

170 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Independent Power Producers of New York, Inc.

Docket Nos. EL13-62-001
EL13-62-002

v.

New York Independent System Operator, Inc.

ORDER GRANTING IN PART AND DENYING IN PART
CLARIFICATION AND REHEARING

(Issued February 20, 2020)

1. On March 19, 2015, the Commission issued an order denying a complaint filed by Independent Power Producers of New York, Inc. (IPPNY) against the New York Independent System Operator, Inc. (NYISO).¹ The complaint alleged that NYISO's Market Administration and Control Area Services Tariff (Services Tariff) is unjust and unreasonable because it permits existing capacity resources needed for short-term reliability and capacity resources with repowering agreements to offer their capacity at *de minimis* price levels into NYISO's Installed Capacity (ICAP) markets. On April 20, 2015, Entergy Nuclear Power Marketing, LLC (Entergy) and IPPNY each filed requests for clarification and rehearing of the March Order. For the reasons discussed below, we grant in part and deny in part the requests for clarification and rehearing.

I. Background

2. On May 10, 2013, IPPNY filed a complaint against NYISO (Original Complaint), arguing that NYISO's Services Tariff is unjust and unreasonable because, by allowing for *de minimis* offers from existing capacity resources that would have exited the market but for the determination that those resources are needed for reliability, NYISO is allowing

¹ *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, at P 1 (2015) (March Order).

artificial price suppression in its ICAP markets.² IPPNY requested that the Commission either: (1) exclude from the ICAP markets uneconomic existing capacity resources that would have exited the market but for receipt of out-of-market payments under reliability must run (RMR) or Reliability Support Services Agreements (RSSAs); or (2) require such resources to offer their capacity into the ICAP markets at offers no lower than their going-forward costs.³ IPPNY pointed to two RSSAs, one with Dunkirk Power, LLC (Dunkirk), and one with Cayuga Operating Company, LLC (Cayuga), both of which were filed with and approved by the New York Public Service Commission (New York Commission).⁴ According to IPPNY, both RSSAs were executed after the resource owners filed notices with the New York Commission to mothball units that were not economic. IPPNY asserted that the Cayuga RSSA expressly required that the capacity covered by the agreement be offered into the ICAP market at a *de minimis* price, which IPPNY argued had already artificially suppressed prices.⁵ Both RSSAs pertained to units located in NYISO's Rest of State zone, and not to units located in one of the mitigated capacity zones.⁶

3. On March 25, 2014, IPPNY submitted an amendment to its Original Complaint (Amended Complaint) to address the executed term sheet between National Grid USA Service Company, Inc. (National Grid) and Dunkirk (Dunkirk Repowering Term Sheet). IPPNY asserted that the Dunkirk Repowering Term Sheet contemplated significant out-of-market payments to Dunkirk for repowering uneconomic units with more capacity and for a longer term than is needed to address a local reliability need that could be addressed at far lower cost through transmission upgrades.⁷ IPPNY contended that the Dunkirk Repowering Term Sheet would, over its ten-year term, significantly suppress ICAP market prices.

² *Id.* P 2.

³ *Id.* P 14.

⁴ *Id.* P 3.

⁵ *Id.* P 4.

⁶ NYISO's buyer-side market power mitigation rules apply to new resources entering the New York City or G-J Locality ICAP markets (mitigated capacity zones). They do not apply to the broader New York Control Area footprint, including the Rest of State and Long Island zones. NYISO, Services Tariff, §§ 2.13 (18.0.0), 23.4.5.7 (26.0.0).

⁷ March Order, 150 FERC ¶ 61,214 at PP 18–20.

4. In the March Order, the Commission denied IPPNY's Original Complaint, finding that IPPNY had failed to meet its burden pursuant to Section 206 of the Federal Power Act (FPA)⁸ to show that NYISO's Services Tariff was unjust and unreasonable.⁹ The Commission stated that IPPNY did not "demonstrate[] harm to the market . . . that justifies excluding the Cayuga or Dunkirk units or conduct that is inconsistent with competitive bidding behavior."¹⁰ Rather, the Commission agreed with NYISO's market monitoring unit (MMU) that "the units are economic from the perspective of satisfying . . . NYISO's reliability requirements."¹¹ The Commission reasoned that it would be reasonable to expect the units to submit low offers because their going-forward costs, taking into account RSSA revenues, are likely to be low. The Commission explained that, because the units are needed for reliability and would clear a capacity market that reflected local reliability needs, it is proper to deduct the RSSA revenues from going-forward costs because those revenues "reflect the value of the services provided by these resources to customers."¹² In addition, the Commission was not persuaded by IPPNY's argument that significant ICAP market price suppression has occurred in the Rest of State "solely as a consequence of the RSSAs," finding instead that any change in ICAP market prices "cannot be attributed to one cause, i.e., the RSSAs."¹³

5. The Commission also denied the Amended Complaint on the basis that IPPNY failed to meet its burden pursuant to section 206 of the FPA.¹⁴ While the Commission found that the Dunkirk Repowering Term Sheet "raise[d] potential issues of artificial price suppression," the Commission noted that it "must consider the current state of the NYISO market, the existing market rules, and the unique aspects" of the Dunkirk Repowering Term Sheet.¹⁵ Moreover, with respect to concerns about future out-of-market payments to uneconomic existing capacity resources, the Commission recognized NYISO's and MMU's "obligation and authority . . . to identify and address any anti-

⁸ 16 U.S.C. § 824e (2018).

⁹ March Order, 150 FERC ¶ 61,214 at PP 64–65.

¹⁰ *Id.* P 65.

¹¹ *Id.* P 66.

¹² *Id.*

¹³ *Id.* P 67.

¹⁴ *Id.* PP 70–71.

¹⁵ *Id.*

competitive conduct that may arise” and found that there was “no reason to presume that either entity would fail to exercise this authority should issues arise in the future.”¹⁶

6. Although the Commission denied the Amended Complaint, the Commission expressed concerns regarding potential price suppressive impacts of repowering agreements similar to the Dunkirk Repowering Term Sheet and whether changed circumstances in the Rest of State zone signaled a need for NYISO to adopt buyer-side market power mitigation rules for that zone.¹⁷ In light of these concerns, the Commission directed NYISO to establish a stakeholder process to consider whether buyer-side market power mitigation measures are needed to address these concerns, and to submit an informational report.¹⁸

7. NYISO submitted two informational reports on June 17, 2015, and December 16, 2015, respectively.

II. Notice of Filing and Responsive Pleadings

8. Notice of NYISO’s June 17, 2015 informational report was published in the *Federal Register*, 80 Fed. Reg. 36,334 (2015), with comments and protests due on or before July 8, 2015.¹⁹ The New York Commission, Indicated TOs,²⁰ IPPNY, Entergy, and MMU filed comments and/or protests. NYISO, IPPNY, and Entergy filed answers.

9. Notice of NYISO’s December 16, 2015 informational report was published in the *Federal Register*, 80 Fed. Reg. 80,762 (2015), with comments and protests due on or

¹⁶ *Id.* P 72 n.98 (citing NYISO, Services Tariff, §§ 23.1.1, 30.3.3, 30.4).

¹⁷ *Id.* PP 1, 69, 71.

¹⁸ *Id.* PP 1, 71.

¹⁹ Subsequently, the comment period was extended to July 17, 2015. *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, Notice of Extension of Time, Docket No. EL13-62-002 (June 24, 2015).

²⁰ Indicated TOs consist of Consolidated Edison Company of New York, Inc.; Orange and Rockland Utilities, Inc.; New York State Electric and Gas Corporation; Rochester Gas and Electric Corporation; Central Hudson Gas and Electric Corporation; New York Power Authority; and Power Supply Long Island.

before January 11, 2016.²¹ MMU, the New York Commission, IPPNY, and Consumer Parties²² filed comments and/or protests. The New York Transmission Owners,²³ IPPNY, and the New York Commission filed answers.

10. On January 9, 2017, the Electric Power Supply Association filed a Request for Expedited Action regarding NYISO's informational reports. Nuclear Energy Institute; New England Power Pool Participants Committee; Natural Resources Defense Council and Sustainable FERC Project (jointly); Exelon Corporation; and the New York Commission filed answers.

III. Requests for Clarification and Rehearing

A. Original Complaint

11. Entergy seeks clarification that the Commission's findings concerning the Dunkirk and Cayuga RSSAs apply only to the units covered by those RSSAs and do not predetermine the outcome of the NYISO RMR proceeding that the Commission established pursuant to section 206 of the FPA in Docket No. ER16-120.²⁴ Entergy contends that the facts the Commission considered were limited in scope and narrowly

²¹ Subsequently, the comment period was extended to January 19, 2016. *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, Notice of Extension of Time, Docket No. EL13-62-002 (Dec. 28, 2015).

²² Consumer Parties consist of Multiple Intervenors and the City of New York.

²³ The New York Transmission Owners consist of the Indicated TOs and Niagara Mohawk Power Corporation d/b/a National Grid.

²⁴ Entergy April 20, 2015 Rehearing Request at 1–2; *see also N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) (NYISO RMR Order) (instituting proceeding requiring NYISO to submit tariff revisions governing retention of and compensation to generating units needed for reliability and a *pro forma* service agreement for RMR service), *order on reh'g & compliance*, 155 FERC ¶ 61,076 (2016) (First NYISO RMR Compliance Order), *order on reh'g & compliance*, 161 FERC ¶ 61,189 (2017) (Second NYISO RMR Compliance Order), *order on reh'g*, 163 FERC ¶ 61,047 (2018), *order on compliance*, 166 FERC ¶ 61,203 (2019); *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER16-120-008 (Sept. 27, 2019) (delegated order). IPPNY similarly asserts that the practical impact of the Commission's findings regarding the Dunkirk and Cayuga RSSAs should be limited given the generic NYISO RMR proceeding. IPPNY states that it would welcome Commission confirmation that its findings are limited, but still seeks rehearing. IPPNY April 20, 2015 Rehearing Request at 17–18 & n.55.

focused on the Dunkirk and Cayuga RSSAs.²⁵ Entergy asserts that the Commission will have the opportunity to review a more complete record in the RMR proceeding and could, based on that record, require rules to protect market competitiveness.²⁶ Alternatively, if the Commission does not grant Entergy's request for clarification, Entergy seeks rehearing of the Commission's finding that mitigation measures should not now be applied to the Dunkirk and Cayuga RSSAs.²⁷

12. IPPNY requests rehearing of the Commission's finding that Dunkirk and Cayuga are economic. IPPNY asserts that it is undisputed that Dunkirk's and Cayuga's owners stated that the units were uneconomic based on then-current and forecasted market prices.²⁸ IPPNY also challenges MMU's analysis because, according to IPPNY, whether a unit is economic cannot be assessed with reference to a hypothetical market structure.²⁹ IPPNY points to Commission precedent that it argues recognizes that whether a unit is economic must be assessed with reference to actual market revenues.³⁰

13. IPPNY also argues that, without explanation, the Commission deviated from its precedent recognizing that out-of-market compensation distorts market signals and that agreements like the RSSAs should be structured to minimize market impacts.³¹ IPPNY contends that the Commission previously rejected the notion that going-forward costs

²⁵ Entergy April 20, 2015 Rehearing Request at 4–5 (citing March Order, 150 FERC ¶ 61,214 at PP 65–68).

²⁶ *Id.* at 2, 5.

²⁷ *Id.* at 1–3, 6–13.

²⁸ IPPNY April 20, 2015 Rehearing Request at 19–20.

²⁹ *Id.* at 18.

³⁰ *Id.* at 19 (citing *Astoria Generating Co. L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,043, at PP 35–36 (2015); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 101, *order on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *order on reh'g & compliance*, 131 FERC ¶ 61,170 (2010), *order on reh'g & compliance*, 150 FERC ¶ 61,208 (2015); *Ne. Utils. Serv. Co.*, 129 FERC ¶ 61,279, at P 56 (2009)).

³¹ *Id.* at 4–5.

should be calculated taking out-of-market revenues into account.³² Moreover, IPPNY asserts that the Commission failed to reconcile its finding that it would be efficient for existing capacity resources receiving out-of-market subsidies to clear the ICAP market with Commission precedent recognizing that artificial price suppression undermines the market, thereby raising costs and harming consumers over the long term.³³

14. IPPNY further claims that the Commission failed to address evidence demonstrating that the RSSAs have significantly suppressed, and are continuing to suppress, ICAP market prices by causing existing capacity resources that would have exited the market to offer capacity at *de minimis* levels.³⁴ IPPNY challenges as irrelevant the Commission's statements that the spot market capacity prices had increased and that "reasons for changes in capacity prices are complex and multi-faceted."³⁵ IPPNY states that the RSSAs would artificially suppress prices all else being equal.³⁶

15. Lastly, IPPNY asserts that the Commission did not articulate a valid distinction between the issues identified in the Original Complaint and the buyer-side and seller-side market power mitigation rules applied in the New York City Locality.³⁷ Although the Commission asserted that IPPNY's reliance on the buyer-side market power mitigation rules "is misplaced, as those rules apply only to new entry," IPPNY responds that this misses the point because the ICAP markets are threatened the same by uneconomic retention of existing resources as by uneconomic entry of new resources.³⁸ In addition, while the Commission stated that the seller-side market power mitigation rules are also

³² *Id.* at 20 (citing March Order, 150 FERC ¶ 61,214 at P 66; *Astoria Generating Co. L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at P 135 (2012), *order on reh'g*, 151 FERC ¶ 61,044 (2015)).

³³ *Id.* at 5, 21–22 (citing *N.Y. Indep. Sys. Operator, Inc.*, 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 (D.C. Cir. 2017); *Cal. Indep. Sys. Operator Corp.*, 142 FERC ¶ 61,248, at PP 63–64 (2013)).

³⁴ *Id.* at 5, 22.

³⁵ *Id.* at 22–23 (quoting March Order, 150 FERC ¶ 61,214 at P 67).

³⁶ *Id.* at 23.

³⁷ *Id.* at 5.

³⁸ *Id.* at 23–24 (quoting March Order, 150 FERC ¶ 61,214 at P 65).

“not relevant as they apply to a maximum (not a minimum) bid cap,” IPPNY counters that the seller-side market power mitigation rules *are* relevant because the bid cap is based on going-forward costs, which the Commission later acknowledged represent a competitive offer.³⁹

B. Amended Complaint

16. IPPNY seeks clarification and, in the alternative, rehearing, and Entergy seeks rehearing of the Commission’s denial of the Amended Complaint. IPPNY argues that allowing NYISO to maintain the status quo regarding the Dunkirk Repowering Term Sheet would be at odds with the Commission’s finding that the agreement is for more capacity and a longer term than is needed for reliability, and that if such capacity is offered into the market below the costs of the repowering, ICAP market prices could be artificially suppressed.⁴⁰ Therefore, IPPNY requests clarification that NYISO’s Services Tariff is unjust and unreasonable to the extent that it permits artificial price suppression caused by agreements that provide out-of-market payments to retain otherwise uneconomic existing capacity resources not needed for reliability and require or incentivize such resources to submit below-cost offers.⁴¹ Further, IPPNY requests clarification that the Commission will require reforms to the Services Tariff if NYISO and its stakeholders do not put forward a just and reasonable remedy.⁴² IPPNY asks that, at a minimum, the Commission clarify that it did not intend to deny the Amended Complaint and made no substantive findings as to agreements similar to the Dunkirk Repowering Term Sheet, but was rather not prepared to order the remedies proposed by IPPNY and is awaiting the results of NYISO’s stakeholder process.⁴³

17. Alternatively, to the extent the Commission denies clarification, IPPNY seeks rehearing. IPPNY and Entergy argue that the Commission ignored evidence that the Dunkirk Repowering Term Sheet will artificially suppress ICAP market prices.⁴⁴ Even assuming that a contract providing for out-of-market payments to retain an existing

³⁹ *Id.* at 24 (quoting March Order, 150 FERC ¶ 61,214 at P 65) (citing March Order, 150 FERC ¶ 61,214 at P 66).

⁴⁰ *Id.* at 9–10 (citing March Order, 150 FERC ¶ 61,214 at P 69).

⁴¹ *Id.* at 3, 10.

⁴² *Id.* at 3, 10–11.

⁴³ *Id.* at 3, 10–11 (citing March Order, 150 FERC ¶ 61,214 at P 70).

⁴⁴ *Id.* at 14–15; Entergy April 20, 2015 Rehearing Request at 1, 3, 14–15.

capacity resource only raises market power concerns if the resource is not needed for reliability, or is not the most economic means to satisfy the reliability need, IPPNY and Entergy argue that IPPNY showed that the Dunkirk Repowering Term Sheet fails on both accounts because it is for more capacity and a longer term than is needed for reliability and is not the least-cost solution.⁴⁵ IPPNY further asserts that the Commission neither addressed arguments that it is unjust and unreasonable to allow agreements providing for the retention of uneconomic existing capacity resources not needed for reliability to cause artificial price suppression, nor identified any basis for departing from Commission precedent recognizing that artificial price suppression is unjust and unreasonable.⁴⁶ IPPNY and Entergy contend that the Commission must take action now and may not delegate the duty to establish a just and reasonable replacement rate to NYISO.⁴⁷ To the extent the Commission found that IPPNY failed to sufficiently support a reasonable remedy, IPPNY and Entergy argue that the Commission carries the burden of establishing a just and reasonable replacement rate.⁴⁸ Finally, Entergy asserts that the Commission identified issues of material fact that could not be resolved, but erroneously failed to set the Amended Complaint for hearing and settlement judge procedures.⁴⁹

IV. Discussion

A. Original Complaint

18. At the outset, we clarify, as Entergy requests, that the Commission's findings regarding the Dunkirk and Cayuga RSSAs in the March Order did not prejudice the issues raised in the NYISO RMR proceeding in Docket No. ER16-120, on which the

⁴⁵ IPPNY April 20, 2015 Rehearing Request at 13–14; Entergy April 20, 2015 Rehearing Request at 14 (citing March Order, 150 FERC ¶ 61,214 at P 69; Amended Complaint at 14).

⁴⁶ IPPNY April 20, 2015 Rehearing Request at 4, 14–15.

⁴⁷ *Id.*; Entergy April 20, 2015 Rehearing Request at 1–3.

⁴⁸ IPPNY April 20, 2015 Rehearing Request at 15–16; Entergy April 20, 2015 Rehearing Request at 15–16 (citing March Order, 150 FERC ¶ 61,214 at P 70; *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011); 16 U.S.C. § 824e(a) (2018)).

⁴⁹ Entergy April 20, 2015 Rehearing Request at 16–17 (citing March Order, 150 FERC ¶ 61,214 at P 69).

Commission has now ruled.⁵⁰ In the NYISO RMR proceeding, the Commission required NYISO to submit tariff revisions governing retention of and compensation to generating units needed for reliability and a *pro forma* service agreement for RMR service.⁵¹ The Commission issued a series of orders on NYISO's compliance filings in that proceeding, which included thorough consideration of what mitigation measures, if any, should apply to RMR generators, based on the record presented in that proceeding.⁵²

19. Other than the clarification provided above, we deny the remaining requests for clarification or rehearing of the Commission's findings regarding the Original Complaint. We continue to find that IPPNY has failed to satisfy its evidentiary burden under FPA Section 206 to show that NYISO's Services Tariff is unjust and unreasonable. We disagree with IPPNY that the Commission failed to adequately consider evidence that IPPNY alleges shows the Dunkirk and Cayuga units—the only two specific resources IPPNY pointed to in its Original Complaint—were, and would continue to, artificially suppress ICAP market prices. As noted above, the Commission found that IPPNY failed to demonstrate “harm to the market in its [O]riginal Complaint that justifies excluding the Cayuga or Dunkirk units or conduct that is inconsistent with competitive bidding behavior”⁵³ and, instead, the Commission agreed with MMU that “the units are economic from the perspective of satisfying . . . NYISO's reliability requirements.”⁵⁴ As we also noted above, the Commission observed it would be reasonable for the units to submit low offers because their going-forward costs, taking into account RSSA revenues, are likely low. As the units are needed for reliability and would clear a capacity market that reflected local reliability needs, the Commission stated it is proper to deduct the RSSA revenues from going-forward costs because those revenues “reflect the value of the services provided by these resources to customers.”⁵⁵ Further, contrary to IPPNY's argument, the Commission was not relying on increased spot market prices to deny the

⁵⁰ See *supra* note 24 (citing all the orders issued in the NYISO RMR proceeding). Because we grant Entergy's request for clarification, we do not address its alternative request for rehearing of the Commission's findings regarding the Original Complaint.

⁵¹ NYISO RMR Order, 150 FERC ¶ 61,116 at P 4.

⁵² First NYISO RMR Compliance Order, 155 FERC ¶ 61,076 at PP 82–83; Second NYISO RMR Compliance Order, 161 FERC ¶ 61,189 at PP 62–63.

⁵³ March Order, 150 FERC ¶ 61,214 at P 65.

⁵⁴ *Id.* P 66.

⁵⁵ *Id.*

Original Complaint, but was rather refuting IPPNY's contention that spot market prices have decreased "solely as a consequence of the RSSAs."⁵⁶

20. IPPNY continues to challenge any argument that Dunkirk and Cayuga are economic, reiterating statements from the units' owners that the units were unable to recover their costs from the market and its own assertion that whether a unit is economic must be assessed with reference to actual market revenues.⁵⁷ However, IPPNY is incorrect that whether a unit is economic must be assessed only with reference to actual market revenues. For example, NYISO's determination of whether a new resource is economic pursuant to its buyer-side market power mitigation rules necessarily involves an estimation of projected market revenues.⁵⁸ Moreover, NYISO's ICAP markets do not reflect the constraints that would bind if Dunkirk or Cayuga were to retire immediately. As the Commission explained in the March Order, where it is not feasible or practical for capacity markets to recognize all transmission constraints, some RSSA-type "agreements may be necessary, since market prices in these instances may be insufficient to retain enough capacity in these locations to reliably serve load in these locations."⁵⁹

21. IPPNY further asserts that the Commission deviated from precedent that rejected the notion that going-forward costs should be calculated taking out-of-market revenues into account.⁶⁰ However, the precedent to which IPPNY cites was not in the RMR context, and so is not on point here. In the Complaint Order, the Commission found that it is efficient for units retained under an RSSA-type agreement to clear in the ICAP market because they are needed for reliability, and that any mitigation imposed on such units which would prevent them from clearing in the ICAP market would be unreasonable. After the Complaint Order, the Commission reiterated this point in the

⁵⁶ *Id.*

⁵⁷ IPPNY April 20, 2015 Rehearing Request at 19 (citing *Astoria Generating Co. L.P.*, 151 FERC ¶ 61,043 at PP 35–36; *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 101; *Ne. Utils. Serv. Co.*, 129 FERC ¶ 61,279 at P 56).

⁵⁸ See *Astoria Generating Co. L.P.*, 151 FERC ¶ 61,043 at P 35 ("NYISO's Services Tariff requires it to estimate energy and ancillary services revenues . . .").

⁵⁹ March Order, 150 FERC ¶ 61,214 at P 68.

⁶⁰ IPPNY April 20, 2015 Rehearing Request at 20 (citing *Astoria Generating Co. L.P.*, 140 FERC ¶ 61,189 at P 135).

NYISO RMR proceeding, in which it found that RMR generators should not be subject to a capacity minimum offer price.⁶¹

22. We disagree with IPPNY's argument that the Commission did not articulate a valid distinction between the issues identified in the Original Complaint and NYISO's buyer-side and seller-side market power mitigation rules applied in the New York City Locality. As the Commission explained, the buyer-side market power mitigation "rules apply only to new entry."⁶² IPPNY argues that this explanation misses the point because ICAP markets are threatened as much by uneconomic retention of existing resources as by uneconomic entry of new resources. But, as explained by MMU, the Dunkirk and Cayuga units at issue in the Original Complaint "are economic from the perspective of satisfying the NYISO's reliability requirements If the reliability needs satisfied by these units were reflected in the capacity market, the units would both clear."⁶³ Therefore, the ICAP markets are not threatened by retention of these resources as "RMR generators are needed to fulfill a reliability need that market forces have not fulfilled."⁶⁴ As for the seller-side market power mitigation rules, these rules impose an offer cap to prevent the exercise of market power to *increase* ICAP market prices.⁶⁵ Although the bid cap is based on going-forward costs, the alleged harm that IPPNY seeks to remedy is artificial price *suppression*.⁶⁶ Therefore, we reiterate that IPPNY's reference to such mitigation measures was misplaced.

B. Amended Complaint

23. We deny all requests for clarification or rehearing of the Commission's denial of the Amended Complaint. As an initial matter, we note that the Commission did not base its denial on concerns with the adequacy of IPPNY's proposed remedy. On the contrary, the Commission identified issues that would need to be resolved before a remedy could

⁶¹ NYISO RMR Order, 150 FERC ¶ 61,116 at P 83.

⁶² March Order, 150 FERC ¶ 61,214 at P 65.

⁶³ Patton Aff. ¶ 26; March Order 150 FERC ¶ 61,214 at P 66.

⁶⁴ NYISO RMR Compliance Order, 155 FERC ¶ 61,076 at P 83.

⁶⁵ March Order 150 FERC ¶ 61,214 at PP 1, 65; *see N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 34 (describing NYISO's seller-side market power mitigation rules).

⁶⁶ *See, e.g.*, IPPNY April 20, 2015 Rehearing Request at 5, 24; Original Complaint at 33 (requesting relief for "price suppression").

be established *if* IPPNY had satisfied its section 206 burden (which it did not). The Commission considered the evidence IPPNY presented in the Amended Complaint and found it to be insufficient to satisfy IPPNY's Section 206 burden to show that NYISO's Services Tariff is unjust and unreasonable.⁶⁷ The Commission found that it "must consider the current state of the NYISO market, the existing market rules, and the *unique aspects*" of the Dunkirk Repowering Term Sheet.⁶⁸ The Commission was not persuaded based on the record before it that the Dunkirk Repowering Term Sheet represents a larger category of repowering agreements that should be subject to some form of market power mitigation; instead, the Commission emphasized the "unique aspects" of that agreement. Given that IPPNY sought an order requiring NYISO to exclude from its ICAP markets existing capacity resources operating under agreements similar to the Dunkirk Repowering Term Sheet, or to impose an offer floor on those resources, but only provided evidence of a single, unique repowering agreement, the Commission stated that "IPPNY only offer[ed] limited evidence for the relief it" sought.⁶⁹

24. With regard to NYISO's two informational reports, we find that NYISO complied with the March Order by establishing a stakeholder process to consider the issues noted in the March Order and filing a status report on that process.

⁶⁷ March Order, 150 FERC ¶ 61,214 at P 71. A complainant seeking to "upset the rate order under the [FPA] carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable." *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

⁶⁸ March Order, 150 FERC ¶ 61,214 at P 70 (emphasis added).

⁶⁹ *Id.* We note that plans to repower Dunkirk were ultimately abandoned in 2018. See NRG Energy, Inc., Annual Report (Form 10-K) 90 (Feb. 28, 2019). Therefore, any claims that the Dunkirk repowering is itself causing artificial price suppression are moot.

The Commission orders:

The requests for rehearing and clarification are hereby granted in part and denied in part, as discussed in the body of this order.

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

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Independent Power Producers of New York, Inc.

Docket Nos. EL13-62-001
EL13-62-002

v.

New York Independent System Operator, Inc.

(Issued February 20, 2020)

GLICK, Commissioner, *concurring*:

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

* * *

2. When first introduced, buyer-side market power rules were (as their name would suggest) aimed squarely at mitigating the exercise of buyer-side market power—*i.e.*, the ability of a large buyer of capacity to exercise its monopsony power to lower the capacity market clearing price. To the extent that the Commission required buyer-side mitigation of capacity market offers, it limited the mitigation to only resources that could be used effectively for the purpose of depressing capacity market prices or to resources with both the incentive and ability to depress capacity market clearing prices.² In short, buyer-side

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

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

market power mitigation was all about and only about the exercise of buyer-side market power.³

3. Over the course of the last decade, however, the Commission has abandoned that narrow focus. It now no longer requires a resource to have market power—or even any incentive to depress capacity market prices—before subjecting that resource to buyer-side market power mitigation. Minimum offer price rules (MOPR) that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states’ exercise of their authority over resource decisionmaking.⁴ The result is an ever-expanding system of administrative pricing that is, ironically enough, justified on the basis that it promotes competition.⁵ But, in reality, the Commission is not promoting anything remotely resembling actual competition.⁶

(discussing the Commission’s early approach to buyer-side market power mitigation).

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

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

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

⁶ It is also worth noting that this Commission’s infatuation with mitigation only goes one way. It is interested in mitigation only when it raises prices. While the Commission has devoted untold resources to pursuing illusory concerns about monopsony power, it has so far refused to take a hard look at seller-side market power. One example is the Chairman’s premature termination of the enforcement process

4. The basic premise of market competition is that sellers should compete with each other to offer the best terms, including price, to provide a particular product or service. And the purpose of capacity markets is to provide the “missing money” that resources need to remain viable, but are unable to earn by providing energy and ancillary services due to various limitations in the markets for those services.⁷ That means that capacity market competition should follow a single ‘first principle’: Enabling resources to vie with each other to require as little “missing money” as possible in order to cover their going forward costs, receive a capacity commitment, and help to ensure resource adequacy. For the market to be truly “competitive,” resources must have the flexibility to reflect their own expertise, experience, technology, risk tolerance and whatever else might provide them with a competitive advantage in the quest to provide capacity at the lowest possible cost. That type of competition can, in theory, produce enormous benefits for consumers by shifting risk to investors, facilitating the entry of relatively efficient resources (and the retirement of inefficient ones), and spurring the development and deployment of new technologies and business models—all while procuring the lowest-cost set of resources needed to keep the lights on.

5. Instead of promoting that type of competition, the Commission’s approach to buyer-side market power has degenerated into a scheme for propping up prices, protecting incumbent generators, and impeding state clean energy policies.⁸ Although the specifics of the mitigation regimes vary among the eastern RTOs, they all generally force new entrants to bid at or above an administratively determined estimate⁹ of what a

regarding the nearly 1,000 percent year-over-year increase in prices in MISO Zone 4 and the Commission’s failure to provide any justification for its finding that such a rate is just and reasonable. *See Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019) (Glick, Comm’r, dissenting at PP 4-5). Another is the Commission’s failure over the course of the last year to take any action on the complaints regarding PJM’s Market Seller Offer Cap. Those complaints allege that PJM’s current rules allow for the exercise of market power, which increased the total cost of capacity by more than a billion dollars. *See PJM Independent Market Monitor Complaint*, Docket No. EL19-47-000 at 11-12.

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

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

⁹ In previous orders, the Commission has made much out of so-called unit-specific

new resource “should” cost, while existing resources are permitted to bid at a lower level.¹⁰ In practice, those administrative pricing regimes create a systemic bias in favor of existing resources and curtail resources’ incentive and ability to compete across all possible dimensions. Moreover, because potential new entrants to the capacity market tend to be disproportionately made up of new technologies and resources needed to satisfy state or federal public policies, the Commission’s use of the MOPR also has the unmistakable effect (and, recently, the intent¹¹) of slowing the transition to a cleaner, more advanced resource mix.

6. That type of quasi-competition does not lead to an efficient market outcome. As noted, the purpose of capacity markets is to procure the lowest-cost of bundle of resources needed to reliably provide electricity by making resources compete based on the amount of “missing money” they require to cover their costs.¹² To achieve that outcome efficiently, resources’ capacity market offers must reflect all relevant costs minus all relevant revenues, including costs and revenues that are not derived directly from Commission-jurisdictional markets.¹³ If the market ignores some of those costs and

exemptions, which permit a resource to bid below a default offer floor if it can convince the relevant market monitor that its estimated net going forward costs are below that floor. If the resource succeeds in that endeavor, the market monitor permits the resource to bid at a lower, but still administratively determined, level. That is still administrative pricing.

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

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

¹² See *supra* P 4.

¹³ The periodic demand curve resets that occur in the eastern RTOs illustrate the

revenues, then the set of resources selected will not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy. And yet that is where we find ourselves: All three eastern RTOs now force new resources to compete based on administratively determined estimates of their costs and revenues rather than their own estimates of what they need to make up the missing money. The result is neither a competitive market nor an efficient outcome.

7. We got to this point largely because of the Commission's misguided belief that it must "protect" capacity markets from the influence of state public policies.¹⁴ That is simply wrong. As explained below, the Commission's efforts to prop up prices by mitigating the effects of state public policies upset the jurisdictional balance that is the heart of the FPA and interfere with capacity markets' ability to produce efficient market outcomes.

8. The FPA is clear. The states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity as well as practices affecting those wholesale sales,¹⁵

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

¹⁴ *See, e.g., NYPSC v. NYISO*, 170 FERC ¶ 61,119, at P 37; *Calpine v. PJM*, 169 FERC ¶ 61,239 at P 5 (explaining that the Commission is applying a minimum offer price rule to state-sponsored resources in order to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support"); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 24 ("It is . . . imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support.").

¹⁵ Specifically, as relevant here, the Commission's jurisdiction applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract affecting such rate, charge, or classification."

Congress expressly precluded the Commission from regulating “facilities used for the generation of electric energy.”¹⁶ Instead, Congress gave the states exclusive jurisdiction to regulate those facilities.¹⁷

9. Although those jurisdictional lines are clearly drawn, the practical reality is far messier. As the Supreme Court has observed, the FPA’s spheres of jurisdiction are not “hermetically sealed.”¹⁸ One sovereign’s exercise of its authority will inevitably affect matters subject to the other sovereign’s exclusive jurisdiction.¹⁹ For example, any state regulation that increases or decreases the number of generation facilities will, through the

16 U.S.C. § 824e(a) (2018); *see also id.* § 824d(a) (similar).

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

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

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

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

law of supply and demand, inevitably affect wholesale rates.²⁰ But the existence of such cross-jurisdictional effects is not necessarily a “problem” for the purposes of the FPA. Rather, those cross-jurisdictional effects are the product of the “congressionally designed interplay between state and federal regulation”²¹ and the natural result of a system in which regulatory authority is divided between federal and state government.²²

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

11. Moreover, as former Commission Chairman Norman Bay correctly observed, an “idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation.”²³ Instead, public policy and

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

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

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

²³ *N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator*, 158 FERC ¶ 61,137

energy markets are inextricably intertwined.²⁴ Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.²⁵ Even if the Commission is successful in ferreting out state efforts to shape the generation mix, the result will not be a “competitive” market. Instead, the market will remain a reflection of public policy, but will ignore the effects of the very policy decisions that Congress *expressly* gave the states the authority to make. And while that might further the Commission’s goal of increasing prices and slowing the transition to a cleaner energy mix, it will not establish a market based on anything close to actual competition or one that is insulated from public policy.

12. And the end result will be deeply inefficient, no matter how many times my colleagues use the words “market” and “competition.” The resources procured through that market will require considerably more missing money than would the set of resources procured in the absence of this kind of over-mitigation.²⁶ That means customers will be paying for more expensive capacity than they should. Moreover, the mitigation regimes that the Commission has approved will, by design, ignore resources that must be built because they are necessary to satisfy state public policies. As a result, the capacity markets will procure more capacity than the regions actually need and customers will be left paying twice for capacity. That means customers will be paying for *more* of the *more* expensive capacity than they should.

(2017) (Bay, Chairman, concurring at 2).

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

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

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

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

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

15. Instead of interfering with state public policies, the Commission's buyer-side market power mitigation regime should focus only on actual market power. In the event that a resource lacks buyer-side market power, its capacity market offer should not be subject to buyer-side mitigation.³⁰ That result is both more consistent with the FPA's dual-federalist design and the Commission's core responsibility as a regulator of monopoly/monopsony power.³¹ That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated,

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

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

²⁹ See *supra* P 4.

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

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

when, and to what level.³² In short, I believe that buyer-side market power mitigation rules that are not limited only to market participants with actual buyer-side market power are *per se* unjust and unreasonable and should be abandoned immediately.³³

16. “Actual” is an important distinction here. The Commission has at times suggested that extending buyer-side market power mitigation to resources that receive state subsidies on the basis that the state is like a quasi-buyer that looks out for the interests of all consumers in the state.³⁴ We should abandon that notion as well. States regulate for a variety of reasons and acting as if any regulation is or could be an exercise of market power fundamentally misunderstands the role of state regulation under the FPA. Philosophical market power—as distinguished from actual market power—should have no place in the Commission’s regulatory regime. In any case, to the extent that a state is directly targeting the wholesale market price, then the law in question is preempted and there is no need to muddle things up with a MOPR.³⁵

17. Recently, several parties and even the Commission have argued that if we do not block state policies, prices may drop so low that capacity markets may cease to ensure

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

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

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

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

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

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

* * *

19. Turning to the merits of this specific order, I concur because it affirms the Commission’s decision not to extend NYISO’s buyer-side market power mitigation rules to resources retained pursuant to a Reliability Support Service Agreement (RSSA). As explained above, buyer-side market power mitigation should apply only to buyers with market power. This record does not indicate that any of the resources retained pursuant to an RSSA are buyers, much less buyers with market power. Accordingly, I agree with the conclusion that no further mitigation is appropriate.

20. In addition, I support the Commission’s adoption of Dr. Patton’s theory that these units would be economic if they were compensated for their local reliability value.³⁸ As

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

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

³⁸ *N.Y. Indep. Sys. Operator*, 170 FERC ¶ 61,118, at PP 19, 22 (2020).

explained above, capacity resources receive revenue for a variety of factors that are not reflected in the capacity market, or even Commission-jurisdictional markets more generally, but that should be considered in evaluating whether a resource is economic. Because I understand today's order to be consistent with that principle, I join it in full.

For these reasons, I respectfully concur.

Richard Glick
Commissioner