

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York State Public Service Commission)	
New York Power Authority)	
Long Island Power Authority)	
New York State Energy Research and Development Authority)	
City of New York)	
Advanced Energy Management Alliance, and Natural Resources Defense Council)	Docket No. EL16-92-000
Complainants,)	
)	
v.)	
)	
New York Independent System Operator, Inc.)	
Respondent)	

**JOINT PROTEST OF INDEPENDENT
POWER PRODUCERS OF NEW YORK, INC.
AND ELECTRIC POWER SUPPLY ASSOCIATION**

On June 24, 2016, the New York State Public Service Commission (“NYPSC”) and six other parties (collectively, “Complainants”) filed a complaint under Sections 206 and 306 of the Federal Power Act (“FPA”), 16 U.S.C. 824(e) and 825(e), with the Federal Energy Regulatory Commission (“Commission”), in the above-captioned docket against the New York Independent System Operator, Inc. (“NYISO”). Complainants allege that applying the NYISO’s buyer-side market power mitigation measures (the “BSM Measures”) in Section 23.4 of Attachment H of the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”) to demand response providers, referred to as Special Case Resources (“SCRs”) in the Services

Tariff,¹ is unjust and unreasonable because it limits the full participation of SCRs in the NYISO's installed capacity ("ICAP") market and "constitutes an impermissible extension and overreach of Federal jurisdiction" into State and local policy objectives.² Complainants request that the Commission grant a blanket exemption from the BSM Measures for all current and future participants in the NYISO's SCR program, including SCRs that are currently subject to offer floor mitigation under the BSM Measures.³ If the Commission rejects a blanket SCR exemption approach, Complainants request that the Commission grant exemptions from the BSM Measures for a slew of specifically identified State distribution level demand response programs.⁴ Under this alternative request for relief, the exempted programs would be removed from the formula used for the BSM mitigation exemption test ("MET") determination. As with their blanket exemption request, Complainants seek to apply the revised rules to both current and future SCRs, asserting that the Commission should order the NYISO to "re-run the mitigation test for these resources [currently subject to BSM Measures], excluding all benefits from the

¹ The Services Tariff defines SCRs as "Demand Side Resources whose Load is capable of being interrupted upon demand at the direction of the ISO, and/or Demand Side Resources that have a Local Generator, which is not visible to the ISO's Market Information System and is rated 100 kW or higher, that can be operated to reduce Load from the NYS Transmission System or the distribution system at the direction of the ISO." Services Tariff § 2.19. Capitalized terms not defined in this Protest shall have the meaning set forth in the Services Tariff.

² *N.Y. State Pub. Serv. Comm'n. et al. v. N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL16-92-000, Complaint Requesting Fast Track Processing of the New York State Public Service Commission, New York Power Authority ["NYPA"], Long Island Power Authority, New York State Energy Research and Development Authority ["NYSERDA"], City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council (June 24, 2016), at 3 ("Complaint").

³ *Id.* at 2.

⁴ *Id.* at 2–3. The programs identified by Complainants are: (i) two existing Consolidated Edison Company of New York, Inc. ("Con Edison") distribution-level demand response programs, its Distribution Load Relief Program ("DLRP") and its Commercial System Load Relief Program ("CSR"); (ii) distribution-level demand response programs recently implemented by Orange and Rockland Utilities, Inc., New York State Electric & Gas Corporation and Central Hudson Gas & Electric Corporation, which were to be modeled on the two existing Con Edison programs; and (iii) NYSERDA's Demand Management Program.

exempt distribution-level Demand Response programs, to determine whether mitigation should continue for these resources.”⁵

Pursuant to Rule 211 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.211, and the Commission’s Notice of Complaint, issued on June 27, 2016 and Notice of Extension of Time, issued on July 12, 2016, the Independent Power Producers of New York, Inc. (“IPPNY”)⁶ and the Electric Power Supply Association (“EPSA”)⁷ hereby protest the Complaint. The Commission should deny the Complaint because Complainants fail to meet their burden under Section 206 of the FPA to demonstrate that application of the BSM Measures to SCRs are unjust and unreasonable, and they equally fail to demonstrate that their proposed exemptions to the BSM Measures for SCRs are just and reasonable. The Commission recently rejected the aspects of a Complaint filed by some of the same parties just a year ago raising these demand response issues and seeking a blanket exemption for demand response programs in the Mitigated Capacity Zones.⁸ Nothing has changed since the issuance of the October Order to support a different determination. Moreover, while the Commission has previously held that the State should file a complaint under FPA Section 206 to address individual programs allegedly hampering the implementation of public policy initiatives, the full panoply of programs

⁵ *Id.* at 3.

⁶ IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York. IPPNY’s members include suppliers and marketers that participate in the NYISO’s capacity markets. This pleading represents the position of IPPNY as an organization, but not necessarily the views of any particular member with respect to any issue. IPPNY filed a doc-less Motion to Intervene in this proceeding on June 30, 2016.

⁷ EPSA is the national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40% of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving power markets. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA filed a doc-less Motion to Intervene in this proceeding on July 11, 2016.

⁸ *N.Y. Pub. Serv. Comm’n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 (2015) (“October Order”).

identified by Complainants do not warrant exclusions from the MET formula. In any event, if the Commission decides to grant the Complainants' request with respect to specific demand response programs, Complainants' request to re-run the mitigation test for SCRs that have already been determined by the NYISO to be subject to offer floor mitigation violates the core tenet applied in the New York markets that parties are bound by their mitigation elections. Thus, if any new exemption is adopted—and Complainants have not justified one—it should be applied prospectively.

I. BACKGROUND

The NYISO administers New York's competitive energy, capacity, and ancillary services markets according to the terms of its Services Tariff. One of the Commission's key responsibilities is "to ensure the reasonableness of the wholesale, inter-state prices determined in the markets" an independent system operator or regional transmission organization administers.⁹ The ability of markets to send accurate price signals to market participants is critical to the proper functioning of those markets, fostering competition, and ensuring reliability at the most efficient cost. The BSM Measures, which have been in place for the past eight years, are the NYISO's primary tool to ensure that uneconomic ICAP supply that enters the market in the Mitigated Capacity Zones does not artificially suppress ICAP prices to the detriment of the competitive market and the investors that rely on such market. In ensuring the integrity of market prices and preventing artificial price suppression, the Commission consistently has recognized the detrimental effects of price suppression, stating that "mitigating an offer that is below the resource's actual net costs is reasonable, whether that resource lowers the ultimate

⁹ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 89 (2011).

auction clearing price by 25% or by 1%,” because even “a small change in the clearing price from a below-cost offer may harm competition.”¹⁰

The NYISO first proposed BSM Measures to be applied in the New York City ICAP market in a filing to the Commission in 2007 in compliance with a Commission order directing the NYISO to file measures to “provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators.”¹¹ The NYISO, supported by the Market Monitoring Unit, proposed a comprehensive capacity structure comprised of revised supplier-side rules and, for the first time, a set of buyer-side market power rules which ultimately became the BSM Measures. Several parties, including Complainants NYPSC and NYPA, protested the NYISO’s proposal, also known as the In-City Compliance Filing. Those protests did not take issue with how the BSM Measures would be implemented, but rather argued only that, generally, the BSM Measures were unnecessary and that the NYISO’s ICAP market structure should be designed to accommodate governmental public policy goals.¹² Specifically, the NYPSC argued that the BSM Measures should be rejected in their entirety because they could interfere with New York’s resource adequacy standards, its ability to self-supply ICAP, and its ability to pursue legitimate public policy goals, such as increased fuel diversity and improved environmental characteristics.¹³

¹⁰ *Id.* at P 63.

¹¹ *See N.Y. Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182, at P 17 (2007); *see also N.Y. Indep. Sys. Operator, Inc.*, Docket No. EL07-39-000, Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure (Oct. 4, 2007), at 1 (“In-City Compliance Filing”).

¹² *See, e.g.*, Docket No. EL07-39-000, *supra*, Initial Comments of New York Power Authority (Nov. 19, 2007), at 9.

¹³ *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 92 (2008).

The Commission found that a market which *seems* to benefit consumers by allowing uneconomic entry that offers at low or zero bids and produces artificially low capacity prices in the short term *ultimately* harms consumers by permanently depressing capacity prices below the net cost of new entry (“Net CONE”).¹⁴ This, in turn, prevents the market from sending accurate price signals to new, economic entrants, thereby inhibiting investment, driving up prices, and threatening reliability in the long term.¹⁵ The Commission further found that its statutory obligation to ensure prices were just and reasonable required it to prevent such outcomes.¹⁶

Rejecting the NYPSC’s argument that the BSM Measures are harmful to the public interest because the offer floor rules would prevent the State’s preferred new resources from clearing the capacity market, the Commission ruled:

Because uneconomic entry could produce unjust and unreasonable capacity prices by artificially depressing those prices, and NYISO’s proposal provides a reasonable means to deter uneconomic entry in the in-City market, we deny NYPSC’s request that the Commission reject the proposed minimum bid requirements for new capacity suppliers. Contrary to NYPSC’s claim, we find that granting its request would adversely impact matters within the Commission’s jurisdiction – in particular, the establishment of just and reasonable wholesale electric energy rates. Adoption of NYPSC’s proposal would lead to artificially depressed capacity prices, thus both causing existing generators to be under-compensated and also directly and adversely impacting the Commission’s ability to set just and reasonable rates for capacity sales in the in-City market.¹⁷

History of Application of BSM Measures to SCRs

In its In-City Compliance Filing, the NYISO proposed that SCRs should be exempt from the BSM Measures. Initially, the Commission agreed with the NYISO that SCRs should be

¹⁴ *Id.* at P 103.

¹⁵ *Id.* at PP 102–103.

¹⁶ *Id.* at P 103.

¹⁷ *Id.* at P 110.

exempt because it found that offer floor mitigation could erect a barrier to entry into the markets, an offer floor based on the Net CONE of generation was not applicable to the Net CONE of demand response resources, and it was uncertain how the NYISO would calculate an SCR's costs to determine whether it was uneconomic.¹⁸ However, on rehearing, the Commission ruled that, consistent with its decision in another docket requiring the NYISO to impose on SCRs "appropriate market power mitigation measures when conduct departs significantly from what would be expected under competitive market conditions, . . . it is appropriate for NYISO's in-City market mitigation rules to apply to SCRs in the same manner as all other in-City market participants."¹⁹ The Commission directed the NYISO to propose tariff amendments to apply the BSM Measures to SCRs.²⁰

In its compliance filing, the NYISO proposed tariff provisions establishing an offer floor for SCRs based on the amount of the per-month minimum payment that is payable to the SCR by its Responsible Interface Party and any other subsidies and benefits the SCR may receive. In its order accepting, subject to modifications, the NYISO's SCR offer floor proposal, the Commission agreed with the NYISO that its proposal was the best available proxy for the SCRs' costs of providing capacity. The Commission stated:

An SCR engaged in demand response agrees to curtail power usage to make capacity available. The best representation of the opportunity cost of that curtailment is the value that will induce the SCR to abstain. Offering this capacity at less than the opportunity cost is an uneconomic offer and will unreasonably drive down the price of capacity. NYISO's proposed offer floor prevents uneconomic SCR entry into the market.²¹

¹⁸ *Id.* at P 120.

¹⁹ *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61301, at P 41 (2008).

²⁰ *Id.*

²¹ *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61170, at P 136 (2010) ("2010 Order").

The Commission also ruled, however, that it is appropriate to exclude payments from the offer floor calculation that an SCR receives under state programs “that further specific legitimate policy goals.”²² The Commission stated that it was reasonable to exclude rebates provided to demand response resources under a NYSERDA program and Con Edison’s DLRP.²³ The Commission ordered the NYISO to revise its tariff to provide a list of the criteria it would use “in evaluating whether to include a specific subsidy or other benefit in its calculation of SCR offer floors.”²⁴

On March 19, 2015, the Commission issued an order on rehearing of its 2010 Order specifying that it did not “intend to grant a blanket exemption for all state programs that subsidize demand response and further clarifying how the SCR BSM rules were to be administered.”²⁵ The Commission stated that the NYISO did not need to provide a list of criteria to determine whether payments under specific programs should be excluded from the SCR offer floor determination.²⁶ Instead, the Commission stated that “the state may seek an exemption from the Commission pursuant to section 206 of the FPA if it believes that the inclusion in the SCR Offer Floor of rebates and other benefits under a state program interferes with a legitimate state objective.”²⁷ The Commission directed the NYISO to file tariff amendments providing that “unless ruled exempt by Commission order on a request for exemption filed by the state, all rebates and other benefits from state programs must be included in the SCR Offer Floor.”²⁸

²² *Id.* at P 137.

²³ *Id.*

²⁴ *Id.*

²⁵ *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61208, at P 30 (2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

On May 8, 2015, Complainants NYPSC, NYPA, and NYSERDA filed a Complaint under Section 206 of the FPA against the NYISO seeking broad-sweeping exemptions to the BSM Measures, including with respect to their application to SCRs.²⁹ Specifically, complainants NYPSC, NYPA, and NYSERDA requested that the Commission exempt all resources from the BSM Measures except new oil and gas-fired generation facilities that are 20 MW or greater. Even as to this very limited subset of facilities, the BSM Complaint sought exemptions from the BSM Measures for: (i) repowerings; (ii) reliability projects; and (iii) self-supplied resources. The complainants argued that SCRs cannot be used to suppress prices and requested a blanket exemption for SCRs.

On October 9, 2015, the Commission issued an order rejecting all of the exemptions to the BSM Measures requested in the BSM Complaint except for narrowly tailored exemptions for intermittent renewable resources and self-supply resources.³⁰ With respect to the complainants' request for an exemption for SCRs, the Commission ruled that the complainants had failed to demonstrate that the continued application of the BSM Measures to SCRs is unjust, unreasonable, or unduly discriminatory or preferential pursuant to Section 206 of the FPA because they did not adequately support their request for a blanket waiver. The Commission explained:

The Commission has since clarified that: (1) it did not “intend to grant a blanket exemption for all state programs that subsidize demand response” in determining the offer floor for Special Case Resources subject to mitigation; and (2) a state may “seek an exemption from the Commission pursuant to section 206 if it believes that the inclusion in the [Special Case Resource] Offer

²⁹ *N.Y. State Pub. Serv. Comm'n et al.*, Docket No. EL15-64-000, Complaint (May 8, 2015) (“BSM Complaint”).

³⁰ See October Order at P 2.

Floor of rebates and other benefits under a state program interferes with a legitimate state objective.”³¹

The complainants and certain transmission owners requested rehearing of the Commission’s October Order, again seeking, among other things, a blanket exemption from the BSM Measures for SCRs. In an order issued just five months ago on February 5, 2016, the Commission denied this request, stating that no additional evidence had been presented on rehearing to alter the Commission’s rejection of a blanket exemption for SCRs and that the Commission disagreed with the transmission owners’ argument “that requiring program-specific exemptions creates a significant burden for both the state and the Commission.”³²

On June 24, 2016, Complainants filed the instant complaint, once again alleging that the NYISO’s BSM Measures were hindering the implementation of the State’s public policy initiatives. According to the Complainants, the BSM Measures inefficiently force SCRs to choose between participation in the State and NYISO programs.

II. PROTEST

A. THE COMMISSION SHOULD CONTINUE TO DENY COMPLAINANTS’ REQUEST FOR EXEMPTIONS FROM THE BSM MEASURES FOR SCRS.

Complainants contend that subjecting SCRs to potential offer floor mitigation interferes with the State’s energy policy objectives under the NYPSC’s Reforming the Energy Vision (“REV”) proceeding³³ and the State’s exclusive retail rate-setting authority to regulate retail distribution utility system operations and planning because it unreasonably restricts customers from participating in both the NYISO’s wholesale SCR program and retail demand response

³¹ *Id.* at P 105 (citing *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,208, at P 30).

³² *N.Y. State Pub. Serv. Comm’n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,088, at P 21 (2016).

³³ See generally NYPSC Case 14-M-0101, *Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision* (“REV Proceeding”)

programs.³⁴ They argue that including the value of benefits an SCR receives in its offer floor determination is flawed because it “links programs that are not intended to be linked, and mischaracterizes the economic considerations that a customer faces when considering which Demand Response program(s) to enroll in.”³⁵ Complainants point to data purportedly demonstrating that most of the activations of demand response under State demand response programs occurred when SCRs were not needed to support bulk system reliability and assert this “evidence” proves the State’s retail demand response programs are separate and distinct from the NYISO’s SCR program.³⁶ Complainants assert that, therefore, SCRs must be granted a blanket exemption from the BSM Measures so “that New York may pursue its core energy policy objectives without Federal interference,” or, at a minimum, the specific programs identified by Complainants must be excluded from the MET formula.³⁷

1. Complainants’ Policy Arguments Are Flawed.

The first flaw in the Complainants’ policy arguments is that it incorrectly presumes that the *sole* purpose of all of the State’s demand response programs is to provide load relief on local distribution facilities to avoid or delay more costly utility distribution system investments. This premise is contradicted by the Complainants’ own statements and their extensive references to the REV Proceeding initiatives in the Complaint alone, which clearly demonstrate that the NYPSC’s policy to promote the deployment of demand response is being driven by a variety of reasons, including reducing peak load on the bulk power system and thereby replacing traditional wholesale electric generation with demand response providers, the very same purpose of the

³⁴ Complaint at 53.

³⁵ *Id.* at 54.

³⁶ *Id.* at 56.

³⁷ *Id.* at 47.

NYISO's SCR program. For example, Complainants state that "[t]he NYPSC, through REV, is engaged in a comprehensive effort to orient distribution utilities toward increasing the deployment of [Distributed Energy Resources ("DERs")] such as Demand Response in order to reduce distribution rates by avoiding costly distribution infrastructure *while achieving numerous State energy and environmental policy objectives.*"³⁸

This premise is further refuted by the record in the NYPSC's REV Proceeding itself. Throughout that proceeding, the NYPSC has repeatedly established that one of its main objectives in REV is to encourage retail customers to be more demand responsive to flatten peak loads, an issue squarely within the NYISO's province. For example, the NYPSC stated in its REV Policy Order that "[i]ncreasing the responsiveness of demand will reduce price volatility in the near term and price inefficiency in the long term. If, for example, the 100 hours of greatest peak demand were flattened, long term avoided capacity and energy savings would range between \$1.2 billion and \$1.7 billion per year."³⁹ Thus, even in those instances where the number of hours that activations of demand response resources by a particular State demand response program and the NYISO's SCR program historically have overlapped may have been small,⁴⁰ payments provided to the demand response resources under the State program likely have had an implicit goal to encourage SCRs to participate in the NYISO's wholesale energy and capacity markets to replace electric generators with demand response and provide other

³⁸ *Id.* at 51–52 (emphasis added).

³⁹ NYPSC Case 14-M-0101, *supra*, Order Adopting Regulatory Policy Framework and Implementation Plan (Feb. 26, 2015), at 20.

⁴⁰ When considering each identified program on an individual basis, Complainants' data reveals that the overlap in activations between the SCR program and Con Edison's Commercial System Load Relief Program occurred in 45% of the hours, which can hardly be characterized as an inconsequential overlap. *Id.*

wholesale market benefits which are, again, the very same purposes of the NYISO's SCR program itself.

In fact, the main purpose of one of the State demand response programs for which Complainants seek a program-specific exemption is to impact the level of wholesale capacity. Complainants state that NYSERDA's Demand Management Program ("DMP") "administered pursuant to the IPEC Reliability Plan includes funding to procure Demand Response resources and other solutions that would contribute toward the replacement capacity needed to avoid a reliability issue if [the Indian Point Energy Center] were to be unavailable."⁴¹ Assuming, *arguendo*, that the Commission decides that any program identified in the Complaint can be excluded from the formula for the MET determination on the basis that it is not intended to reduce demand on the bulk power transmission system, the Commission should rule that the DMP is not eligible for an exemption because it clearly is intended to reduce such demand.

Second, contrary to Complainants' arguments, application of the BSM Measures to SCRs does not interfere with the State's ability to encourage the deployment of demand response resources through State demand response programs and does not "constitute[] an impermissible extension of Federal jurisdiction into matters of State authority under the FPA."⁴² All SCRs in the Mitigated Capacity Zones are subject to the MET. If the SCR passes, it is free to bid its capacity at the price it wishes. If the SCR fails, it must bid an offer floor. Neither MET result nor any other NYISO rule proscribes the SCR's participation in any local State program. The MET simply defines the parameters for the SCR's participation in the NYISO market. If the

⁴¹ Complaint at 59. The NYPSC claims that the NYSERDA DMP emanated from a NYPSC proceeding in which the NYPSC developed a reliability contingency plan acting "squarely within the system planning activities that the Federal Power Act reserves to the States and New York in particular." *Id.* at 33 (citation omitted). While not probative to the matters at issue in this proceeding, it bears note that the NYPSC's jurisdiction to take certain steps concerning the reliability contingency plan was at issue in that proceeding.

⁴² *Id.* at 50.

SCR bids its offer floor and fails to clear the market, Complainants are correct that it may be unavailable to support bulk system reliability, but it is also true that it was not needed by the system.⁴³ On the other hand, granting Complainants' request would adversely interfere with the establishment of just and reasonable wholesale electric energy rates—matters within the Commission's exclusive jurisdiction. Adoption of Complainants' proposal would artificially depress ICAP prices in contravention of the FPA's core mandate to set just and reasonable rates and would cause existing generators to be under-compensated. Complainants wholly fail to account for, much less address, the adverse consequences to the market that will result from under-mitigation.

The BSM Measures do not prescribe whether, what types, or the amount of demand response resources that should be deployed. The Complainants have failed to demonstrate that the State's programs and policies to promote demand response cannot be implemented without exemptions from the BSM Measures that would adversely impact the ICAP market. As the Complainants admit, whether an entity decides to participate in a State demand response program is a purely economic decision. If the State wishes to secure demand response to provide local distribution benefits, it can simply raise the level of compensation that is paid to demand response providers to attract the resources. It should not be allowed to subsidize the costs of demand response providers by relying on SCR ICAP revenues if the SCR's participation in the ICAP market would artificially suppress ICAP prices. The BSM Measures must remain fully intact to prevent State programs that subsidize demand response from adversely impacting the just and reasonable ICAP rate.

⁴³ *Id.* at 46–47.

Complainants incorrectly claim that the potential for offer floor mitigation in the NYISO's markets could result in an SCR choosing the NYISO program and foregoing participation in the State's local distribution demand response program.⁴⁴ This claim has no merit. An SCR would only be mitigated by the NYISO if the revenues from the State program are sufficiently high to make the SCR uneconomic in the NYISO program, *i.e.*, the State local distribution program revenues exceeded the expected NYISO program revenues. In this instance, a rational SCR provider would have chosen to participate in the State demand response program and not the NYISO's SCR program, so there is no practical harm attendant to the offer floor bidding requirement. Therefore, any threat of mitigation should have no impact on any State goals to deploy demand response to reduce or delay local distribution infrastructure investments.

Third, under the Services Tariff, SCRs receive the same ICAP market payments as Generators and have the potential for the same impacts as Generators on that market. SCRs can significantly impact capacity prices, and exempting SCRs from offer floor mitigation will give SCRs the incentive and ability to artificially suppress capacity prices. For that reason, the Commission has already ruled that the NYISO's BSM Measures should be applied to all suppliers, including SCRs. The NYISO estimates 531 MW of SCRs in the Mitigated Capacity Zones for the 2016 Summer Capability Period.⁴⁵ With the uncertainty regarding the Commission's jurisdiction to regulate demand response in wholesale markets under the FPA resolved in the Commission's favor by the U.S. Supreme Court and the NYPSC's significant

⁴⁴ *Id.* at 3.

⁴⁵ *Power Trends 2016: The Changing Energy Landscape*, NYISO (July 5, 2016), at 18, http://www.nyiso.com/public/webdocs/media_room/publications_presentations/Power_Trends/Power_Trends/2016-power-trends-FINAL-070516.pdf.

efforts to encourage demand response under REV, it is very possible that the level of SCRs in the ICAP market will grow rapidly.⁴⁶ Thus, the Commission should deny the Complainants' requests for a blanket exemption and a Commission ruling that payments received by SCRs under the State demand response programs identified in the Complaint be excluded from the mitigation test applied to new SCRs under the BSM Measures.

2. Complainants' Requests For a Blanket SCR Exemption and Exclusion of All Identified Programs from the MET Determination Lack Merit and Must Be Rejected.

Citing to the Supreme Court's recent *Hughes* decision for the premise that regulatory decisions in one market may have an incidental effect on another market, Complainants assert the State demand response programs are "'untethered to' the resources' 'wholesale market participation.'"⁴⁷ Complainants thus seek two forms of relief: a blanket exemption outright for all SCRs or, in the alternative, a ruling directing the NYISO to exclude the demand response programs identified by Complainants from the formula used to make the MET determination.

Turning first to Complainants' blanket exemption request, a blanket exemption for SCRs would allow any SCR to participate in the ICAP market without any offer floor mitigation, no matter how large the subsidy it received and without regard to the underlying purpose for such program. Thus, a State subsidized SCR that is uneconomic in the ICAP market would be allowed to freely offer its ICAP as a price taker even if its purpose, as with the DMP, is to affect the level of capacity in the wholesale market. The Complainants' request for a blanket exemption from the BSM Measures for SCRs is the third such request that has been made in the past 13 months alone. As the Commission has found numerous times, such a subsidy would

⁴⁶ *Electric Power Supply Association v. FERC*, 136 S.Ct. 760 (2016).

⁴⁷ See Complaint at 8–9, 52–53 (quoting *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016)).

undermine the core principles behind the Commission-approved BSM Measures—namely, that the NYISO should not permit uneconomic entry to suppress capacity prices artificially because doing so distorts the market price signals that are necessary to encourage investment in new, and the maintenance of needed existing, generators to meet reliability needs. On that basis, the Commission denied the prior two requests. No facts or circumstances have changed since the Commission made these determinations. Thus, the Commission should deny the instant request as well.⁴⁸

Nor should the full slate of programs identified by Complainants be excluded from future MET determinations. The Commission stated in its orders rejecting the requests to broadly exempt SCRs from the BSM Measures that a state may request program-specific exemptions pursuant to FPA Section 206 if it believes inclusion of state program benefits in the SCR's offer floor "interferes with a legitimate state objective."⁴⁹ However, any such filing must still meet the strictures of FPA Section 206. Even if any credence could be given to Complainants' assertion that limited hours of SCR program and State demand response program overlap should alone exclude a State program from the BSM test, Complainants' own data demonstrates there is, in fact, substantial program overlap. For example, Con Edison's CSR program and the NYISO SCR program were called together 45% of the time over the 5-year study period.⁵⁰ Meanwhile, Complainants have provided no data concerning the O&R, NYSEG, and Central Hudson demand response programs, so there is no basis to conclude those programs do not significantly overlap

⁴⁸ See *N.Y. Pub. Serv. Comm'n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 105 (2015) (denying request for exemption for SCRs), *reh'g and clarification denied*, 154 FERC ¶ 61,088, at P 21 (2016) (denying rehearing request seeking exemption for SCRs).

⁴⁹ *Id.*

⁵⁰ See Complaint at 45.

with the NYISO SCR program.⁵¹ Thus, Complainants have failed to meet their burden to demonstrate that inclusion of State program benefits in SCR offer floors under the BSM Measures is unjust and unreasonable, or unduly discriminatory or preferential pursuant to Section 206 of the FPA with respect to the specific programs they have identified. Indeed, excluding such program benefits from SCR offer floors would be unjust and unreasonable because it would allow SCRs that are uneconomic in the NYISO ICAP market to artificially suppress ICAP prices. Thus, contrary to Complainants' broad assertion, the State's programs are not "untethered to" the resources' wholesale market participation.

Likewise, providing the relief sought by Complainants across such a broad spectrum of projects would also be discriminatory and preferential because it would guarantee all SCRs will receive two payments to provide service when other Generators receive only one payment for providing such service. Specifically, under the Services Tariff, a Transmission Owner may request that the NYISO commit certain Generators for a Dispatch Day before the Day-Ahead Market if it determines that the Generators are needed to meet the reliability of its local system. A Transmission Owner may also request that the NYISO commit additional Generators "following the close of the Day-Ahead Market to meet changed or local system conditions for the Dispatch Day that may cause the Day-Ahead schedules for the Dispatch Day to be inadequate to ensure the reliability of its local system."⁵² The Services Tariff provides that the NYISO will fulfill a Transmission Owner's request for additional units by committing the Generators via a Supplemental Resource Evaluation. Under the NYISO's Services Tariff, Generators that sell ICAP are required to offer their units in the Day-Ahead Market. Thus, a

⁵¹ *See generally id.*

⁵² Services Tariff § 4.2.3.1.

Generator that is an ICAP supplier must use its best efforts to provide service to meet a Transmission Owner's local system needs. A Generator does not receive any compensation outside of the normal NYISO market payments for committing to make itself available to provide this service other than its ICAP payment.

In contrast, an SCR that commits to make itself available to meet a Transmission Owner's local system needs can receive two payments for providing this service, one payment from the wholesale ICAP market and another payment from a State retail demand response program. SCRs in load Zone J can receive ICAP payments even though they are not required to provide load relief in response to a Transmission Owner's request for assistance to meet local system needs.⁵³ If an SCR that is otherwise uneconomic in the ICAP market without a payment from a State demand response program chooses to participate in the wholesale ICAP market and a State retail demand response program, it should not be allowed to receive two payments for the same service that a Generator is required to provide for only one payment *and* artificially suppress the ICAP payments the Generator is paid.

B. IF THE COMMISSION DECIDES TO GRANT THE COMPLAINANTS' REQUEST FOR AN EXEMPTION FOR SCRS, IT SHOULD APPLY ITS RULING ON A PROSPECTIVE BASIS.

Complainants request that the Commission order the NYISO to either apply a blanket exemption to all current SCRs or re-run the mitigation test for existing SCRs that are subject to offer floor mitigation, "excluding all benefits from the exempt distribution-level Demand Response programs, to determine whether mitigation should continue for these resources."⁵⁴ If the Commission grants any aspect of Complainants' request to exempt SCRs from offer floor

⁵³ *Id.* § 5.12.11.1.

⁵⁴ Complaint at 3.

mitigation, it should reject Complainants' request for retroactive application to SCRs that the NYISO has already determined to be subject to offer floor mitigation.

Continuing to apply new mitigation exemptions prospectively is consistent with the Commission's past determinations. For example, in its order accepting a competitive entry exemption from the BSM Measures, the Commission confirmed that generating projects that had received final offer floor determinations from the NYISO in their respective Class Years were bound by that determination, and, thus, could not apply for the competitive entry exemption.⁵⁵ Moreover, granting the Complainants' request would set a bad precedent that policy changes made by the Commission that affect market rules will be applied retroactively, upsetting settled expectations and introducing an even higher level of uncertainty into the market.

⁵⁵ See *N.Y. Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,110, at P 77 (2015).

CONCLUSION

In light of the foregoing, IPPNY/EPSCA respectfully request that the Commission deny the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the foregoing document by electronic mail or first-class mail upon each person designated on the official service list compiled by the Secretary to the Commission in this proceeding.

David B. Johnson
David B. Johnson

Dated: July 21, 2016