UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Independent Power Producers of New York, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket No. EL13-62-002**
	)	
New York Independent System Operator, Inc.,	)	
	)	
Respondent.	)	

ANSWER OF NATURAL RESOURCES DEFENSE COUNCIL AND THE SUSTAINABLE FERC PROJECT TO REQUEST FOR EXPEDITED ACTION

January 24, 2017

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I. Summary

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's (the "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2016), the Natural Resources Defense Council ("NRDC"), and the Sustainable FERC Project hereby respond to the Request for Expedited Action[1] of the Electric Power Supply Association ("EPSA") in the above referenced proceeding.

EPSA's Request for Expedited Action should be rejected. EPSA's request is procedurally improper because it exceeds the Commission's specific directives defining the scope of this proceeding, and calls for modifications to NYISO's tariff that have not been discussed in a NYISO stakeholder process. Should the Commission reach the merits, EPSA's implied argument that resources supported by New York's Clean Energy Standard warrant special buyer-side mitigation scrutiny should be rejected. It runs contrary to established Commission precedent, and would result in unjust and unreasonable prices and frustrate legitimate state policy objectives. Furthermore, EPSA has provided no evidence in support of its claims.

II. Background

a. FERC's order denying IPPNY's amended complaint

This proceeding stems from a complaint filed by the Independent Power Producers of New York ("IPPNY") on May 10, 2013.[2] The Complaint argued that the

> Commission should find that [NYISO's] Services Tariff is unjust and unreasonable" because it permits "artificial suppression of prices in the New York Control Area ('NYCA') installed capacity ('ICAP') market resulting from below-cost offers of capacity from resources that would have exited the market but for

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[1] *See* Docket No. EL13-62-002, *Request for Expedited Action*, (January 9, 2016) (the "Request for Expedited Action").

[2] *See* Docket No. EL13-62-000, *Complaint Requesting Fast Track Processing of the Independent Power Producers of New York, Inc.* (May 10, 2013) ("IPPNY Complaint").

> out-of-market revenues under reliability must run ('RMR') contracts and similar mechanisms, including, but not limited to, Reliability Support Services Agreements ('RSSAs') like those recently approved by the New York Public Service Commission (the 'NYPSC') for facilities that would otherwise have been mothballed.[3]

IPPNY filed an amended complaint on March 25, 2014, focusing on a term sheet agreement between National Grid and Dunkirk Power, LLC ("Dunkirk"), to subsidize the repowering of units 2, 3, and 4 at the Dunkirk Generating Station (the "Dunkirk Repowering").[4] The agreement had been executed after IPPNY filed its initial complaint, so IPPNY's amendment updated the original filing to address the Dunkirk Repowering. While the Dunkirk Repowering was justified at the time as necessary to meet short-term reliability needs, according to IPPNY it was in fact "well out of proportion to any identified reliability need" and was presumably instead merely an effort to suppress prices.[5]

The Commission denied IPPNY's Amended Complaint. In doing so, it appropriately explained that the "issue before" the Commission was whether IPPNY had demonstrated that buyer-side mitigation was warranted to address bidding behavior enabled by out-of-market

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[3] *Id.* at 1-2. The New York Independent System Operator's installed capacity market includes three localities for which load-serving entities must procure minimum amounts of capacity from resources located within the locality. The localities for which such local procurement is required are "New York City, Long Island, and the G-J Locality," which covers the Lower Hudson Valley and New York City. NYISO Installed Capacity Manual § 2.6. The larger non-localized market serving the entire state is known as the New York Control Area (NYCA). *See id.* "NYISO refers to the capacity zone encompassing load zones in the NYCA other than in" constrained localities as 'Rest of State.'" *New York Independent System Operator, Inc.*, 143 FERC 61,217 at P 2 (2013); *see also Independent Power Producers of New York, Inc. v. New York Independent System Operator, Inc.*, 150 FERC ¶ 61,214, at P 10 (2015), *reh'g pending* ("Order Denying Amended Complaint") (referring to units in the "NYCA rest-of-state region"). NYISO has never applied buyer-side mitigation rules in the rest-of state region.

[4] *See* Docket No. EL13-62, *Motion to Amend, and Amendment to, Complaint of the Independent Power Producers of New York, Inc.* (Mar. 25, 2014) ("IPPNY Amended Complaint").

[5] *Id.* at 7, 14.

agreements justified based on purported reliability needs, i.e. "whether NYISO's tariff is unjust and unreasonable because it permits existing capacity resources needed for short-term reliability and capacity resources with repowering agreements to offer their capacity at *de minimus* levels."[6]

In answering that question, the Commission concluded that "IPPNY has failed to show that NYISO's tariff is unjust and unreasonable without imposing minimum bid requirements for existing resources needed for short-term reliability in NYISO's rest-of-state capacity market."[7] The Commission made clear that out-of-market compensation for meeting bona-fide reliability needs is properly included in a unit's going-forward costs, and that therefore the receipt of any such revenues does *not* trigger buyer-side mitigation:

> We agree with the New York Commission that, when RSSA revenues are taken into consideration, the Cayuga and Dunkirk units' going-forward costs would likely be low. Because Cayuga and Dunkirk are needed for reliability and would clear a capacity market that also reflected local reliability needs, RSSA revenues received by these resources reflect the value of the services provided by these resources to customers. In calculating the going-forward costs of these two resources, it is reasonable to deduct their RSSA revenues, because the revenues do not overstate the value provided by the resources to customers. It is therefore reasonable, and fully consistent with NYISO's tariff rules, for the units to bid at *de minimus* levels.[8]

With regard to the narrow issue of the Dunkirk Repowering, however, FERC determined that further stakeholder process was warranted because the "agreement appear[ed] to procure more capacity" than was necessary to meet NYISO's reliability needs.[9] The Commission denied IPPNY's amended complaint even with respect to this narrow issue because IPPNY had offered

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[6] Order Denying Amended Complaint at P 64.

[7] *Id.* at P 65.

[8] *Id.* at P 66.

[9] *Id.* at P. 69.

only "limited evidence for the relief it seeks."[10] The Commission concluded that further stakeholder policy development was necessary because "there is no existing policy in NYISO for how buyer-side market power mitigation would apply to repowering agreements" like Dunkirk's "that purportedly resolve[], at least in part, a short-term reliability need."[11] To examine the issues raised by IPPNY with respect to this narrow class of "repowering agreements similar to Dunkirk's," the Commission ordered NYISO to examine, through its stakeholder process, whether such agreements should "trigger[] a buyer-side market power evaluation," whether buyer-side mitigation rules should be extended to the rest-of-state capacity zone in order to permit such evaluations, and "what mitigation measures need to be in place to address such concerns."[12]

b. NYISO's compliance filings in response to FERC's Order

The NYISO responded to FERC's directive through two filings, a compliance report filed on June 17, 2015,[13] and a response to a subsequent information request from FERC filed on December 16, 2015.[14] NYISO's filings address "retention and repowering of . . . units similar to Dunkirk's" through an "approach under which the NYISO would screen and monitor for suspicious behavior, and be required to refer any suspicious behavior identified to the Commission's Office of Enforcement for further review."[15]

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[10] *Id.* at P 70.

[11] *Id.*

[12] *Id.* at 71.

[13] Docket No. EL13-62, *New York Independent System Operator, Inc., Compliance Report* (June 17, 2015) ("NYISO Compliance Report").

[14] Docket No. EL13-62, *Response to Information Request* (Dec. 16, 2015) ("NYISO Information Response").

[15] *Id.* at 3.

NYISO concluded that a generic offer floor is not an appropriate mechanism to address price suppressive contracts masquerading as short-term reliability solutions due to its "significant potential for over-mitigation of legitimate conduct."[16] NYISO highlighted that an analytical approach focusing on allegedly "uneconomic" contracts would risk inappropriate mitigation of contracts that were the result of "legitimate public policy measures motivated by factors such as direct economic benefits, deferred investment, fuel diversity, and reduced emissions."[17] Due to these concerns and others, NYISO concluded that a system of monitoring and referring suspicious behavior to the Commission's Office of Enforcement was the best approach, as the Commission's Office of Enforcement is "better suited to distinguish legitimate from illegitimate conduct, and to identify the appropriate recourse."[18]

IPPNY submitted a protest to NYISO's Information Response on January 19, 2016.[19] IPPNY argues that, rather than referring suspicious behavior to the Commission's Office of Enforcement, NYISO should instead "impose offer floor mitigation on Uneconomic Retention behavior identified as an exercise of buyer-side market power."[20] IPPNY defines "Uneconomic Retention" in relation to whether a unit was needed for reliability purposes, revealing an intended focus on evaluating agreements similar to the Dunkirk Repowering.[21] IPPNY proposes that

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[16] *Id.* at Attachment II, p. 16.

[17] *Id.* at Attachment II, p. 17.

[18] *Id.* at Attachment II, p. 16.

[19] Docket No. EL13-62-002, *Protest of the Independent Power Producers of New York, Inc.* (Jan. 19, 2016) ("IPPNY Protest").

[20] *Id.* at 13.

[21] *See id.* at 11 n. 36 (discussing contracts for the retention of units in excess of reliability needs, and not mentioning any other potential needs such contracts may serve). IPPNY's protest does not provide any framework for evaluating out-of-market payments for non-reliability products, or

certain units "likely to be uneconomic" be monitored and mitigated where they receive payments that were "not the result of a non-discriminatory procurement process," and "are greater than 5% of the near-term market value of the products sold under the contract as calculated by the NYISO as of the time the contract is executed."[22]

c. The New York Public Service Commission's Order Adopting a Clean Energy Standard

On August 1, 2016, more than seven months after IPPNY filed its protest and through a proceeding entirely unrelated to the inquiry NYISO was conducting pursuant to FERC's order denying IPPNY's amended complaint, the New York Public Service Commission ("NY PSC") issued its Order Adopting a Clean Energy Standard.[23] The Clean Energy Standard Order establishes New York as a national leader on clean energy policy through a multi-faceted program designed to ensure the state meets its ambitious goals of reducing energy-sector greenhouse gas emissions by at least 40 percent by 2030,[24] and supplying at least 50 percent of its electricity from renewable sources by 2030.[25] NRDC was extensively involved in the proceeding leading up to the adoption of the Clean Energy Standard, filing several sets of comments regarding its proposed

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otherwise discuss payments for providing environmental benefits through mechanisms such as Renewable Energy Credits or Zero Emissions Credits.

[22] *Id.* at 19.

[23] N.Y. Pub. Serv. Comm'n, Case 15-E-0302, *Order Adopting a Clean Energy Standard* (Aug. 1, 2016), *available at* http://tinyurl.com/hr5euxa ("CES Order").

[24] The New York State Energy Plan's greenhouse gas emission reduction goal of 40 percent by 2030 applies not only to the electric power generation, but to the energy sector more broadly, including "industry, buildings, and transportation," meaning that to achieve its goal the State must reduce emissions from electric power generation by *more* than 40 percent. *See* 2015 New York State Energy Plan, available at https://energyplan.ny.gov/Plans/2015.aspx.

[25] *Id.*at 2.

design.[26]

To achieve the 50 percent renewable energy goal, the Clean Energy Standard Order directs the New York Energy Research and Development Authority, as well as the state's utilities and other electricity providers, to undertake various actions. Most notably, it requires them to purchase Renewable Energy Credits produced by new large-scale renewable generators. Second, the Order establishes a separate and distinct Zero Emissions Credit Program (ZEC Program) that requires utilities and other electricity providers to purchase credits from nuclear power plants that meet a "public necessity" standard—meaning that in the state's view they provide public policy benefits that must be preserved.[27] The Commission values these Zero Emissions Credits by using a formula that caps payments at the social cost of carbon, based on the calculations of a federal interagency working group published in July 2015.[28] Together, these programs seek to achieve the goal of reducing "total emissions of air pollutants resulting from fossil fuel combustion."[29]

d. EPSA's request for expedited action

On January 9, 2017, more than five months after the NY PSC issued the Clean Energy Standard Order, EPSA submitted a filing in this docket claiming that the Clean Energy Standard Order "threatens to artificially suppress prices in the ICAP market."[30] EPSA focuses exclusively

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[26] *See, e.g.*, N.Y. Pub. Serv. Comm'n, Case 15-E-0302, *Comments of Acadia Center, Citizens Campaign for the Environment, Citizens for Local Power, Environmental Advocates of New York, National Wildlife Federation, Natural Resources Defense Council, The Nature Conservancy, New York Public Interest Research Group, Pace Energy and Climate Center, Sierra Club* (Apr. 22, 2016), *available at* http://tinyurl.com/hjnqc24.

[27] *Id.* at 124.

[28] *See* CES Order at 131-35.

[29] *Id.* at 3.

[30] Request for Expedited Action at 10.

on the ZEC Program and does not raise any concerns with regard to other aspects of the Clean Energy Standard Order such as its Renewable Energy Credit provisions.[31] To remedy price suppression allegedly caused by the ZEC Program, EPSA requests the Commission to "order the NYISO to promptly propose modifications to the Services Tariff based on the approach set forth in the IPPNY Protest."[32]

III. Comments

a. EPSA's request should be denied as procedurally improper

EPSA's request is procedurally improper because it goes significantly beyond the scope of the open issues in this proceeding. FERC's order denying IPPNY's amended complaint required NYISO to implement a stakeholder process focused solely on "repowering agreements similar to Dunkirk's."[33] The defining characteristics of the Dunkirk Repowering, as articulated in the Order, were that it "purportedly resolve[d], at least in part, a short-term reliability need," but "appear[ed] to procure more capacity than is needed for short-term reliability, and for a much longer term."[34] A stakeholder process focused on agreements with these defining characteristics was necessary to resolve the undecided portion of FERC's original inquiry, which had already been limited to the question "whether NYISO's tariff is unjust and unreasonable because it permits existing capacity resources needed for short-term reliability and capacity resources with repowering agreements to offer their capacity at *de minimus* levels."[35] The NY PSC's Clean Energy Standard Order was not

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[31] *See id.* at 7-12.

[32] *Id.* at 15.

[33] Order Denying Amended Complaint at P 71.

[34] *Id.* at PP 69, 70.

[35] *Id.* at 64.

justified on the basis of meeting short-term reliability needs, nor does it provide for any payments in excess of the value of products delivered. Rather, the clear focus of the Clean Energy Standard is the achievement of the state's ambitious clean energy goals and the need to "not only reduce carbon emissions," but also "nitrogen oxides, sulfur dioxide, and particulate matter emissions."[36] It calls for payments to be made to compensate eligible resources for their environmental benefits, in accordance with the NY PSC's state-jurisdictional determination regarding that value. EPSA's implied request for the Commission to require NYISO to apply buyer-side mitigation to units receiving payments pursuant to the ZEC Program therefore falls outside the scope of the proceeding, and must be rejected.

In submitting its compliance filings in response to FERC's order denying IPPNY's amended complaint, NYISO was *required* under the Commission's "long established" rules to limit those filings "to the specific directives ordered by the Commission,"[37] i.e. to considering what mitigation measures may be needed to address repowering agreements like Dunkirk's that are justified on the basis of short-term reliability needs, but provide for capacity in excess of those needs. EPSA's requested relief, even if proposed by NYISO in the first instance, would be "deemed automatically rejected at the time of the filing" as exceeding the scope of the Commission's specific directives.[38] But it *also* must be rejected as an impermissible collateral attack on the Commission's original order. Such a challenge to "the substance of those directives" is "improper."[39]

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[36] CES Order at 3.

[37] *Consol. Edison Co. of N.Y.*, 152 FERC 61,110, at P 71 n.130 (2015).

[38] *See Reliant Energy Aurora, LP*, 111 FERC 61,159 at P 26 (2005).

[39] *San Diego Gas & Elec. Co. Complainant*, 127 FERC 61,269 at P 259 (2009), *aff'd on reh'g*, 131 FERC 61,144 at P 21 (2010).

Indeed, this entire proceeding has concerned only out-of-market payments justified based on purported short-term reliability needs. IPPNY's original complaint objected to NYISO's treatment of units receiving "revenues under reliability must run ('RMR') contracts and similar mechanisms, including, but not limited to Reliability Support Services Agreements,"[40] and its Amended Complaint focused on the Dunkirk Repowering and similar contracts.[41] Even IPPNY's proposed solution is styled as a mechanism for screening "agreements similar to the Dunkirk agreement."[42] IPPNY's Amended Complaint did not mention the ongoing development of the NY PSC's Clean Energy Standard Order, and never invoked the state's then-existing policies providing for payments to resources based on their environmental benefits.[43] This was a logical decision given the fact that, as explained below, such payments present analytically distinct issues from the Dunkirk Repowering and do not warrant mitigation. To the extent that EPSA interprets the relief requested by IPPNY in its Protest as applying beyond the context of agreements similar to the Dunkirk Repowering and instead providing for a test that would screen and mitigate units supported by the ZEC Program, EPSA merely highlights the unsupported and procedurally improper nature of such requested relief.

Fortunately, even IPPNY's over-broad proposal cannot reasonably be read as implicating any resources supported by the Clean Energy Standard Order. IPPNY calls for NYISO to mitigate certain units where they receive payments under a contract that are "greater than 5% of the near-

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[40] IPPNY Complaint at 1-2.

[41] *See* IPPNY Amended Complaint at 2-4.

[42] IPPNY Protest at 4.

[43] The State's prior Renewable Portfolio Standard, for example, provides for contracts providing payments for renewable energy credits created by renewable generators. *See* N.Y. Pub. Serv. Comm'n, Case 03-E-0188, *Order Regarding Retail Renewable Portfolio Standard* (Sept. 24, 2004), *available at* http://tinyurl.com/zqbhq5w.

term market value of the products sold under the contract as calculated by the NYISO."[44] Under the ZEC Program, eligible nuclear units receive payments not for the electricity they sell, but for a separate and district product—Zero Emissions Credits—whose value is defined pursuant to state law through the Clean Energy Standard Order as the amount paid under those contracts. Likewise, Renewable Energy Credits sold pursuant to the Clean Energy Standard Order's framework to support renewable generators constitute the environmental attributes associated with renewable electricity and are separate and distinct from the electric power and other FERC-jurisdictional products produced by those facilities. NYISO has no place in judging the value of such attributes where, as here, they are unbundled from the associated electricity, because determining that value falls outside of the Commission's jurisdiction.[45] And even if such a screening mechanism were applied to units receiving compensation for their environmental benefits, such application would be nonsensical in this instance, as it would never result in mitigation (since revenues from selling Renewable Energy Credits and Zero Emissions Credits would never exceed 5 percent of their value).

Even though IPPNY's proposed solution would not extend to resources supported by the Clean Energy Standard Order, EPSA's filing highlights the problematic nature of IPPNY's expansive request. Contrary to the specific directive in the order denying IPPNY's amended complaint, IPPNY calls for NYISO tariff revisions that do not contain a limiting provision to ensure that mitigation measures target "repowering agreements similar to Dunkirk's."[46] Indeed,

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[44] IPPNY Protest at 19.

[45] *See WSPP, Inc.*, 139 FERC ¶ 61,061 at P 21 (2012) ("RECs and contracts for the sale of RECs are not themselves jurisdictional facilities subject to the Commission's jurisdiction under FPA section 201.")

[46] Order Denying Amended Complaint at P 71.

IPPNY's proposal appears to sweepingly apply to all types of generation facilities and payments made pursuant to *any* type of state policy rather than those targeting but overcompensating for short-term reliability needs.

Such relief, if granted, could cause confusion with regard to state policies unrelated to the Dunkirk Repowering. For example, it is possible that in the future New York will seek to spur clean energy resources through the use of mechanisms unlike the Dunkirk Repowering but that nevertheless do require payments for electric energy or capacity bundled with sales of renewable energy credits. As the Commission acknowledged in its amicus brief filed in the Supreme Court's recent case *Hughes v. Talen Energy Marketing, LLC*,[47] states may "require[] that utilities enter into . . . bilateral contracts for the purchase of capacity . . . with particular types of generators."[48] Any such contracts, which would be executed in order to support a clean energy mix, would not pose the same concerns as the Dunkirk Repowering (providing compensation for reliability attributes in excess of what is necessary to address a short-term reliability need). Agreements for energy bundled with Renewable Energy Credits would not warrant buyer-side mitigation, and in any case have not been discussed in this proceeding. Accordingly, since NYISO's standard procedures dictate that "mitigation proposals must have the support of a fully developed factual record and a stakeholder process,"[49] it would be entirely improper for the Commission to require tariff revisions implicating any such future contracts.

In sum, EPSA's request must be rejected because it re-interprets IPPNY's Protest in a manner that goes well beyond the scope of this proceeding to encompass issues not addressed in

[47] 136 S. Ct. 1299 (2016).

[48] Brief for the United States as Amicus Curiae, *Hughes v. Talen Energy Mktg., LLC*, case nos. 14-614 and 14-623 at 34 (Jan. 19, 2016), available at https://perma.cc/4ELB-QKCU.

[49] Order Denying Amended Complaint at P 71.

NYISO's stakeholder process, and because it would require NYISO to file tariff revisions that go well beyond the specific directive contained in FERC's order denying IPPNY's amended complaint. In resolving the remaining issues presented by NYISO's compliance filings, the Commission should instead narrowly address only those issues upon which NYISO's stakeholder process and the record in this proceeding have focused, without deciding or implicating in any manner the broader questions now raised in the first instance by EPSA.

b. The Commission should not mitigate units on account of payments they receive for providing environmental benefits

As described above, the Commission should reject EPSA's Request for Expedited Action on procedural grounds. In the event that the Commission decides to reach the merits of EPSA's request, however, it should deny EPSA's implicit request to mitigate units based on their receipt of compensation for providing environmental benefits. EPSA's request runs contrary to the Commission's precedent regarding the treatment of environmental costs and benefits, its practices with regard to revenues from similar products and attributes produced by electric generators, and the purpose of buyer-side mitigation, which is to prevent *artificial* price suppression. EPSA's request, if granted, would force consumers to procure redundant capacity and frustrate states' ability to carry out legitimate public policies. Furthermore, EPSA's request should be rejected because neither EPSA nor IPPNY has presented evidence in support of ESPA's position and therefore has not met the burden under Section 206 of the Federal Power Act to demonstrate that NYISO's existing tariff is unjust or unreasonable.

1. NYISO's buyer-side mitigation rules

"Mitigation measures in NYISO currently apply only to the NYC locality and the G-J locality, not the broader NYCA footprint."[50] Within these localities, mitigation rules cover only new capacity resources, not existing resources or energy market bids.[51] The Commission has never held that the receipt of Renewable Energy Credits in NYISO triggers special buyer-side mitigation scrutiny. Indeed, its decisions to-date reveal a solicitude for state public policies that weighs against mitigation of resources supported by such policies even if mitigation might otherwise be warranted.[52] And while the Commission has not specifically addressed whether payments for providing environmental benefits should be included in NYISO's going-forward costs formula, NYISO's rules do provide that costs of complying with environmental requirements should be so included.[53,54]

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[50] Order Denying Amended Complaint at P 70.

[51] *See* NYISO Market Administration and Control Services Tariff; Attachment H, available at http://www.nyiso.com/public/markets_operations/documents/tariffviewer/index.jsp;

[52] *See infra* Section III.b.3 (discussing FERC's obligation to weigh the benefits of accommodating state public policies). *See also N.Y. Pub. Serv. Comm'n, N.Y. Power Auth., & N.Y. State Energy Research & Dev. Auth.*, 153 FERC ¶ 61,022 (2015) (Honorable, C.D., concurring) (stating that the Commission's decision exempting certain renewable resources from buyer-side mitigation rules "is an important step in accommodating New York's public policy goals").

[53] NYISO's tariff includes within going-forward costs "the costs . . . necessary to comply with federal or state environmental . . . requirements that must be met in order to supply Installed Capacity." NYISO Market Administration and Control Services Tariff; Attachment H, § 23.2.1. Given that the same generation mix would result whether a state mandates dirty but not clean resources to make payments or instead provides for payments to be made to clean but not dirty resources, it would make little sense to treat environmental compliance costs differently from payments for providing environmental benefits.

[54] Consistent with the principle that such benefits should be included in NYISO's assessment of unit costs, the NYISO market monitor *does* include benefits from sales of environmental attributes in calculating whether a unit should be exempted under Part B of the mitigation exemption test. *See* 153 FERC 61,022 at P 48 (for renewable resources that are not otherwise exempt from buyer-side mitigation rules, Part B of the mitigation exemption test "takes into account certain incentives for owning renewable resources by reducing the unit-specific Net CONE").

2. Bidding behavior accounting for payments for providing environmental benefits does not provide cause for mitigation

While the Commission should refrain from answering the questions raised by EPSA in the first instance in this proceeding, if it were to do so it should expressly clarify that bidding behavior accounting for Renewable Energy Credit or Zero Energy Credit payments under the Clean Energy Standard Order *does not* cause artificial price suppression, and that such benefits are properly deducted from a unit's going-forward costs.

NYISO's buyer-side mitigation rules are designed "to address market power exhibited by certain entities seeking to lower capacity market prices" and prevent the "exercise [of] buyer-side market power to *artificially* suppress ICAP market prices."[55] Where units selling products into FERC's markets earn revenues from sales of non-FERC-jurisdictional products and are able to offer lower market bids on account of those revenues, the lower market prices that result are not *artificial*. Rather, they reflect the true economic reality that units participating in FERC's markets face, just as lower operating costs enable lower bids. Consistent with this principle, the Commission has held in *ISO New England Inc.* that neither "Renewable Energy Credits" nor "Production Tax Credit[s] . . . should be considered" out-of-market revenues.[56]

As explained above, the Zero Emissions Credits and Renewable Energy Credits defined under the Clean Energy Standard Order are separate and distinct from electricity, representing instead only the environmental benefits that the NY PSC has deemed the eligible facilities create.[57] Because of this, they are no different from other non-FERC-jurisdictional products that

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[55] 153 FERC 61,022 at PP 10, 36, *reh'g denied*, 154 FERC 61,088 (2016) (emphasis added).

[56] 146 FERC 61,084 at P 32 (2014).

[57] While Renewable Energy Credits are not directly implicated by EPSA's Request for Expedited Action, it is eminently clear that such credits are an entirely separate and distinct from the associated electricity. Under the Clean Energy Standard Order, the value of Renewable Energy

other types of generators produce. The Commission has never held that bidding behavior accounting for revenues from separate products, such as fertilizer produced by waste-to-energy facilities, hydrogen produced by fuel cells may produce hydrogen, or steam produced by co-generation facilities, gives rise to artificial price suppression. Payments for Renewable Energy Credits or Zero Emissions Credits are no different, as they reflect the true value of separate products that units create under state law. In this regard, revenues from selling such credits are significantly different from the revenues from the Maryland program at issue in *Hughes*, which entailed adjusting wholesale capacity prices to address a purported reliability need rather than compensating a generator for delivering a separate and distinct product.[58] Thus, incorporating such revenues into wholesale market bids is not "uneconomic." To the contrary, it reflects efficient behavior, just as incorporating costs incurred to meet state environmental requirements is economically efficient.

As the Commission's order denying IPPNY's amended complaint reveals, a concern potentially necessitating buyer-side mitigation arises not *generally* where a unit receives revenues outside of FERC-supervised markets, but rather only where such revenues result from the sale of FERC-jurisdictional products and do not reflect the true value of those products (presumably because a mismatch between a unit's revenues and the true value of the capacity or energy

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Credits is determined through the operation of a competitive market to reach the NY PSC's Renewable Energy Credit supply requirements under the Order. Renewable Energy Credits are unbundled from the associated electricity and thus the NY PSC's authority to determine their value is directly supported by the Commission's holding in *WSPP Inc. See* 139 FERC ¶ 61,061 at PP 18-24.

[58] *See* Brief of Amicus Curiae Natural Resources Defense Council, Inc. In Support of Defendants' Motion to Dismiss, Case No. 16-cv-8164 (S.D.N.Y. Dec. 20, 2016), at 12-14 (discussing the Maryland program at issue in Hughes) and 15-16 (distinguishing the ZEC Program), available at https://www.nrdc.org/sites/default/files/suport-nys-promote-clean-energy-amicus-brief-20161209.pdf.

products sold outside FERC's markets suggests manipulative conduct rather than a bona-fide sale).[59] Consistent with this principle, the Commission held that it was "reasonable to deduct [the] RSSA revenues" received by the Cayuga and Dunkirk units, "because the revenues do not overstate the value provided by the resources to customers."[60] It was "therefore reasonable, and fully consistent with NYISO's tariff rules, for the units to bid at *de minimus* levels."[61] By contrast, "the Dunkirk repowering agreement," "[u]nlike the RSSA contracts discussed in the original Complaint . . . appears to procure more capacity than is needed" to address the "short-term reliability needs upon which it was justified, and "for a much longer term."[62]

In the case of resources supported by payments under the Clean Energy Standard, it is manifestly clear that the price of Renewable Energy Credits or Zero Emissions Credits accurately reflects the value of those products, because their value is provided under state law through the framework created by the Clean Energy Standard Order. Furthermore, while FERC has jurisdiction to evaluate and value reliability benefits according to the needs of the bulk power

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[59] *See* Order Denying Amended Complaint at PP 66, 69-70 (contrasting revenue payments made pursuant to the RSSA agreements which reflected the true value of bulk system reliability benefits provided with the Dunkirk Repowering, justified based on purported bulk system reliability benefits that were not accurately valued). Further, even in cases where such revenues do not align with FERC's determined value, such a mismatch is warranted where products are bundled with non-FERC jurisdictional products such as environmental attributes and the total value received reflects the true value of the *combined* products.

[60] *Id.* at P 66.

[61] *Id.*

[62] *Id.* at P 69. Indeed, as the Sierra Club, NRDC and other environmental organizations observed in a recent letter to the NY PSC regarding the Dunkirk Repowering, "[c]hanged circumstances post-dating approval of the Agreement have eliminated the Commission's purported justifications for its approval." N.Y. Pub. Serv. Comm'n, Case 12-E-0577, *Comments of Sierra Club et al.*, at 1 (Dec. 19, 2016). Since the execution of the Dunkirk Repowering Term Sheet, "National Grid completed ratepayer-funded transmission upgrades that obviated any need for generation at Dunkrik," for reliability purposes. Nor does the Dunkirk facility provide any environmental benefits, as it is an "environmentally harmful coal and gas facility." *Id.*

system, it has expressly disclaimed jurisdiction over unbundled Renewable Energy Credits.[63] It therefore should have no role in determining whether the NY PSC has accurately determined the value of carbon emissions reductions and other environmental benefits that such credits represent.[64]

3. EPSA's request must be denied to avoid unjustly forcing customers to pay for redundant capacity and frustrating legitimate state policy

Were the Commission to order NYISO tariff changes providing for the mitigation of units submitting bids that are lower than they otherwise would have been because they reflect payments received pursuant to New York's Clean Energy Standard Order, customers would be unjustly forced to procure redundant capacity. Not only would this require them to pay for unnecessary resources, it would also artificially increase capacity prices because the new marginal unit under such a scenario would likely have submitted a bid in excess of the bid provided by the last unit *truly* necessary to reliably serve the system. As the Commission explained in denying IPPNY's Amended Complaint, "[w]here RMR agreements are necessary, those resources also satisfy the reliability needs of the broader NYCA footprint, and it would be inefficient to procure other capacity elsewhere in the NYCA footprint to satisfy the NYCA capacity needs met by the RMR capacity."[65] The same logic holds with regard to units receiving payments for Renewable Energy Credits or Zero Emissions Credits, as those units would continue to meet NYISO's capacity needs so long as they did not sell it into other regions.

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[63] *WSPP, Inc.*, 139 FERC ¶ 61,061 at PP 18-24 (2012).

[64] For this reason, even assuming that it were appropriate to mitigate resources furthered by state policies designed to support the reliability of the system that conflict with FERC's own reliability regulations, it still would be entirely inappropriate to subject resources to buyer-side mitigation on account of receiving such payments under state law for their environmental benefits.

[65] Order Denying Amended Complaint at P 68.

In "assuring just and reasonable rates" under the Federal Power Act, the Commission has an obligation to "protect[] consumers from overpaying for . . . capacity."[66] In fact, in imposing increased capacity costs, FERC has an affirmative duty to articulate how those increased costs translate into benefits for customers.[67] Here, where payments for environmental attributes under the Clean Energy Standard reflect true value that a resource provides pursuant to legitimate state policy, there are no countervailing benefits that would warrant subjecting such resources to special scrutiny or to excluding such payments from a unit's going-forward costs. Accordingly, it would violate the Federal Power Act for the Commission to impose any such measures.

Rather than applying special scrutiny to resources supported by state policies, buyer-side mitigation rules should instead be designed with special care to avoid mitigating such resources where possible. FERC has "sought to accommodate the ability of states to pursue their policy goals,"[68] recognizing that it is appropriate for buyer-side mitigation rules to "complement[] state programs promoting renewable resources."[69] The need to "accommodat[e] the ability of states to pursue . . . legitimate state policy objectives" is sufficiently important that it must be balanced against the Commission's "responsibility to promote" policies that in a vacuum would render

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[66] *ISO New England Inc., and New England Power Pool Participants Committee*, 155 FERC 61,023, at P 34 (2016).

[67] *See Transcanada Power Marketing v. FERC*, 811 F.3d 1, 13 (2015) (finding that, in approving a tariff imposing higher costs on customers, FERC failed to meet its obligation to articulate a reasoned justification for imposing those higher costs).

[68] *ISO New England Inc. and New England Power Pool Participants Committee*, 155 FERC 61,023 at P 23 (2016).

[69] *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC 61,173 at P 82 (2014), *reh'g denied*, 150 FERC ¶ 61,065 (2015).

"economically efficient markets and efficient prices."[70] This makes sense because, just as FERC recognized the need for bulk transmission planning rules to efficiently account for state public policies in Order No. 1000,[71] so must RTOs set wholesale market rules in a manner that renders prices just and reasonable in light of state policy choices. Where resources supported by legitimate state policies are mitigated, the procurement of redundant capacity increases customer costs, even if absent those state policies a different approach would be more efficient. It is not FERC's role to dictate to states what their public policies should be, but rather to ensure just and reasonable wholesale prices given the existing policy framework.

Conversely, states should not be forced to choose between repealing their legitimate and sovereign public policies or else permitting FERC to saddle customers with unnecessary costs to procure redundant capacity. The Commission has recognized that preventing such potential over procurement supplies a powerful rationale warranting *exemption* from buyer-side mitigation rules to accommodate legitimate state policies, even where underlying unit offers might otherwise trigger mitigation.[72]

4. EPSA has provided no evidence to meet its burden under Section 206 of the Federal Power Act to demonstrate that NYISO's current tariff is unjust and unreasonable

As demonstrated above, procedural concerns, FERC's responsibility to provide for just

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[70] *New England States Committee on Electricity v. ISO New England Inc.*, 142 FERC 61,108 (2013), *reh'g denied*, 151 FERC ¶ 61,056 (2015).

[71] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC 61,051, at PP 2, 82 (2011) ("Order No. 1000") (mandating transmission owners to "explicitly provide for consideration of transmission needs driven by Public Policy Requirements," defined as encompassing "state or federal laws or regulations").

[72] *See ISO New England Inc. and New England Power Pool Participants Committee*, 155 FERC 61,023 at P 25 (2016) (holding that a renewables exemption to buyer-side mitigation rules was justified, in part, because it prevented a scenario where consumers would have "to pay for additional capacity that exceeds the requirements of the demand curve").

and reasonable prices, and its obligation to seek to accommodate legitimate state policy objectives all weigh powerfully against rejecting EPSA's request. Above all this, EPSA provides *no evidence* in support of its specious claim that New York's Clean Energy Standard Order "threatens to artificially suppress prices in the NYISO ICAP market."[73] EPSA provides no expert testimony and no market data regarding the price impacts of the Clean Energy Standard, provides no coherent explanation as to why such impacts constitute *artificial* price suppression, nor does it even cite any evidence to this effect provided by IPPNY or any other parties to this proceeding. EPSA therefore has not met its burden under Section 206, even were its request otherwise justified, which it is not.

IV. Conclusion

For the foregoing reasons, NRDC and the Sustainable FERC Project respectfully request that the Commission deny EPSA's Request for Expedited Action and decide this case in a manner that that accounts for the fact that resources receiving payments pursuant to New York's Clean Energy Standard should not be mitigated on account of submitting wholesale market bids that account for such revenues.

Respectfully submitted,

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Dated: January 24, 2017

[73] Request for Expedited Action at 10.

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at New York, N.Y., this 24th day of January, 2017.

By: *\/s\/ Miles Farmer*
Miles Farmer