June 30, 2021

Comments of the Natural Resources Defense Council, the Alliance for Clean Energy New York, and Earthjustice on NYISO's Buyer Side Mitigation Reform Considerations

Introduction:

Natural Resources Defense Council, the Alliance for Clean Energy New York, and Earthjustice (collectively, "Clean Energy Advocates") appreciate the opportunity to provide comments related to NYISO's Buyer Side Mitigation Reform as requested in its NYISO's Buyer Side Mitigation Reform Consideration presentation at the June 3, 2021 Installed Capacity Working Group (ICAPWG) meeting.[1] Clean Energy Advocates strongly urge NYISO to develop tariff reforms that return buyer-side mitigation (BSM) rules to their original and proper economic purpose—i.e., to prevent the exercise of actual buyer-side market power to artificially depress the capacity market clearing price. The application of BSM rules should be limited to those instances where a large net buyer of capacity has both the incentive and the ability to exercise market power. Returning BSM rules to their proper purpose of preventing this kind of uneconomic behavior will effectively eliminate the application of BSM rules to clean energy resources like wind, solar, storage, demand response, and energy efficiency that are needed for New York to achieve its climate and clean energy goals.

The New York Climate Leadership and Community Protection Act (CLCPA) sets forth bold climate and equity mandates. It requires steep greenhouse gas (GHG) emissions cuts across all sectors of the economy to reduce Statewide emissions by 85% of 1990 levels—and eliminate net emissions—by 2050.[2] Within the electric sector, it requires that 70% of the State's electricity supply come from renewable energy sources by 2030 and that this supply is emissions free by 2040. The CLCPA also includes several important provisions to prioritize equity in fighting climate change and to ensure that disadvantaged communities[8] are not left behind in the State's clean energy transition. The CLCPA specifically directs that when "considering and issuing permits, licenses, and other administrative approvals and decisions, . . . [state administrative bodies] shall not disproportionately burden disadvantaged communities."[3] These state entities must also "prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities."[4] To meet these bold climate and equity mandates, New York must drastically reduce fossil fuel use, especially in the downstate regions where BSM rules apply and where the installed capacity and energy supply remain dominated by fossil resources.[5]

We respond below to the specific questions posed in the June 3 NYISO presentation:

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[1] https://www.nyiso.com/documents/20142/21942500/20210603%20NYISO%20-%20BSM%20Reforms%20Consideration%20vFinal.pdf/4189be01-f9a3-01c1-3b3b-04632db0a25b.

[2] CLCPA § 1(4); *id*. § 2, NY ECL §§ 75-0107(1), 75-0109(4).

[3] *Id*. § 7(3).

[4] *Id*.

[5] *See* NYISO Power Trends 2021 at 24-25.

1) For any potential BSM reform, what rationale or standard should be considered to support the just and reasonableness of such a proposal?

- The original intent of BSM rules was to prevent large net buyers of capacity from intentionally suppressing market prices by submitting below-cost bids for a small amount of supply in order to reap significant capacity cost savings from the reduced market clearing prices that result from this "uneconomic supply."[6] To prevent this type of gaming of the capacity market, BSM rules have historically required these net buyers to offer their supply above a price floor that reflects the cost of the specific resources they are offering. Until recently, the concept was to ensure that entities with both the ***incentive and ability*** to engage in manipulative price suppression would be unable to do so by requiring their capacity market offers to reflect their full costs.

- To rectify the harm and market distortions caused by current mitigation regime, NYISO's reform efforts should serve to return BSM rules to their original and proper economic purpose to prevent the exercise of actual buyer-side market power to artificially depress the capacity market clearing price. BSM remains an appropriate mechanism for its narrow original purpose of preventing monopsony power;[7] however, the application of BSM rules should be limited to instances where a large net buyer of capacity has both the incentive and ability to exercise market power. If the new resource is not affiliated with a self-supply entity, there is no need to screen the resource for buyer-side market power.

- Returning BSM rules to their narrow original purpose of addressing actual instances of buyer-side market power has several advantages. First, it will enable the capacity market to continue offering competitive benefits by producing accurate price signals that align with market fundamentals.[8] Second, it will dramatically decrease the administrative burden associated with applying the status quo BSM rules to proposed new resources, which are expected to increase five to ten times from historic levels due to the influx of clean resources being developed to achieve New York's nation-leading climate and clean energy policies.[9] Third, it will provide a simple and durable framework for supporting just and reasonable rates that is consistent with a state's exercise of its legitimate authority under the Federal Power Act to shape the resource mix for its citizens.

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[6] *See N.Y. Indep. Sys. Operator, Inc.,* 122 FERC ¶ 61,211, at P 106 (2008) (explaining that buyer-side market power "mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost.").

[7] Brattle Affidavit at 20.

[8] Brattle Affidavit at 6.

[9] *See* Shaun Johnson, Buyer Side Mitigation (BSM) Process Improvements, NYISO ICAPWG, at 4 (Feb. 18. 2021), https://www.nyiso.com/documents/20142/19267620/BSM_Process_Improvements_20210218_final.pdf/8353ad77-11e0-b084-8594-8cf6d01c41d9.

2) ***Should BSM reforms be focused primarily on exempting CLCPA resources?***
• How would CLCPA resources be defined?
• Should the exemption be explicit, or implicit/mechanical?

3) ***Should BSM reforms be focused on allowing revenues for attributes valued by state policy and not procured by the NYISO-administer wholesale markets? • Would this be specific policies or all state policies?***

Clean Energy Advocates answer to questions 2) and 3), as explained in more detail below, are simply that BSM rules should only apply in instances where there is a net-buyer of capacity with the ability to exercise market power if their capacity offers clear the market. If a new resource is not affiliated with a self-supply entity, there is no need to screen the resource for buyer-side market power.

- In the last several years, BSM rules have been inappropriately repurposed to thwart New York's climate, clean energy, and equity mandates by making it more difficult to develop clean energy resources, particularly where they are most needed. The distortion of BSM rules is based on the flawed economic theory that resources receiving public policy support inappropriately suppress capacity market prices, thus undermining investment signals and ultimately system reliability. The remedy for this misdiagnosis has been to often exclude resources that receive revenues for meeting public policy requirements from the capacity market by requiring them to bid at artificially inflated prices in an attempt to "restore" prices to the levels that are theorized to exist in the absence of public policies.

- As Dr. Kathleen Spees and Dr. Samuel A. Newell, each Principles at The Brattle Group, recently testified in an affidavit on the economic impacts of BSM in the NYISO capacity market: "There is no sensible economic rationale for applying BSM to resources that are developed or maintained to address the harms of climate change or other environmental externalities."[10] Indeed, a correct economic analysis of BSM must consider the following factors:
    - State environmental policies address a well-understood market failure to reflect environmental externalities. The environmental value of policy-supported resources should not be considered an illegitimate distortion of markets that must be excluded, but rather a correction that is needed to achieve a more efficient outcome;
    - The "correct" price for capacity is one that aligns supply and demand, not the price that would prevail in the absence of state policies;
    - Capacity markets with sloping demand curves cannot simultaneously produce low prices and poor resource adequacy;

[10] *Cricket Valley Energy Center LLC and Empire Generating Company LLC v. New York Independent System Operator Inc.*, FERC Docket No. EL21-7-000, Protest of Clean Energy Parties, Exhibit A: Written Testimony of Dr. Kathleen Spees and Dr. Samuel A. Newell at 4 (Nov. 18, 2020) (hereinafter "Brattle Affidavit").

- Broad application of BSM to policy resources will amplify (not mitigate) the regulatory risks affecting capacity investments; and

- Merchant generation investors operate in a market and regulatory context that has always required them to face uncertainties associated with a wide range of energy and environmental regulations at the federal, state, and local levels; these policies and associated economic subsidies have always influenced the resource mix (some in favor of incumbent fossil resources and others in favor of clean energy resources). Merchant investors should never expect to be indemnified against risks associated with these policies (nor should they be required to return revenues to customers when policy changes favor their own investments).[11]

- Far from "protecting" the capacity market, the application of BSM rules to public policy resources serves to erode and eventually eliminate the economic benefits of the capacity market because it creates an increasing disconnection between market fundamentals and market clearing prices as greater quantities of public policy-supported clean energy resources come online.[12] The result is a growth in excess customer costs, societal costs, and wealth transfers to incumbent fossil plants that will rapidly become unsustainable from a policy and economic perspective.[13]

- **Importantly, the primary focus for BSM reform should be on the limited conditions in which BSM rules should apply, rather than attempting to craft an adequate definition of the resources that are exempt based on technology type or resource attribute.** As FERC Chairman Richard Glick explained: "[T]he Commission's buyer-side market power mitigation regime should be all about—and only about—buyers with market power. In the event that a resource is not a buyer with market power, its capacity market offer should not be subject to buyer-side mitigation. That result is both more consistent with the FPA's federalist foundation and the Commission's core responsibility as a regulator of monopoly/monopsony power. That approach would also be a great deal simpler and would get the Commission out of these interminable disputes about who gets mitigated, when, and to what level.[14] In other words, BSM rules should only apply in instances where there is a net-buyer of capacity with the ability to exercise market power if their capacity offers clear the market. If a new resource is not affiliated with a self-supply entity, there is no need to screen the resource for buyer-side market power.

[11] *Id*. at 5.
[12] *Id* at 8.
[13] *Id*.
[14] *New York Indep. Sys. Operator, Inc. New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61058, 61556 (2020) (Glick dissenting at para 16).

4) Should the NYISO consider an approach similar to the "Presumed Good Faith Standard" that was proposed by PJM on April 28, 2021?

- The Clean Energy Advocates caution against the NYISO considering an approach like the "Presumed Good Faith Standard" that was proposed by PJM on April 28, 2021.[15]

    - There is no need to presume state policy is in good faith unless the state is net buyer of capacity with market power. When New York acts within its authority under the Federal Power Act to shape the resource mix for its citizens, NYISO's market rules must acknowledge the State's exercise of legitimate authority and provide for an efficient wholesale market framework that respects the State's choices concerning resource mix.[16]

    - PJM's proposal problematically conflates preemption and mitigation. PJM proposes that FERC coopt two criteria that the U.S. Supreme Court of the United States articulated in *Hughes v. Talen*[17] to identify instances in which state law is pre-empted by the Federal Power Act: 1) state policy "targeting" the wholesale rate for a FERC-jurisdictional product, and 2) "tethering" payment to clearing in the capacity market. The question of preemption, however, is fundamentally different than whether a rate is just and reasonable. States may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain.[18] Preemption is only appropriate where a state action has usurped FERC's exclusive right to determine whether a wholesale rate is just and reasonable.[19] When this jurisdictional line is crossed, the Federal Power Act simply and properly displaces the state law. In contrast to preemption, mitigation, even when egregiously applied to public policy resources, has never prevented states from supporting their preferred policy resources. Instead, mitigation effectively allows the lawful state activity to continue but attempts to offset the effects of public policy on the wholesale price. Conflating preemption and mitigation invites NYISO and FERC to overstep the limits of their authority and take on the role that Congress reserved for the states of regulating generation facilities. Whether a state policy action is pre-empted under the Federal Power Act is a question for the judiciary, not FERC. Having FERC review state public policy to make pre-emption determinations that are really questions for a district court is not a workable standard (nor is it a role FERC likely wishes to take on),[20] as it is difficult to consistently

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[15] Adam Keech, PJM's Initial Proposal: Minimum Offer Price Rule, MOPR CIFP Meeting (April 28, 2021) available at https://www.pjm.com/-/media/committees-groups/cifp-mopr/2021/20210428/20210428-item-04-pjms-initial-proposal-minimum-offer-price-rule.ashx.

[16] *See New York State Pub. Serv. Comm'n, New York Power Auth., Long Island Power Auth., New York State Energy Rsch. & Dev. Auth., City of New York, Advanced Energy Mgmt. All., & Nat. Res. Def. Council*, 174 FERC ¶ 61110 (2021) (Clements concurring at para 4).

[17] *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

[18] *Hughes v. Talen Energy Mktg.*, LLC, 136 S. Ct. 1288, 1298 (2016).

[19] Christiansen, Matthew, *FPA Preemption in the 21st Century* (Dec. 17, 2015). 91 New York University Law Review Online 1 (2016), Available at SSRN: https://ssrn.com/abstract=2705217.

[20] *See New York Indep. Sys. Operator, Inc. New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61058, 61545 (2020) (FERC requiring NYISO to modify its proposal to remove the Commission's role as arbiter in the event of a

apply and is easily subject to abuse. NYISO's BSM reform efforts should not seek to establish criteria for triggering mitigation in support of a just and reasonable rate that problematically conflates criteria for when a state law is preempted by the Federal Power Act.

Timeline for NYISO Action:

Clean Energy Advocates support NYISO's plan and high-level timeline for BSM reform and for capacity market accreditation improvements as presented on slide 9 of the Buyer Side Mitigation Reform Considerations presentation[21]. We agree that the role of accurately valuing capacity resources' contribution to resource adequacy is important and we are amenable to the proposed adjusted schedule for improving capacity accreditation; however, we would strenuously oppose any effort to delay implementation of BSM reforms until capacity market accreditation improvements are complete. Such delay is not necessary to support short-term reliability.[22] Indeed, tethering BSM reforms to capacity market accreditation improvements would aggravate the unacceptable financial and health costs on New Yorkers imposed by BSM rules and create a risk that FERC will step in and establish BSM reforms without stakeholder input.[23]

Importantly, the unacceptable financial and health costs imposed by BSM rules on New Yorkers is neither speculative nor forthcoming—it is present and getting worse. In Class Year 2019, six energy storage resources (ESRs) (65 MW of installed capacity) in Zones G-I were subject to an administratively determined offer floor. This is nearly double the amount of ESRs (three ESRs totaling 37.5 MWs of installed capacity) that received exemptions under the BSM rule's Part A Test,[24] which only exempts a resource when its capacity will not lead the capacity surplus of a locality to exceed four to six percent.[25] If the BSM rules are not expeditiously reformed, the harm to the ESRs in Class Year 2021 could be even worse. The Class Year 2021 Candidates include 27 ESR candidates totaling 3230 MWs, more than any other project type.[26] The majority of these projects are located in the Mitigated Capacity Zones (Zones G-J).[27] It is imperative that BSM reforms are implemented before the completion of Class Year 2021 to avoid further economic harms imposed by application of BSM rules to clean energy resources.

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disagreements over which retirements qualify as Incremental Regulatory Retirements for determination of the renewable resource exemption to BSM rules).

[21] https://www.nyiso.com/documents/20142/21942500/20210603%20NYISO%20-%20BSM%20Reforms%20Consideration%20vFinal.pdf/4189be01-f9a3-01c1-3b3b-04632db0a25b.

[22] While Clean Energy advocates do not agree with the contention, BSM rules have only been based on a need to maintain reliability standards over the long term. *See New York State Pub. Serv. Comm'n, New York Power Auth., Long Island Power Auth., New York State Energy Rsch. & Dev. Auth., City of New York, Advanced Energy Mgmt. All., & Nat. Res. Def. Council*, 173 FERC ¶ 61022, 61108 (2020).

[23] NYISO, 174 FERC ¶ 61,242 (2021) (Glick, Comm'r, concurring at para 3).

[24] Raghu Palavadi Naga, Highlights from the MMU Review of the Class Year 2019 BSM Evaluation, Potomac Economics, at 7 (Mar. 29, 2021), https://www.nyiso.com/documents/20142/20285352/MMU%20Presentation%20re%20CY19%20BSM%20Evaluation.pdf/532d8be1-69c2-a6f2-b29c-b8eb593dc197.

[25] *Id*. at 5.

[26] Class Year 2021 Candidates at 2 (June 9, 2021).

[27] *Id*. at 3-4.

In addition to their market distorting effects, BSM rules frustrate state policies that prioritize equity in fighting climate change, including the reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities long overburdened with the negative effects of electric generation. BSM rules disproportionately impact Black and Brown communities in and around New York City because they serve to delay the retirement of highly polluting fossil-fuel "peaking" plants sited in these communities, which receive most of their revenues from the capacity market. Although these plants tend not to run very often, their emissions contain as much as 20 times the amount of NOx as a typical power plant and contribute to ground level ozone. The impacts of this pollution are significant—exposure to ozone causes an estimated 400 deaths, more than 800 hospital admissions, and more than 4,000 emergency department visits in New York every year,[28] and long-term exposure to the types of air pollutants associated with peaker plants has been linked to the disproportionate impacts of Covid-19 among Black and Brown communities in New York.[29] The current form of BSM rules exemplify structural barriers to a clean and equitable energy transition because they block the development of clean resources precisely where the state's dirtiest, least-efficient power plants are located.

Conclusion:

In conclusion, Clean Energy Advocates strongly urge NYISO to develop tariff reforms that return BSM rules to their original and proper economic purpose—i.e., to prevent the exercise of actual buyer-side market power to artificially depress the capacity market clearing price. The application of BSM rules should be limited to instances where a large net buyer of capacity has both the incentive and ability to exercise market power. Where either the incentive or the ability to exercise market power is absent, BSM rules should not apply. Clean Energy Advocates also caution against the NYISO considering an approach like the "Presumed Good Faith Standard" that was proposed by PJM on April 28, 2021, because there is no need to presume state policy is in good faith unless the state is net buyer of capacity with market power and because PJM's proposal problematically conflates preemption and mitigation. Finally, Clean Energy Advocates support NYISO's plan and high-level timeline for BSM reform and for capacity market accreditation improvements; however, we would strenuously oppose any effort to delay implementation of BSM reforms until capacity market accreditation improvements are complete.

[28] *Air Pollution and the Health of New Yorkers: The Impact of Fine Particles and Ozone*, New York City Department of Health and Mental Hygiene, 4 available at https://www1.nyc.gov/assets/doh/downloads/pdf/eode/eode-air-quality-impact.pdf. https://www1.nyc.gov/assets/doh/downloads/pdf/eode/eode-air-quality-impact.pdf.

[29] *See* Eric B. Brandt, PhD, Andrew F. Beck, MD, MPH, and Tesfaye B. Mersha, PhD, *Air pollution, racial disparities, and COVID-19 mortality*, J Allergy Clin Immunol (July 2020) available at https://www.jacionline.org/article/S0091-6749(20)30632-1/pdf. https://www.jacionline.org/article/S0091-6749(20)30632-1/pdf.