



**Public Service
Commission**

Public Service Commission

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April 20, 2015

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket Nos. EL07-39-006, ER08-695-004, ER10-2371-
000 - New York Independent System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Request for Rehearing of the New York State Public Service Commission in the above-referenced proceedings. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment
cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System)	Docket Nos. EL07-39-006
Operator, Inc.)	ER08-695-004
)	ER10-2371-000

REQUEST FOR REHEARING OF THE NEW YORK
STATE PUBLIC SERVICE COMMISSION

INTRODUCTION AND SUMMARY

The New York State Public Service Commission (NYPSC) respectfully requests rehearing of the Federal Energy Regulatory Commission's (FERC or Commission) March 2015 Order,¹ which reversed the Commission's prior determination declining to impose certain market power mitigation measures upon demand response resources participating in the New York Independent System Operator, Inc's (NYISO) Installed Capacity (ICAP) market. In particular, the March 2015 Order determined that certain demand response resources that participate in the NYISO ICAP market as Special Case Resources (SCRs) must now submit minimum bids that include the economic benefits they receive from State

¹ Docket No. EL07-39, et al., New York Independent System Operator, Inc., Order on Clarification, Rehearing, and Compliance Filing, 150 FERC ¶61,208 (issued March 19, 2015) (March 2015 Order).

programs designed to promote demand response resources.² These State programs include Consolidated Edison Company of New York, Inc's (ConEd) Distribution Load Relief Program (DLRP), and potentially the New York State Energy Research and Development Authority (NYSERDA) rebate programs. The NYPSC seeks rehearing of the March 2015 Order pursuant to Section 313 of the Federal Power Act (16 U.S.C. §8251) and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.713).³

The NYPSC urges the Commission to reconsider its March 2015 Order, which failed to explain the Commission's departure from existing policies designed to promote demand response resources and to remove barriers that prevent such resources from participating in wholesale markets. Specifically, the Energy Policy Act of 2005 states that "[i]t is the policy of the United States that...demand response systems shall be

² The Commission has characterized SCRs as typically "industrial or commercial companies that, in exchange for an advanced payment, agree to curtail power usage, usually by shutting down, when requested to do so by the NYISO." See, Docket No. EL07-39, et al., New York Independent System Operator, Inc., Order on Rehearing and Further Order on Compliance Tariff Sheets, 124 FERC ¶61,301 (issued September 30, 2008), fn 27.

³ The NYPSC filed a timely Notice of Intervention in Docket No. EL07-39-000 on March 21, 2007, and in Docket No. ER08-695-000 on April 10, 2008. The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated.”⁴ Likewise, in addressing the role of demand response in wholesale markets, FERC has explicitly stated that it “is not regulating retail rates or usurping or impeding state regulatory efforts concerning demand response.”⁵

The March 2015 Order acts contrary to the Commission’s established policies by erecting unnecessary market barriers against demand response participation in the ICAP market and impeding New York’s efforts to encourage demand response resources. Specifically, the March 2015 Order jeopardizes the effectiveness of New York’s DLRP by forcing demand response resources participating in the ICAP market to refrain from also participating in the DLRP in order to avoid onerous penalties under the market mitigation measures. This ruling not only interferes with State goals, but may have a negative impact on the future reliability of the State’s distribution systems. Similarly, the March 2015 Order creates an unnecessary barrier to demand response participation in the ICAP market by imposing mitigation measures upon SCR resources that receive NYSERDA rebates.

⁴ Pub. L. No. 109-58, Sec. 1252(f), 119 Stat. 594, 965 (2005).

⁵ RM10-17-000, Demand Response Compensation in Organized Wholesale Energy Markets, Order No. 745, 134 FERC ¶61,187 (issued March 15, 2011) (Order No. 745), ¶¶113-14.

New York's demand response initiatives are representative of numerous programs that states administer throughout the country to help customers utilize energy more efficiently. Singling out New York's initiatives as alleged improper government intervention in the markets is unprecedented, discriminatory on its face, and contrary to FERC's policy statements in Order No. 745 and Order No. 1000.⁶ The NYPSC urges the Commission to grant rehearing as expeditiously as possible in order to allow the robust and full participation of demand response resources in both the DLRP and NYISO ICAP market during the critical 2015 summer capability period.

The March 2015 Order also failed to provide a reasoned explanation as to why the Commission reversed its prior decision to exclude the State programs from the calculation of the minimum bid floor. As the Commission previously explained, "it is not [FERC's] intent to interfere with state programs that further specific legitimate policy goals."⁷ Accordingly, the May 2010 Order determined that "[b]ased on the information provided

⁶ RM10-23-000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 100, 136 FERC ¶61,051 (issued July 21, 2011) (Order No. 1000), ¶¶203-13 (ensuring that the transmission planning process complements state public policy efforts).

⁷ Docket No. EL07-39, et al., New York Independent System Operator, Inc., Order on Clarification, Rehearing, and Compliance Filing, 131 FERC ¶61,170 (issued May 20, 2010) (May 2010 Order), ¶137.

in this proceeding, the Commission believes it is reasonable to allow an exemption for the two programs discussed in the filings in this proceeding, NYSEERDA rebates and ConEd's [DLRP], and exclude the payments received by SCRs under these programs from the calculation of the offer floor."⁸ The Commission's March 2015 Order, however, failed to articulate a rationale as to why, almost five years later, there is an insufficient record in this proceeding to warrant the exemptions.

The Commission should reconsider the arguments raised in Commissioner Bay's dissent to the March 2015 Order (the Dissent). Most importantly, the Dissent highlights the significant record basis supporting findings that the State's demand response programs further a legitimate purpose, and that "there is no evidence that these programs undercut the capacity market or were intended to do so."⁹ Accordingly, the NYPSC asks that the Commission recognize the State's legitimate policy objectives and continue to exempt the State's demand response programs from unwarranted and unnecessary market power mitigation measures.

⁸ Id.

⁹ March 2015 Order, Dissent p. 3.

BACKGROUND

On March 7, 2008, the Commission issued an Order accepting the NYISO's proposal to exempt SCRs from the ICAP market mitigation imposed on uneconomic investment. The Commission stated that demand response is a valuable tool for maintaining reliability in an environmentally benign manner, and that subjecting demand response to an offer floor through market mitigation could erect a barrier against market entry.¹⁰

On September 30, 2008, however, the Commission reversed its decision in the March 2008 Order, and found that market mitigation rules should apply to SCRs in the same manner as it does to all other market participants. On October 31, 2008, the NYISO submitted a compliance filing in order to implement the Commission's ruling.

On December 2, 2008, the NYPSC filed a Protest to the NYISO's October 2008 filing. The NYPSC explained the purpose and rationale for the ConEd DLRP and NYSERDA rebate programs, and argued that imposing a mandatory bid floor on SCRs that reflect the program incentives could interfere with various State initiatives designed to achieve the important policy objectives of bolstering reliability and reducing peak demand through development of demand response resources.

¹⁰ Docket No. EL07-39, New York Independent System Operator, Inc., Order Conditionally Approving Proposal, 122 FERC ¶61,211 (issued March 7, 2008), ¶120.

On May 20, 2010, the Commission determined that "[b]ased on the information provided in this proceeding, the Commission believes it is reasonable to allow an exemption for the...NYSERDA rebates and ConEd's [DLRP], and exclude the payments received by SCRs under these programs from the calculation of the offer floor."¹¹ The Commission explained that these two exemptions were appropriate given that "it is not [FERC's] intent to interfere with state programs that further specific legitimate policy goals."¹²

In the March 2015 Order, however, FERC, after almost five years of inaction, abruptly reversed its prior decision by granting the NRG Companies' Request for Rehearing of the May 2010 Order. As justification for its decision, FERC claimed that "the current record in this proceeding does not adequately support the exemption of payments under the [ConEd and NYSERDA] programs from the SCR's offer floor,"¹³ without explaining why this deficiency had lain dormant for five years or why it failed at any time during that lengthy period to ask that the record be supplemented. FERC indicated that "the state may seek an exemption from the Commission pursuant to section 206 of the FPA

¹¹ Docket No. EL07-39, et al., New York Independent System Operator, Inc., Order on Clarification, Rehearing, and Compliance Filing, 131 FERC ¶61,170 (issued May 20, 2010) (May 2010 Order), ¶137.

¹² Id.

¹³ March 2015 Order, ¶31.

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.”¹⁴ The Commission therefore directed the NYISO to file tariff revisions to provide 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.”¹⁵

In contrast to the inadequate and irrational justification stated in the March 15 Order, the Dissent correctly notes that the Commission had previously rejected the need for the NYPSC to file a complaint and that “[t]he majority offers no explanation as to why that prior ruling was erroneous.”¹⁶ Rejecting the majority’s rationale that the record was insufficient, the Dissent highlighted record evidence demonstrating that,

under ConEd’s program, cost-based payments are made to participating retail customers pursuant to a retail tariff in order to assist the utility in dealing with distribution feeder outages. Payments are not tied to the customers’ participation in NYISO’s capacity market and are designed to provide load relief on the local distribution system to avoid or defer costly distribution system upgrades. Rather than being aimed at capacity prices, ConEd’s Distribution Load Relief Program addresses the reliability of the local distribution system. The nexus between this program and the capacity market - not to mention any alleged harm to that market - is so attenuated as to amount to speculation.

¹⁴ March 2015 Order, ¶30.

¹⁵ Id.

¹⁶ March 2015 Order, Dissent, p. 2.

Second, the NYSEDA rebates are funded by retail customers and provide one-time payments to enable facilities to participate in demand response programs by offsetting the cost of new equipment, such as load shedding controls, automation equipment, and new generation equipment.¹⁷

Dismissing reliance on the Commission's obligation to prevent market power abuse as an excuse for sweeping demand response into onerous market mitigation, the Dissent stated that "there is no evidence that these programs undercut the capacity market or were intended to do so." Further, the Dissent noted the NYISO's position, where it emphasized that it "does not believe that any of the programs of which it is aware that are currently administered or approved by New York State, or a governmental authority thereof, are currently causing uneconomic entry that would harm the capacity markets."¹⁸ In light of this record evidence, the March 15 Order's conclusion that the record is inadequate lacks a rational basis.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUES

- A. Whether the Commission erred in failing to explain its departure from established policies for promoting demand response and eliminating barriers to its development, and avoiding interference with state programs.¹⁹

¹⁷ March 2015 Order, Dissent pp. 1-2 (footnotes omitted).

¹⁸ Id., p. 3.

¹⁹ Id.

B. Whether the Commission erred in failing to provide a reasoned explanation for reversing the exemptions for demand response programs that it previously granted.²⁰

II. DISCUSSION

A. The Commission Failed To Explain Its Departure From Established Policies For Eliminating Barriers To Demand Response Participation In Wholesale Markets And Preventing Interference With State Programs

The March 2015 Order departs dramatically, without adequate explanation, from the Commission's existing policies for promoting demand response resources. In particular, the Energy Policy Act of 2005 states that "[i]t is the policy of the United States that...demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated."²¹ The Commission previously adhered to this statutory responsibility when addressing the role of demand response in wholesale markets and establishing its policies. Indeed, in deciding whether demand response should participate in wholesale markets in the first place, FERC explicitly stated

²⁰ In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,...or, unsupported by substantial evidence." 5 U.S.C. §706.

²¹ Pub. L. No. 109-58, Sec. 1252(f), 119 Stat. 594, 965 (2005).

that it "is not regulating retail rates or usurping or impeding state regulatory efforts concerning demand response."²²

Contrary to the Commission's established policies, the March 2015 Order erects unnecessary market barriers that clearly impede and obstruct the participation of demand response resources in the ICAP market. The record in this proceeding amply demonstrates that it is unnecessary to mitigate demand response resources based on their participation in State demand response programs. According to the NYISO, none of the programs that are currently administered or approved by New York State, or a governmental authority thereof, are currently promoting the uneconomic entry into the capacity markets that could harm those markets. The Dissent reached a similar conclusion that "there is no evidence that these programs undercut the capacity market or were intended to do so."²³

Moreover, as ConEd has previously stated in this docket, the Company uses the Rider U (DLRP) to deal with distribution feeder outages (contingencies), which do not necessarily coincide with the hottest days. Specifically, the ConEd tariff specifies that the criterion for a load relief period, which requires program participant responses, is whether "the next contingency would result in a Condition Yellow, or if

²² Order No. 745, ¶¶113-14.

²³ March 2015 Order, Dissent p. 3.

a voltage reduction of five percent or greater has been ordered." As the NYPSC detailed in its December 2008 Protest, these criteria demonstrate that DLRP is not tied to participation in the ICAP market because it is designed to meet the goal of providing load relief to the local distribution system at the time it is needed, regardless of the timing of participation in the ICAP market. Concomitant with that goal, the DLRP is intended to avoid, or at least defer, the need for costly distribution upgrades. Therefore, it is clear that DLRP operates at the distribution level, and qualifies as the type of demand response program that the Commission is obligated to promote in furtherance of its statutory responsibilities and its own prior policies.

Instead of meeting the Commission's statutory responsibilities and policies, the March 2015 Order impedes and jeopardizes New York's efforts to encourage demand response through DLRP resources. Specifically, the March 2015 Order forces certain demand response resources participating in the ICAP market to refrain from also participating in the DLRP in order to avoid onerous market mitigation penalties. The March 2015 Order also erects another unnecessary barrier against demand response participation in the ICAP market by imposing mitigation upon certain SCR resources that receive NYSERDA rebates. In contrast, the May 2010 Order buttresses the

conclusion that the impact of market mitigation would be to hinder and obstruct the development of demand response resources. At that time, the Commission explained that granting the exemptions for the State's programs was appropriate given that "it is not [FERC's] intent to interfere with state programs that further specific legitimate policy goals."²⁴

Given that the March 2015 Order impedes the participation of demand response resources in wholesale markets, and acts as a barrier to State programs, it is contrary to the Commission's statutory responsibilities and existing policies. The Commission therefore erred in failing to explain why it was departing from such policies, or how the March 2015 Order could be consistent with such policies.

B. The Commission Failed To Provide A Reasoned Explanation For Reversing Its Prior Determination Exempting State Demand Response Programs From The Mandatory Bid Floor For SCR ICAP Providers

The March 2015 Order determined that "the current record in this proceeding does not adequately support the exemption of payments under the [ConEd and NYSERDA] programs from the SCR's offer floor."²⁵ In so doing, the Commission reversed the determination in its May 2010 Order, which found that "[b]ased on the information provided in this proceeding,

²⁴ May 2010 Order, ¶137.

²⁵ March 2015 Order, ¶31.

the Commission believes it is reasonable to allow an exemption for the...NYSERDA rebates and ConEd's [DLRP], and exclude the payments received by SCRs under these programs from the calculation of the offer floor."²⁶ However, the Commission failed to explain why its prior ruling was erroneous, why the record is no longer adequate to support an exemption, why it took five years to ascertain that the record was inadequate, or what additional information would be needed to support an exemption.

The Commission further erred in ignoring the extensive record supporting the exemptions. As noted in the Dissent, the record demonstrates that ConEd's program is designed to provide load relief on the local distribution system to avoid or defer costly distribution system upgrades, and that payments under the program are unrelated to a customers' participation in the ICAP market. The Dissent appropriately concluded that "[t]he nexus between this program and the capacity market - not to mention any alleged harm to that market - is so attenuated as to amount to speculation."²⁷ Moreover, the NYSERDA rebates were correctly observed to be one-time payments to "enable facilities to participate in demand response programs by offsetting the cost of new equipment, such as load shedding controls, automation

²⁶ May 2010 Order, ¶137.

²⁷ March 2015 Order, Dissent, p. 2.

equipment, and new generation equipment.”²⁸ These rebates are therefore not payments tied to the provision of ICAP, and in fact are utterly unrelated to participation in the ICAP market. The NYISO also provided evidence supporting its conclusion that it “does not believe that any of the programs of which it is aware that are currently administered or approved by New York State, or a governmental authority thereof, are currently causing uneconomic entry that would harm the capacity markets.”²⁹

The March 2015 Order failed to address this extensive record evidence in a meaningful manner, or set forth a reasoned explanation showing how it was insufficient. The March 2015 was therefore arbitrary and capricious, and must be remedied.

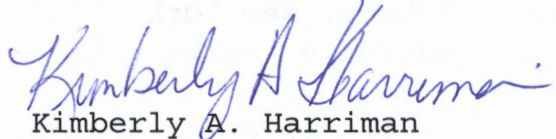
²⁸ March 2015 Order, Dissent, pp. 1-2 (footnotes omitted).

²⁹ Id., p. 3.

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant rehearing of the March 2015 Order.

Respectfully submitted,



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Public Service Commission
of the State of New York
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Dated: March 20, 2015
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated: Albany, New York
March 20, 2015



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