23.4.5.7.3.5).

The Commission orders:

(A) The requests for rehearing and clarification in Docket No. EL16-92-001 are hereby granted in part and denied in part, as discussed in the body of this order.

(B) NYISO's compliance filing in Docket No. ER17-996-000 is hereby rejected as moot, as discussed in the body of this order.

(C) A paper hearing will be conducted in Docket No. EL16-92. The parties to the proceeding in Docket No. EL16-92 may submit their initial round of testimony, evidence, and/or argument within 60 days of the date of this order. Reply testimony, evidence, and/or argument may be submitted 30 days thereafter (or 90 days from the date of this order), as discussed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council	Docket Nos. EL16-92-001 ER17-996-000 (not consolidated)

v.

New York Independent System Operator, Inc.

New York Independent System Operator, Inc.

(Issued February 20, 2020)

GLICK, Commissioner, *dissenting*:

1. Today the Commission issues a series of orders addressing buyer-side market power mitigation rules in the NYISO capacity market. Notably, none of the orders is actually focused on buyers with market power. Instead, these orders only illustrate the extent to which the Commission has perverted "buyer-side market power mitigation" in order to prop up prices, lock in the current resource mix, and attack state policies that promote clean energy. As I have previously explained, that "is illegal, illogical, and truly bad public policy."[1] Buyer-side market power mitigation should be all about and only about mitigating buyer-side market power. To extent that buyer-side market power mitigation rules apply to buyers without market power, they are *per se* unjust and unreasonable.

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2. When first introduced, buyer-side market power rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise its monopsony power to lower the capacity market clearing price. To the extent that the Commission required buyer-side mitigation

[1] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (*Calpine v. PJM*) (Glick, Comm'r, dissenting at P 1).

of capacity market offers, it limited the mitigation to only resources that could be used effectively for the purpose of depressing capacity market prices or to resources with both the incentive and ability to depress capacity market clearing prices.[2] In short, buyer-side market power mitigation was all about and only about the exercise of buyer-side market power.[3]

3. Over the course of the last decade, however, the Commission has abandoned that narrow focus. It now no longer requires a resource to have market power—or even any incentive to depress capacity market prices—before subjecting that resource to buyer-side market power mitigation. Minimum offer price rules (MOPR) that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decisionmaking.[4] The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the

[2] *See, e.g.*, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 34, 103-104 (2006) (discussing the buyer-side market power mitigation provisions imposed as part of the settlement that created the Reliability Pricing Model); *see also* Richard B. Miller, Neil H. Butterklee & Margaret Comes, *"Buyer-Side" Mitigation in Organized Capacity Markets: Time for a Change?*, 33 Energy L.J. 449, 460-61 (2012) (*Time for a Change?*) (discussing the Commission's early approach to buyer-side market power mitigation).

[3] *See, e.g.*, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 ("The Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply."); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61211, at P 106 (2008) (explaining that buyer-side market power "mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost").

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

basis that it promotes competition.[5] But, in reality, the Commission is not promoting anything remotely resembling actual competition.[6]

4. The basic premise of market competition is that sellers should compete with each other to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the "missing money" that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.[7] That means that capacity market competition should follow a single 'first principle': Enabling resources to vie with each other to require as little "missing money" as possible in order to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly "competitive," resources must have the flexibility to

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

[6] It is also worth noting that this Commission's infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power. One example is the Chairman's premature termination of the enforcement process regarding the nearly 1,000 percent year-over-year increase in prices in MISO Zone 4 and the Commission's failure to provide any justification for its finding that such a rate is just and reasonable. *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm'r, dissenting at PP 4-5). Another is the Commission's failure over the course of the last year to take any action on the complaints regarding PJM's Market Seller Offer Cap. Those complaints allege that PJM's current rules allow for the exercise of market power, which increased the total cost of capacity by more than a billion dollars. *See* PJM Independent Market Monitor Complaint, Docket No. EL19-47-000 at 11-12.

[7] *See, e.g.*, James F. Wilson, *"Missing Money" Revisited: Evolution of PJM's RPM Capacity Construct* 1 (2016), *available at* https://www.publicpower.org/system/files/documents/markets-rpm_missing_money_revisited_wilson.pdf (discussing the concept of "missing money" and the origin of capacity markets in the eastern RTOs); Roy J. Shanker January 10, 2003 Comments, Docket No. RM-01-12-000 (discussing the idea of missing money).

reflect their own expertise, experience, technology, risk tolerance and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. That type of competition can, in theory, produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

5. Instead of promoting that type of competition, the Commission's approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.[8] Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate[9] of what a new resource "should" cost, while existing resources are permitted to bid at a lower level.[10] In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity market

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

[9] In previous orders, the Commission has made much out of so-called unit-specific exemptions, which permit a resource to bid below a default offer floor if it can convince the relevant market monitor that its estimated net going forward costs are below that floor. If the resource succeeds in that endeavor, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing.

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

tend to be disproportionately made up of new technologies and resources needed to satisfy state or federal public policies, the Commission's use of the MOPR also has the unmistakable effect (and, recently, the intent[11]) of slowing the transition to a cleaner, more advanced resource mix.

6. That type of quasi-competition does not lead to an efficient market outcome. As noted, the purpose of capacity markets is to procure the lowest-cost of bundle of resources needed to reliably provide electricity by making resources compete based on the amount of "missing money" they require to cover their costs.[12] To achieve that outcome efficiently, resources' capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly from Commission-jurisdictional markets.[13] If the market ignores some of those costs and revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

7. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.[14] That is

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

[12] *See supra* P 4.

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

[14] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119, at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a minimum offer price rule to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New*

simply wrong. As explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

8. The FPA is clear. The states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity as well as practices affecting those wholesale sales,[15] Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy."[16] Instead, Congress gave the states exclusive jurisdiction to regulate those facilitates.[17]

9. Although those jurisdictional lines are clearly drawn, the practical reality is far messier. As the Supreme Court has observed, the FPA's spheres of jurisdiction are not

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England Inc., 162 FERC ¶ 61,205, at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support.").

[15] Specifically, as relevant here, the Commission's jurisdiction applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification." 16 U.S.C. § 824e(a) (2018); *see also id*. § 824d(a) (similar).

[16] *See id.* § 824(b)(1) (2018); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517–18 (1947) (recognizing that the analogous provisions of the NGA were "drawn with meticulous regard for the continued exercise of state power"). Although these cases generally deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission's role under the FPA.

[17] 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States").

"hermetically sealed:"[18] One sovereign's exercise of its authority will inevitably affect matters subject to the other sovereign's exclusive jurisdiction.[19] For example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.[20] But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation"[21] and the natural result of a system in which regulatory authority is divided between federal and state government.[22]

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

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

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

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

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

10. Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the FPA's dual-federalist structure. When the Commission tries to prevent a state public policy from having an inevitable, but indirect effect on the capacity market, it takes on the role that Congress gave to the states. That is true even where the Commission claims that its only "policy" is to block the effects of state public policies, not the policies themselves. After all, a federal policy of eliminating the effects of state policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

11. Moreover, as former Commission Chairman Norman Bay correctly observed, an "idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation."[23] Instead, public policy and energy markets are inextricably intertwined.[24] Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.[25] Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a "competitive" market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission's goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition or one that is insulated from public policy.

12. And the end result will be deeply inefficient, no matter how many times my colleagues use the words "market" and "competition." The resources procured through that market will require considerably more missing money than would the set of

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elsewhere.").

[23] *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

[24] As the FPA itself recognizes, "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. § 824 (2018).

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

resources procured in the absence of this kind of over-mitigation.[26] That means customers will be paying for more expensive capacity than they should. Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, the capacity markets will procure more capacity than the regions actually need and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

13. In addition, widespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts, especially given the ever-growing threat posed by climate change.[27] A capacity construct that ignores those states' public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the wrong types of resources or resources that are not needed at all. It is hard for me to see how a price signal that encourages redundant investment is a "competitive" or desirable outcome, much less a just and reasonable one.

14. The Commission has suggested that if it succeeds in blocking state policies, then capacity markets will become efficient little islands unto themselves.[28] But a capacity market is a means to an end, not an end in itself. It is a construct that is supposed to minimize the amount of money that customers spend on capacity in order to meet a target reserve margin.[29] A capacity market that does not serve that purpose and is "efficient" only if you disregard the fact that, in the real-world, it produces inefficient results is a market that we ought to reject out-of-hand.

15. Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should focus only on actual market power. In the event

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

[27] *See, e.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at P 55).

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

[29] *See supra* P 4.

that a resource lacks buyer-side market power, its capacity market offer should not be subject to buyer-side mitigation.[30] That result is both more consistent with the FPA's dual-federalist design and the Commission's core responsibility as a regulator of monopoly/monopsony power.[31] That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level.[32] In short, I believe that buyer-side market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.[33]

16. "Actual" is an important distinction here. The Commission has at times suggested that extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.[34] We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is or could be an exercise of market

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

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

[32] Some of the proceedings resolved by today's orders have stretched on for nearly seven years at this point. *See, e.g.*, Independent Power Producers of New York Complaint, Docket No. EL-13-62-000 (filed in May 2013).

[33] In dissents from previous Commission orders addressing MOPRs, I have also argued that the Commission's policy in those particular cases exceeded its jurisdiction because it directly targeted state policies. *E.g.*, *Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 7-17). I still believe that to be true. But my point today is a broader one: The Commission should altogether abandon the use of buyer-side market power regimes to address something other than actual buyer-side market, even putting aside whether the Commission's application of those regimes exceeds its jurisdiction in the first place.

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

power fundamentally misunderstands the role of state regulation under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission's regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.[35]

17. Recently, several parties and even the Commission have argued that if we do not block state policies, prices may drop so low that capacity markets may cease to ensure resource adequacy.[36] As an initial matter, there is simply no evidence that we are even remotely close to a scenario in which states policies render the capacity markets useless.[37] Although capacity prices have fallen in recent years, that has more to do with the entry of more efficient resources and excess supply (which is likely due at least in part to the mitigation regime itself), not state policies. In any case, if we ever reach a point where the only way to "save" a capacity market is to unmoor it from reality by blocking state policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-world outcomes or the Commission usurping the role that Congress reserved for the states.

18. Indeed, the Commission's efforts to "save" capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. One need look no further than New York, where the Public Service Commission has begun a proceeding to consider "taking back" from NYISO the responsibility for ensuring resource adequacy. The Commission's overreach in today's orders will no doubt create greater momentum in that direction.

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

[36] *E.g.*, *ISO New England*, 162 FERC ¶ 61,205 at PP 21, 24; *see Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (asserting that state policies compromise the "integrity" of the capacity market); *see* Calpine Complaint, Docket No. EL16-49-000, at 31-32.

[37] *Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (Glick, Comm'r, dissenting at 9-11).

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19. Turning to the merits of this specific order, I dissent because I believe that buyer-side market power mitigation regimes that do not apply only to buyers with market power are *per se* unjust and unreasonable. Special Case Resources are demand-side resources made up of electricity consumers (i.e., buyers of electricity) that sell capacity based on their ability to reduce their energy consumption from the grid at NYISO's direction. As these resources are buyers of electricity, they should be subject to buyer-side market power mitigation insofar—and only insofar—as they have market power. Because today's order subjects all Special Case Resources to buyer-side market power mitigation rules, I believe that those rules are unjust and unreasonable.

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner