UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Public Service Commission and New York State Energy Research and Development Authority
v. Docket No. EL19-86-001
New York Independent System Operator, Inc.

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued October 15, 2020)

1. On February 20, 2020, the Commission issued an order denying the complaint (Complaint) filed by the New York State Public Service Commission (New York Commission) and the New York State Energy Research and Development Authority (NYSERDA) (collectively, the Complainants) pursuant to section 206 of the Federal Power Act (FPA)[1] against the New York Independent System Operator, Inc. (NYISO),[2] alleging that applying NYISO's buyer-side market power mitigation rules contained in Section 23.4 of NYISO's Market Administration and Control Area Services Tariff (Services Tariff) to electric storage resources is unjust, unreasonable and unduly discriminatory or preferential. New York Parties,[3] Clean Energy Parties,[4] and Indicated

[1] 16 U.S.C. § 824e.

[2] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,119 (2020) (Complaint Order).

[3] New York Parties are the New York Commission, NYSERDA, New York Power Authority (NYPA), Long Island Power Authority (LIPA), and the City of New York.

[4] Clean Energy Parties are the Natural Resources Defense Council (NRDC), the Sustainable FERC Project, the American Wind Energy Association (AWEA), and Advanced Energy Economy.

New York Transmission Owners (Indicated NYTOs)[5] each filed timely requests for rehearing of the Complaint Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,[6] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,[7] we are modifying the discussion in the Complaint Order and reach the same result in this proceeding, as discussed below.[8]

I. Background

3. NYISO's buyer-side market power mitigation rules provide that, unless exempt from mitigation, new Installed Capacity (ICAP) resources must enter the New York City and G-J Locality capacity zones (mitigated capacity zones)[9] at a price at or above an applicable offer floor until their capacity clears 12 monthly auctions.[10] NYISO's buyer-

[5] Indicated NYTOs are Central Hudson Gas & Electric Corporation (Central Hudson); Consolidated Edison Company of New York, Inc. (Con Edison); NYPA; New York State Electric & Gas Corporation (NYSEG); Orange and Rockland Utilities, Inc. (Orange and Rockland); Long Island Power Authority (LIPA); Long Island Lighting Co., d/b/a Power Supply Long Island (PS Long Island); and Rochester Gas & Electric Corporation (RG&E).

[6] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[7] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[8] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Complaint Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[9] NYISO's Services Tariff defines "Installed Capacity" as "External or Internal Capacity, in increments of 100 kW, that is made available pursuant to Tariff requirements and ISO Procedures." NYISO, Services Tariff, § 2.9 (27.0.0). The G-J Locality (mitigated capacity zones) consists of Load Zones G, H, I, and J zones "within which a minimum level of Installed Capacity must be maintained." *Id.* § 2.12 (8.0.0) (defining "Locality").

[10] NYISO, Services Tariff, Attach H. § 23.4.5.7 (26.0.0).

side market power mitigation rules do not apply to new resources entering in the broader New York Control Area (NYCA) footprint.

4. NYISO will exempt a new entrant from the offer floor if it passes either one of two exemption tests under its buyer-side market power mitigation rules: the Part A test, which assesses market capacity conditions, or the Part B test, which evaluates unit-specific costs.[11] If a new resource passes either test, it is not required to offer above a floor price in the capacity market. Under the Part A test, NYISO will exempt a new entrant from the offer floor if the forecast of capacity prices in the first year of a new entrant's operation is higher than the default offer floor, which is 75% of the Net Cost of New Entry (CONE) of the hypothetical unit modeled in the most recent ICAP demand curve reset. This test allows new resources to avoid an offer floor at times when the market is approaching the minimum required 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. Under the Part B test, NYISO will exempt a new entrant from the offer floor if the forecast of capacity prices in the first three years of a new entrant's operation (three-year mitigation study period), is higher than the Net CONE of the new entrant. Under NYISO's currently effective Services Tariff, the Part B test is performed before the Part A test. A resource may also be exempt from buyer-side market power mitigation rules if it meets the requirements for a competitive entry exemption,[12] a renewable resources exemption;[13] or a self-supply exemption.[14]

[11] *Id.* § 23.4.5.7.2 (26.0.0).

[12] *Id.* § 23.4.5.7.9.1 (26.0.0).

[13] *See N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020).

[14] *See N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 2 (2015) (October 2015 Order) (requiring NYISO to revise the rules governing buyer-side market power mitigation in NYISO's Services Tariff to exempt a narrowly defined set of renewable and self-supply resources), *reh'g denied*, 154 FERC ¶ 61,088 (2016) (October 2015 Rehearing Order); *see also N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,121 (2020) (accepting in part, subject to condition, and rejecting in part NYISO's compliance filing to the October 2015 Order and directing NYISO to file a further compliance filing).

5. New electric storage resources participating in the NYISO capacity market are currently subject to the same buyer-side market power mitigation rules as traditional generators.[15]

6. The Complainants asserted that the application of NYISO's buyer-side market power mitigation rules limits electric storage resources' entry and participation in NYISO's capacity market and interferes with federal and state policy objectives, and therefore, is both unjust, unreasonable, and unduly discriminatory, and inconsistent with Order No. 841.[16] The Commission denied the Complaint.

II. Discussion

7. We sustain the result in the Complaint Order, as modified by the discussion below. We continue to find that the Complainants failed to show that the existing rate, which applies buyer-side market power mitigation to new electric storage resources offering into the NYISO capacity market, is unjust, unreasonable or unduly discriminatory and preferential[17] or inconsistent with Order No. 841.[18] Further, the Commission's denial of the requested exemption reflected reasoned decision-making based on substantial record evidence,[19] including economic theory and the opinion of NYISO's Market Monitoring Unit's (MMU).[20]

---

[15] *See* Complaint Order, 170 FERC ¶ 61,119 at P 4 & n.10 (citing *N.Y. Indep. Sys. Operator, Inc*., 169 FERC ¶ 61,225 (2019) (First Order No. 841 Compliance Order), *on compliance and addressing requests for rehearing*, 172 FERC ¶ 61,119 (2020) (Second Order No. 841 Compliance and Rehearing Order)).

[16] *See* Complaint Order, 170 FERC ¶ 61,119 at P 5; *see also Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127, at P 3 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019).

[17] *See* Complaint Order, 170 FERC ¶ 61,119 at P 36.

[18] *See id*. P 40.

[19] Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011); *see La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (substantial evidence "requires more than a scintilla, but can be satisfied by less than a preponderance of evidence").

[20] *See* Complaint Order, 170 FERC ¶ 61,119 at PP 37-44.

A. Section 206 Burden and Price Suppression

1. Complaint Order

8. The Commission found that the Complainants had failed to meet their burden under section 206 of the FPA to show that the existing buyer-side market power mitigation rules in Section 23.4 of NYISO's Services Tariff are unjust, unreasonable, or unduly discriminatory or preferential.[21] As a result, the Commission denied both the Complainants' (1) requested blanket exemption from the buyer-side market power mitigation rules for electric storage resources, as well as their (2) alternative limited 300 megawatt (MW)/year exclusion from the buyer-side market power mitigation rules for new electric storage resources.[22]

9. Specifically, the Commission found that the Complainants failed to demonstrate that the unmitigated entry of electric storage resources in NYISO's mitigated capacity zones would not result in the suppression of capacity prices.[23] The Commission pointed out that "neither the Complainants nor Clean Energy Parties addressed the aggregate impact of the entry of numerous small resources into the NYISO market."[24] The Commission stated that, "[a]s explained in the October 2015 Order, the cumulative effect of multiple smaller units could have a significant impact on ICAP market prices."[25] The Commission further highlighted the MMU's concern with exempting these resources because "buyer-side market power mitigation is driven not by the size of individual projects, but by the aggregate amount of generating capacity that receives out-of-market subsidies."[26] The Commission thus disagreed with the Complainants "that electric storage resources could not be effective tools of price suppression and should therefore qualify for exemption from NYISO's buyer-side market power mitigation rules."[27]

10. Noting that NYISO's buyer-side market power mitigation measures are applied to all new entrants in the mitigated capacity zones unless an entrant demonstrates that it is

---

[21] *Id*. P 36.

[22] *Id*. PP 1, 36, Ordering Paragraph.

[23] *Id*. P 39.

[24] *Id*.

[25] *Id*. P 39 & n.90 (citing October 2015 Order, 153 FERC ¶ 61,022 at P 62).

[26] *Id*. P 29 & n.92 (citing MMU Comments at 8).

[27] *Id*. P 39.

eligible for an exemption, the Commission pointed out that electric storage resources are able to participate in the market similar to any other resources.[28] The Commission further explained that NYISO's buyer-side market power mitigation rules do not foreclose these resources' ability to pass the Part B test, which already takes into consideration certain incentives, such as explicitly considering the expected benefits to zero-emissions resources that result from New York's participation in the Regional Greenhouse Gas Initiative.[29] The Commission added that electric storage resources are also free to seek NYISO's competitive entry exemption, or, alternatively, NYISO's self-supply exemption.[30]

11. The Commission also found that "[buyer-side] market power mitigation is not inconsistent with Order No. 841's mandate that ISOs/RTOs reduce or eliminate barriers to electric storage participation in their markets" because "Order No. 841 does not address buyer-side market power mitigation."[31] Thus, the Commission reasoned, Order No. 841 neither mandates that electric storage resources be exempt from mitigation, nor states that buyer-side market power mitigation, on its own, presents an impermissible barrier to entry."[32]

2. Rehearing Requests

12. New York Parties state that section 206 of the FPA requires a two-prong analysis, pursuant to which the Commission must: (1) determine whether an existing rate is unjust, unreasonable or unduly discriminatory or preferential;[33] and, if so (2) impose a new (replacement) rate.[34] New York Parties and Indicated NYTOs argue that the Commission disregarded this two-step analysis, conflating (1) what a complainant must show to prove the existing rate is unjust and unreasonable or unduly discriminatory or

---

[28] *Id*. P 38.

[29] *Id*.

[30] *Id*.

[31] *Id*. P 40.

[32] *Id*.

[33] New York Parties Rehearing Request at 26 (citing *Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017) (quoting 16 U.S.C. § 824e(a))).

[34] *Id*. (citing *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1143 (D.C. Cir. 1984)).

preferential with (2) support for the proposed remedy.[35] Indicated NYTOs assert that the Commission erred by imposing a burden on the Complainants to prove that applying unmitigated entry, or annual mitigation of up to 300 MW, of new electric storage resources in NYISO's mitigated capacity zones, would not result in the suppression of ICAP prices.[36] Indicated NYTOs argue that by confusing section 206's two steps, the Commission shirked twin obligations (1) to decide whether the Complaint presented substantial evidence that NYISO's buyer-side mitigation rules over-mitigated the potential for electric storage resources to suppress ICAP prices through the exercise of buyer-side market power, and (2) to establish the appropriate remedy.[37]

13. New York Parties assert that the Commission analyzed the Complaint using a novel standard that contradicts precedent and is inconsistent with section 206 of the FPA.[38] New York Parties state that the Commission previously exempted resources from buyer-side market power mitigation where it found they have limited or no incentive and ability to suppress prices. New York Parties contend that the Complainants made a persuasive case that modern electric storage resources lack the size, incentive and ability to utilize bidding practices to artificially depress ICAP prices.[39] New York Parties argue, the Commission abandoned this standard, finding instead that the Complainants failed to demonstrate that the unmitigated entry of electric storage resources in NYISO's mitigated capacity zones would result in the suppression of capacity market prices.[40] New York Parties argue that departing from the original basis for granting NYISO buyer-side market power mitigation authority (i.e., to mitigate buyer-side market power) and applying buyer-side market power mitigation to all new capacity resources, the Commission disregarded the fact that New York's programs procure attributes outside the scope of the ICAP market and outside the Commission's jurisdiction that are not compensated by the ICAP market.[41]

---

[35] *See id*. at 26-27; Indicated NYTOs at 11-12.

[36] Indicated NYTOs Rehearing Request at 11.

[37] New York Parties Rehearing Request at 27; *see also* Indicated NYTOs Rehearing Request at 11.

[38] New York Parties Rehearing Request at 20-27.

[39] Indicated NYTOs Rehearing Request at 11.

[40] New York Parties Rehearing Request at 21 (citing Complaint Order, 170 FERC ¶ 61,119 at P 37).

[41] *See id*. at 12.

14. Clean Energy Parties assert that the application of buyer-side market power mitigation to electric storage resources is unlawful because it lacks a reasoned basis.[42] Primarily, Clean Energy Parties contend that the Commission misapplied buyer-side market power mitigation, because electric storage resources do not have the incentive or the ability to suppress prices and therefore lack market power. Clean Energy Parties continue that the Complaint Order does not allow for electric storage resources to bid based on their true costs. Moreover, Clean Energy Parties argue that the Complaint Order lacks a coherent theory of harm or substantial evidence to support its "extraordinary reordering" of market outcomes.[43] Consequently, Clean Energy Parties argue, the Commission had no reasoned basis to conclude that the application of buyer-side market power mitigation would be just and reasonable under the circumstances.[44]

15. New York Parties argue that electric storage resources are similarly situated to renewable resources and self-supply resources, which are exempt from NYISO's buyer-side market power mitigation rules.[45] New York Parties argue that, like renewable and self-supply resources, electric storage resources lack the incentive and ability to suppress prices. New York Parties assert that New York's focus on developing electric storage resources is unrelated to price suppression, but rather seeks to enhance legitimate State policy objectives. New York Parties add that, similar to the high development costs and low capacity factors characteristic of renewable resources, the costs required to develop storage are significant, and durational limits on storage resources' discharge capacity results in reduced unforced capacity (UCAP).[46] New York Parties argue that these factors, combined with the relatively small size of storage facilities, render electric storage resources ineffective tools for suppressing capacity market prices.[47] New York Parties assert this is particularly important for small electric storage resources because the

[42] Clean Energy Parties Rehearing Request at 3.

[43] *Id*. at 3, 29.

[44] *Id*. at 30.

[45] *See* New York Parties Rehearing Request at 21 & n.39 (citing October 2015 Order, 153 FERC ¶ 61,022 (accepting renewables exemption but directing compliance filing to develop cap to further limit risk they will impact capacity market)).

[46] New York Parties Rehearing Request at 22.

[47] *Id*. at 23 & n.48.

administrative burden of mitigation far outweighs the risk that the resource will significantly affect clearing prices.[48]

16. Indicated NYTOs argue that the Commission erred in presuming that electric storage resources participate in relevant markets on an aggregated basis.[49] They note that the Complainants asserted, and multiple parties agreed, that electric storage resources are limited in size, scope, functionality and location and therefore lack the ability and incentive to exercise buyer-side market power and manipulate bids into the ICAP market to depress prices artificially.[50] Indicated NYTOs state that the Commission determined, however, that it is irrelevant whether an individual electric storage resource or combination of electric storage resources have monopsony or oligopoly power, intent or ability to depress market prices acting alone or in combination with others.[51] Indicated NYTOs assert that, without record evidence, the Commission found that electric storage resources "comprise a single, monolithic market presence that necessarily acts in unison" to artificially depress ICAP market prices.[52] They assert that this finding inexplicably departs from the basis upon which buyer-side mitigation was approved for the NYISO market in the first place.[53]

17. Clean Energy Parties reiterate that the Complaint Order fails to comply with Order No. 841 by preventing electric storage resources from clearing the capacity market, which, they argue, in turn thwarts New York's policy goals.[54] Clean Energy Parties assert "it is simply nonsensical" for the Commission to argue that subjecting electric storage resources to buyer-side market power mitigation "is not inconsistent" with Order No. 841's directive to reduce or eliminate barriers to these resources' participation in organized markets.[55] Clean Energy Parties state that in addition to capacity, electric storage resources are also precluded from contributing other types of technical services,

---

[48] *Id*. at 23.

[49] Indicated NYTOs Rehearing Request at 15-17.

[50] *Id*. at 15-16 & n.46 (citing Complaint Order, 170 FERC ¶ 61,119 at P 19).

[51] *Id*. at 16 & n.47 (citation omitted).

[52] *Id*. at 16 & n.48 (citing Complaint Order, 170 FERC ¶ 61,119 at P 39).

[53] *Id*. at 16 & n.49 (citing *N.Y. Indep. Sys. Operator, Inc*., 122 FERC ¶ 61,211, at P 86 (2008) (Original Buyer-Side Market Power Mitigation Order)).

[54] Clean Energy Parties Rehearing Request at 44.

[55] *Id*. at 44-45 & n.183 (citing Complaint Order, 170 FERC ¶ 61,119 at P 40).

such as resiliency and frequency regulation.[56] Clean Energy Parties contend that this preclusion contradicts Order No. 841's mandate to maximize the ability of storage to contribute to its fullest technical capability.[57] Clean Energy Parties add that applying buyer-side market power mitigation rules to electric storage resources will impact New York City and its environs, where New York has determined electric storage resources will have the broadest range of potential contributions due to the congested nature of the local distribution grid.[58] Clean Energy Parties argue that the Commission thus blocks New York's geographic distribution goals for electric storage resources, including the magnitude and rate of electric storage resources' distribution.[59] Clean Energy Parties continue that buyer-side market power mitigation, which only applies in down-state areas, will steer electric storage resources away from New York City, where the resources are needed, and toward the unconstrained upstate NYISO zones.

3. Commission Determination

18. We conclude that the Commission correctly applied FPA section 206 and continue to find that the Complainants have not met their section 206 burden to show that NYISO's existing buyer-side market power mitigation rules are unjust and unreasonable or unduly discriminatory or preferential with respect to electric storage resources.[60]

19. To prevail at the first step of the two-step section 206 analysis, the Complainants were required to show that the existing rate, which mitigates new electric storage resources in the NYISO capacity market, is no longer just and reasonable because it over-mitigates electric storage resources.[61] As all parties agree, the capacity market is designed to encourage new investment, retain existing needed capacity, and signal when

[56] *Id*. at 45 & n.184 (citing Complaint at 35).

[57] *Id*. at 45 & n.185 (citing Order No. 841, 162 FERC ¶ 61,127 at P 20) (errata version).

[58] *Id*. at 45.

[59] *Id*. at 15-17.

[60] *See* Complaint Order, 170 FERC ¶ 61,119 at P 36.

[61] 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 the rate is unlawful).

capacity is sufficient or when additional resources are needed.[62] Under-mitigation of uneconomic entry can suppress capacity prices; over-mitigation discourages new entry; both extremes jeopardize long-term consumer interests.[63] To attain an appropriate balance between under-mitigation and over-mitigation, the Commission has allowed NYISO to exempt certain resources from the buyer-side market power mitigation rules if they lack the incentive and/or ability to suppress capacity market prices.[64] In the Complaint Order, noting Complainants' and Clean Energy Parties' failure to address the aggregate impact of the entry of numerous small resources in the NYISO markets, the Commission found that electric storage resources, in the aggregate, have the ability to suppress capacity market prices.[65] Thus, given this ability to be "effective tools of price suppression," the Commission determined that Complainants and other parties had not shown that the existing rate is unjust and unreasonable because it over-mitigates electric storage resources.[66]

---

[62] Complaint Order, 170 FERC ¶ 61,119 at P 4 & n.11 (citing Complaint at 9); *see also* Original Buyer-Side Market Power Mitigation Order, 122 FERC ¶ 61,211 at P 103 (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").

[63] *See* NYISO Answer at 3 (internal citations omitted); *see also* Original Buyer-Side Market Power Mitigation Order, 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).

[64] *See, e.g.*, October 2015 Order, 153 FERC ¶ 61,022, *reh'g denied*, 154 FERC ¶ 61,088.

[65] Complaint Order, 170 FERC ¶ 61,119 at P 39 & nn.91-92 (citing October 2015 Order, 153 FERC ¶ 61,022 at P 62; MMU Comments at 8-9); *see also N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137, at P 30 (2017) (exempting Special Case Resources (SCR) from buyer-side market power mitigation because they have limited or no incentive and ability to suppress ICAP market prices), *order on reh'g*, 170 FERC ¶ 61,120, at PP 16-17 (2020) (granting rehearing and finding that all new special case resources (or SCRs) should be subject to buyer-side market power mitigation because a blanket exemption does not 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).

[66] *Id*. PP 36-44.

20. Challengers' argument that the Commission unreasonably conflated (a) what a complainant must prove to prevail on its complaint with (b) the showing a complainant must make to support its remedy, is mistaken. When the Commission determined that the Complainants "fail[ed] to demonstrate that the unmitigated entry of electric storage resources in NYISO's mitigated capacity zones would not result in the suppression of capacity prices,"[67] this meant that the Complainants had failed to meet the first prong of section 206 of the FPA. As noted above, the Complainants had not shown that the existing rate over-mitigates electric storage resources because the Commission found that electric storage resources, in the aggregate, have the ability to suppress capacity market prices.[68] The Commission did not address the second prong of the section 206 analysis, that is, the replacement rate, because the Complainants failed to show the existing rate is unjust and unreasonable.

21. We continue to find that the Complainants did not meet their burden under section 206. While Complainants contend that the Commission lacked evidence that, if electric storage resources were exempt from mitigation, the capacity market would fail to meet resource adequacy requirements, the Commission reasonably relied on the MMU's opinion that electric storage resources have the ability to suppress ICAP market prices absent appropriate mitigation.[69] While, in the short-run, customers might seem to benefit from price suppression, in the long-run, price suppression will discourage investors from continuing to develop resources to meet current and future reliability needs, ultimately harming customers.[70] And, over time, such price suppression could lead to failure to

---

[67] *Id*. P 37.

[68] *Id*. P 39.

[69] Complaint Order, 170 FERC ¶ 61,119 at P 39 & n.92 (citing MMU Comments at 8-9). *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 65 (D.C. Cir. 2014) ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.") (quoting *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987)).

[70] *See* Original Buyer-Side Market Power Mitigation Order, 122 FERC ¶ 61,211 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."); *see also New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, 146 FERC ¶ 61,039, at P 52 (2014); *FPC v. Hope*, 320 U.S. 591, 603 (1944) (evaluating whether end result of agency's balancing customer interests with utility's "legitimate concern with financial integrity of the company" resulted in just and reasonable rates).

meet resource adequacy requirements.[71] The Commission may rely on economic theory to support its determinations.[72]

22. We continue to find that applying buyer-side market power mitigation to electric storage resources will protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market state support. It will enable the NYISO ICAP market to send price signals on which both investors and consumers can rely to guide the entry and exit of economically-efficient capacity resources, attract investment in new and existing resources when the system requires it, and to do so at reasonable cost. This, in turn, supports the capacity market's core objective of maintaining resource adequacy at just and reasonable rates.

23. Further, we disagree with Indicated NYTOs' contention that the Commission presumed that electric storage resources participate in the ICAP market on an aggregate basis. Rather, the Commission was concerned with the combined effect that individual subsidized storage resources would have on clearing prices. When the Commission stated that certain parties failed to address the "aggregate impact of the entry of numerous small resources into the NYISO market[,]"[73] the Commission was referring to the combined impact of individual electric resources bidding into the ICAP market, not electric storage resource aggregation. As the Commission made clear, "buyer-side market power mitigation is driven not by the size of individual projects, but by the *aggregate amount* of generating capacity that receives out-of-market subsidies."[74] This finding does not rest on an assumption that electric storage resources are participating in the market on a coordinated basis, but instead on the impact that the total amount of all of

[71] *See, e.g.*, Original Buyer-Side Market Power Mitigation Order, 122 FERC ¶ 61,211 at P 103; *PJM Interconnection, L.L.C.,* 143 FERC ¶ 61,090, at PP 20-21 (2013), *order on reh'g & compliance*, 153 FERC ¶ 61,066 (2015), *vacated & remanded sub nom. NRG Power Mktg, LLC v. FERC*, 862 F.3d 108, 10 (D.C. Cir. 2017) (noting that "a lower clearing price may reduce the supply of electricity in the long run"); *Cal. Indep. Sys. Operator Corp.*, 142 FERC ¶ 61,248, at PP 63-64 (2013).

[72] *See, e.g.*, *NextEra v. FERC*, 898 F.3d at 14, 23 (D.C. Cir. 2018) (dismissing argument that the Commission did not quantify price suppression resulting from ISO-NE's minimum offer price rule exemption, deferring to Commission's predictive judgment); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (Commission may make findings "based on generic factual predictions derived from economic theory").

[73] Complaint Order, 170 FERC ¶ 61,119 at P 39.

[74] *Id*.

state-subsidized electric storage resources participating individually would have on the ICAP market clearing prices. Thus, we also continue to find challengers' assertion that electric storage resources warrant an exemption because they are small and therefore unlikely to significantly affect capacity prices lacks merit because this argument fails to consider the combined effect that an entire class of state-supported resources would have on ICAP market clearing prices.

24. We further disagree with Indicated NYTOs' contention that the Commission has unreasonably departed from the original purpose of buyer-side market power mitigation, i.e., to check the market power of large buyers. Buyer-side market power mitigation rules may change over time to protect the integrity of the capacity market. Despite the origins of buyer-side market power mitigation rules, they have subsequently been used in centralized markets to prevent resources that have the incentive and/or ability to suppress market prices from exercising that ability.[75] The Complainants have not demonstrated that that concern is unjust and unreasonable as applied to electric storage resources.

25. New York Parties assert that the Commission has historically limited the exemptions from buyer-side market power mitigation in the NYISO market to those resources that lack the incentive and ability to depress ICAP market clearing prices.[76] We note, however, that the Commission has held that "[w]hether to grant an exemption is based on each case's unique facts."[77] The Commission's decision not to exempt electric storage resources from NYISO's buyer-side market power mitigation rules is explicitly tied to electric storage resources' ability to suppress ICAP market clearing prices. The Commission has also held that uneconomic new entry must not be permitted to suppress market prices, *regardless of intent*, finding that "all uneconomic entry has the effect of depressing prices below the competitive level," and that "this [was] the key element that mitigation of uneconomic entry should address."[78] Thus, even if we were to assume that

---

[75] *See, e.g.*, *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058, at PP 4-6 (2020) (citing October 2015 Order, 153 FERC ¶ 61,022, *reh'g denied*, 154 FERC ¶ 61,088).

[76] New York Parties Rehearing Request at 21; *see also* October 2015 Order, 153 FERC ¶ 61,022 at P 10; October 2015 Rehearing Order, 154 FERC ¶ 61,088 at P 31.

[77] *Big Rivers Electric Cooperation v. Midcontinent Independent System Operator, Inc.* ,158 FERC ¶ 61,132, at P 7 (2017) (ISO-New England Renewable Resources Exemption Rehearing Order) (quoting *ISO New England Inc*., 135 FERC ¶ 61,029, at P 171 (2011), *reh'g denied in pertinent part*, 138 FERC ¶ 61,027 (2012)).

[78] *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008); *see also N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,120 at P 17 (granting rehearing of the Commission's decision to require NYISO to exempt all new SCRs from buyer-side market power mitigation because "a blanket exemption does not

electric storage resources lack intent to suppress prices, the Commission reasonably relied on the MMU's analysis that the aggregate entry of electric storage resources (particularly concentrated aggregate entry in specific zones) have the *ability* to suppress capacity market prices.[79]

26. We also continue to disagree with assertions that electric storage resources are similarly situated to other classes of resources that are exempt from NYISO's buyer-side market power mitigation rules.[80] Regarding the renewable resources exemption, in the October 2015 Order, the Commission determined that only *purely intermittent* renewable resources with *low* capacity factors are eligible for the renewable resources exemption based on the Commission's determination that these resources have little or no incentive and ability to exercise buyer-side market power.[81] Electric storage resources are not *purely intermittent,* and therefore we continue to find electric storage resources are not similarly situated to renewable resources and that the Commission appropriately found that the Complainants had not demonstrated that application of buyer-side market mitigation rules to electric storage resources is not unjust and unreasonable, or unduly discriminatory or preferential. We also note that, as the Commission pointed out in the Complaint Order, if an electric storage resource is used for self-supply, and thus would qualify under the self-supply exemption, that electric storage resource may utilize the self-supply exemption.[82]

27. Moreover, as the Commission pointed out, applying buyer-side market power mitigation to new electric storage resources does not unreasonably limit these resources'

---

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"); *see also Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 155 (2018) (noting that "[t]he Commission has previously recognized that resources receiving out-of-market support are capable of suppressing market prices, regardless of intent") (citing *ISO-New England Inc.*, 135 FERC ¶ 61,029 at PP 170-71).

[79] Complaint Order, 170 FERC ¶ 61,119 at P 39 & n.92 (citing MMU Comments at 9).

[80] *See id*. P 41; *see also N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 & n.30 (2017) ("To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences *that are material to the inquiry at hand.*") (emphasis added).

[81] October 2015 Order, 153 FERC ¶ 61,022 at P 47.

[82] *See* Complaint Order, 170 FERC ¶ 61,119 at P 38.

entry and participation in the capacity market; they can still seek to pass the Part B test, which already takes into account certain incentives, such as explicitly considering the expected benefits to zero emissions resources that result from New York's participation in the Regional Greenhouse Gas Initiative, or utilize the competitive entry exemption[83] or, alternatively, as noted above, NYISO's self-supply exemption.[84]

28. Furthermore, we note that the Commission's buyer-side market power mitigation rules are not designed to prevent electric storage resources from participating in the NYISO market. These rules apply equally to all new resources that do not qualify for an exemption. As the Commission explained in the Complaint Order, mitigation rules ensure that the NYISO capacity market provides accurate price signals necessary to drive and signal investment needs.[85] Furthermore, we continue to disagree with Clean Energy Parties that the Complaint Order will block New York's geographic distribution goals for electric storage resources, including the magnitude and rate of their distribution. As the Commission explained, "NYISO's market rules do not obligate or deny developers' choice to build generation resources in any specific capacity zone in New York State."[86]

29. In addition, contrary to Clean Energy Parties' contention, we continue to find that the current mitigation rules for electric storage resources do not conflict with Order No. 841.[87] As the Commission explained in the Complaint Order, Order No. 841 did not address, and therefore did not preclude, application of buyer-side market power mitigation rules to electric storage resources.[88] Indeed, Order No. 841 specifically allowed organized markets to consider whether to mitigate electric storage resources.[89] Furthermore, in the Order No. 841 compliance proceeding, NYISO proposed and the

---

[83] *Consolidated Edison Company of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139 (2015).

[84] October 2015 Order, 153 FERC ¶ 61,022.

[85] Complaint Order, 170 FERC ¶ 61.119 at P 44.

[86] *Id*. P 44.

[87] *Id*. P 40.

[88] *Id*.

[89] Order No. 841, 162 FERC ¶ 61,127 at P 96 (errata version) (stating that "each RTO/ISO may consider whether it is appropriate to update and/or apply existing market power mitigation processes to electric storage resources to alleviate market power concerns").

Commission accepted NYISO's proposal to continue to mitigate new electric storage resources,[90] notwithstanding the fact that New York Entities[91] raised similar objections to the ones set forth in the Complaint in this proceeding.[92] Clean Energy Parties fail to provide any new evidence or changed circumstances or other reason to persuade us that mitigating new electric storage resources now contravenes Order No. 841.[93]

---

[90] *See* First Order No. 841 Compliance Order, 169 FERC ¶ 61,225 at PP 56, 73-74 (accepting NYISO's proposal to continue mitigating electric storage resources over 2 MW but rejecting NYISO's proposal, based on the October 2015 Order's rejection of extensive exemptions to buyer-side market power mitigation, to extend such mitigation to electric storage resources under 2 MW, as beyond the scope of compliance and requiring a section 205 filing).

[91] In that proceeding, New York Entities comprises the New York Commission and NYSERDA, *see* First Order No. 841 Compliance Order, 169 FERC ¶ 61,225 at P 14, who are the Complainants in this proceeding.

[92] *See* New York Entities Protest, Docket No. ER19-457-000, at 9 (filed Feb. 7, 2020) (arguing the compliance filing "contravenes the directives in Order No. 841 and interferes with legitimate State policy objectives"); *see also* First Order No. 841 Compliance Order, 169 FERC ¶ 61,225 at P 14 (noting New York Entities arguments that subjecting electric storage resources to potential mitigation "creates a significant economic and logistical barrier to electric storage resource market entry[,]" "interfer[es] with legitimate state policy objectives" and that electric storage resources should be exempt like other similarly situated resources because "electric storage resources do not have the incentive or ability to exercise market power") (citations omitted).

[93] *See, e.g.*, *Advanced Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 664-65 (D.C. Cir. 2017) (discussing changed circumstances, including market operations and other tariff changes, that could support a finding that an existing rate had become unjust and unreasonable); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1288 (D.C. Cir. 2000) ("A rate order must be modified where 'new evidence warrants the change.'") (quoting *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930)).

We note that, while the NYISO's Order No. 841 compliance proceeding and the instant complaint proceeding were virtually coterminous, on December 20, 2019, two months before issuance of the Complaint Order, the Commission accepted NYISO's proposal to continue to apply buyer-side market power mitigation to new electric storage resources in the First Order No. 841 Compliance Order. Complainants have not shown why the Commission's acceptance of continued mitigation of new electric storage resources as compliant with Order No. 841 was in error.

B. Jurisdiction and State Interests

1. Complaint Order

30. In the Complaint Order, the Commission found that mitigation of electric storage resources in NYISO's capacity market does not divest New York of its jurisdiction over generation facilities or its authority to set generation-related environmental goals.[94] The Commission explained that New York remains free to pursue its environmental objectives through its regulation of electricity generation.[95] The Commission further explained that "[w]here state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable."[96] Therefore, the Commission found that the application of buyer-side market power mitigation to electric storage resources in NYISO appropriately protects the capacity market from the price suppressive effects of resources receiving out-of-market support while preserving the cooperative federalism approach established under the FPA.[97]

2. Rehearing Requests

31. Clean Energy Parties, Indicated NYTOs, and New York Parties reiterate their argument that buyer-side market power mitigation rules violate the FPA's cooperative federalism framework.[98] Specifically, Clean Energy Parties argue the Commission wrongly interferes with New York's exercise of authority over generation facilities, local reliability, retail sales, or other matters the FPA reserved to the states.[99] Clean Energy

[94] Complaint Order, 170 FERC ¶ 61,119 at P 37.

[95] *Id*. P 40.

[96] *Id*. P 37 & n.87 (citing *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014) (affirming the Commission's decision to eliminate the state mandate exemption because "below-cost entry suppresses capacity prices . . . [and the Commission is] statutorily mandated to protect the [PJM capacity auction] against the effect of such entry.")) (*NJBPU*).

[97] *Id*. P 37.

[98] *See* Clean Energy Parties Rehearing Request at 2, 12-24; Indicated NYTOs Rehearing Request at 9; New York Parties Rehearing Request at 2, 4-10.

[99] *See* Clean Energy Parties Rehearing Request at 13 & n.61 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); New York Parties Rehearing Request at 2; Indicated NYTOs Rehearing Request at 13 & n.37 (citing 16 U.S.C. § 824(b)(1); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288,

Parties assert that states' "role as regulators of generation facilities" can include "the right to forbid new entrants from providing new capacity, to require retirement of existing generators, [and] to limit new construction to more expensive, environmentally-friendly units."[100] Clean Energy Parties add that states may exercise these regulatory prerogatives even if such regulations "incidentally affect" wholesale electricity markets.[101]

32. Challengers assert the Complaint Order will inappropriately thwart New York's regulatory goals.[102] Clean Energy Parties state that, while New York has sought to accelerate the amount and rate of electric storage resource deployment by providing financial incentives, the application of buyer-side market power mitigation rules to electric storage resources will impede those objectives by removing a portion of the financial incentive through mitigation.[103] Clean Energy Parties add that the Commission did not analyze the nature and scope of the impact of the proposed buyer-side market power mitigation on New York's regulatory goals and the Complaint Order nullified the New York Energy Storage Order's state regulatory program. Clean Energy Parties state that the Commission thereby upset state and private developer plans and rendered substantial numbers of projects unviable.[104] Clean Energy Parties argue, therefore, that the Complaint Order failed to meaningfully balance the impacts of mitigation on New York State's regulatory goals against the benefits of applying buyer-side market power mitigation.[105]

1296 (2016); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 767; *New York v. FERC*, 535 U.S. 1, at 24 (2002); *Pac. Gas & Elec. Co.*, 461 U.S. at 205)).

[100] Clean Energy Parties Rehearing Request at 13 & n.64 (quoting *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (*Connecticut PUC*)).

[101] *Id*. at 13 & n.66 (citing *Hughes*, 136 S. Ct. at 1298).

[102] Indicated NYTOs Rehearing Request at 20.

[103] Clean Energy Parties Rehearing Request at 15. New York Parties assert New York determined the public interest required the state to support the development of 3,000 megawatts (MW) of energy storage resources by 2030. New York Parties Rehearing Request at 7 & n.15 (citation omitted).

[104] Clean Energy Parties Rehearing Request at 44 & n.182 (citing Evans Aff. ¶¶ 18-19).

[105] *Id*. at 19.

33. New York Parties and Indicated NYTOs reiterate that electric storage resources offer many benefits that are not compensated in wholesale capacity, energy, or ancillary services markets (Other Attributes).[106] Indicated NYTOs argue that state support for Other Attributes is not the kind of "out-of-market" payment that warrants mitigation because it reflects compensation for attributes outside of the ICAP market.[107] Indicated NYTOs argue that the Commission exceeded the scope of its authority and affirmatively encroached upon matters reserved to the state by penalizing (through mitigation) electric storage resources for supplying non-ICAP attributes sought by New York.[108] Citing *Hughes*, Indicated NYTOs state that the Supreme Court has supported states' rights to encourage and foster the development and supply of the non-ICAP attributes provided by electric storage resources without impinging on the Commission's lawful authority under the FPA.[109] Indicated NYTOs argue that the fact that state program payments to electric storage resources are not conditioned on electric storage resources clearing in NYISO's ICAP markets shows that electric storage resources satisfy the Court's requirements under *Hughes* and that electric storage resources are not participating in the NYISO ICAP markets with the intent to suppress prices.[110] Challengers continue that the Commission failed to consider or balance the impacts of the continued application of buyer-side market power mitigation to electric storage resources with New York's

---

[106] *See* Indicated NYTOs Rehearing Request at 6, 8, 13; New York Parties Rehearing Request at 7-8 & n.17. These Other Attributes include, but are not limited to enabling integration and reducing curtailment of more intermittent renewable generation; reducing demand for peak electric generation; reducing greenhouse gas emissions and other pollutants; increasing fuel diversity and system resilience; improving environmental justice; increasing the supply and diversity of resources able to provide ancillary services; improving efficiency and reliability of transmission and distribution systems. New York Parties Rehearing Request at 7-8.

[107] Indicated NYTOs Rehearing Request at 14. Indicated NYTOs assert that recognition of non-ICAP value is far from unprecedented, stating that natural gas-fired generators that choose to participate in ICAP markets have the potential to monetize byproduct gypsum from the flue gas desulfurization process. Indicated NYTOs Rehearing Request at 14 & n.41 (citation omitted).

[108] *Id*. at 14-15.

[109] *Id*. at 15 & n.45 (citing *Hughes*, 136 S. Ct. at 1298) ("States, of course, may regulate within the domain congress assigned to them even when their laws incidentally affect areas within FERC's domain") (citing *Oneok, Inc. v. Learjet*, *Inc*., 135 S. Ct. 1591, 1599 (2015)); *id*. at 1299).

[110] *Id*. at 15 & n.45.

regulatory goals.[111] Indicated NYTOs assert that the Commission is "duty bound" to reasonably accommodate legitimate state interests in procuring Other Attributes and in shaping the fuel and technology mix for electric generation in New York.[112] Clean Energy Parties assert that, while in the Complaint Order the Commission found that it will remain possible to build electric storage resources in any zone in New York, the ability to locate anywhere is not the issue.[113]

34. New York Parties argue that the Commission in the Complaint Order wrongly seeks to counteract steps taken by New York in pursuit of its environmental goals.[114] New York Parties argue that subjecting state-supported electric storage resources to buyer-side market power mitigation, while prohibiting these resources from taking all revenue sources—including state subsidies—into account when setting their market bids, imposes a costly administrative barrier on these resources, artificially increases the prices at which they are permitted to offer capacity, and increases the likelihood that these resources will not clear wholesale markets. New York Parties argue the Commission skews the capacity auction by (1) imposing a substantial and unwarranted economic burden on New York's effort to effectuate State generation policy and (2) forcing New York and its citizens to pay for legacy fossil-fueled resources whose continued operation may be at odds with New York's climate and environmental policies.[115]

35. Clean Energy Parties argue that the Commission's inconsistent treatment of other revenue sources is arbitrary and capricious, unduly discriminatory, and reflects the Commission's improper purpose of interfering with state policy. Clean Energy Parties state that, while the Commission applies buyer-side market power mitigation to electric storage resources on the theory that the out-of-market subsidies these resources receive unfairly distort the capacity market, there are a number of other revenue sources (or benefits that effectively act as revenue) that resources receive that have many common characteristics and have the same impact on capacity market bidding behaviors, as do out-of-market payments that the Commission considers "price suppressive."[116]

---

[111] *See* Clean Energy Parties Rehearing Request at 18-24; *see also* Indicated NYTOs Rehearing Request at 13-17, 21; New York Parties Rehearing Request at 13.

[112] Indicated NYTOs Rehearing Request at 21.

[113] Clean Energy Parties Rehearing Request at 18-19.

[114] New York Parties Rehearing Request at 9.

[115] *Id*. at 9.

[116] Clean Energy Parties Rehearing Request at 23-24.

Clean Energy Parties also contend that the Commission exceeded its statutory authority in the Complaint Order.[117] Clean Energy Parties assert that "[w]ithout a statutory basis," the Commission's decision to value State payments for environmental services at zero in calculating capacity market offers is "unjust and unreasonable and unduly discriminates against resources that earn revenue from selling such services."[118] Clean Energy Parties assert that, instead of facilitating efficient market operations, the Commission frustrates the decisions of state environmental regulators by undoing their economic consequences.

36. New York Parties argue that, in the Complaint Order, the Commission departs without reasoned explanation from *Calpine Corp. v. PJM Interconnection, L.L.C.*,[119] which determined that the Commission may not subject federally-subsidized resources to mitigation because doing so would "disregard or nullify the effects of [the] federal legislation" establishing the subsidy.[120] New York Parties assert the same reasoning applies here because when a state subsidizes or directs the development or procurement of certain resources for environmental or other state-jurisdictional policy reasons, it exercises authority that Congress deliberately and expressly reserved to the states.[121] New York Parties argue the Commission has no more basis to "disregard or nullify the effect of" state action exercising reserved authority under the FPA than it has to counteract a federal subsidy; regardless whether the subsidy is enacted by Congress or by a state, it is not unjust, unreasonable or unduly discriminatory for the resource to rely on the subsidy when participating in a capacity market.[122]

3. Commission Determination

37. We continue to find that applying NYISO's buyer-side market power mitigation rules to electric storage resources does not improperly intrude on matters within New York's jurisdiction.[123] The Commission does not interfere with the states' authority over

[117] *Id*. at 3 (citations omitted), 19-24.

[118] *Id*. at 20.

[119] 169 FERC ¶ 61,239 (2019) (December 2019 PJM Capacity Market Order).

[120] New York Parties Rehearing Request at 10 & n.20 (citing PJM Capacity Market Order, 169 FERC ¶ 61,239 at P 10).

[121] *Id*. at 10.

[122] *Id*.

[123] Complaint Order, 170 FERC ¶ 61,119 at P 37 ("Where state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable.") (citing *NJBPU*, 744 F.3d at

generation facilities, local reliability, retail sales or other matters the FPA reserved to the states merely by implementing wholesale rules affecting matters within the states' jurisdiction.[124] We recognize that the FPA reserves to the state decisions concerning generation; but the FPA provides the Commission with the jurisdiction and authority to regulate rates for wholesale sales made by those generation resources, and we are obligated to ensure that such rates are just and reasonable and not unduly discriminatory or preferential.[125]

38. We disagree with Clean Energy Parties' assertion that the Commission lacked statutory authority to continue to apply buyer-side market power mitigation rules to electric storage resources, given New York's decision to provide out-of-market support to electric storage resources in order to meet its environmental and other goals. As the Commission and courts have recognized, notwithstanding state jurisdiction over resource decisions, the Commission is obligated to ensure that wholesale rates are just and reasonable and not unduly discriminatory.[126] Moreover, insofar as all new resources offering into the NYISO market are mitigated unless specifically exempt, applying buyer-side market power mitigation to electric storage resources is not unduly discriminatory.

---

100).

[124] *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016) ("When FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers—in short, when it takes virtually any action respecting wholesale transactions—it has some effect … on retail rates. That is of no legal consequence."); *N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 at PP 14, 22 (upholding exclusion of public power entities from the self-supply exemption and rejection of proposed 1,000 MW cap on renewables as insufficiently tailored to the mitigated zones; finding that the Commission did not take any action in the February 2020 Order to divest New York of its jurisdiction over generation facilities or to promote renewable generation).

[125] 16 U.S.C. §§ 824, 824d, 824e; *see also Hughes*, 136 S. Ct. at 1296; *Connecticut PUC*, 569 F.3d at 481-82 ("Petitioners are thus compelled to concede that the Commission may directly establish prices for capacity"); October 2015 Order, 153 FERC ¶ 61,022 at P 10 (stating that where state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable).

[126] 16 U.S.C. §§ 824, 824d, 824e; *see also Hughes*, 136 S. Ct. at 1296; *Connecticut PUC*, 569 F.3d at 481-82; October 2015 Order, 153 FERC ¶ 61,022 at P 10 (stating that where state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable).

Electric storage resources are not similarly situated to other categories of resources that are exempt from mitigation, as discussed above.[127]

39. We disagree with parties' contentions that the Commission failed to consider or weigh New York's concerns and we continue to find that the Complaint Order struck the appropriate balance between over- and under-mitigation and accommodating state policies while protecting the integrity of the capacity market.[128] The buyer-side market power mitigation rules are not intended to hinder NYISO's promotion of clean energy and other legitimate public policy objectives; rather, they reflect a reasonable balance between protecting the capacity market from the potential for resources receiving out-of-market state support to suppress prices below competitive levels and ensuring that NYISO's buyer-side market power mitigation rules do not impose inappropriate barriers to electric storage resource participation.[129] This balancing ensures that prices are just

[127] *See supra* P 26.

[128] *See* Complaint Order, 170 FERC ¶ 61,119 at P 7 (finding that "the application of buyer-side market power mitigation to electric storage resources in NYISO appropriately protects the capacity market from the price-suppressive effects of resources receiving out-of-market support while preserving the cooperative federalism approach established under the FPA").

[129] *See, e.g.*, *N.Y. Pub. Serv. Comm'n*, 170 FERC ¶ 61,120 at P 19 (finding that application of buyer-side market power mitigation to new SCRs strikes the appropriate balance between: (1) the need to protect NYISO's ICAP markets from the potential for SCRs to exercise buyer-side market power to suppress ICAP market prices below competitive levels; and (2) ensuring that NYISO's buyer-side market power mitigation rules do not impose inappropriate barriers to SCRs' participation in the ICAP markets); October 2015 Order, 153 FERC ¶ 61,022 at P 51 (limiting exempted renewable resources to those that are both purely intermittent and that have relatively low capacity factors and high development costs and directing NYISO to propose a cap on renewable resources to further balance state policy objectives against the risk of price suppression); *ISO New England*, 162 FERC ¶ 61,205, at P 24 (2018) ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support."); December 2019 PJM Capacity Market Order, 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").

and reasonable[130] such that in the long-term there is sufficient resource adequacy to ensure reliability.[131]

40. New York Parties' contention that the Complaint Order conflicts with the Commission's reasoning in the December 2019 PJM Capacity Market Order is mistaken. In the PJM Capacity Market Order, the Commission determined that all state-subsidized resources that do not qualify for an exemption should be mitigated.[132] However, the Commission determined that it lacked authority to mitigate federal subsidies, which are created by federal statute.[133] In the PJM Capacity Market Order, the Commission rejected the same argument that New York Parties assert here: that state subsidies are on par with federal subsidies because a federal statute recognizes state authority over generation resources. The Commission explained that the source of authority for federal subsidies, as opposed to state subsidies, is not equivalent. Federal subsidies are authorized by federal statutes; state subsidies are authorized by state laws.[134]

41. Further, applying buyer-side market power mitigation to electric storage resources does not constitute direct regulation of generation facilities, nor does it prohibit states from favoring certain resources over others. In *NJBPU*, the court determined that the Commission did not intrude on the state's jurisdiction to determine its resource mix or prevent the state from promoting chosen resources because, in applying PJM's pricing rules to state-subsidized resources, the Commission did not prevent the state from supporting preferred resources, but only required that, if state-subsidized generation is used to meet capacity obligations through PJM's capacity market, the resource must clear

[130] Indeed, as the U.S. Court of Appeals for the Seventh Circuit has explained, the Commission "has taken [state subsidy decisions] as givens and set out to make the best of the situation they produce." *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018).

[131] *See* MMU Comments at 8 ("The capacity market would not be able to attract investment without the NYISO's strong commitment to competitive market principles and [buyer-side market power mitigation] measures that ensure subsidized entry does not drive prices below competitive levels.").

[132] PJM Capacity Market Order, 169 FERC ¶ 61,239 at PP 2, 5.

[133] *Id*. P 10.

[134] PJM Capacity Market Rehearing Order, 171 FERC ¶ 61,035 at P 119.

the capacity market on a competitive basis.[135] Likewise, mitigating new electric storage resources neither requires nor prohibits state action. States remain free to support preferred resources; mitigating electric storage resources only ensures that state choices do not adversely affect the wholesale capacity market and that capacity prices "send appropriate market signals supporting efficient market entry and exit" of resources.[136]

C. Just and Reasonable Rates

1. Complaint Order

42. In the Complaint Order, the Commission found that the fact that the possible exclusion of electric storage resources from the ICAP market could lead to customers "paying twice" for capacity would not render the application of buyer-side market power mitigation to electric storage resources unjust and unreasonable.[137] The Commission explained that while the possibility of double-payment is a risk that states are free to take when crafting legislation, the Commission may exercise its authority to ensure that rates in wholesale markets remain just and reasonable.[138] The Commission further explained that it remains necessary to protect the price signals that the ICAP market provides to incent the economically efficient entry and exit of resources. Therefore, the Commission concluded that it is important to protect capacity market prices from price suppression to ensure that the capacity market can operate as designed.[139]

2. Rehearing Requests

43. Indicated NYTOs state that, by aggregating all new electric storage resources for purposes of assessing the justness and reasonableness of applying buyer-side market power mitigation, the Commission finds that market power would be exercised *per se* because more supply translates to lower prices, regardless of the actual market participation practices of any single electric storage resource or evidence that electric

---

[135] *NJBPU*, 744 F.3d at 97-98; *see also Connecticut PUC*, 569 F.3d at 481-82 (holding that the Commission did not directly regulate generation facilities by requiring resources to meet installed capacity requirements).

[136] *Astoria Generating Co., L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,043, at P 31 (2015).

[137] Complaint Order, 170 FERC ¶ 61,119 at P 42.

[138] *Id*.

[139] *Id*. P 43.

storage resources act or would act in concert.[140] Indicated NYTOs state that the Complaint Order conflates lower prices resulting from normal supply and demand (competition) with artificial downward price manipulation.[141]

44. New York Parties assert that, contrary to the Complaint Order's premise, the entry of electric storage resources into the ICAP market is economic.[142] New York Parties contend that electric storage resources developed in response to New York programs are economic because the resources would incur little, if any, additional cost to provide ICAP in the NYISO markets. For this reason, New York Parties contend that electric storage resources would be willing to provide capacity to NYISO no matter the clearing price. New York Parties also assert that electric storage resources are similar to existing (as opposed to new) resources, which also have low marginal costs to provide capacity and generally bid as price takers.[143] New York Parties note that existing resources are exempt from mitigation, which means that they are all but guaranteed to clear and to be paid for their capacity, while electric storage resources will be mitigated and may fail to clear despite their low marginal ICAP market entry costs. New York Parties point out Commissioner Glick's dissent from the Complaint Order stating that, "[the] administrative pricing regimes" imposed by the Commission "create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions.'"[144] New York Parties contend therefore that the Complaint Order errs in treating electric storage resources differently than existing resources.

45. Clean Energy Parties assert that the Commission failed to address record evidence regarding costs to customers of electric storage mitigation.[145] Clean Energy Parties and New York Parties argue that the Commission breached its duty to protect NYISO

---

[140] Indicated NYTOs Rehearing Request at 16.

[141] *Id*.

[142] New York Parties Rehearing Request at 11.

[143] *Id*. at 12.

[144] *Id*. (quoting Glick, Comm'r, dissenting, at P 5).

[145] Clean Energy Parties Rehearing Request at 3 & n.13 (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 355 (1956); *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010); *NextEra Energy, Inc. v. Pac. Gas & Elec. Co.*, 167 FERC ¶ 61,096, at P 12 (2019); *Duke Energy Carolinas LLC*, 156 FERC ¶ 61,201, at P 36 (2016)).

customers from overpaying for capacity[146] because the Complaint Order will result in over-mitigating the NYISO capacity market, increasing costs needlessly and reducing reliability.[147] Clean Energy Parties and New York Parties also contend that the Commission erred in its reliance on the Third Circuit's opinion in *NJBPU* to deflect responsibility for these increased costs.[148]

46. New York Parties assert that, contrary to precedent, the Complaint Order will require load-serving entities to purchase more capacity than they need, at higher prices than necessary.[149] New York Parties argue the Complaint Order wrongly required electric storage resources to offer capacity at prices above their real net marginal cost.[150] New York Parties assert the Complaint Order makes it likely that electric storage resources will fail to clear the capacity market, NYISO will not count their capacity contributions, and load-serving entities will buy more capacity than needed, at higher prices than necessary.[151] New York Parties add that New York is promoting the development of electric storage resources to provide low-marginal cost capacity to NYISO, and therefore mitigating electric storage resources "props up" prices and inflates consumer costs.[152]

47. Indicated NYTOs argue that New Yorkers should be able to obtain the value of Other Attributes without having to pay twice for capacity in the ICAP market because

---

[146] *Id*. at 4 (citations omitted); New York Parties Rehearing Request at 17-18.

[147] Clean Energy Parties Rehearing Request at 4 & n.15 (citing *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 at P 52); New York Parties Rehearing Request at 17-20.

[148] *See* Clean Energy Parties Rehearing Request at 4 & n.17 (citing *NJBPU*, 744 F.3d 74; *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1067 (D.C. Cir. 1991); *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229, at P 10 (2015); *El Paso Elec. Co. v. Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,182, at 61,939 n.41 (1994)).

[149] New York Parties at 17-18 (citing *ISO New England Inc.*, 165 FERC ¶ 61,202, at P 85 (2018); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005); *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015); *TransCanada Power Mktg. v. FERC*, 811 F. 3d 1, 11-13 (D.C. Cir. 2015)).

[150] *Id*. at 18.

[151] *Id*.

[152] *Id*. at 18-19.

buyer-side market power mitigation is causing *ex ante* over-mitigation.[153] New York Parties add that, while the Commission has jurisdiction to mitigate capacity markets, that does not mean the costs it imposes on customers here are just and reasonable. New York Parties assert that although the Commission states that it must "protect the price signals that [the ICAP markets] provide [] to incent the economically efficient entry and exit of resources,"[154] there is nothing efficient about rejecting state-supported storage resources' offers into the ICAP market at low marginal costs. According to New York Parties, this ignores electric storage resources' contributions to resource adequacy and procures higher cost capacity than needed by the ICAP market.[155] Indicated NYTOs assert that, "[o]n rehearing, the Commission needs to address why increased costs for ICAP due to price maintenance that provide an incentive for incumbent generators not to retire remain just and reasonable in light of the Complaint Order's statement that New Yorkers will be forced to double-pay for ICAP."[156]

48. Indicated NYTOs assert that Complainants provided substantial evidence that any state support for electric storage resources does not contribute to or supply the "missing money" the ICAP market was designed to provide to ensure resource adequacy.[157] Indicated NYTOs essentially argue that the possibility that electric storage resources do not have the same "missing money" needs as generators already in the market could lower costs to consumers, and therefore over-mitigating capacity resources (namely, electric storage resources) increases ICAP prices above the level needed to ensure resource adequacy. They add that, given electric storage resources' provision of Other Attributes not procured through the ICAP market, the ICAP market is doing more than supplying the missing money.[158] Indicated NYTOs thus assert that New York customers are cross-subsidizing artificially high ICAP market prices that are not the product of the normal workings of supply and demand.[159]

---

[153] Indicated NYTOs Rehearing Request at 20-21.

[154] New York Parties Rehearing Request at 19 (citing Complaint Order, 170 FERC ¶ 61,119 at P 43).

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

[156] Indicated NYTOs Rehearing Request at 20.

[157] Indicated NYTOs Rehearing Request at 17-18.

[158] *Id*. at 17-18.

[159] *Id*. at 18 & n.55. Indicated NYTOs note that in an order issued concurrently with the Complaint Order, the Commission found that values are not procured or

3. Commission Determination

49. We disagree with the argument that the Commission disregarded substantial record evidence and failed to consider the cost to consumers that will result from continuing to apply buyer-sider market power mitigation to electric storage resources. Responding to arguments that the possible exclusion of electric storage resources from the ICAP market could lead to customers "paying twice for capacity"—once through funding storage and again through capacity market purchases—the Commission stated that "[w]hile the possibility of double-payment is a risk that states are free to take when crafting legislation, the Commission may exercise its authority to ensure that rates in wholesale markets remain just and reasonable."[160] The Commission reasoned that, regardless whether the ICAP market's ability to provide resource adequacy has been threatened to date, it is important to protect capacity market prices from price suppression to ensure that the capacity market can operate as designed.[161] Additionally, we disagree with Indicated NYTOs' premise that the Commission "has increased [capacity] costs due to price maintenance"[162] and New York Parties' contention that the Commission is propping up capacity market prices.[163] Rather, as we have reiterated in this order, the Commission simply found Complainants failed to show that the existing rate over-mitigates electric storage resources, which have the ability, in aggregate, to suppress capacity market prices.

50. We disagree with Clean Energy Parties' contention that the Commission's reliance on *NJBPU* is misplaced.[164] *NJBPU* articulates principles that are equally applicable here, including that "states may use any resource they wish to secure the capacity they need"

---

compensated under the ICAP market and, as such, the value for non-market attributes earned by certain generators does not justify imposition of market-power mitigation. *See id*. (citing *Indep. Power Producers of N.Y. v. N.Y. Indep. Sys. Operator, Inc*., 170 FERC ¶ 61,118 (2020) (*IPPNY)* (denying rehearing of *IPPNY*, 150 FERC ¶ 61,214 (2015)).

[160] Complaint Order, 170 FERC ¶ 61,119 at P 42 & n.95 (citing *NJBPU*, 744 F.3d at 74 (holding that states "are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s],' . . . including possibly having to pay twice for capacity.")).

[161] *Id*. P 43.

[162] *See* Indicated NYTOs Rehearing Request at 20.

[163] *See* New York Parties' Rehearing Request at 19.

[164] *See* Clean Energy Parties Rehearing Request at 4 & n.17.

and that even if states' preferred generation resources fail to clear the auction, the states are free to use them anyway.[165] More significantly, while states are "free to make their own decisions regarding how to satisfy their capacity needs," they may not impinge on the Commission's jurisdiction over wholesale rates and they will "appropriately bear the costs of [those] decision[s], including possibly having to pay twice for capacity."[166]

51. We find unpersuasive New York Parties' assertion that electric storage resources should not be mitigated because they are similar to existing resources that also have low marginal costs to provide capacity and generally bid as price takers.[167] Even if electric storage resources have low marginal costs, it is still appropriate to recognize the out-of-market state support they receive in their offers. As to New York Parties' argument that the Commission in the Complaint Order wrongly required electric storage resources to offer capacity at prices above their real net marginal cost,[168] to the extent this argument challenges the specific way that NYISO sets the default offer floors for resources, it is beyond the scope of this proceeding.

52. We further conclude that, even if electric storage resources require less compensation from the ICAP market than other resources, this does not justify allowing them to (1) compete in the ICAP market without recognizing any out-of-market state support they may receive and (2) displace other existing resources that do not receive out-of-market subsidies. And, the fact that the ICAP market does not value Other Attributes is irrelevant; the buyer-side market power mitigation rules and exemptions are focused on ensuring that all similarly-situated resources compete equally to provide capacity.

53. Finally, we disagree with the contention that the Commission conflated lower prices resulting from normal supply and demand (competition) with artificial downward price manipulation[169] or that we made any finding regarding the *per se* exercise of market power.[170] Electric storage resources that receive out-of-market support are not competing on an equal basis with those resources that do not receive similar out-of-market support.

---

[165] *NJBPU*, 744 F.3d at 97.

[166] *Id.*

[167] New York Parties Rehearing Request at 12.

[168] *Id*. at 18.

[169] Indicated NYTOs Rehearing Request at 16.

[170] *Id*.

The Commission orders:

In response to the rehearing requests filed by New York Parties, Clean Energy Parties, and Indicated NYTOs, the Complaint Order is hereby modified and the result sustained, 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 and New York State Energy Research and Development Authority
Docket No. EL19-86-001

v.

New York Independent System Operator, Inc.

(Issued October 15, 2020)

GLICK, Commissioner, *dissenting*:

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

2. In this order, the Commission continues to apply buyer-side market power mitigation where it does not belong. The electric storage resources at issue in this proceeding are not buyers, much less buyers with market power. That should be the end of the analysis. Instead, the Commission insists on subjecting those resources to unjust and unreasonable mitigation measures that will inappropriately prop up prices and place the Commission in direct conflict with the State of New York. It is becoming increasingly clear that, unless something changes, the Commission's effort to "protect" NYISO's capacity market may ultimately be what dooms it.

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

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

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

4. The Commission has abandoned that narrow focus. It no longer requires a resource to be a buyer, much less a buyer with market power, before subjecting that resource to buyer-side market power mitigation. Buyer-side market power rules—often referred to as minimum offer price rules or MOPRs—that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decisionmaking.[3] The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the

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

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

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

basis that it promotes competition.[4] But, in reality, it is not competition that the Commission is promoting.[5]

5. The basic premise of market competition is that sellers should compete to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the "missing money" that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.[6] That means that capacity market

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

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

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

competition should follow a single "first principle": Enabling resources to vie with each other to require as little missing money as possible to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly competitive, resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance, and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. True competition can produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

6. Instead of promoting true competition, the Commission's approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.[7] Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate[8] of what a new resource "should" cost, while existing resources are permitted to bid at a lower level.[9] In

---

missing money).

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

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

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

practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources' incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity markets tend to disproportionately be new technologies and resources needed to satisfy state or federal public policies, the Commission's use of MOPRs also has the unmistakable effect (and, recently, the intent[10]) of slowing the transition to a cleaner, more advanced resource mix.

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

8. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.[12] However,

---

resources).

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

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

[12] *See, e.g.*, *NYPSC v. NYISO*, 170 FERC ¶ 61,119 at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a MOPR to state-sponsored resources in order to "protect PJM's capacity market from the price-

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

9. The FPA is clear. The states, not the Commission, are responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity, as well as practices affecting those wholesale sales,[13] Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy."[14] Congress instead gave the states exclusive jurisdiction to regulate generation facilitates.[15]

10. But while those jurisdictional lines are clearly drawn, the spheres of jurisdiction themselves are not "hermetically sealed."[16] One sovereign's exercise of its authority will

---

suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support[.]").

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

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

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

[16] *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601

inevitably affect matters subject to the other sovereign's exclusive jurisdiction.[17] For example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates.[18] But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation"[19] and the natural result of a system in which regulatory authority over a single industry is divided between federal and state government.[20] Maintaining that interplay and permitting each

---

(2015) (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the Natural Gas Act).

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

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

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

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

sovereign to carry out its designated role is essential to the cooperative federalism regime that Congress made the foundation of the FPA.

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

12. Moreover, as former Commission Chairman Norman Bay correctly observed, an "idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation."[21] Instead, public policy and energy markets are inextricably intertwined.[22] Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.[23] Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a "competitive" market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission's goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition, much less one that is insulated from public policy.

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

---

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

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

[23] *See Calpine v. PJM*, 169 FERC ¶ 61,239 (Glick, Comm'r, dissenting at PP 27-28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (*Calpine v. PJM Initial Order*) (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.[24] Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, capacity markets will procure unneeded capacity and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

14. In addition, widespread mitigation undermines a capacity market's ability to establish price signals that efficiently guide resource entry and exit. States will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts, especially given the ever-growing threat posed by climate change.[25] A capacity construct that ignores state public policies will produce price signals that do not reflect the factors that are actually influencing the development of new resources. Those misleading price signals will encourage the participation of the wrong types of resources or resources that are not needed at all. It is hard for me to see how a price signal that encourages redundant investment is a "competitive" or desirable outcome, much less a just and reasonable one.

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

---

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

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

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

[27] *See supra* P 5.

only if you disregard the fact that, in the real-world, it produces inefficient results is a "market" that we ought to reject out-of-hand.

16. Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should be all about—and only about—buyers with market power. In the event that a resource is not a buyer with market power, its capacity market offer should not be subject to buyer-side market power mitigation.[28] That result is both more consistent with the FPA's federalist foundation and the Commission's core responsibility as a regulator of monopoly/monopsony power.[29] That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level. In short, I believe that buyer-side market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.[30]

17. "Actual" is an important distinction here. The Commission has at times justified extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.[31] We should abandon that notion as well. States regulate for a

---

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

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

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

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

variety of reasons and acting as if any regulation is an exercise of market power fundamentally misunderstands the role Congress reserved for the states under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission's regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.[32]

18. Some argue that Commission intervention is necessary to "protect" the market from states' exercise of their authority under the FPA. But if we ever reach a point where the only way to "save" a capacity market is to unmoor it from reality by blocking the effects of state policies, then it will be past time to find an alternative approach to ensuring resource adequacy—one whose feasibility does not depend on inefficient real-world outcomes or the Commission usurping the role that Congress reserved for the states. What is more, that perspective completely ignores previous state and federal actions to shape the generation mix, which have collectively done far more to shape the current generation mix than the steps that states are taking today.[33]

19. Indeed, the Commission's efforts to "save" capacity markets are more likely to hasten their eventual demise. The more the Commission interferes with state public policies under the pretext of mitigating buyer-side market power, the more it will force states to choose between their public policy priorities and the benefits of the wholesale markets that the Commission has spent the last two decades fostering. Although that should be a false choice, the Commission is increasingly making it into a real one. New York provides the perfect example as the Public Service Commission has begun a proceeding to consider "taking back" from NYISO the responsibility for ensuring resource adequacy.[34] And numerous states are considering leaving the other eastern RTOs' capacity markets, which also have rules that hinder states' exercise of their

---

the resource that the resource is mitigated for the conduct of the state.").

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

[33] *See, e.g.*, *Calpine v. PJM Initial Order*, 163 FERC ¶ 61,236 (Glick, Comm'r, dissenting, at 6-9) (discussing the history of federal and state subsidies that have shaped the resource mix).

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

resource decisionmaking authority. The Commission's overreach, affirmed in today's order, will no doubt create greater momentum in that direction.

II. Today's Order is Arbitrary and Capricious

20. I believe that the foregoing analysis compels the Commission to go back to basics on buyer-side market power mitigation.[35] Where entities are not buyers, they categorically should not be subject to buyer-side market power mitigation.[36] End of discussion. And where entities are buyers, the Commission should impose buyer-side market power mitigation only when those buyers possess actual market power.[37]

21. Today's order fails that standard. When participating in NYISO's capacity market, electric storage resources are not buyers, much less buyers with market power. Accordingly, the application of buyer-side market power mitigation to electric storage resources is *per se* unjust and reasonable.

22. The Commission does not contest the facts.[38] Instead, it responds that "[b]uyer-side market power mitigation rules may change over time to protect the integrity of the capacity market."[39] None of the rehearing parties are disputing the fact that buyer-side market power mitigation rules—like any market rules—can and will change over time. Their point is that those rules have changed in a manner that is arbitrary and capricious.[40]

---

[35] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,119 (2020) (Glick, Comm'r, dissenting at PP 1, 19).

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

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

[38] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,060, at P 24 (2020) (Order) ("Despite the origins of buyer-side market power mitigation rules, they have subsequently been used in centralized markets to prevent resources that have the incentive and/or ability to suppress market prices from exercising that ability.").

[39] *Id.*

[40] NYTOs Rehearing Request at 7 ("[T]he Complaint Order's anticompetitive effects cannot be saved by the economic theory of prevention of monopsony power because there is no basis to presume or find that the [electric storage resources], individually or as a class, have buyer-side market power."); Clean Energy Groups Rehearing Request at 24-29 (contending that "the Commission should approve the exemptions requested in the Complaint because [electric storage resources] have neither the incentive nor the ability to suppress capacity market clearing prices and thus lack market power, which is the basis for the Commission's authority to approve mitigation");

In particular, they argue that it is not reasonable to impose measures for mitigating buyer-side market power where there is no buyer-side market power to begin with.[41] Noting the fact that those rules have changed is not a reasoned response to the argument that the change is arbitrary and capricious.[42] After all, the mere fact that a rule *can* change does not make the change at issue just and reasonable.

23. The Commission also argues that it is appropriate to evaluate market power here by looking to whether all electric storage resources collectively possess something akin to buyer-side market power.[43] But, as I explained in my dissent from the underlying order, that is not how the Commission evaluates market power in other circumstances.[44] We do not, for example, consider whether all natural gas-fired units collectively possess market power and mitigate them on that basis.[45] It would be absurd to do so because individual resources do not share incentives or act on a class-wide basis. As such, if buyer-side market power is actually the concern, an inquiry based on an entire resource class's ability to "suppress prices" is not a reasonable approach to addressing that concern.

24. In addition, the Commission's rejection of the arguments for adopting a limited exemption from buyer-side market power mitigation is similarly unreasoned. The New York Parties argue that the Commission should have created an exemption for electric storage resources in much the same way that it created exemptions—albeit limited ones—for renewables and self-supply resources.[46] As they explain, the same principles on which the Commission relied to justify those exemptions support an exemption from

---

New York Parties Rehearing Request at 17-20.

[41] *See, e.g.*, NYTOs Rehearing Request at 12-13; Clean Energy Groups Rehearing Request at 24-29.

[42] After all, the fact that an agency may permissibly change policy does not mean that it is permissible for an agency to adopt arbitrary and capricious policy. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[43] Order, 172 FERC ¶ 61,060 at P 19.

[44] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,119 (Glick, Comm'r, dissenting at P 19 & n.38).

[45] *Id.* (Glick, Comm'r, dissenting at n.38).

[46] New York Parties Rehearing Request at 21-24 ("The record in this proceeding demonstrates that [electric storage resources] are similarly situated to those resources the Commission has previously found warranted exemptions.").

mitigation for at least some electric storage resources.[47] The Commission response is bewildering, to put it mildly. It suggests that electric storage resources are not similarly situated to the renewable resources receiving exemptions, because "the Commission determined that only *purely intermittent* renewable resources with *low* capacity factors are eligible for the renewable resources exemption based on the Commission's determination that these resources have little or no incentive and ability to exercise buyer-side market power."[48] And, the Commission notes, "[e]lectric storage resources are not *purely intermittent*."[49]

25. But, no one is arguing that electric storage resources are intermittent, much less "*purely intermittent*." Nor should they because the Commission has never said that only resources that are purely intermittent can or should qualify for exemptions from buyer-side market power mitigation rules. Rather, the Commission has previously provided exemptions from buyer-side market power mitigation based upon whether the resource has the incentive and ability to artificially suppress prices.[50] It is abundantly clear that the rehearing requests are arguing that electric storage resources are similarly situated to other exempt resources because they lack the incentive *and* ability to depress the capacity market clearing price—not that they are intermittent.[51] In other words, the rationale relied upon to support limited exemptions for other resource types supports a similar exemption for electric storage resources. Responding to that argument with a reference to the uncontested fact that electricity storage resources are not intermittent renewables is not a reasoned response. In fact, it is completely nonsensical.

---

[47] *Id.*

[48] Order, 172 FERC ¶ 61,060 at P 26.

[49] *Id.*

[50] *See, e.g.*, *N.Y. Pub. Serv. Comm'n v. N.Y Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at PP 47, 51 (2015) (explaining that "purely intermittent [renewable resources] and that have relatively low capacity factors and high development costs . . . have limited or no incentive and ability to artificially suppress capacity prices").

[51] New York Parties Rehearing Request at 22 ("The record in this proceeding demonstrates that [electric storage resources] are similarly situated to those resources the Commission has previously found warranted exemptions. Like renewables and self-supply, storage resources lack the incentive and ability to suppress prices."); *see also* Order, 172 FERC ¶ 61,060 at P 19 ("To attain an appropriate balance between under-mitigation and over-mitigation, the Commission has allowed NYISO to exempt certain resources from the buyer-side market power mitigation rules if they lack the incentive and/or ability to suppress capacity market prices.").

26. The bottom line is that the Commission has failed to justify the continued use of buyer-side market power mitigation measures against individual energy storage resources. And it has similarly failed to explain the differing approaches it has taken to issuing exemptions from mitigation for different types of resources. Indeed, today's order leaves the distinct impression that if the New York Parties had sought an exemption for electric storage resources a few years earlier, they very likely would have received it and been in a better place today. All told, today's order aptly illustrates what a mess buyer-side market power mitigation has become in New York.

* * *

27. As I have explained before, we must not let the detailed questions addressed in this order cause us to lose the forest for the trees.[52] New York is exercising its reserved authority under the FPA to regulate generation resources as part of its ambitious efforts to address climate change.[53] As part of that policy, it is seeking to promote electric storage resources and secure the multitude of benefits that those resources can provide to the grid.[54] The Commission's approach to buyer-side market power mitigation puts it at loggerheads with the State in a way that is entirely unnecessary and wholly unproductive.

28. The Commission can use all the buzz words it wants—"integrity,"[55] "price suppression,"[56] or even just the ad nauseam invocation of markets[57]—without changing the fact that we are witnessing a federal agency attempt to stamp out the effects of a state's efforts to promote a clean energy future. That does not end well. Not only does it undermine the jurisdictional balance that Congress created when it enacted the FPA, it

---

[52] *See N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 (2020) (Glick, Comm'r, dissenting at P 31).

[53] *See* New York Parties Complaint at 2, 15-16, 20-21 (filed July 19, 2019) (discussing the New York State Climate Leadership and Community Protection Act (CLCPA)).

[54] *See, e.g.*, Clean Energy Groups Rehearing Request at 8-9 ("The efficient and widespread deployment of [electric storage resources] at scale is critical to meeting the CLCPA's requirement of 3,000 MW of energy storage as well as the law's broader renewable electricity and greenhouse gas reduction requirements.").

[55] Order, 172 FERC ¶ 61,060 at P 39.

[56] *E.g.*, *id.* PP 21, 49.

[57] *Id.*, *passim*.

also leads to higher prices[58] and casts doubt on the long-term viability of the markets that we should be striving to foster and protect.

29. Finally, today's order is yet another example of why we should pay attention to what the Commission does, not what it says. We've heard a lot recently about concerns regarding climate change, respect for states' rights, and enthusiasm for emerging technologies, including energy storage. In today's order, all those concerns are on full display. And yet, as usual, when push comes to shove, the Commission inevitably choses the path that will prop up prices and freeze in place the current resource mix. Until that changes, even once, we should remain skeptical that professed concerns about climate, states' rights, or emerging technologies are anything more than window dressing.

For these reasons, I respectfully dissent.

_____

Richard Glick
Commissioner

[58] On this score, the Commission's response is essentially that any price increases are the fault of the states for having exercised their authority over the generation mix in the first place. *Id.* PP 49-50. Blaming the states for exercising their reserved authority, especially when it was Commission policy that earlier this year underwent an abrupt change and created the problem, is hardly a model of good government, much less reasoned decisionmaking. *See* New York Parties Rehearing Request at 20 ("[T]he Commission not only failed to protect consumers from excessive rates and charges; it is responsible for foisting those charges on consumers."); *see also id.* at 18 (explaining that describing the risk of double payment as one "'states are free to take'" is "backwards").