174 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council	Docket Nos. EL16-92-004
v.	
New York Independent System Operator, Inc.	
New York Independent System Operator, Inc.	ER17-996-004

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING, AND SETTING ASIDE PRIOR ORDER, IN PART

(Issued February 18, 2021)

1. On October 7, 2020, the Commission concluded, after a paper hearing, that payments received under the Commercial System Distribution Load Relief Programs (CSRPs) under consideration in this proceeding[1] do not qualify for exclusion from the calculation of the offer floors for Special Case Resources (SCRs) under the New York Independent System Operator, Inc.'s (NYISO) buyer-side market power mitigation rules.[2] The New York State Public Service Commission, New York State Energy Research and Development Authority, City of New York, Natural Resources Defense Council, Advanced Energy Management Alliance, Energy Spectrum, Inc., and the

[1] The CSRPs under consideration in this proceeding are those listed in the underlying 2016 complaint in this proceeding, which include: (1) Consolidated Edison Company of New York's (ConEd) CSRP; (2) Orange and Rockland Utilities' CSRP; (3) Central Hudson's CSRP; and (4) New York State Electric and Gas Corporation's (NYSEG) CSRP.

[2] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,022, at PP 4, 57-58 (2020) (October 2020 Order).

E Cubed Company (collectively, NY State and Environmental Parties); and ConEd and Orange and Rockland Utilities (collectively, Companies) requested rehearing of the October 2020 Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,[3] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act,[4] we are modifying the discussion in the October 2020 Order and setting aside the order, in part, as discussed below.[5]

I. Background

3. SCRs are demand response resources that are eligible to provide capacity in NYISO's Installed Capacity (ICAP) market. NYISO's application of its buyer-side market power mitigation rules to SCRs has been modified through various proceedings before the Commission.[6] In 2016, the Complainants[7] filed a complaint against NYISO (Complaint), alleging that the application of NYISO's buyer-side market power mitigation rules in the Market Administration and Control Area Services Tariff (Services Tariff) is unjust and unreasonable because the rules limit full participation of SCRs in NYISO's ICAP market and interfere with federal, state, and local policy objectives. On February 3, 2017, the Commission granted the Complaint, in part, and allowed for a blanket exemption for new SCRs from NYISO's buyer-side market power

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

[4] 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.").

[5] *Allegheny Def. Project*, 964 F.3d at 16-17.

[6] *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, *order on reh'g & compliance*, 124 FERC ¶ 61,301 (2008), *order on clarification, reh'g and compliance*, 131 FERC ¶ 61,170 (2010), *order on clarification, reh'g and compliance*, 150 FERC ¶ 61,208 (2015), *order on reh'g and compliance*, 158 FERC ¶ 61,127 (2017); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 105 (2015), *order on reh'g and clarification*, 154 FERC ¶ 61,088 (2016).

[7] The Complainants are the New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council.

mitigation.[8] The Commission, in granting the blanket exemption, did not address whether to exclude payments from certain retail-level programs identified in the Complaint from the calculation of SCR offer floors. In the February 2020 Order, the Commission reversed the Complaint Order, removed the blanket exemption, and reopened the record for a paper hearing to determine whether the retail-level demand response programs listed in the Complaint should be excluded from the calculation of SCR offer floors.[9] The Commission stated that it would evaluate these programs on a program-specific basis to determine whether they are "designed to address" and "address solely distribution-level reliability needs," and therefore, whether payments from those programs should be excluded from the calculation of SCR offer floors.[10]

4. On October 7, 2020, after consideration of the initial and reply briefs filed in the paper hearing, the Commission concluded that while the payments received under the Distribution Load Relief Programs (DLRPs) submitted for consideration qualify for exclusion from the calculation of SCR offer floors, payments received under the CSRPs submitted for consideration do not so qualify.[11]

II. Rehearing Requests

5. Companies allege that, in evaluating a retail-level demand response program's eligibility for exclusion from the SCR offer floor calculation, the Commission applied an "exclusive benefit" standard that differs from the standard set forth in the February 2020 Order. Companies contend that the February 2020 Order did not clearly establish or support a standard that requires the CSRPs to "solely address" distribution reliability needs.[12] Similarly, the NY State and Environmental Parties argue that the Commission's finding that "any program that provides reliability benefits to the transmission system does not solely address distribution reliability needs"[13] is contrary

[8] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (Complaint Order).

[9] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,120 (2020) (February 2020 Order).

[10] *Id.* P 19.

[11] October 2020 Order, 173 FERC ¶ 61,022 at PP 4, 57-58. The October 2020 Order also addressed requests for rehearing of the February 2020 Order.

[12] Companies Rehearing Request at 11.

[13] NY State and Environmental Parties Rehearing Request at 14 (citing October 2020 Order, 173 FERC ¶ 61,022 at P 58).

to a statement elsewhere in the October 2020 Order, where the Commission stated that "demand response programs that are designed to address and predominantly address distribution-level reliability needs are not properly considered as providing Installed Capacity."[14]

6. According to the NY State and Environmental Parties, the Commission's determination in the October 2020 Order to include CSRP payments in the calculation of SCR offer floors rests on a single statement in the affidavit of Griffin Reilly (Reilly Affidavit) referencing the avoidance of transmission infrastructure investment.[15] Companies and the NY State and Environmental Parties argue that the Commission misrepresented the Reilly Affidavit, which referred only to "local" transmission and distribution infrastructure investment.[16] The NY State and Environmental Parties maintain that the CSRPs are not designed to address bulk power system capacity concerns, further noting that the evidence in the record to support this claim is "overwhelming."[17] Companies, in turn, argue that the CSRPs do not benefit, and are not designed to benefit, any transmission infrastructure subject to NYISO's operational control.[18]

7. Companies also dispute the Commission's finding from the October 2020 Order that CSRPs "provide network load relief to the system during peak hours to address system-wide needs under peak load operating conditions."[19] They argue that while CSRPs may be *triggered* based on forecasted system peaks, the relief is at the distribution "network" or "circuit" level.[20]

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[14] *Id.* (citing October 2020 Order, 173 FERC ¶ 61,022 at P 15).

[15] *Id.* at 14.

[16] *Id.* at 14-16 (citing October 2020 Order, 173 FERC ¶ 61,022 (Glick, Comm'r, dissenting at n.59)); Companies Rehearing Request at 8-9; Reilly Aff. at 4.

[17] NY State and Environmental Parties Rehearing Request at 8-10 (citing testimony from Adam Evans, Griffin Reilly, and Jon Hilowitz).

[18] Companies Rehearing Request at 9.

[19] *Id.*

[20] *Id.* at 10.

8. Finally, NY State and Environmental Parties allege that the October 2020 Order is a "poor policy" that will have a "chilling effect" on the development of demand response resources and, in turn, will increase costs to consumers.[21] The NY State and Environmental Parties further contend that the October 2020 Order impedes the functioning of distribution-level demand response programs and, in so doing, intrudes on state authority over retail sales.[22] In addition, they argue that applying buyer-side market power mitigation to SCRs receiving CSRP revenues would "nullify" federal legislation favoring the development of demand response.[23]

III. Discussion

A. Procedural Matters

9. On November 3, 2020, Rodan Energy Solutions (USA) Inc. (Rodan) filed a motion to intervene out-of-time in Docket No. EL16-92-000.[24] Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2020), we deny Rodan's late intervention. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure, and consider, among other things, whether the movant had good cause for failing to file the motion within the time prescribed. When, as here, a late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, the movant bears a higher burden to demonstrate good cause for granting such late intervention.[25] Rodan's motion to intervene out-of-time fails to address the criteria for late interventions in Rule 214(d), or explain why the motion could not have been timely filed. Accordingly, we find that Rodan has failed to demonstrate the requisite good cause, and we deny the motion to intervene out-of-time.

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[21] NY State and Environmental Parties Rehearing Request at 16.

[22] *Id.* at 18.

[23] *Id.* at 19.

[24] Rodan also filed a motion to intervene on September 18, 2020, which was also submitted out-of-time.

[25] *See, e.g., PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,209, at P 24 (2019); *PaTu Wind Farm LLC v. Portland Gen. Elec. Co.*, 151 FERC ¶ 61,223, at P 39 (2015); *Columbia Gas Transmission Corp.*, 113 FERC ¶ 61,066, at P 5 (2005).

B. Substantive Matters

10. The objective of the paper hearing in this proceeding was to evaluate whether the programs identified in the Complaint were designed to address and address solely distribution-level reliability needs. Upon consideration of the arguments presented on rehearing, we set aside the Commission's finding on the paper hearing with respect to the CSRPs under consideration in the underlying complaint[26] and hereby find that those CSRPs should be excluded from the calculation of SCR offer floors in NYISO.[27]

11. We agree that the reference to "local transmission infrastructure investment" in the Reilly Affidavit[28] is not dispositive and does not disqualify the Companies' CSRPs as being "designed to address" and "address[ing] solely distribution-level reliability needs." As the Companies note, aside from one reference to "local transmission," the Reilly Affidavit makes clear that CSRPs are exclusively designed to benefit distribution-level facilities.[29] Upon reconsideration of the testimony and clarification provided by the rehearing requests, we agree that the Reilly and Hilowitz Affidavits confirm that the Companies' CSRPs assist the Companies "to avoid, or at a minimum defer, construction of costly *distribution* infrastructure upgrades . . . while maintaining [the Companies'] *distribution system reliability.*"[30]

12. We also find persuasive Companies' explanation that, although the Companies' CSRPs are triggered based on forecasted system peaks, the relief occurs at the

[26] October 2020 Order, 173 FERC ¶ 61,022 at PP 58-59.

[27] Given our finding that the CSRPs under consideration satisfy the standard from the February 2020 Order, we need not address the rehearing arguments challenging the October 2020 Order as contravening state and federal policy.

[28] The direct quotation from Griffin Reilly's testimony refers to a tabular demonstration that "illustrates how the program enables the Company to avoid local transmission and distribution infrastructure investment." Companies Br., Reilly Aff. at 2.

[29] The Reilly Affidavit refers specifically to the avoidance of three types of infrastructure upgrades: (1) distribution area networks or circuits; (2) distribution area stations; and (3) feeders that supply the distribution area substations (i.e., radial, non-networked sub-transmission).

[30] Companies Rehearing Request at 9 (citing Reilly Aff. at 4, Hilowitz Aff. at 3 (emphasis added)).

distribution level.[31] Accordingly, we agree that the CSRPs under consideration here are not designed to address system-wide needs and that any incidental system-wide reliability benefit that the CSRPs might provide is not the result of the programs' design.[32] That finding is consistent with the Commission's treatment of DLRPs, which may have a similar, incidental system-wide benefit.[33]

The Commission orders:

In response to the requests for rehearing, the October 2020 Order is hereby modified and set aside, in part, as discussed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

[31] *Id.* at 10. Because Central Hudson's CSRPs and NYSEG's CSRPs similarly provide relief at the distribution level, the Companies' rehearing arguments on this point have also persuaded us that Central Hudson's and NYSEG's CSRPs qualify for exclusion from the SCR offer floor. *See* New York State Public Service Commission Initial Brief at 13-14 (noting that Central Hudson's CSRP "is dispatched to relieve distribution system peak loads" and that NYSEG's CSRP is dispatched "in order to relieve distribution system peak loads").

[32] *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 776 (2016) (noting that "[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other").

[33] October 2020 Order, 173 FERC ¶ 61,022 at P 57.

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CLEMENTS, Commissioner, *concurring*:

1. I agree with today's decision to set aside, in part, the Commission's October 7, 2020, order. While I did not participate in the previous orders in this proceeding, the narrow question before us here is whether payments from Commercial System Distribution Load Relief Programs merit exclusion from the calculation of demand-side resource offer floors in NYISO. I agree that they do.

2. I write separately to express a broader concern with what are known as NYISO's buyer-side market power mitigation rules and disagreement with the Commission's recent findings in this proceeding. I have previously expressed my disagreement with similarly intentioned rules in PJM's capacity market.[1] NYISO's buyer-side mitigation rules are likewise divorced from the objective of mitigating actual monopsony power, and instead now serve only as likely impediments to New York's public policies in the name of "protecting" markets within the Commission's jurisdiction. FERC-jurisdictional markets operate as a means to harness competition toward the end of greater efficiency in the provision of electric service—a benefit that can lower costs for customers. NYISO's markets cannot succeed in achieving this end by operating in a vacuum that fails to embrace the reality of state policy choices.

[1] *Calpine Corp. v. PJM Interconnection L.L.C.*, 174 FERC ¶ 61,036 (2021) (Clements, Comm'r, concurring). I am also concurring in an order issued today to express similar concerns with regard to the MOPR in ISO New England. *ISO New England Inc.*, 174 FERC ¶ 61,120 (2021) (Clements, Comm'r, concurring).

3. As an initial matter, record evidence in this proceeding does not support application of buyer-side mitigation to demand-side resources in NYISO. Ample record evidence indicates these resources do not possess the ability to exercise buyer-side market power in NYISO's capacity market. Even NYISO, the *respondent* to this complaint, stated clearly that they do not and supported a blanket exemption from the buyer-side mitigation rules.[2] Based on these facts, the Commission in 2017 concluded that demand-side resources "have limited or no incentive and ability to exercise buyer-side market power to artificially suppress [capacity] market prices"[3] and directed a blanket exemption. I believe this was the correct finding. Where there is evidence that market power exists and could lead to unjust and unreasonable wholesale rates, we must address it. But NYISO's buyer-side mitigation rules have, with the complicity of the Commission, been misappropriated toward ends unrelated to mitigating market power.

4. A state's exercise of its authority under the Federal Power Act to shape the resource mix for its citizens is not an exercise of market power, and applying mitigation to such state actions is harmful to customers. Then-Commissioner Bay has proven prescient in his caution, expressed during an earlier stage of this long proceeding, that misapplication of market power mitigation in the form of minimum offer price rules was "unsound in principle and unworkable in practice," and "places the Commission in direct and recurring conflict with the states" in a manner "that raises costs to consumers."[4] Those criticisms ring truer today than in 2017. The State of New York has implemented increasingly ambitious policies to move toward a cleaner resource mix. Continued misapplication of NYISO's buyer-side mitigation rules to resources developed pursuant to those policies risks over-procurement of capacity and excessive costs to NYISO customers—an outcome I view as unjust and unreasonable. NYISO's market rules must instead acknowledge the State's exercise of legitimate authority and provide for an efficient wholesale market framework that respects the State's resource mix choices.

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[2] NYISO July 21, 2016 Answer at 3 ("[I]t appears that no external (e.g., State or State-approved) demand response program has the ability to meaningfully increase SCR Unforced Capacity [] to suppress capacity prices in New York."). *See also* NYISO July 21, 2016, Answer, attach. II ¶ 10.

[3] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137, at P 30 (2017).

[4] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (Bay, Comm'r, concurring).

5. I look forward to engaging with my colleagues to work with the State of New York, NYISO, and the stakeholder community to re-examine the current capacity market construct to find a durable solution that yields just and reasonable rates for NYISO customers.

For these reasons, I respectfully concur.

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Allison Clements
Commissioner

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CHRISTIE, Commissioner, *concurring*:

1. I write separately to reiterate that the issues attendant to the intersection of state public policies and RTO/ISO markets need to be considered comprehensively in a general proceeding in which all interested groups and entities – including, of course, the states – can offer their views, instead of this continuing trench warfare over "MOPR-type" issues in individual cases in which only a tiny fraction of the interested universe can participate.

2. Issues like those involved in today's proceeding are complicated, involving competing interests and competing values and the obvious tension between FERC's duty to ensure just and reasonable – and not unduly discriminatory or preferential – wholesale rates and the states' authority over retail rates and their own public policies. Today's proceeding illustrates the complexity. While the issues involved in today's order have been described as an example of the alleged misuse by this Commission of buyer-side mitigation rules,[1] others may describe them as an effort to prevent retail subsidies paid to certain Demand Response (DR) providers from unfairly impacting prices in NYISO's Installed Capacity (ICAP) market, which are under FERC jurisdiction.

3. Since other retail consumers ultimately pay, directly or indirectly, for subsidies directed to the few, whether this state policy actually saves *all* retail consumers in New York money or provides other benefits is a debate for elected policy-makers – and

[1] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,022 (2020) (Glick, Comm'r, dissenting at PP 1-4 and *passim*).

the voters – in the State of New York. I also note that the NYISO is a single-state ISO and I have been able to locate no evidence in the record that the New York policies at issue in today's order are causing cost-shifting onto consumers in other states. If consumers in other states were disadvantaged, I may well view this matter differently, but on this record – and with the desire to see this entire issue teed up for review and consideration – I concur.

For these reasons, I respectfully concur.

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Mark C. Christie
Commissioner