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June 18, 2018

Shaun Johnson
New York Independent System Operator, Inc.
10 Krey Boulevard, Rensselaer, NY 12144
Sent via E-Mail: sjohnson@nyiso.com

Re: Department of Public Service Staff Comments on Proposed Rules to Apply
Buyer-Side Mitigation for Energy Storage and DER Market Participation

Dear Mr. Johnson:

To memorialize feedback provided at meetings of the Installed Capacity (ICAP) Working Group (ICAPWG), the Department of Public Service Staff (DPS) and New York State Energy Research and Development Authority (NYSERDA) (collectively, the State Entities) submit these comments regarding the NYISO's proposed rules to apply Buyer-side mitigation (BSM) rules for energy storage resource and distributed energy resource participation in the ICAP market. The proposed energy storage rules respond to Order No. 841, in which FERC directed RTOs/ISOs "to **remove barriers** to the participation of electric storage resources in the **capacity**, energy, and ancillary service markets operated by Regional Transmission

Organizations (RTO) and Independent System Operators (ISO) (RTO/ISO markets).”¹ In so ruling, FERC explained that such barriers reduce competition in the wholesale markets. FERC directed each RTO/ISO to revise its tariff to establish a participation model consisting of market rules that, recognizing the physical and operational characteristics of electric storage resources, facilitates their participation in the RTO/ISO markets.

The proposed electric storage and distributed energy resource capacity market rules do not satisfy, and in fact contravene, Order No. 841 because they would subject all electric storage and distributed energy resources to the BSM test, thereby creating an unjust and unreasonable barrier to entry. Additionally, the proposed rules would fail to reasonably accommodate, and would impede, legitimate State policy interests by creating a barrier to these underdeveloped resources which did not previously exist prior to the new public policy. Further, the policy promoting deployment of these resources is needed to further long-term State environmental and clean energy resource goals.

Initially, Order No. 841 directed the NYISO to develop participation rules that reduce barriers to full electric storage resource participation in the wholesale markets. Although compliance with this directive presumably would include an effort to identify the barriers to market entry, NYISO Staff acknowledged at an ICAPWG meeting that it made no effort to identify what barriers inhibit electric storage resource market entry. It is impossible, therefore, for NYISO Staff, stakeholders, and FERC to confirm whether the proposed rules adequately reduce barriers to full electric storage resource participation in wholesale markets. For this reason alone, the proposed rules do not satisfy Order No. 841.

¹ Electric Storage Participation, 162 FERC ¶61,127 (2018), at i (Order No. 841) (emphasis added).

As discussed further below, the NYISO should revise the proposed rules to exempt electric storage and distributed energy resources from BSM because they lack the incentive and ability to exert market power and artificially suppress prices, and are needed to further long-term State environmental and energy resource goals. In the alternative, if the NYISO insists on subjecting electric storage and distributed energy resources to the BSM test notwithstanding the arguments presented below, then, at a minimum, it should develop a limited exemption for these resources.

I. Electric Storage and Distributed Energy Resources Should Be Exempt From Mitigation

Subjecting electric storage and distributed energy resources to the BSM test and potential mitigation is inappropriate because it would (i) be contrary to FERC’s directives in Order No. 841, (ii) inappropriately mitigate resources that lack the incentive and ability to exercise market power, (iii) fail to accommodate legitimate State policy interests, and (iv) ignore that the Demand Curves in the Mitigated Capacity Zones are designed for prices to respond quickly to market entry and exit.

A. Subjecting Electric Storage and Distributed Energy Resources to Potential Mitigation Would Violate Order No. 841 by Creating a Barrier to Market Entry

In Order No. 841, FERC found that “existing RTO/ISO market rules are unjust and unreasonable in light of barriers that they present to the participation of electric storage resources in the RTO/ISO markets, thereby reducing competition and failing to ensure just and reasonable rates.”² FERC additionally found that market rules which limit the services that electric storage resources are technically capable of providing create barriers to market

² Order No. 841, P19.

participation.³ The State Entities fully support the Order No. 841 directive that the NYISO identify and reduce, to the greatest extent practicable, barriers that prevent electric storage resources from participating in the wholesale markets to the fullest extent of their technical capability.

The BSM measures were designed with an intent to discourage the use of monopsony power, i.e., net buyers with the ability and incentive to exercise market power. Mitigation presents a potent market barrier when applied to new resources. Mitigating a resource can cut off its access to capital and degrade projected revenues to a degree that makes the project uneconomic to develop. Even the potential risk of mitigation makes project development more difficult by increasing the cost of financing.

NYISO Staff did not disagree with counsel for New York City when he stated at an ICAPWG that most, if not all, electric storage resources would be mitigated because the test is tied to the economics of a gas peaker plant. The proposed market rules, therefore, would create a known, potent barrier to full electric storage and distributed energy resource participation in the ICAP market. Consequently, the proposal fails to comply with, and contravenes, the Order No. 841 directive to identify and reduce market barriers.

B. BSM Measures Should Not Be Applied To Electric Storage Resources That Lack The Incentive And Ability To Exercise Market Power

FERC has recognized that classes of resources should be exempt from mitigation, and that such an exemption will not harm competition and price formation in the ICAP market. In Docket No. EL16-92, FERC exempted from the BSM test all demand response resources that

³ Id.

participate in the NYISO’s ICAP market.⁴ In so ruling, FERC explained that the NYISO’s Services Tariff was unjust, unreasonable, unduly discriminatory or preferential under Section 206 of the Federal Power Act (FPA) because it applies the BSM rules to Special Case Resources (SCRs), “which have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices.”⁵ Importantly, FERC stated that this finding is consistent with its Minimum Offer Pricing Rule policy because “buyer-side market power mitigation rules are intended to address ‘market power exhibited by certain entities seeking to lower capacity market prices.’”⁶ FERC found that SCRs “have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices” because “they are not effective tools of price suppression.”⁷ Regarding SCRs that participate in both retail and wholesale demand response programs, FERC found that the retail payments to SCRs were made for “providing services that are separate and distinct from the payments that SCRs receive for participating in the NYISO’s ICAP market” and, therefore, does not justify subjecting these resources to potential mitigation.⁸

The same reasoning applies with equal force to electric storage and distributed energy resources. Many of the electric storage and distributed energy resources that are likely to enter the ICAP market in the foreseeable future would likely provide less than 2 MW. The State is promoting these resources to further long-term environmental and clean energy resource goals,

⁴ Docket No. EL16-92-000, 158 FERC ¶61,137 (2017) (DR Exemption Order).

⁵ Id., P30.

⁶ Id.

⁷ Id.

⁸ Id., P33.

and not to suppress capacity prices.⁹ Regardless, these resources would serve as ineffective tools for price suppression because they lack the incentive and ability to exercise market power. The resources would be installed throughout the state over a period of years and by many developers, thereby reducing further the hypothetical adverse impact they might have on wholesale capacity prices. Moreover, if the capacity factor of an average storage resource is less than the system average, increasing electric storage resource deployment could cause the Installed Reserve Margin to increase, thereby increasing ICAP requirements. This further demonstrates that storage resources are not “effective tools of price suppression” or able to exercise market power.¹⁰

The proposed rules would also subject electric storage and distributed energy resources to potential market power mitigation without making even a cursory effort to evaluate whether they have the incentive or ability to exercise market power to artificially suppress prices. Buyer-side mitigation rules include only a subjective test to determine if a resource is “economic” using the NYISO’s own assumptions. This lack of effort contrasts starkly with the supply-side mitigation rules, which apply only to resources that have the ability to (i) withhold capacity to affect prices, *and* (ii) benefit from that action.

Finally, subjecting all electric storage and distributed energy resources to the BSM test would be a logistical and administrative challenge to implement. For example, the NYISO proposes to test each individual resource within an aggregation. This likely would overwhelm NYISO staff and create unreasonable delays to project implementation.

⁹ Section 74 of the New York State Public Service Law was recently amended to require the State to develop an energy storage deployment program.

¹⁰ Id.

C. **ICAP Market Rules Need to Accommodate Legitimate State Policy Interests**

The FPA establishes a framework of cooperative federalism that preserves states' rights to pursue legitimate policy interests, while directing FERC to assure just and reasonable rates in the wholesale markets. The states also have a reserved right under the FPA to regulate resource adequacy and the supply mix. States, like New York, that deregulated their energy markets did not waive these rights when they supported the development and RTO/ISO administration of an ICAP market. Further, the U.S. Supreme Court has affirmed the states' right to encourage the development of resources that further public policy goals.¹¹ The state and federal jurisdictional spheres should be harmonized to satisfy the FPA.

The NYISO is well aware of New York's clean energy goals, which include defined targets to achieve greenhouse gas emissions reductions, increase renewable generation, and deploy electric storage and distributed energy resources. The NYISO has worked with the State Entities and other stakeholders to further these policy goals, and it has demonstrated the willingness and ability to accommodate State policy goals within the wholesale market. In its recent comments on offshore wind in Case 18-E-0071, for instance, the NYISO stated that it "...welcomes the opportunity to continue working constructively with [DPS and the Public Service Commission (PSC)] to pursue achievement of the State's clean energy goals ... in a manner that maintains the efficiency of competitive wholesale electricity markets. By leveraging competitive markets, the State can pursue its goals in an efficient manner, while maintaining the high degree of reliability New Yorkers have come to expect." The State Entities understand

¹¹ Hughes v. Talen Energy Mktg., LLC, 136 S.Ct. 1288, 1298 (2016).

these statements to mean that the NYISO will work to reasonably accommodate important State policy interests in the wholesale markets.

The clean energy policy goals that the State currently is pursuing include achieving the statewide deployment of at least 1,500 MW of electric storage resources by 2025. Subjecting electric storage resources to the BSM test not only fails to accommodate this policy, but it would obstruct this goal by erecting a massive barrier to the development of resources needed to achieve it. NYISO's stated, general commitment to accommodating State policy goals should not be limited to off-shore wind projects. The State Entities, therefore, respectfully urges the NYISO to align its proposed electric storage resource market participation rules with its public statements in support of the State's clean energy goals by exempting electric storage resources from the BSM test. Moreover, the NYISO and market participants have put in an enormous amount of time and effort into the DER Roadmap and other State policy-related initiatives. Exposing electric storage and distributed energy resources to the uncertainty and risk of potential mitigation would nullify any progress previously achieved from those collaborative efforts and is contrary to the NYISO's market enhancements defined in the DER Roadmap Initiative.

Finally, it should be noted that, as recently pointed out in the MMU's State of the Market Report, State policies can increase as well as decrease the price of capacity. For example, tightening environmental standards to protect public health may speed the retirement of those generators which do not meet the new standards, thus increasing capacity prices. The NYISO appropriately reviews the reliability impacts of such retirements, but does not block them simply because they may reduce supply (and increase capacity prices). Similarly, the NYISO should not block new entry that is needed to serve legitimate public policies simply because they

may increase supply (and decrease capacity prices). State policies are not intended to manipulate capacity prices either up or down; instead, they are intended to address legitimate policy concerns (including local reliability and environmental issues) that are outside the narrow scope of the capacity market. Under New York's Public Service Law, the PSC must address all relevant public policies, not just those addressed by NYISO markets. The PSC cannot ignore public policies simply because there is no perfect market solution for them.

D. Exempting Electric Storage And Distributed Energy Resources Will Not Threaten the NYISO's Capacity Market

The NYISO's Capacity Requirements were designed to ensure resource adequacy, which is an important (although not the only) aspect of reliability. Allowing electric storage and distributed energy resources to enter the market will not harm resource adequacy. These new resources will simply receive capacity rights consistent with the new or existing resources they displace, allowing for differences in availability and reliability. Meanwhile, utilities and the PSC intend to use electric storage and distributed energy resources to address local reliability and environmental concerns that are outside the scope of NYISO markets. Allowing electric storage and distributed energy resources to receive capacity payments will encourage the efficient entry of such resources, while fully maintaining resource adequacy.

At the start-up of the NYISO, its capacity market exhibited "boom and bust" pricing, which raised concerns as to whether the capacity market could ensure resource adequacy. In response, the PSC proposed the capacity market Demand Curves, which provide for the purchase of additional supplies of capacity, beyond the minimum requirements, at gradually lower prices. The Demand Curves therefore provide more stable and predictable market price signals for resource adequacy. The slopes of the Demand Curves for the Mitigated Capacity Zones dictate that there is always a price response when a resource enters or exits the

market. It is routine for gas turbines to be mothballed when capacity prices decline, and Pivotal Suppliers can bid their Going Forward Costs (GFCs) when prices decline below their GFC. Thus, if new entry causes capacity prices to decline, existing supply may exit the market without threatening resource adequacy and capacity prices will recover. This automatically coordinates the entry and exit of resources, while neutralizing any short-term price impacts associated with new entry. The NYISO should not confuse these normal market fluctuations with “buyer-side market power,” and should not apply the BSM test with a heavy hand simply to avoid short-term price changes that are inherent in the design of the Demand Curves.

II. If The NYISO Does Not Exempt Electric Storage And Distributed Energy Resources From The BSM Test, It Should Develop A Limited Exemption For These Resources

If, notwithstanding the foregoing arguments, the NYISO declines to exempt electric storage and distributed energy resources from the BSM test, it should propose a carve-out that exempts a defined population of these resources. This limited exemption would not harm competitive price formation in the ICAP market, and it would be consistent with exemptions granted for other resources that further State policy interests.

FERC, for instance, granted a limited exemption for renewable and self-supply resources.¹² In so ruling, FERC found that the limited exemption was justified because these resources “derive limited or no benefit from lower prices,” and “have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices....”¹³

¹² NYPSC et al. v. NYISO, 153 FERC ¶61,022 (2015) (RE Exemption Order).

¹³ Id., P10.

The NYISO subsequently submitted a compliance filing – which remains pending before FERC – that proposed to exempt up to 1,000 MW of new renewable generation on an annual basis.

As explained above, most electric storage and distributed energy resources deployed in the near-term are expected to be relatively small and, like the renewable and self-supply resources addressed in the RE Exemption Order, will not have the incentive or ability to exercise market power or benefit from lower prices. The NYISO’s compliance filing demonstrates that 1,000 MW of renewable generation annually could be exempt from mitigation without harming the competitive wholesale capacity market. It is illogical and irrational to propose market rules which assume that far smaller annual additions to the capacity market would have an adverse impact on price formation and competition.

Accordingly, the NYISO should revise its proposed market rules to create a carve-out that exempts either: (a) all individual or aggregate electric storage and distributed energy resources less than 20 MW; or, (b) up to 500 MW of aggregate electric storage and distributed energy resource capacity on an annual basis. Either exemption would constrain the amount of unmitigated capacity that may enter the market, and both would be consistent with the limited mitigation exemptions previously granted by FERC.

At an absolute minimum, most resources less than 2 MW are exempt from the BSM test under the current NYISO tariffs. NYISO Staff explained at an ICAPWG meeting that it considers this exemption to be a mistake and will be seeking to “correct” it by subjecting all new resources of any size to the BSM test. It is inappropriate for the NYISO to use this process to expand mitigation to electric storage and distributed energy resources less than 2 MW that otherwise would be exempt from the BSM test but for proposed rules that are supposed to be designed to enable market participation.