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June 24, 2016

**SENT VIA ELECTRONIC FILING**

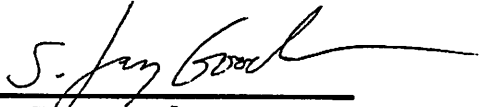
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. EL16-\_\_\_-000 - New York State Public  
Service Commission et al. v. New York Independent  
System Operator, Inc.

Dear Secretary Bose:

Attached for filing in the above-referenced proceeding, please find the Complaint Requesting Fast Track Processing of the New York State Public Service Commission, New York Power Authority, Long Island Power Authority, New York State Energy Research and Development Authority, City of New York, Advanced Energy Management Alliance, and Natural Resources Defense Council. Should you have any questions regarding the attached, please feel free to contact me at (518) 402-1537.

Very truly yours,

  
\_\_\_\_\_  
S. Jay Goodman, Esq.  
Assistant Counsel

Attachment  
cc: Robert Fernandez, Esq.

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

**NEW YORK STATE PUBLIC )  
SERVICE COMMISSION, NEW )  
YORK POWER AUTHORITY, )  
LONG ISLAND POWER )  
AUTHORITY, NEW YORK )  
STATE ENERGY RESEARCH AND )  
DEVELOPMENT AUTHORITY, )  
CITY OF NEW YORK, ADVANCED )  
ENERGY MANAGEMENT )  
ALLIANCE, AND NATURAL )  
RESOURCES DEFENSE COUNCIL )**

**COMPLAINANTS, )**

**V. )**

**DOCKET NO. EL16-\_\_\_\_-000**

**NEW YORK INDEPENDENT )  
SYSTEM OPERATOR, INC. )**

**RESPONDENT. )**

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**COMPLAINT REQUESTING FAST TRACK PROCESSING OF THE  
NEW YORK STATE PUBLIC SERVICE COMMISSION, NEW YORK POWER  
AUTHORITY, LONG ISLAND POWER AUTHORITY, NEW YORK STATE  
ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, CITY OF NEW  
YORK, ADVANCED ENERGY MANAGEMENT ALLIANCE, AND NATURAL  
RESOURCES DEFENSE COUNCIL**

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RESOURCES DEFENSE COUNCIL**

**I. EXECUTIVE SUMMARY**

Pursuant to sections 206 and 306 of the Federal Power Act (“FPA”),<sup>1</sup> and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),<sup>2</sup> the New York State Public Service

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<sup>1</sup> 16 U.S.C. §§ 824e, 825e (2012).

<sup>2</sup> 18 C.F.R. § 385.206 (2014).

Commission (“NYPSC”), New York Power Authority (“NYPA”); Long Island Power Authority and its wholly-owned subsidiary Long Island Lighting Company d/b/a LIPA (“LIPA”), New York State Energy Research and Development Authority (“NYSERDA”), the City of New York (“City”), the Advanced Energy Management Alliance (“AEMA”), and the Natural Resources Defense Council (“NRDC”; collectively, the “Complainants”) hereby submit this complaint (“Complaint”) against the New York Independent System Operator, Inc. (“NYISO”). The Complaint seeks to address the application of the NYISO’s current tariff provisions that impose mitigation measures limiting the participation of certain “Demand Response” providers, referred to as Special Case Resources (“SCRs”), in the Installed Capacity (“ICAP”) market.

The Commission, the NYPSC, and the City share the same policy objective to promote the full utilization of Demand Response resources. However, application of the NYISO’s buyer-side market power mitigation (“BSM”) measures contained in Section 23.4 of Attachment H of the NYISO’s Market Administration and Control Area Services Tariff (“Market Services Tariff”) results in BSM rules that limit full SCR participation, interfere with Federal, State, and local policy objectives, and are therefore unjust and unreasonable. The Commission should remedy this defect by granting a blanket exemption from the BSM measures for all SCR program participants. The blanket exemption should include SCR resources currently subject to BSM measures.

If, arguendo, the Commission declines to grant a blanket exemption for SCRs, then it should find, at a minimum, that each of the State programs discussed below warrants a specific exemption. Program-specific exemptions should include Demand Response resources currently subject to BSM measures that participate in the SCR

program and a distribution-level program. The NYISO should re-run the mitigation test for these resources, excluding all benefits from the exempt distribution-level Demand Response programs, to determine whether mitigation should continue for these resources. Each Demand Response program discussed herein serves legitimate Federal, State, and local policy goals, such as achieving targeted load relief needed for distribution system reliability purposes, deferring and/or avoiding expensive distribution-level upgrades, and/or reducing electric power sector emissions.

Including payments from the indicated State programs in the calculation of the SCR Offer Floor will likely force Demand Response resources to forgo participation in utility-administered distribution-level Demand Response programs in order to avoid mitigation. This outcome directly interferes with the State's authority over distribution rates since it is New York's policy to maximize the use of Demand Response by distribution utilities in order to defer or avoid the need for capital and operating expenses related to local distribution system upgrades to support local reliability requirements. Moreover, by interfering with the State's distribution-level Demand Response programs, the BSM rules impermissibly intrude upon reliability and distribution planning matters reserved to the states under the Federal Power Act.<sup>3</sup> Commission approval of BSM rules that interfere with the State's use of Demand Response as a system planning tool and to reduce retail delivery rates thus constitutes an impermissible extension and overreach of Federal jurisdiction into matters of state authority under the FPA. This result is untenable, particularly given New York's current REV initiative, which is designed to promote the increased use of Demand Response resources. Accordingly, the BSM rules

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<sup>3</sup> 16 U.S.C. §§ 824 and 824o(i).

should be modified to reflect this circumstance and to exclude the distribution system Demand Response programs described herein when determining whether SCRs should be mitigated.

The NYPSC supports and promotes several utility-specific distribution programs that serve different goals than the NYISO's Demand Response programs. Moreover, Demand Response providers typically make a determination whether to participate in the NYISO SCR program independent of their participation in those local distribution-focused programs. The current NYISO BSM rules are unjust and unreasonable as applied to Demand Response resources because they inappropriately link benefits received from distribution-level Demand Response programs with the "provision of capacity." New York energy policy is focused, in part, on dynamic load management programs that can be used to avoid both utility (distribution) costs and NYISO (bulk system capacity and energy) costs. A utility's decision whether to implement retail Demand Response programs relates to the reliability of its distribution system, reducing retail rates by avoiding or minimizing distribution infrastructure costs, and providing market participants with choices.

Mitigating all new SCR participants in the NYISO's Mitigated Capacity Zones ("MCZs") by imposing an Offer Floor on their ICAP bids, regardless of whether the participant has the intention, incentive, and/or ability to exercise buyer-side market power, is not justified and threatens the viability of the State's utility-administered distribution-level Demand Response programs. The exemption requested in this



Complaint, which the Commission has repeatedly invited from the State,<sup>4</sup> is needed to enable the implementation of legitimate State and local energy policy objectives that rely, in part, on the successful implementation of Demand Response programs. The proposed exemption would also be consistent with Federal law and policy – including Commission precedent – that favors knocking down barriers to the increased deployment of Demand Response resources. In Order No. 745, for instance, the Commission explained that it has effectuated national policy favoring the increased deployment of Demand Response by “support[ing] competitive wholesale energy markets by removing barriers to participation of demand response resources.”<sup>5</sup>

Complainants further request that the Commission move promptly to implement the BSM exemptions requested in this Complaint. As detailed herein, subjecting Demand Response resources to the NYISO’s BSM rules is unjust and unreasonable because it erects artificial barriers to market entry, thereby impeding program enrollment and interfering with legitimate energy policy objectives. Swift action is needed so that revised BSM policies and procedures are implemented in sufficient time to avoid limitations in utility Demand Response program enrollment that otherwise may occur during the 2016 Summer Capability Period, which commenced on May 1, 2016. Although the 2016 Summer Capability Period has commenced, fast track processing could enable program modifications that would increase the amount of Demand

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<sup>4</sup> See, e.g., New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc., 153 FERC ¶61,022 (issued October 9, 2015) (“BSM Exemption Order”).

<sup>5</sup> Demand Response Compensation in Organized Wholesale Energy Markets, 134 FERC ¶61,187 (March 15, 2011) at ¶11 (“Order No. 745”).

Response available to address system peaks that will occur before the 2016 Summer Capability Period concludes. Complainants anticipate that, absent fast track processing of this Complaint, the inclusion of payments received from distribution-level Demand Response programs in SCR Offer Floors will depress participation in distribution-level and SCR Demand Response programs during the Summer of 2016. These utility-administered programs are intended, in part, to avoid costly distribution infrastructure investments and operating expenses driven by the need to serve distribution system peak load. Continuing the unjust and unreasonable mitigation of SCRs, therefore, directly interferes with the State's authority over distribution rates.

Finally, the relief sought herein is consistent with Commission policy and precedent regarding the treatment of Demand Response providers in wholesale energy markets. In Order No. 719, the Commission considered, in relevant part, whether market reforms were needed to improve the (i) role of Demand Response in organized markets, and (ii) use of market prices to increase Demand Response participation during periods of operating reserve shortage.<sup>6</sup> The Commission explained that it “balances the mix of regulation and competition based on changing circumstances, taking into account such factors as the opportunities for competition to control market power, advances in technology, changes in economies of scale, and new state and federal laws that affect the energy industry.”<sup>7</sup> The Commission adopted a suite of reforms intended to “ensure just

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<sup>6</sup> Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶61,071 (Oct. 17, 2008) at ¶12.

<sup>7</sup> Id. at ¶1.

and reasonable rates, to remedy undue discrimination and preference, and to improve wholesale competition in regions with organized markets.”<sup>8</sup>

In so ruling, the Commission explained that the adopted reforms reflect its policy goal of eliminating barriers to Demand Response participation in organized power markets by ensuring comparable treatment of resources.<sup>9</sup> This policy objective explicitly recognizes that Demand Response “can provide competitive pressure to reduce wholesale power prices; increases awareness of energy usage; provides for more efficient operation of markets; mitigates market power; enhances reliability; and in combination with certain new technologies, can support the use of renewable energy resources, distributed generation, and advanced metering.”<sup>10</sup> Significantly, the Commission stated that “the wholesale electric power market works best when demand can respond to the wholesale price.”<sup>11</sup>

In 2011, the Commission again took aim at impediments to Demand Response participation in wholesale energy markets. Explaining that “a market functions effectively only when both supply and demand can meaningfully participate,” the Commission identified a concern that Demand Response participation was suppressed by the available compensation levels and held that Demand Response resources should be

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<sup>8</sup> Id. at ¶13.

<sup>9</sup> Id. at ¶16.

<sup>10</sup> Id.

<sup>11</sup> Id. at ¶17.

paid the market price for energy, when certain conditions are satisfied.<sup>12</sup> Order Nos. 719 and 745 continued an ongoing effort to effectuate national policy favoring the increased deployment of Demand Response.<sup>13</sup> Importantly, the Commission explained that its decisions balanced the “textbook economic analysis” applied to technical rate design issues with the “practical realities of how ... markets operate.”<sup>14</sup> The Commission also recognized that regulatory oversight of Demand Response “is a complex matter that lies at the confluence of state and federal jurisdiction,” and that its ability to support Demand Response participation is limited to its delegated statutory authority.<sup>15</sup>

The Supreme Court recently upheld the Commission’s decision that Demand Response resources should be compensated at wholesale market rates.<sup>16</sup> In so ruling, the Court observed that “wholesale [Demand Response] ... is all about reducing wholesale rates; so too, then, the rules and practices that determine how those programs operate.”<sup>17</sup> Although jurisdiction over wholesale and retail markets is split between FERC and the states, respectively, the wholesale and retail markets cannot be separated cleanly from each other and actions in one market necessarily will have an impact on the other

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<sup>12</sup> Order No. 745 at ¶1. Notably, the Commission affirmed its finding in Order No. 719 that active Demand Response participation “in organized wholesale energy markets helps to increase competition in those markets.” (*Id.* at ¶9 [citation omitted].)

<sup>13</sup> *Id.* at ¶11-13, 113.

<sup>14</sup> *Id.* at ¶46.

<sup>15</sup> *Id.* at ¶114-15.

<sup>16</sup> Federal Energy Regulatory Commission v. Electric Power Supply Association et al. (“EPSA”), 130 S.Ct. 760 (2015).

<sup>17</sup> *Id.* at 776.

market.<sup>18</sup> Nevertheless, permissible regulatory decisions in one market that have an incidental effect on the other market are not inherently objectionable. The Supreme Court recently clarified this relationship, explaining that states may encourage new supply resources through measures “untethered to” the resources’ “wholesale market participation.”<sup>19</sup>

The Commission’s regulations explicitly recognize the balance of state and Federal jurisdiction over Demand Response by preventing the participation of Demand Response in wholesale markets if prohibited by the state. However, where a state has not acted to prevent such participation, such as in New York, the Demand Response bids must be accepted into the market.<sup>20</sup> This Complaint urges FERC to adopt a consistent policy approach across wholesale markets and to truly support the full participation of Demand Response by preventing the BSM measures from acting as an artificial and unnecessary barrier to such participation.

## II. COMMUNICATIONS

Complainants request that all correspondence and communications concerning this filing be sent to each of the following persons and that each are included on the Commission’s official service list for this filing:<sup>21</sup>

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<sup>18</sup> Id. at 777-78.

<sup>19</sup> Hughes v. Talen Energy Marketing, LLC et al., (“Hughes”) 136 S.Ct. 1288 (2016).

<sup>20</sup> 18 C.F.R. §35.28(g)(1)(i)(A); see also Order No. 719 at ¶310.

<sup>21</sup> 18 C.F.R. § 385.203.

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### **III. DESCRIPTION OF COMPLAINANTS AND RESPONDENT**

#### **A. NYPSC**

The NYPSC is a regulatory body established under the laws of the State of New York with jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State. The NYPSC is therefore a “State Commission” as defined in section 3(15) of the FPA.<sup>22</sup> The FPA reserves to states the jurisdiction and authority to ensure the intrastate safety, adequacy, and reliability of electric service, as well as the exclusive authority to regulate retail utility rates.<sup>23</sup> The NYPSC has approved utility-administered Demand Response programs because they support these objectives, which are directly tied to its retail rate setting authority.

#### **B. NYPA**

NYPA is a corporate municipal instrumentality and a political subdivision of the State of New York, organized under the laws of New York, and operates pursuant to Title 1 of Article 5 of the New York Public Authorities Law (“PAL”). NYPA is a “state instrumentality” within the definition of section 201(f) of the FPA.<sup>24</sup> It is engaged in the generation, transmission, and sale of electric power and energy at wholesale and retail throughout New York, and is a founding member of the NYISO. NYPA’s bulk power

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<sup>22</sup> 16 U.S.C. § 796(15). 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.

<sup>23</sup> 16 U.S.C. § 824o(i)(3).

<sup>24</sup> 16 U.S.C. § 824(f) (“No provision in this subchapter shall apply to, or be deemed to include ... a State or any political subdivision of a State ... or any agency, authority, or instrumentality or any one or more of the foregoing ....”); see also Village of Bergen v. FERC, 33 F.3d 1385, 1389 (D.C. Cir. 1994).

transmission system encompasses approximately 1,400 circuit miles, and consists of facilities ranging from 115 kV to 765 kV. NYPA is an unusually diverse market participant because its various business interests include the following substantive areas that are addressed, in one fashion or another, in the NYISO markets: generation owner, transmission owner, demand response participant, load serving entity, and a municipal utility. NYPA's various interests, and its public purpose as stated in its statutory charter, lead it to look broadly at appropriate market structures without facing the pressure of satisfying any single business interest.

NYPA has no distribution facilities and virtually all of NYPA's customers are connected to the transmission and distribution systems of other public utilities. As the Commission has recognized, NYPA, unlike other public utilities, does not have a defined, integrated service area; instead, "its customers are located in the service areas of other transmission providers, and ... pay for transmission service based on the costs of the transmission providers where the loads are located."<sup>25</sup> NYPA's customers are located throughout the State of New York, in both upstate and downstate areas, and include both wholesale power purchasers and end users. NYPA also serves customers in states other than New York. As the largest state-owned power organization in New York, NYPA has taken the responsibility for constructing, owning, and operating critical segments of transmission and generation infrastructure throughout the State. NYPA owns or has contracts with substantial generation resources in New York State, including certain resources that are currently mitigated and are subject to the Minimum Offer Floor Requirement.

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<sup>25</sup> Cent. Hudson Gas & Elec. Corp., 103 FERC ¶61,143 at ¶30 (2003).



### **C. LIPA**

LIPA is a wholly-owned subsidiary of the Long Island Power Authority, a corporate municipal instrumentality and political subdivision of the State of New York. LIPA, through its service provider PSEG Long Island, provides electric service to 1.1 million customers on Long Island and holds retail rate-setting authority for its service territory. LIPA also participates in the NYISO-administered energy and capacity markets on behalf of its customers. PSEG Long Island administers LIPA's distribution-level Demand Response programs, whose purpose is the same as the analogous programs regulated by the NYPSC for the investor-owned utilities in New York.

### **D. NYSERDA**

NYSERDA is a public benefit corporation created under the New York Public Authorities Law. NYSERDA is tasked with supporting the development of new energy technologies.<sup>26</sup> Its powers include supporting renewable energy, energy efficiency, and other grid market-related technologies, resources, and programs, and participating in the development of electric generating facilities.<sup>27</sup>

### **E. City**

The City of New York is a municipal corporation of the State of New York. Comprised of a densely populated, vertical urban environment as the country's paramount center of business and commerce, New York City requires a robust and highly reliable electric system. By its *One City, Built to Last: Transforming New York City's*

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<sup>26</sup> PAL § 1850-a.

<sup>27</sup> *Id.* §§ 1854(1)(b) and (3)(d).

*Buildings for a Low-Carbon Future* plan,<sup>28</sup> the City has set a goal of reducing carbon emissions by 80 percent by 2050, as compared to 2005 levels, and it has joined with 460 cities across six continents in making commitments to reduce greenhouse gas emissions.<sup>29</sup>

Demand Response is an important element of the portfolio of measures that preserves system reliability during peak periods. It also will assist the City in achieving its carbon emissions goal. Accordingly, the City is a strong supporter of the NYISO's Demand Response programs, it is an active participant in those programs, and it encourages other building owners and managers to participate in such programs.

#### **F. AEMA**

AEMA is a trade association under Section 501(c)(6) of the Federal Tax code, and an alliance of providers and supporters of Demand Response united to overcome barriers to the nationwide use of this resource. On behalf of its member companies, AEMA advocates for policies that empower and compensate customers to manage their energy usage so as to make the electric grid more efficient, more reliable, more environmentally-friendly, and less expensive. The association's members include national Demand Response and advanced energy management service and technology providers, as well as some of the largest Demand Response resources in the nation, who support advanced energy management solutions to realize the electricity cost savings those solutions provide to their companies.

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<sup>28</sup> See *One City: Built to Last* (issued September 2014), available at <http://www.nyc.gov/html/builttolast/pages/home/home.shtml>; *One New York: The Plan for a Strong and Just City* (issued April 2015) available at <http://www.nyc.gov/html/planyc/html/publications/publications.shtml>.

<sup>29</sup> See <http://www.compactofmayors.org>.

## **G. NRDC**

NRDC is a national non-profit membership organization with more than 363,000 members. NRDC is committed to the preservation and protection of the environment, public health, and natural resources. To this end, NRDC is actively involved in advancing policies that reduce greenhouse gas emissions and other forms of air pollution and that accelerate the deployment of energy efficiency, renewable energy, and other clean energy resources. It also participates in stakeholder forums in FERC-jurisdictional regional transmission organizations where it advocates for removing barriers to clean energy resources.

## **H. NYISO**

In accordance with its Market Services and Open Access Transmission Tariffs, the NYISO is the entity responsible for providing non-discriminatory open access transmission service, maintaining reliability, and administering competitive wholesale markets for electricity, capacity, and ancillary services in New York State. The NYISO also is responsible for implementing the BSM measures at issue in this Complaint, pursuant to the provisions of its Market Services Tariff.

## **IV. BACKGROUND**

### **A. Buyer-Side Mitigation**

The NYISO administers capacity, energy, and ancillary services markets pursuant to its Market Services Tariff. The NYISO-administered ICAP market is designed to encourage new investment, the retention of existing needed capacity, and to inform retirement decisions by providing a price signal that indicates when sufficient capacity is

available or when additional ICAP resources are needed to meet New York’s peak demand and maintain its planning reserve margin.<sup>30</sup>

Under the NYISO’s ICAP market rules, mitigation measures apply to only two MCZs: New York City and the “G-J Locality” (also referred to as the “New Capacity Zone”), which covers the Lower Hudson Valley as well as New York City.<sup>31</sup> Mitigation is not imposed in other NYISO zones.

The capacity mitigation measures in effect in the MCZs include (i) Offer Cap mitigation, which is intended to counteract incentives for pivotal suppliers to raise prices above competitive levels, as well as (ii) Offer Floor mitigation, which is intended to counteract incentives for buyers to suppress prices below competitive levels. The Commission has determined that BSM may be an appropriate means to prevent the artificial suppression of market prices for capacity attributable to the entry of projects that would otherwise be uneconomic but for subsidization by net buyers with an intent and

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<sup>30</sup> The installed capacity market in the NYISO is commonly referred to as the “ICAP Market.”

<sup>31</sup> Mitigated Capacity Zones include “New York City and any Locality added to the definition of ‘Locality’ accepted by the Commission on or after March 31, 2013.” NYISO Market Services Tariff § 2.13 (2015), available at [http://www.nyiso.com/public/markets\\_operations/documents/tariff\\_viewer/index.jsp](http://www.nyiso.com/public/markets_operations/documents/tariff_viewer/index.jsp). On August 13, 2013, the Commission accepted the NYISO’s proposal to define a new capacity zone consisting of Load Zones G through J. *N.Y. Indep. Sys. Operator, Inc.*, 144 FERC ¶61,126 (2013).

incentive to depress capacity prices.<sup>32</sup> The BSM provisions were intended to deter such behavior and assure that market clearing prices reflect competitive outcomes.<sup>33</sup>

However, despite this relatively narrow purpose, the current BSM rules require the NYISO to scrutinize every new resource in a mitigated zone to determine whether it is “economic” and should qualify for an exemption. For an SCR, the resource is forecast to be economic if

the ISO projects that the ICAP Spot Market Auction price will exceed the Special Case Resource’s Offer Floor for the first twelve months that the Special Case Resource is reasonably anticipated to offer to supply UCAP.... The Offer Floor for a Special Case Resource shall be equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resource.<sup>34</sup>

If an SCR receives an exemption, it is eligible to bid in the capacity market without the requirement to offer at no lower than the floor price. Otherwise, it will be subjected to

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<sup>32</sup> N.Y. Indep. Sys. Operator, Inc., 122 FERC ¶ 61,211 at ¶101, order on reh’g & compliance, 124 FERC ¶61,301 (2008) (“A large net buyer could acquire new capacity that is not needed in the market and whose costs exceed the market price. Such an investment would be inefficient, the net buyer would lose money on the capacity, and no rational seller would knowingly make such an investment. . . . The mitigation of net buyers’ sales of capacity proposed by NYISO should help avoid this.”) The Commission initially determined in 2008 that BSM rules should apply to “net buyers” only, but on rehearing of its decision, the Commission eliminated the restriction.

<sup>33</sup> N.Y. Indep. Sys. Operator, Inc., 122 FERC ¶61,211 at ¶103.

<sup>34</sup> Market Services Tariff, Att. H § 23.4.5.7.5. This test is explained further in the attached Affidavit of Adam B. Evans, a Utility Analyst in the New York Department of Public Service’s (“NYDPS”) Office of Markets and Innovation. The impact of mitigation on market decisions by Demand Response providers is explained in the attached Affidavit of Katherine Hamilton, Executive Director of AEMA.

mitigation and may be precluded from earning NYISO capacity market revenues if the auction clearing price is below the SCR's Offer Floor.

### **B. The SCR Program**

The NYISO-administered SCR program can be deployed for a discrete period to supplement generation when Operating Reserves are forecast to be short, or when there is an actual Operating Reserve Deficiency or other bulk system emergency.<sup>35</sup> The SCR program is designed to reduce power usage by inducing large power users, mostly industrial, institutional, and commercial businesses, to shed load.<sup>36</sup> SCR program participants are paid by the NYISO for reducing energy consumption when asked to do so by the NYISO. These reductions are mandatory when called upon and, as part of their agreement to perform in the program, participants who clear the capacity market are paid in advance for agreeing to cut power usage upon request.

### **C. Procedural History**

In March 2008, FERC appropriately recognized that market mitigation measures should not be imposed on Demand Response resources in New York. The Commission acknowledged that Demand Response “is a valuable tool for the maintenance of reliability and fulfills this role in an environmentally benign way.”<sup>37</sup> FERC further

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<sup>35</sup> The NYISO also administers the Emergency Demand Response Program, the Day Ahead Demand Response Program, and the Demand Side Ancillary Service Programs. These programs are not in issue in this Complaint.

<sup>36</sup> 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.

<sup>37</sup> New York Independent System Operator, Inc., 122 FERC ¶61,211 (issued March 7, 2008) at ¶120.

concluded that applying an Offer Floor to Demand Response resources “could erect a barrier to entry” for that market segment.<sup>38</sup>

In September 2008, however, FERC reversed course and directed the NYISO to apply BSM measures to SCRs in the same manner as all other resources subject to BSM in the MCZs.<sup>39</sup> In so ruling, FERC did not adequately explain either the basis for this change in policy, or why the damage attendant to discouraging new Demand Response market participants suddenly is outweighed by the theoretical risk that unmitigated SCRs might inappropriately depress wholesale capacity prices.

Following a series of compliance filings, FERC subsequently approved a method proposed by the NYISO to establish an Offer Floor based on certain payments and benefits received by SCRs.<sup>40</sup> Significantly, the Commission explained that “it is not our intent to interfere with state programs that further specific legitimate policy goals. We agree that it is appropriate to exempt payments an SCR receives from such programs from the calculation of the price floor proposed by NYISO.”<sup>41</sup> The Commission therefore reversed itself again and specifically exempted from the Offer Floor calculation the Distribution Load Relief Program (“DLRP”) administered by Consolidated Edison Company of New York, Inc. (“Con Edison”) and a rebate program administered by NYSERDA.

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<sup>38</sup> Id.

<sup>39</sup> New York Independent System Operator, Inc., 124 FERC ¶61,301 (issued September 20, 2008) at ¶41.

<sup>40</sup> New York Independent System Operator, Inc., 131 FERC ¶61,170 (issued May 20, 2010) at ¶133.

<sup>41</sup> Id. at ¶137.

These program-specific exemptions continued for approximately five years without any identifiable harm to the wholesale capacity market. Then, in March 2015, in the absence of substantial evidence warranting such change, the Commission reversed course from its 2010 ruling, finding that its prior decision to exempt the Con Edison DLRP and NYSERDA rebate programs was unsupported by record evidence and, therefore, should be reversed.<sup>42</sup> Asserting that it did not intend to “grant a blanket exemption for all state programs that subsidize demand response,” FERC clarified that it would evaluate program-specific exemptions on a case-by-case basis and grant them if needed to avoid interference with a legitimate state objective.<sup>43</sup>

Then-Commissioner Bay dissented from these decisions in an opinion that clearly articulated why the “reasons offered by the majority” did not justify its “reversal of course.”<sup>44</sup> Commissioner Bay explained:

First, the majority contends that the “current record ... does not adequately support the exemption.” Notably, the majority makes no effort to identify what additional information it seeks. Nor does it grapple with any of the evidence in the extensive record compiled during the eight years this matter has been pending. The record demonstrates 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.

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<sup>42</sup> New York Independent System Operator, Inc., 150 FERC ¶61,208 (issued March 19, 2015) (“SCR Mitigation Order”).

<sup>43</sup> Id. at ¶30.

<sup>44</sup> Id., Dissent at 1.



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.

Second, the NYSERDA 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. The Commission-approved SCR offer floor is defined to include “the monthly value of any payments or other benefits the SCR receives from a third party for the provision of” installed capacity. The one-time payments at issue here cannot reasonably be characterized as “payments . . . from a third party for the provision of” installed capacity. As a result, it does not appear that they are even subject to mitigation under NYISO’s tariff in the first instance.”<sup>45</sup>

Concluding that the Commission had announced its intent not to “interfere with state programs that further specific legitimate policy goals,” Commissioner Bay affirmed that the majority did just that “by declaring the ConEd and NYSERDA programs to be presumptively improper exercises of market power.”<sup>46</sup> Commissioner Bay explained that there was no record evidence that these programs “undercut the capacity market or were intended to do so.”<sup>47</sup>

On March 30, 2015, the NYISO filed a Request for Expedited Clarification of the SCR Mitigation Order.<sup>48</sup> The NYISO described in its Request a potential ambiguity in the SCR Mitigation Order and asked the Commission to expeditiously clarify whether the

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<sup>45</sup> Id. at 1-2 (citations omitted; quotation marks in original).

<sup>46</sup> Id. at 2 (citation omitted).

<sup>47</sup> Id. at 3.

<sup>48</sup> Docket Nos. EL07-39-006 et al., New York Independent System Operator, Inc., Request for Expedited Clarification of the New York Independent System Operator, Inc. (dated March 30, 2015).

BSM examination of SCR providers located in any Mitigated Capacity Zone should consider benefits received from a retail Demand Response program, or if such benefits should be included in the analysis only for SCRs located in the New York City zone. The NYISO's Request remains pending before the Commission.<sup>49</sup>

On April 20, 2015, parties sought rehearing of the SCR Mitigation Order. In its rehearing petition,<sup>50</sup> the NYPSC explained that the Commission had not explained the basis for its departure from existing policies that promoted Demand Response resources by exempting them from the potential application of market mitigation measures. A consortium of transmission owners also sought rehearing on the same basis, explaining that the unexplained change in policy would have “deleterious impacts” on “legitimate State programs.”<sup>51</sup> Both rehearing requests remain pending before the Commission.<sup>52</sup>

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<sup>49</sup> Given the uncertainty created by this outstanding request for clarification, the discussion presented herein conservatively assumes that the BSM examination for prospective SCRs will include retail program benefits, regardless of which Mitigated Capacity Zone the resource is located in, and explains why such inclusion is wrong.

<sup>50</sup> Docket Nos. EL07-39-006 et al., New York Independent System Operator, Inc., Request for Rehearing of the New York State Public Service Commission (dated April 20, 2015).

<sup>51</sup> Docket Nos. EL07-39-006 et al., New York Independent System Operator, Inc., Request for Rehearing of the Indicated New York Transmission Owners (dated April 20, 2015) at 2 (“TO Rehearing Petition”).

<sup>52</sup> Concerned that a substantial period of time might pass before the Commission ruled on their rehearing petition and to preserve their rights with respect to the final aspects of the SCR Mitigation Order, the Indicated Transmission Owners sought judicial review of the SCR Mitigation Order on May 14, 2015. On September 10, 2015, the United States Court of Appeals for the District of Columbia Circuit declined to hold the case in abeyance pending further administrative proceedings, and dismissed the Indicated Transmission Owners' petition for judicial review, because a party may not simultaneously seek agency rehearing and judicial review of the same administrative decision. (Case No. 15-1138, Consolidated Edison Company of New York, Inc. et al. v. Federal Energy Regulatory Comm'n, Order [D.C. Cir. 2015].)

Also on April 20, 2015, the NYISO submitted a compliance filing that proposed Service Tariff amendments responsive to the SCR Mitigation Order.<sup>53</sup> The Commission has not ruled on the proposed Services Tariff amendments, which had a proposed effective date of March 19, 2015.

On May 8, 2015, the NYPSC, NYPA, and NYSERDA filed a Complaint against the NYISO advocating, *inter alia*, that the BSM rules would be unjust, unreasonable, or unduly preferential unless they are applied only to new gas- or oil-fired simple and combined-cycle units that are 20 MW or greater (the “BSM Exemption Complaint”).<sup>54</sup> They urged that the BSM rules no longer should apply to renewable resources, transmission assets coupled with unforced capacity delivery rights, nuclear resources, and SCRs, and that an exemption also should apply to certain self-supply resources. Petitioners in the BSM Exemption Complaint also argued that the BSM rules should no longer apply to Demand Response resources.

The Commission granted the proposed exemption for certain self-supply resources as well as a limited exemption for certain renewable resources but otherwise denied the BSM Exemption Complaint.<sup>55</sup> Explaining the basis for its decision not to exclude Demand Response resources from BSM, the Commission stated that the BSM Exemption Complaint did not adequately support the proposed exclusion.<sup>56</sup> The

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<sup>53</sup> Docket Nos. EL07-39-006 *et al.*, New York Independent System Operator, Inc., Tariff Filing (dated April 20, 2015).

<sup>54</sup> EL15-64-000, New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc., Complaint (dated May 8, 2015).

<sup>55</sup> See generally BSM Exemption Order.

<sup>56</sup> Id. at ¶105.

Commission, however, stated that the Petitioners could seek an exemption where including benefits received from a state program in the SCR Offer Floor would interfere with a legitimate state objective.<sup>57</sup>

On November 9, 2015, NYPSC, NYPA, and NYSERDA joined with the City of New York, Multiple Intervenors, and Natural Resources Defense Council to seek rehearing of the BSM Exemption Order.<sup>58</sup> Relevant to the instant Complaint, the BSM Rehearing Request argued that the Commission erred in declining to adopt a general exemption for Demand Response resources because mitigation would act as a disincentive to prospective Demand Response resources and restrict the growth of Demand Response in New York. The BSM Rehearing Request explained the legitimate State objectives served by the distribution-level Demand Response programs in issue, and how mitigation would impede participation in those programs. The BSM Rehearing Request discussed the State objectives frustrated by the mitigation of Demand Response resources.

On February 5, 2016, the Commission issued an Order Denying Rehearing and Clarification that declined to grant rehearing on its denial of an exemption for Demand Response resources.<sup>59</sup> Asserting that the complainants failed to demonstrate how

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<sup>57</sup> Id.

<sup>58</sup> EL15-64-000, New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority v. New York Independent System Operator, Inc., Request for Rehearing (dated November 8, 2015) (“BSM Rehearing Request”).

<sup>59</sup> New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority, 154 FERC ¶61,088 (February 5, 2016).

application of BSM rules to SCRs renders the NYISO's Market Services Tariff unjust, unreasonable, or unduly discriminatory or preferential pursuant to FPA § 206, FERC reiterated that states may request an exemption if the inclusion of specific program revenues and benefits in the Offer Floor calculation would interfere with a legitimate state objective.<sup>60</sup>

#### **D. State Distribution-Level Demand Response Programs**

##### **1. Con Edison**

The NYPSC has been overseeing distribution-level Demand Response programs administered by Con Edison since 2000. The utility currently offers three such programs for its customers and aggregators. The DLRP, noted above, and the Commercial System Load Relief Program ("CSR") support the reliability of Con Edison's local network distribution systems operating at voltages of 4 kV, 13 kV, 27 kV, and 33 kV.<sup>61</sup> The utility's electric system is comprised of 62 area substations that supply 64 networks and 19 non-network load areas and includes: approximately 25,000 conduit miles of duct; approximately 95,800 miles of underground cable; and approximately 41,200 underground transformers that step energy down to 120/208 volts to supply the secondary distribution system. Over 75 percent of Con Edison's networks peak at times that differ from the statewide peak load, with some networks peaking midday and others peaking in the late evening.<sup>62</sup>

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<sup>60</sup> Id. at ¶21 (citation and internal quotation marks omitted).

<sup>61</sup> Case 16-E-0050, Consolidated Edison Company of New York, Inc. – Electric Rates, Pre-Filed Direct Testimony of Electric Infrastructure and Operations Panel (dated January 29, 2016) at 21 (describing the utility's distribution system).

<sup>62</sup> Case 14-M-0101, Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Comments of Consolidated Edison Company of New York, Inc.

The DLRP is a network contingency demand response program applicable to individual customers who contract to reduce load by at least 50 kW during an event and third-party market participants (“Aggregators”) who contract to reduce at least 50 kW. DLRP includes both a “Reservation Payment Option” under which participants receive a reservation payment that obligates performance when called, and a voluntary option. Con Edison calls DLRP events to reduce strain on local distribution lines within specific areas when contingencies occur (i.e., feeder outages that can result in distribution-related customer outages).<sup>63</sup> The DLRP is an “emergency-based, network-specific program” that is designed primarily to address local distribution reliability needs and is used to reduce demand in specific local distribution networks when demand reductions are required in those networks.<sup>64</sup> Consequently, the program is generally not called at the same time as the NYISO SCR program. The NYPSC distinguished the DLRP from NYISO Demand Response programs when it rejected a proposal to link DLRP payments with payments from NYISO programs, explaining that:

The NYISO programs are market-based and the payments are determined, and should continue to be determined as such. Also, there may be customers participating in [the DLRP] that do not participate in the NYISO programs, and the reverse. Lastly, the intent of each program is different

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and Orange & Rockland Utilities, Inc. on Staff’s White Paper on Utility Ratemaking and Utility Business Models (dated October 26, 2015) at 5.

<sup>63</sup> Case 07-E-0392, Consolidated Edison Company of New York, Inc. – Tariff Filing, Untitled Order (issued June 12, 2007) at 3.

<sup>64</sup> Case 09-E-0115, Demand Response Initiatives, Order Adopting in Part and Modifying in Part Con Edison’s Proposed Demand Response Program (issued October 23, 2009) at 4. See also TO Rehearing Petition at 5 (explaining that Con Edison’s DLRP “involves cost-based retail payments for distribution load relief and that its programs are not related to the NYISO installed capacity market”; citation omitted).

and therefore each warrants its own cost/payment justification.<sup>65</sup>

For purposes of the DLRP, Con Edison's system is divided into "Tier 1" and "Tier 2" networks that are compensated at different levels. Tier 2 networks are identified as those considered a higher priority for demand response to address an actual or potential system reliability issue (e.g., to provide primary feeder relief on a network with increasing load).<sup>66</sup> The need to offer higher incentives to recruit Demand Response resources to targeted networks was driven, in part, by a significant outage that occurred on Con Edison's system during the summer of 2006.<sup>67</sup> The NYPSC found that Demand Response resources available on the affected network were insufficient to avoid the "operational events" or moderate the network damage that resulted from those events.<sup>68</sup> Additional Demand Response resources provide an additional tool to moderate damage resulting from a contingency or to increase the safety margin against major service interruptions.<sup>69</sup> Tier 1 networks are those not otherwise designated as Tier 2.

Con Edison's CSRP is available to customers (or Aggregators) located in its service territory that are able to curtail load or switch to on-site generation to reduce demand by at least 50 kW. Planned events may be called when the day-ahead forecast load is at least 92 percent of the forecast summer system peak. Similar to Con Edison's

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<sup>65</sup> Case 07-E-0392, Consolidated Edison Company of New York, Inc., Confirming Order (issued June 12, 2007) at 15 (adopting the recommendation and rationale proffered by the New York Department of Public Service Staff).

<sup>66</sup> Case 07-E-0392, supra, Untitled Order at 13-14.

<sup>67</sup> Id. at 2.

<sup>68</sup> Id.

<sup>69</sup> Id.

DLRP, the CSRP also provides both a Reservation Payment Option and a voluntary option. Each local network has a designated 4-hour curtailment window based on its load peaks, which start as early as 11 a.m. and end as late as 11 p.m.<sup>70</sup> The program is designed to reduce local network peaks and delay the need for capital investments to expand those networks.<sup>71</sup>

The NYPSC has approved DLRP and CSRP modifications from time to time so as to promote participation and maximize program benefits. In so ruling, the NYPSC has explained that Con Edison's Demand Response programs "provide a great benefit during periods of extreme energy demand and benefit all customers by allowing the company to operate its system in the most efficient way."<sup>72</sup> The distribution network peak load reductions that these programs achieve benefit all utility customers by deferring investments in new distribution infrastructure, avoiding emissions, reducing peak period energy prices, and supporting reliable system operation.<sup>73</sup> Con Edison may rely upon these demand and peak load reductions when planning its capital budget, which it cannot do for Demand Response that participates only in the wholesale market.<sup>74</sup>

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<sup>70</sup> Con Edison Demand Response Programs, CSRP Event Call Windows for 2016 at 1, available at <https://www.coned.com/energyefficiency/PDF/csrp-call-windows-2016.pdf> (organizing Con Edison networks according to their peak hours).

<sup>71</sup> Case 14-E-0423, Dynamic Load Management Programs, Order Instituting Proceeding Regarding Dynamic Load Management and Directing Tariff Filing (issued December 15, 2014) at 1-2 ("DLM Order I").

<sup>72</sup> Case 13-E-0573, Consolidated Edison Company of New York, Inc. – Demand Response Programs, Order Adopting Tariff Revisions with Modifications (issued March 13, 2014) at 10-11.

<sup>73</sup> Id. at 11.

<sup>74</sup> Id.



Con Edison also administers the Brooklyn Queens Demand Management Program (“BQDM”) as a pilot “demand-side management program ... to offset or eliminate the need for traditional utility infrastructure.”<sup>75</sup> The BQDM Program comprises 52 MW of non-traditional utility-side and customer-side solutions, including Demand Response, and is designed to address localized growth in demand.<sup>76</sup> The initiative will test the concepts being developed in the Reforming the Energy Vision (“REV”) proceeding and should provide valuable insight into how alternatives to traditional capital investment may be used to achieve REV objectives in the marketplace.<sup>77</sup>

## **2. Other Utility Distribution-Level Demand Response Programs**

Recognizing the multiple distribution system and environmental benefits that utility-administered Demand Response programs provide, the NYPSC directed all investor-owned electric utilities in New York to develop and implement retail Demand Response and other “Dynamic Load Management” programs modeled on Con Edison’s DLRP and CSRP by the summer of 2015.<sup>78</sup> Orange & Rockland Utilities (“O&R”), New York State Electric & Gas Corporation (“NYSEG”), and Central Hudson Gas and

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<sup>75</sup> Case 14-E-0302, Brooklyn Queens Demand Management Program Petition, Order Establishing Brooklyn/Queens Demand Management Program (issued December 12, 2014) at 7 (“BQDM Order”).

<sup>76</sup> Although Con Edison has not finalized the auction details, the utility anticipates that it will focus demand reductions around the “peak hour” (9:00 p.m. to 10:00 p.m.). Case 14-E-0302, supra, BQDM Quarterly Expenditures & Program Report (dated February 29, 2016) at 19, 26-27 (“BQDM Report”).

<sup>77</sup> BQDM Order at 2.

<sup>78</sup> DLM Order I at 1-2, 7 (directing jurisdictional utilities to develop distribution-level demand response programs modeled on the programs administered by Con Edison).

Electric Corporation (“Central Hudson”) now administer distribution-level Demand Response programs in MCZs.

The decision to make retail Dynamic Load Management programs available throughout New York flowed directly from the REV initiative, which recognized that Dynamic Load Management programs would promote REV objectives including the deferral or avoidance of capital investments on distribution system infrastructure and improving system efficiency, reliability, and resiliency.<sup>79</sup> REV seeks to optimize the deployment of distributed energy resources (“DERs”) such as Demand Response to realize local distribution system reliability and cost benefits. Demand Response programs enhance the capability of utilities to exercise load shifting and curtailment measures, if needed, and the statewide availability of utility-administered Demand Response programs would inform other potential actions such as REV demonstration projects, changes in net metering, and the implementation of community solar.<sup>80</sup> Importantly, the utility-administered distribution-level Demand Response programs also are expected to serve as a key transitional element to the REV paradigm, while also providing the distribution system benefits noted above.<sup>81</sup>

The NYPSC also required as an early step of the REV initiative that jurisdictional utilities identify parts of their system requiring upgrades that may be addressed by non-

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<sup>79</sup> Id. at 2.

<sup>80</sup> Id. at 4, 6.

<sup>81</sup> Cases 14-E-0423 et al., supra, Order Adopting Dynamic Load Management Filings with Modifications (issued June 18, 2015) (explaining that the distribution-level Demand Response programs are “a major step forward toward the ultimate goal of” REV).

wires alternatives (“NWAs”).<sup>82</sup> The NYPSC directed utilities to file NWA plans that could be implemented to address the identified system upgrades, and held that such plans may include payments to Demand Response providers to offset or eliminate the need for more costly traditional utility infrastructure investments.<sup>83</sup>

Customers enrolled in the SCR program also may enroll in the local utility-administered Demand Response programs. As detailed herein, however, although a Demand Response resource may participate in both NYISO- and utility-administered programs, the programs are intended to serve different purposes, the services provided by Demand Response resources in each program are different, and the benefits arising from the NYISO- and utility-administered programs are distinct.<sup>84</sup> The programs are distinguishable further by the facts that the SCR program and the utility-administered programs typically are called at different times, and that the money paid to demand response resources compensates for the distinct services and benefits provided under the different programs.<sup>85</sup>

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<sup>82</sup> Case 14-M-0101, supra, Order Adopting Regulatory Policy Framework and Implementation Plan (issued February 26, 2015) at 130 (“REV Order”).

<sup>83</sup> Id. at 3, n.3, 33-34, 130; Case 14-M-0101, supra, New York State Department of Public Service Staff Report and Proposal (dated April 24, 2014) at 14.

<sup>84</sup> Con Edison’s DLRP, for instance, “involves cost-based payments made to a *retail* customer pursuant to a *retail* tariff to provide *retail* load relief on the distribution system.” (TO Rehearing Petition at 5) (emphasis in original).

<sup>85</sup> See, e.g., TO Rehearing Petition at 5 (explaining that “[w]hile a resource that participates in a distribution load relief program, such as Con Edison’s, may also participate in the NYISO’s capacity market as an SCR, the payments made to that resource for distribution load relief and the payments made to that resource for the wholesale capacity it provides to the NYISO are fully separate from and independent of each other”).

The dispatch of resources enrolled in distribution-level programs also differs significantly from the SCR program, which reflects the fact that each program is designed to address needs on distinct systems. For instance, during the five-year period from 2011 through 2015, Con Edison's DLRP and the NYISO's SCR programs were called in Zone J in a total of 235.5 hours.<sup>86</sup> These events, however, overlapped for only 14 hours, accounting for less than 6 percent of the hours called.<sup>87</sup> The CSRP and SCR programs similarly overlapped during less than half of the hours called, although to a greater extent than the DLRP and SCR programs.<sup>88</sup>

The NYPSC has explained that SCR program participants benefit bulk system reliability whereas CSRP and DLRP participants address only distribution-level peaks and reliability issues.<sup>89</sup> The primary purpose of distribution-level Demand Response programs, which include utility-administered distribution-level programs analogous to the Con Edison DLRP and CSRP, is to benefit the administering utilities' distribution system. The NYPSC directed the State's utilities to develop detailed marginal distribution cost studies to support the design of tailored Dynamic Load Management program payments beginning in the summer of 2016.<sup>90</sup> In short, the retail Demand Response programs implemented by the New York utilities are intentionally designed to focus exclusively on distribution system needs and benefits.

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<sup>86</sup> Evans Aff. at ¶19.

<sup>87</sup> Id.

<sup>88</sup> Id. at ¶20.

<sup>89</sup> Cases 14-E-0-0423 et al., supra, Order Adopting Dynamic Load Management Filings with Modifications (issued June 18, 2015 at 12-13 ("DLM Order II").

<sup>90</sup> Id.

### 3. NYSERDA Programs

Exercising its reserved authority to engage in planning that ensures the intrastate safety, adequacy, and reliability of electric service, the NYPSC directed Con Edison to coordinate the development of a reliability contingency plan that addresses the potential closure of the 2,040 MW Indian Point Energy Center (“IPEC”).<sup>91</sup> Establishing more stringent reliability standards and resource adequacy needs associated with the potential retirement of the largest generation resource in Southeast New York is squarely within the system planning activities that the Federal Power Act reserves to the states and New York in particular.<sup>92</sup>

In response to the State’s identified needs under the Contingency Planning Order, Con Edison and NYSERDA proposed a reliability contingency plan that included, inter alia, an energy efficiency/demand reduction program that would use financial incentives to obtain 100 MW of peak demand reduction by no later than June 1, 2016.<sup>93</sup> The resulting Demand Management Program (“DMP”) focuses on securing demand reduction between 2 p.m. and 6 p.m., Monday through Friday, from June 1 through September 30 (excluding legal holidays).<sup>94</sup> The demand reductions must be available by June 1, 2016,

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<sup>91</sup> Case 12-E-0503, Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing (issued November 4, 2013) (“Contingency Planning Order”).

<sup>92</sup> 16 U.S.C. § 824o(i)(3).

<sup>93</sup> Contingency Planning Order at 2-3.

<sup>94</sup> Case 12-E-0503, supra, Indian Point Energy Center Energy Efficiency, Demand Reduction, and Combined Heat and Power Revised Implementation Plan (dated August 13, 2014) at 3 (“IPEC Reliability Plan”).

and DMP incentives are provided as a one-time payment for performance during a period of up to 10 years.<sup>95</sup>

In addition, it is important to note that the NYISO's application of BSM rules to Demand Response will significantly impact future retail market development actions as implemented by the NYPSC. Specifically, the NYPSC directed NYSERDA to implement the Clean Energy Fund ("CEF"), which comprises a ten-year, \$5 billion commitment to develop retail markets supporting clean energy business growth.<sup>96</sup> To this end, NYSERDA will implement an array of market development, research and development, and renewable energy and energy efficiency technology deployment activities that are designed to help the State achieve its clean energy and energy efficiency goals. A primary objective of the CEF is to achieve at-scale development of clean energy options for consumers, which may include packages of energy efficiency and other distributed energy resources and services that both allow consumers to better control their energy costs, as well as expand business opportunities for industries seeking to provide such packaged services to consumers. The CEF anticipates that certain emergent distributed energy resource business models may include Demand Response as a revenue opportunity in a package of services to consumers. Eroding the value of Demand Response would impair the attractiveness of those service packages – for both

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<sup>95</sup> Demand Management Program Application, Con Edison Green Team and NYSERDA at 3, available at <http://www.coned.com/energyefficiency/PDF/Demand-Management-Program-Application.pdf>.

<sup>96</sup> Case 14-M-0094, Proceeding on Motion of the Commission to Consider a Clean Energy Fund, Order Authorizing the Clean Energy Fund Framework (issued January 21, 2016).

customer and service providers – and impede development of the retail market for those services.

**E. Summary of Supporting Affidavits**

Attached hereto as Exhibits A and B are the supporting affidavits of Adam B. Evans and Katherine Hamilton, respectively. Mr. Evans is an analyst employed by the NYDPS with duties that include monitoring and evaluating the NYISO ICAP market design and operations, acting as NYDPS Staff lead on NYISO Demand Response issues, and advising the NYPSC. In his Affidavit, Mr. Evans explains: 1) how the NYISO's BSM rules currently work as applied to Demand Response providers; 2) how the New York ICAP markets and distribution-level Demand Response programs are implemented to advance State policy objectives; 3) why the BSM rules are not just and reasonable as applied to Demand Response providers; and, 4) why this improper application of the BSM rules inequitably impedes Demand Response participation in wholesale and retail programs.

Ms. Hamilton is the Executive Director of AEMA, which is a trade association that advocates against barriers to the increased deployment of Demand Response. In her affidavit, Ms. Hamilton explains how BSM measures harm Demand Response providers and impedes their full participation in both wholesale and retail markets. Ms. Hamilton presents a hypothetical analysis demonstrating that, as early as the summer of 2016 Capability Period, new Demand Response providers would be compelled to choose between participating in either the SCR program or one or more of the utility-administered Demand Response programs if the relief requested herein is not granted.

## **V. COMMUNICATIONS WITH NYISO**

In advance of filing the instant Complaint, the Complainants reached out to the NYISO to explain the BSM exemptions proposed herein, and to obtain the NYISO's comments. Complainants discussed the Complaint with the NYISO, and considered its feedback in the preparation of this filing.

## **VI. COMPLAINT**

### **A. Requested Relief**

The Complaint requests that the Commission make the following findings:

1. That critical New York energy policy objectives and retail rate setting authority include robust Demand Response programs as a constituent element of the strategy to achieve those goals.
2. That all SCR program participants enrolled in a utility-administered distribution-level Demand Response program should be exempt from the BSM measures because subjecting these resources to mitigation limits full SCR participation and interferes with legitimate state policy objectives as well as the State's retail rate setting authority. This exemption should include resources that currently are mitigated and participate in both the SCR and one or more distribution-level Demand Response programs, as well as Demand Response resources that seek to participate in the SCR program on or after the date of any Commission order granting the blanket exemption.
3. That including benefits provided by the utility-specific distribution-level Demand Response programs described herein in the Offer Floor of an SCR is unjust and unreasonable because it erects a barrier to market entry, thereby restricting an SCR's ability to participate in both the NYISO and utility-specific programs and interfering with legitimate state policy objectives as well as the State's retail rate setting authority. For resources that currently are mitigated and participate in both the SCR and one or more distribution-level Demand Response programs, the NYISO should re-run the mitigation test, excluding benefits associated with the exempt distribution-level programs, to determine whether the resource should continue to be mitigated.



4. That including benefits provided by the NYSEDA-administered DMP in the Offer Floor of an SCR is unjust and unreasonable because it erects a barrier to market entry that interferes with legitimate state policy objectives as well as the State's retail rate setting authority. For resources that currently are mitigated and participate in both the SCR program and the DMP, the NYISO should re-run the mitigation test, excluding benefits associated with the DMP, to determine whether the resource should continue to be mitigated.

Fast Track processing of this Complaint is necessary to effectuate the requested changes prior to completion of the summer 2016 Capability Period.

## **B. Argument**

### **1. New York Energy Policy Objectives and Retail Rate Setting Authority Rely, in Part, on Robust Demand Response Programs.**

The Federal Power Act recognizes that plenary authority to regulate retail utility rates resides exclusively with the states.<sup>97</sup> State policy explicitly obligates the NYPS&C to consider a variety of environmental policy objectives when approving utility distribution rates and regulations. Pursuant to New York Energy Law § 3-101(1), it “shall be the energy policy of the state ... to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy.” This statutory policy is intended, *inter alia*, to protect environmental values, conserve resources for future generations, and to promote public health and welfare.<sup>98</sup> Energy Law § 3-103 obligates every state agency to “conduct its affairs” in conformance with the statutory energy policy.

The Energy Law establishes a cyclical four-year energy planning process that culminates in the publication of a comprehensive Energy Plan. Pursuant to Energy Law

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<sup>97</sup> 16 U.S.C. §824. See also EPSA at 3 (stating that FERC “may not regulate either within-state wholesale sales or, more pertinent here, retail sales of electricity (*i.e.*, sales directly to users)”).

<sup>98</sup> Energy Law § 3-101(1).

§ 6-104(2), the Energy Plan must include various forecasts, including demand estimates for all energy sources taking into account load management and other cost-effective, demand-reducing measures. The Energy Plan also must identify and assess the costs and benefits of demand-reducing measures and other supply source alternatives.<sup>99</sup>

Significantly, the Energy Law mandates that all energy-related actions or decisions of state agencies must be reasonably consistent with the Energy Plan or its current update.<sup>100</sup>

The current State Energy Plan was issued in 2015 and embraces REV as the focal point of New York energy policy.<sup>101</sup> Explaining that REV “will build an integrated energy network” that “harness[es] the combined benefits of the central grid with clean, locally generated power,”<sup>102</sup> the Energy Plan explains that it “coordinates every State agency and authority that touches energy to advance the REV agenda.”<sup>103</sup> The Energy Plan states that REV will focus on “removing market barriers and bridging market gaps” to transition New York to a clean energy economy that will promote economic growth and preserve the state’s environment by reducing the emissions of greenhouse gases and other pollutants.<sup>104</sup> Overall, the Energy Plan adopted the following three targets for New York to achieve by 2030: 1) reduce GHG emissions by 40 percent from 1990 levels; 2)

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<sup>99</sup> Id. § 3-101(2)(b).

<sup>100</sup> Id. § 6-104(5)(b). Exceptions are permitted with a finding that relevant provisions of the Energy Plan are not reasonable or probable based on a material and substantial change in fact or circumstances. (Id.)

<sup>101</sup> The Energy to Lead: 2015 New York State Energy Plan, available at <http://www.nyenergyplan.com> (“2015 Energy Plan”).

<sup>102</sup> Id. at 7.

<sup>103</sup> Id.

<sup>104</sup> Id. at 10.

obtain at least 50 percent of electric supply from renewable resources; and 3) achieve at least 600 trillion BTU in increment energy efficiency gains.<sup>105</sup>

Because customers have been financing costly infrastructure investments necessary to satisfy an increasing peak demand, the Energy Plan concludes that solutions that reduce or shift peak load (e.g., demand management, energy storage) should be “seriously considered, wherever practical,” as complementary investments that may defer the need to incur more expensive infrastructure costs.<sup>106</sup> The NYPSC initially explained REV as an initiative to consider, on a comprehensive basis, how the State’s existing regulatory paradigm and energy market designs “either effectuate or impede progress toward achieving” state energy policy objectives.<sup>107</sup> Through REV, the State will reorient the regulatory paradigm “toward a customer-centered approach that harnesses technology and markets.”<sup>108</sup> The NYPSC found that this initiative would be consistent with the 2014 Draft State Energy Plan, “which calls for the use of markets and reformed regulatory techniques to achieve increased system efficiency, carbon reductions, and customer empowerment.”<sup>109</sup> The initiative will support the development of markets that enable active participation by customers and third parties so as to “achieve dynamic load management on a system-wide scale, resulting in a more efficient and secure electric system ....” (e.g., flatten and reduce peak load, improve system efficiency, defer utility

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<sup>105</sup> Id. at 112.

<sup>106</sup> Id. at 28.

<sup>107</sup> Case 14-M-0101, supra, Order Instituting Proceeding (issued April 25, 2014) at 1.

<sup>108</sup> REV Order at 3.

<sup>109</sup> Id.

infrastructure investment, reduce emissions, and engage customers as active market participants).<sup>110</sup> Under REV, NYPSC requires that New York utilities' distribution system planning and operations increasingly rely on Demand Response and other distributed energy resources as an alternative to traditional investment to reduce retail delivery costs while maintaining local reliability. Such requirements tie directly to New York State's authority to establish just and reasonable retail rates. As detailed in the Distribution System Implementation Plans ("DSIPs") Guidance Order, the NYPSC is requiring each jurisdictional utility to conduct a thorough self-assessment of its system to identify opportunities to effectuate REV policies and objectives, and to engage in a comprehensive and transparent planning process.<sup>111</sup> Utilities thus are required to develop DSIPs that detail how they will support the increased deployment of distributed energy resources – including, but not limited to, Demand Response – on their distribution systems. The DSIPs will provide the practical roadmap necessary for distribution utilities to effectuate REV into utility planning and operations to achieve the most cost-effective distribution systems. This transitional process is needed for utility systems to adapt to changing technologies and evolving markets.<sup>112</sup> The DSIPs address only utility distribution systems, not transmission systems, and neither pertain to nor plan for changes on the bulk system or in wholesale markets.

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<sup>110</sup> Id.

<sup>111</sup> Case 14-M-0101, supra, Order Adopting Distributed System Implementation Plan Guidance (issued April 20, 2016) at 4.

<sup>112</sup> Id. at 10.

**2. Subjecting SCRs to BSM Interferes with State Policy Objectives and Retail Rate Setting Authority That Promote and Rely Upon Demand Response**

Wholesale and retail Demand Response programs are complementary to each other but serve different purposes, yield different benefits, and compensate distinctly different services. The programs should be coordinated to facilitate participation and maximize their benefits. However, subjecting Demand Response resources to potential mitigation in the SCR program presents unreasonable barriers for customers to participate in both wholesale and retail programs. As detailed below, this artificial barrier to SCR program participation increases customer costs and reduces the effectiveness of Demand Response. Subjecting Demand Response resources to the NYISO's BSM rules, therefore, is unjust and unreasonable, interferes with the State's authority over retail distribution rates, and interferes with the State's local system planning authority under FPA §824o(i)(3) by limiting the State's ability to rely on Demand Response to be used as an alternative to traditional distribution system investments and to address system peaks.

**a. Subjecting SCRs to BSM Interferes with Legitimate State Policy Objectives**

Under the NYISO's existing BSM rules, a new Demand Response capacity resource will be exempt from mitigation if the forecast ICAP Spot Market Auction price is projected to exceed the SCR's Offer Floor for the first twelve months that the SCR plans to offer unforced capacity ("UCAP").<sup>113</sup> The SCR will be mitigated, however, if its Offer Floor is projected to exceed the forecast ICAP Spot Market Auction price during

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<sup>113</sup> Market Services Tariff, Att. H, § 23.4; Evans Aff. at ¶13.

the same period.<sup>114</sup> A mitigated resource is subject to the Offer Floor, which constrains its bid behavior, until its ICAP offers have been accepted in the ICAP Spot Market Auction at a level above its Offer Floor for a period of twelve months.<sup>115</sup>

Applying the BSM rules to utility-administered Demand Response providers limits the aggregate amount of Demand Response that may be recruited to participate in available programs and thus results in an inefficient use of this resource. Complex mitigation rules and program requirements that change periodically diminish the ease of SCR program participation and reduce enrollment levels.<sup>116</sup> Although the economics of participating in a Demand Response program is a key decisional factor for potential Demand Response providers, the relative difficulty or burden associated with enrollment and participation also are substantial factors for customers deciding whether to enroll or continue participating in a Demand Response program.<sup>117</sup> Subjecting SCRs to BSM measures increases the complexity and uncertainty of program participation, which can have a negative impact on program enrollment.<sup>118</sup>

Applying the BSM rules to prospective SCRs will likely compel them to choose between NYISO- and utility-administered Demand Response programs,<sup>119</sup> even though those programs are intended to address different systems, yield distinct benefits, and compensate for different services provided. Demand Response providers will evaluate

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<sup>114</sup> Market Services Tariff, Att. H, § 23.4; Evans Aff. at ¶14.

<sup>115</sup> Market Services Tariff, Att. H, § 23.4; Evans Aff. at ¶13.

<sup>116</sup> Hamilton Aff. at ¶22.

<sup>117</sup> Id. at ¶21-22.

<sup>118</sup> Id.

<sup>119</sup> Evans Aff. at ¶24; Hamilton Aff. at ¶21-22.

which program yields the greater financial benefit and/or less onerous participation requirements, and choose accordingly.<sup>120</sup> Those evaluations are based in part on forecasts of a volatile and unpredictable market.<sup>121</sup> Market volatility will create market uncertainty because it will be exceedingly difficult to forecast how long an Offer Floor may persist.<sup>122</sup>

Ms. Hamilton illustrates this result with a forecast of potential market conditions that are likely to be realized during the Summer 2016 Capability Period. Ms. Hamilton used current data to estimate the market clearing price for ICAP and compensation levels for participants in the Con Edison DLRP and/or CSR program.<sup>123</sup> Under the anticipated conditions evaluated in this analysis, new Demand Response providers that participate in the SCR program and (i) the Con Edison DLRP (Tier 2), or (ii) both the CSR and DLRP programs, would be mitigated during the 2016 Summer Capability Period and subjected to an Offer Floor.<sup>124</sup> On the other hand, SCR providers that only participate in the DLRP (Tier 1) or the CSR program may not be mitigated, depending on actual market conditions.<sup>125</sup>

The net effect of these issues is likely to be that Demand Response providers will choose to participate only in the more lucrative program.<sup>126</sup> It may also instigate a cycle

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<sup>120</sup> Evans Aff. at ¶24; Hamilton Aff. at ¶21.

<sup>121</sup> Hamilton Aff. at ¶21.

<sup>122</sup> Id.

<sup>123</sup> Id. at ¶14-17.

<sup>124</sup> Id. at ¶18.

<sup>125</sup> Id. at ¶19.

<sup>126</sup> Id. at ¶21.

of program design changes that inflate program costs without increasing program benefits. In other words, if the risk of mitigation compels Demand Response providers to choose between wholesale- and retail-level Demand Response programs, the NYPSC would have to decide whether to: (i) increase payments offered under the utility-administered programs to lure Demand Response providers from the SCR program, or (ii) oversee utility-administered programs that struggle to enroll Demand Response providers and are incapable of maximizing the potential benefits of Demand Response. The former option would unnecessarily increase customer costs without a commensurate increase in the amount of Demand Response enrolled in all programs, while the latter option would neuter the efficacy of state Demand Response programs. Both options would result in unproductive competition among Demand Response programs and an inefficient and sub-optimal deployment of Demand Response resources while (i) impairing the State's ability to rely on Demand Response to improve local distribution reliability, optimize distribution capital spending, and reduce distribution plant capital and operating expenses, and (ii) impeding progress toward legitimate State policy objectives.<sup>127</sup>

Moreover, utility-specific Demand Response programs exist to solve a need that is complementary to, but distinct from, the NYISO's SCR program. The "primary objective" of retail Demand Response programs is "to reduce load during distribution system peaks in order to avoid expensive distribution infrastructure upgrades otherwise needed to meet those peaks."<sup>128</sup> While the retail programs support distribution system

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<sup>127</sup> Evans Aff. at ¶24.

<sup>128</sup> DLM Order II at 11-12. See also Evans Aff. at ¶16.



reliability, the SCR program is designed to support bulk transmission system reliability at or near system peak conditions.

Importantly, events on the distribution system that trigger calls under retail Demand Response programs are separate and distinct from those that trigger calls under the SCR program. Distribution-level Demand Response programs may be activated in a targeted manner to relieve constraints and/or reduce peaks on a specific network. In contrast, SCR program events call on resources located throughout an entire zone to address zonal contingencies or peaks.

The utility-specific programs and the SCR ICAP programs are often called upon at different times of the day and on different days of the year. These retail programs are designed to relieve distribution system constraints that often do not occur near bulk system peak load.<sup>129</sup> For instance, from 2011 through 2015 in Zone J, the DLRP and SCR programs were called in a total of 235.5 hours.<sup>130</sup> These calls, however, overlapped only during 14 hours, or approximately 6% of the total.<sup>131</sup> Although the CSR and SCR program calls overlapped to a greater extent over the same period, a majority (*i.e.*, 55%) of the wholesale and retail Demand Response program calls did not overlap.<sup>132</sup> These results are consistent with and reflect “the intentional differences in purpose and design between the wholesale and retail programs, as well as the services they procure.”<sup>133</sup>

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<sup>129</sup> Evans Aff. at ¶16.

<sup>130</sup> *Id.* at ¶19.

<sup>131</sup> *Id.*

<sup>132</sup> ¶20.

<sup>133</sup> *Id.* at ¶21. There is no “tethering” between the distribution-level programs and Demand Response participation in the wholesale capacity market. (Hughes at 1299.)

Concluding that compensation paid for participation in the utility-administered programs should reflect the costs and benefits to utility distribution systems, the NYPSC directed utilities to complete a detailed marginal distribution system cost study to better align retail Demand Response program compensation and the distribution system benefits provided by participating Demand Response resources.<sup>134</sup> Based on the fact that utility-administered and NYISO-administered Demand Response program participants provide different services with different value streams, the NYPSC concluded that individual customers should be allowed to participate fully in both programs.<sup>135</sup>

Program rules and policies that compel Demand Response providers to choose among available programs artificially suppress the resources available to support bulk- and distribution-system reliability, which is contrary to both State and Federal goals. New service providers that could enhance distribution system reliability would be unavailable to support the distribution system and benefit customers if they elect to participate only in the SCR program due to mitigation. Conversely, new providers that elect to participate only in a retail Demand Response program would be unavailable to support bulk system reliability through the SCR program. The needs of the two types of programs are different, but both can be satisfied by the same Demand Response resource, thus creating a synergistic benefit for the State's consumers. The BSM measures, however, impede this synergy and prevent New York from maximizing the bulk system

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There is no question, therefore, as to whether the State is preempted from implementing retail Demand Response programs. (Id.)

<sup>134</sup> DLM Order II at 12.

<sup>135</sup> Id.

and distribution-level benefits that could be realized from each Demand Response resource.<sup>136</sup> This concern is not theoretical – on May 17, 2016, the NYISO issued a notice stating that 79 kW of new SCR capacity in Zone J had been mitigated, and thus would be subject to an Offer Floor.<sup>137</sup>

Demand Response resources will be forced to choose between the SCR program and retail programs during Summer 2016 and afterwards if SCRs are not exempted promptly from application of the BSM rules. The choice of programs will be driven by economics but the result will be that overall capacity enrolled in all programs will be less than if SCRs are not subject to mitigation.<sup>138</sup> BSM, therefore, interferes with legitimate state policy objectives by erecting artificial barriers to Demand Response market entry. This conclusion is supported further by the facts that (i) there is no nexus between retail Demand Response programs and the SCR program, (ii) retail and wholesale Demand Response programs serve different purposes and yield different benefits, and (iii) the economic considerations underlying a decision to participate in one or both programs are not necessarily related. A blanket BSM exemption for SCRs is needed so that New York may pursue its core energy policy objectives without Federal interference.

The BSM exemption requested herein is also consistent with Federal energy policy. In EPISA, the Commission defeated a challenge to its authority to regulate

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<sup>136</sup> Evans Aff. at ¶24.

<sup>137</sup> The notice was provided by the NYISO via electronic communication only. In response to a query by the NYPSC, the NYISO explained that notice of the SCR mitigation decision would not be posted on the NYISO's website. No reason was provided for the NYISO's decision to limit public notice in this manner.

<sup>138</sup> Evans Aff. at ¶24; Hamilton Aff. at ¶21.

wholesale Demand Response programs, thereby securing a significant victory for wholesale Demand Response programs.<sup>139</sup> In upholding the Commission, the Supreme Court recognized that the Energy Policy Act of 2005 declared that it shall be the policy of the United States to encourage Demand Response.<sup>140</sup> The Supreme Court noted further that Congress directed that the deployment of Demand Response enabling technology will be facilitated, and “unnecessary barriers to demand response participation in energy ... markets shall be eliminated.”<sup>141</sup> The Supreme Court described actions taken by the Commission to effectuate this national policy through Order Nos. 719 and 745.<sup>142</sup>

Other recent examples of this national policy include Executive Order 13693: Planning for Federal Sustainability in the Next Decade (“EO 13963”), which directs Federal agencies to participate in cost-effective demand management programs as one element of a comprehensive effort to increase efficiency and improve environmental performance.<sup>143</sup> Further, a Quadrennial Energy Review process established by President Obama in 2014 enumerated five key policy recommendations for the “grid of the future,” including that the “future grid should encourage and enable energy efficiency and demand response to cost effectively displace new and existing electric supply

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<sup>139</sup> Federal Energy Regulatory Commission v. Electric Power Supply Association et al., 130 S. Ct. 760 (2016).

<sup>140</sup> Id. at 769 (citation omitted).

<sup>141</sup> Id. (internal quotation marks and citation omitted).

<sup>142</sup> Id. at 769-72.

<sup>143</sup> EO 13963 is available at <https://www.whitehouse.gov/the-press-office/2015/03/19/executive-order-planning-federal-sustainability-next-decade>.

infrastructure, whether centralized or distributed.”<sup>144</sup> The Department of Energy recently commenced public engagement with respect to the “Second Installment” of the Quadrennial Energy Review.<sup>145</sup> As part of that process, the Department acknowledged that the next QER analysis should include “changes to power system operations and markets can provide significant flexibility, often at lower economic costs than building new transmission infrastructure. Examples include . . . demand response.”<sup>146</sup>

FERC can promote Federal energy policy and support policy objectives shared with New York by harmonizing the wholesale Demand Response programs it regulates with the retail Demand Response programs discussed herein. This action would extend, and be consistent with, the market reforms adopted in Order Nos. 719 and 745. In Order No. 745, the Commission noted that eliminating barriers to increased Demand Response participation will induce increased investment and deployment of Demand Response resources while helping to “limit potential generator market power.”<sup>147</sup> The Commission emphasized that eliminating such barriers does not equate to preferential treatment for

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<sup>144</sup> Quadrennial Energy Review: Energy Transmission, Storage, and Distribution Infrastructure (April 2015) at 3-24, available at <http://energy.gov/epa/downloads/quadrennial-energy-review-first-installment>. Broadly speaking, this is consistent with REV.

<sup>145</sup> U.S. Department of Energy Stakeholder Briefing Memo: “QER 1.2: An Integrated Study of the U.S. Electricity System,” *available at* [http://energy.gov/sites/prod/files/2016/02/f29/Second%20Installment%20Briefing%20Memorandum\\_0.pdf](http://energy.gov/sites/prod/files/2016/02/f29/Second%20Installment%20Briefing%20Memorandum_0.pdf) (dated February 4, 2016).

<sup>146</sup> Id. at 15-16.

<sup>147</sup> Order No. 745 at ¶59.

Demand Response providers but, instead, “facilitates greater competition” and allows the markets to “determine the appropriate mix of resources.”<sup>148</sup>

Although Order Nos. 719 and 745, and the Supreme Court’s decision in EPSA, pertain to Demand Response participation in wholesale energy markets, the underlying rationale and policy considerations apply with equal force to Demand Response participation in the wholesale capacity market. The Commission repeatedly has acknowledged that promoting Demand Response reflects national energy policy and has enacted market reforms to increase Demand Response participation in wholesale energy markets.<sup>149</sup> It would be irrational, inconsistent, and counterproductive for FERC to undermine its efforts to eliminate barriers to Demand Response in the energy market, but then erect barriers in the ICAP market. SCR Program rules that fail to harmonize with retail Demand Response initiatives undermine Federal as well as State policy objectives, and should be avoided. Moreover, such rules substantially and directly interfere with the State’s authority over retail distribution rates. Commission approval of BSM rules that interfere with the State’s use of Demand Response to avoid distribution level capital expenditures and operating expense constitutes an impermissible extension of Federal jurisdiction into matters of State authority under the FPA.

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<sup>148</sup> Id.

<sup>149</sup> Order No. 719 at ¶16-19 (stating that “the Commission has issued several orders over the last several years on various aspects of electric demand response in organized markets, with the goal of removing unnecessary obstacles to demand response participating in the wholesale power markets of RTOs and ISOs”); Order No. 745 at ¶11 (explaining that the Commission “has undertaken several reforms” to effectuate national policy by removing barriers to the participation of Demand Response resources in competitive wholesale energy markets).

Finally, the blanket exemption should extend to, and include, existing SCR program participants that currently are subject to an Offer Floor under the NYISO's BSM rules. Mitigation of Demand Response resources to any extent, whether more or less than 79 kW, interferes with legitimate State policy objectives for the reasons detailed herein. It would be arbitrary, irrational, and inconsistent to find that mitigation only would interfere with State policy objectives if it occurs after the date of a Commission order granting the blanket exemption.

**b. Subjecting SCRs to BSM Interferes with the State's Plenary Retail Rate-Setting Authority**

Demand Response is an important element of REV's emphases on Dynamic Load Management, empowering customers to engage in the electric markets, and increasing reliance on Demand Response and other distributed energy resources for distribution system planning and operations. Artificial regulatory barriers that impede Demand Response program enrollment interfere with these objectives by limiting the extent to which the State may rely on DERs, including Demand Response programs, to moderate retail utility rates by deferring the need for new distribution system infrastructure investment.<sup>150</sup>

Although FERC has jurisdiction over wholesale rates, the FPA reserves to states the exclusive and plenary authority to regulate utilities with respect to the establishment of just and reasonable retail rates.<sup>151</sup> The NYPSC, through REV, is engaged in a comprehensive effort to orient distribution utilities toward increasing the deployment of DERs such as Demand Response in order to reduce distribution rates by avoiding costly

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<sup>150</sup> Case 14-E-0423, supra, Order Instituting Proceeding at 4.

<sup>151</sup> 16 U.S.C. §824.

distribution infrastructure while achieving numerous State energy and environmental policy objectives. As detailed above, current BSM rules interfere with the State's ability to increase the deployment of Demand Response via programs designed for utility distribution systems. Current BSM rules, therefore, interfere with the State's plenary retail rate-setting authority by regulating the behavior of resources on distribution systems that are paid for with funds collected from retail customers.

State efforts to rely on Demand Response and other distributed energy resources to avoid capital investments and operational expenses on utility distribution systems are consistent with recent precedent regarding the intersection of FERC jurisdiction and state policy initiatives. In EPSA, the Supreme Court focused on wholesale Demand Response programs and whether it is appropriate for resources participating in those programs to be compensated at the same rate as other wholesale capacity providers, such as independent power producers.<sup>152</sup> Current BSM rules interfere with Demand Response participation in the retail programs detailed herein.

Hughes also is inapposite to this Complaint. The Hughes Court explained its "limited" decision to invalidate a state subsidy program because it concluded that program payments "disregard[] an interstate wholesale rate required by FERC."<sup>153</sup> The Court explained further that its decision would not stand in the way of any state "encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation."<sup>154</sup> Moreover, state programs would not

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<sup>152</sup> EPSA at 785-86

<sup>153</sup> Hughes at 1303.

<sup>154</sup> Id.



suffer from a “fatal defect” if the state “does not condition payment of funds on capacity clearing the auction....”<sup>155</sup> The retail Demand Response programs detailed herein are not tethered or otherwise linked to participation in the wholesale market, and do not impose on participants any obligations pertaining to the wholesale capacity market.

Although there is no linkage between the State’s retail Demand Response programs and the wholesale markets regulated by FERC, current BSM rules interfere with the State’s ability to regulate retail distribution utility system operations and planning by inhibiting its ability to promote retail Demand Response. This inappropriate extension of Federal jurisdiction interferes with the State’s exclusive retail rate-setting authority, and should be corrected consistent with the relief sought herein.

**3. If the Commission Declines to Grant a Blanket Exemption, Then It Should Find that Each Distribution-Level Program Individually Qualifies for an Exemption**

As detailed above, the Commission should approve a blanket exemption for SCRs because mitigating these resources interferes with legitimate state energy policy objectives, and is inconsistent with FERC’s efforts to eliminate barriers to the participation of Demand Response in wholesale markets. If, arguendo, the Commission declines to grant a blanket exemption as requested, then it should find, at a minimum, that the benefits from each of the state programs providing ratepayer support described herein should be excluded from the mitigation test applied to new SCRs. The Commission should also direct the NYISO to re-evaluate whether mitigation should continue to apply to existing SCR resources that also participate in a distribution-level program.

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<sup>155</sup> Id.

Including the benefits provided by retail Demand Response programs in the bid floor calculated for SCRs inappropriately links programs that are not intended to be linked, and mischaracterizes the economic considerations that a customer faces when considering which Demand Response program(s) to enroll in. SCR participation in the wholesale capacity market cannot be evaluated in the same manner as generator participation and, therefore, the NYISO adopted a proxy value that represents the compensation needed to induce the SCR to shed load.<sup>156</sup> Specifically, the SCR mitigation test currently compares projected ICAP Spot Market Auction prices to the opportunity cost of Demand Response resource curtailment and uses this proxy value to determine whether the Demand Response resource is economic and can avoid mitigation.<sup>157</sup>

As discussed above, retail and wholesale Demand Response programs often are called at distinct times. Material differences in Demand Response program features give rise to curtailment costs and benefits to a customer that will vary from program to program. For many customers, therefore, the decisions to enroll in a utility-administered Demand Response program and the NYISO SCR program are largely independent and based on the distinct opportunity costs presented by each program. That is, customers typically will enroll in the SCR program if the opportunity cost associated with a curtailment under the NYISO program is economic, independent of whether the customer also participates in retail Demand Response programs.

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<sup>156</sup> Evans Aff. at ¶12.

<sup>157</sup> Id. at ¶13-14.

With limited exception where retail Demand Response program participation is tied to enrollment in the SCR program (i.e., Demand Response resources enrolled under the IPEC Reliability Plan), there is no material nexus between the retail programs and the wholesale capacity market. The lack of any such connection is supported by an earlier NYISO conclusion that retail Demand Response programs had not caused “uneconomic entry that would harm the capacity markets.”<sup>158</sup> Notwithstanding its reversal on whether SCRs should be subject to BSM, the Commission has not identified any actual harm that retail Demand Response programs in New York have caused to the wholesale capacity market.<sup>159</sup>

The foregoing arguments against including retail Demand Response program benefits in the Offer Floor calculated for an SCR apply to each of the retail programs implemented in New York.<sup>160</sup> Additional arguments are provided by consideration of the individual programs.

Utility-administered DLRP and CSRP are implemented in MCZs by Con Edison, O&R, NYSEG, and Central Hudson.<sup>161</sup> As explained above, DLRPs are designed to

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<sup>158</sup> Docket Nos. EL07-39-000 and ER08-695-000, New York Independent System Operator, Inc., Tariff Filing (dated August 24, 2010), p. 12.

<sup>159</sup> Indeed, then-Commissioner Bay noted recently that “there is no evidence” that certain Con Edison and NYSEG Demand Response programs “undercut the capacity market or were intended to do so.” (150 FERC ¶61,208, Dissent at 3.)

<sup>160</sup> If buyer-side mitigation is extended to NYISO Zone K (i.e., Long Island), then the distribution-level demand response programs administered by LIPA also should be exempt from mitigation for the same reasons described herein for other utility-administered demand response programs.

<sup>161</sup> As noted previously, the Market Services Tariff currently includes retail Demand Response program benefits in the BSM test of prospective SCRs located in the New York City Zone, but not those located in other Mitigated Capacity Zones. Given that the Commission may address the NYISO’s March 2015 clarification petition by

support distribution system reliability whereas CSRPs are intended to reduce distribution system peaks. Program events may be focused on specific networks or dispersed throughout the utility's service territory, but the program operates without dependence on the SCR program.

As noted above, the performance of the retail Demand Response programs administered by Con Edison illustrate this point. During the five-year period from 2011 through 2015, the vast majority of DLRP and CSRP activations occurred when SCRs were not needed to support bulk system reliability. DLRP and CSRP goals and activations are separate and distinct from those of the SCR program, and the retail Demand Response programs specifically exclude capacity-related payments when the participant is compensated for such benefits through a separate program (e.g., the SCR program). Moreover, Con Edison cannot rely exclusively on SCRs for distribution system planning purposes.

The BQDM program addresses a localized reliability need on the utility's distribution system in several neighborhoods.<sup>162</sup> Under this initiative, Con Edison will spend approximately \$200 million to procure 52 MW of non-traditional utility- and customer-sited measures to defer or eliminate the need to spend approximately \$1 billion on the traditional utility distribution infrastructure that otherwise would be required to

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deciding that retail program benefits should be included in the BSM analysis of prospective SCRs located in any Mitigated Capacity Zone, the discussion presented in this Complaint treats the issue conservatively by assuming that such retail program benefits will be reflected in the BSM analysis of resources located in any MCZ, and explains why such inclusion is wrong.

<sup>162</sup> Id. at 2, n.2.

address the identified need.<sup>163</sup> Customer-sited measures supported by this program will include, but not be limited to, Demand Response, efficiency, and on-site generation.<sup>164</sup>

The program is wholly-focused on neighborhoods in the Brooklyn and Queens area where growth in demand is anticipated to exceed the local distribution system's ability to serve load.<sup>165</sup> Demand Response and other resources thus will be procured for the sole purpose of supporting distribution system reliability and incentives paid will be tied directly to the local distribution system benefits to be provided by participating resources. Of critical importance to the NYPSC, the BQDM program also will pilot the viability of REV concepts. This is a local program that is focused on addressing distribution system needs at a lower cost and effectuating REV, which is the focal point of State energy policy. It should not be linked to the unrelated SCR program for purposes of determining whether an SCR should be mitigated.

Mitigation of Demand Response resources in the Zone J locality is particularly detrimental to state policy objectives because a substantial proportion of the state's load is located in that region, and there is a particular need to moderate upward pressure on Con Edison's multi-billion dollar capital investment requirements. The value of this distribution-level benefit is substantial – leveraging the CSR to support system planning and defer infrastructure investment has saved Con Edison ratepayers approximately \$200 million.<sup>166</sup> Participants in the other retail Demand Response programs face similar economic considerations and could also be limited to participation in a single program.

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<sup>163</sup> BQDM Order at 3, 19.

<sup>164</sup> BQDM Report at 16-27.

<sup>165</sup> BQDM Order at 2.

<sup>166</sup> Hamilton Aff. at ¶9.

Further, interference with the State’s ability to direct Con Edison’s increased reliance on retail Demand Response to avoid capital expenditures and operating expenses on distribution plant while maintaining local reliability would impermissibly restrict authority granted to the State by the FPA.

Finally, the program exemptions should extend to, and include, existing SCR program participants that currently are subject to an Offer Floor under the NYISO’s BSM rules and also participate in a distribution-level program. Mitigation of Demand Response resources to any extent, whether more or less than 79 kW, interferes with legitimate State policy objectives for the reasons detailed herein. It would be arbitrary, irrational, and inconsistent to find that mitigation would only interfere with State policy objectives if it occurs after the date of a Commission order granting the program-specific exemptions.

#### **4. Mitigating Resources Enrolled in the Demand Management Plan Interferes with State Policy Objectives Relative to System Planning**

The IPEC Reliability Plan is designed to ensure adequate resources are available to address reliability concerns in the event of a potential IPEC retirement. This reliability contingency plan is a more stringent reliability standard than the NYISO would otherwise plan for, and is squarely within the NYPSC’s authority, reserved to the states under Section 824o(i)(3) of the Federal Power Act. Consistent with this authority, the IPEC Reliability Plan targets a suite of replacement supply resources, including 100 MW of contributions from Demand Response providers and energy efficiency measures.<sup>167</sup> The IPEC Reliability Plan – including the DMP – was implemented to ensure adequate and

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<sup>167</sup> IPEC Reliability Plan at 3.

reliable service to the State's largest load center, thereby protecting the health and safety of its residents and businesses.<sup>168</sup>

The DMP administered pursuant to the IPEC Reliability Plan includes funding to procure Demand Response resources and other solutions that would contribute toward the replacement capacity needed to avoid a reliability issue if IPEC were to be unavailable. The primary purpose of this initiative was to plan system upgrades that would be necessary to support reliability in the absence of IPEC. Including benefits that participants receive from the IPEC Reliability Plan would impede program enrollment by these resources, thereby interfering with legitimate state energy policy objectives.

The EPSA Court recognized the relationship between Commission regulation of wholesale power markets and state regulation of retail power markets. With respect to the compensation appropriate for Demand Response participating in wholesale energy markets, the Court observed that the challenged regulatory action would allow any state regulator to preclude jurisdictional companies to participate in the wholesale market.<sup>169</sup> The Court explained further that, although the Commission could have overridden that authority, it chose not to do so "in recognition of the linkage between wholesale and retail markets and the States' role in overseeing retail sales."<sup>170</sup> The Commission effectively

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<sup>168</sup> Notwithstanding concerns that the City expressed during the regulatory process preceding NYPSC approval of the IPEC Reliability Plan, the City fully supports the arguments advanced herein regarding how the NYISO's BSM rules should be applied to Demand Response resources.

<sup>169</sup> EPSA at 785 (citation omitted).

<sup>170</sup> Id.

granted States a “veto” power as a shield against potential retail rate impacts arising from Demand Response participation in the wholesale energy markets.<sup>171</sup>

A similar framework should be adopted for Demand Response participating in the wholesale capacity market. Where states allow jurisdictional companies to provide demand response in the wholesale capacity market, bids from participating resources should be accepted without regulatory intervention and the resources compensated at market rates, if the bid clears the market. This result would promote Federal and State policies favoring the increased deployment of Demand Response.

The Commission should harmonize the Demand Response rules and policies adopted for the wholesale energy and capacity markets and eliminate barriers to the full participation of Demand Response providers in both markets. As applied to the DMP, participating companies receive a one-time incentive that offsets part of the cost to install equipment that enables Demand Response. The program does not provide additional or continuing payments and it does not compensate participating companies for responding to any SCR call. The incentive, therefore, is not a payment for installed capacity within the meaning of the NYISO’s BSM rules, and it should be excluded from the Offer Floor calculation. Including DMP incentive payments in an SCR’s Offer Floor would discourage participation in the DMP, thereby (i) interfering with a legitimate State policy objective, and (ii) impeding the State’s ability to increase reliance on Demand Response for distribution planning and reliability.

Moreover, mitigating SCR resources that also participate in the DMP would force customers to pay twice for the same capacity resource – once for the DMP incentive paid

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<sup>171</sup> Id.



to achieve a state policy objective, and again for an amount of substitute capacity equivalent to the mitigated resource. The Commission recently approved a mitigation exemption for renewable resources in the ISO-NE control area specifically to protect customers from such double payment, as well as to avoid “over-mitigation” that interferes with state policy objectives.<sup>172</sup>

Finally, the proposed exemption should extend to, and include, existing SCR program participants that currently are subject to an Offer Floor under the NYISO’s BSM rules. Mitigation of Demand Response resources to any extent, whether more or less than 79 kW, interferes with legitimate State policy objectives for the reasons detailed herein. It would be arbitrary, irrational, and inconsistent to find that mitigation would only interfere with State policy objectives if it occurs after the date of a Commission order granting the mitigation exemption for Demand Response resources that participate in both the SCR program and the DMP.

#### **5. The Commission Should Authorize Fast Track Processing of this Complaint**

Importantly, Fast Track processing of this Complaint is necessary to avoid continuing the anti-competitive and counterproductive policies noted above and the inefficient deployment of Demand Response during the summer of 2016. Swift resolution of the issues raised herein could promote increased Demand Response participation in advance of system peaks that are anticipated to occur during the latter part of the 2016 Summer Capability Period.

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<sup>172</sup> ISO New England Inc. and New England Power Pool Participants Committee, 155 FERC ¶61,023 (April 8, 2016) at ¶33 (explaining that “[t]he renewables exemption fulfills the Commission’s statutory mandate by protecting consumers from paying for redundant capacity”).

The Commission should move promptly to implement the BSM exemptions requested in this Complaint. Subjecting Demand Response resources to the NYISO's BSM rules is unjust and unreasonable because it erects artificial barriers to market entry, thereby impeding program enrollment and interfering with legitimate state energy policy objectives. Action on this Complaint would resolve these issues. Prompt action is requested to provide market certainty, thereby supporting program enrollment and increased participation levels while avoiding interference with legitimate state energy policy objectives. Promptly modifying the BSM rules as proposed in this Complaint also would assist the NYISO in effectively and efficiently revising its BSM rules.

Engaging in the NYISO stakeholder process as a means for resolving these issues, however, will result in significant delay because BSM issues do not lend themselves to efficient resolution in the stakeholder process. The Complainants should not be compelled to engage in what might become an unduly protracted stakeholder process while the unjust and unreasonable BSM rules that obstruct pressing public policy goals remain intact.

### **C. Additional Requirements of Rule 206**

Pursuant to Rule 206 of the Commission's Rules of Practice and Procedure, Complainants sets forth below the following information that is not provided elsewhere in the Complaint:

#### **Rule 206(b)(4)(5): Financial Impact and Nonfinancial Impacts on Complainants**

Complainant is unable to accurately quantify the aggregate dollar impact associated with the mitigation of SCR resources. However, as discussed herein, such mitigation impedes participation in available Demand Response programs, thereby

harming consumers by diminishing the utility of Demand Response programs intended to defer the need for costly distribution infrastructure investments, thereby moderating future retail rate increases. Applying BSM to Demand Response resources also interferes with other legitimate state policy objectives such as improving electric system efficiency, reducing emissions, and empowering customers to participate in the energy market.

**Rule 206(b)(6): Related Proceedings**

In addition to the pending complaint proceedings identified above, there are other proceedings that are pending or are within the rehearing period that raise other issues concerning the buyer-side mitigations measures. These proceedings are:

- *New York Independent System Operator, Inc.*                      Docket No. EL15-64
- *New York Independent System Operator, Inc.*                      Docket No. EL07-39

**Rule 206(b)(7): Specific Relief Requested**

Because (i) critical New York energy policy objectives include robust Demand Response programs as a constituent element of the strategy to achieve those goals; (ii) inclusion of such program benefits in the calculation of the Offer Floor for the NYISO's SCR program erects a barrier to market entry; and (iii) the Commission's recent decision on the applicability of buyer-side mitigation to the SCR program interferes with legitimate State policy objectives, Complainants seek the following relief:

1. All SCR program participants enrolled in a utility-administered distribution-level Demand Response program should be exempt from the BSM measures because subjecting these resources to mitigation limits full SCR participation and interferes with legitimate state policy objectives and retail rate setting authority. This exemption should include resources that currently are mitigated and participate in both the SCR and one or more distribution-level Demand Response programs, as well as Demand Response resources that seek to participate in the SCR program on or after the date of any Commission order granting the blanket exemption.

2. The benefits provided by the utility-specific distribution-level Demand Response programs and storage incentives described herein should not be included in the calculation of the Offer Floor for any SCR participant, including mitigated resources currently participating in the SCR program
3. The benefits provided by the NYSERDA-administered distribution-level Demand Response programs should not be included in the Offer Floor for any SCR participant, including mitigated resources currently participating in the SCR program

**Rule 206(b)(8): Documents that Support the Complaint**

Documents supporting the Complaint include:

- Exhibit A – Affidavit of Katherine Hamilton;
- Exhibit B – Affidavit of Adam B. Evans; and
- Exhibit C – Con Edison and NYISO Demand Response Program Activity 2011-2015.

**Rule 206(b)(10): Notice of Complaint**

A form of notice suitable for publication in the *Federal Register* is attached to this Complaint.

**Rule 206(c): Service**


A copy of this Complaint has been served on the following party via e-mail:

Robert Fernandez  
General Counsel  
New York Independent System Operator, Inc.  
10 Krey Boulevard  
Rensselaer, New York 12144

**CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth herein, the Complainant respectfully requests that the Commission order the NYISO to make a compliance filing within 30 days to amend the Market Services Tariff and the mitigation measures in the manner proposed in this Complaint.

Respectfully submitted,

  
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for Kimberly A. Harriman*

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Dated: June 24, 2016  
Albany, New York

**EXHIBIT A**

**AFFIDAVIT OF KATHERINE HAMILTON**

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

**NEW YORK STATE PUBLIC )  
SERVICE COMMISSION, NEW )  
YORK POWER AUTHORITY, )  
LONG ISLAND POWER )  
AUTHORITY, NEW YORK )  
STATE ENERGY RESEARCH AND )  
DEVELOPMENT AUTHORITY, )  
CITY OF NEW YORK, ADVANCED )  
ENERGY MANAGEMENT )  
ALLIANCE, AND NATURAL )  
RESOURCES DEFENSE COUNCIL )  
 )  
COMPLAINANTS, )  
 )  
V. )  
 )  
NEW YORK INDEPENDENT )  
SYSTEM OPERATOR, INC. )  
 )  
RESPONDENT. )**

**DOCKET NO. EL16-\_\_\_-000**

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**COMPLAINT REQUESTING FAST TRACK PROCESSING OF THE  
NEW YORK STATE PUBLIC SERVICE COMMISSION, NEW YORK POWER  
AUTHORITY, LONG ISLAND POWER AUTHORITY, NEW YORK STATE  
ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, CITY OF NEW  
YORK, ADVANCED ENERGY MANAGEMENT ALLIANCE, AND NATURAL  
RESOURCES DEFENSE COUNCIL**

**AFFIDAVIT OF KATHERINE  
HAMILTON ON BEHALF OF THE  
COMPLAINANTS**

I, Katherine Hamilton, being duly sworn, depose and say:

1. My name is Katherine Hamilton and I am the Executive Director of  
Advanced Energy Management Alliance (“AEMA”) within my role as Principal, 38



North Solutions, LLC. My business address is 1133 15<sup>th</sup> St, NW, 12<sup>th</sup> floor, Washington, DC 20005. I have degrees from Cornell University and the Sorbonne, Paris, and have studied electrical engineering during a decade with an investor-owned utility, Virginia Power. I have previously worked at the National Energy Renewable Laboratory, Good Energies, and have led American Bioenergy Association and GridWise Alliance. All of my experience and current work is focused on clean energy and innovation.

2. AEMA is a trade association under Section 501(c)(6) of the Federal tax code, and an alliance of providers and supporters of demand response (“DR”) united to overcome barriers to the nationwide use of DR. On behalf of its member companies, AEMA advocates for policies that empower and compensate customers to manage their energy usage so as to make the electric grid more efficient, more reliable, more environmentally friendly, and less expensive.

3. The association’s members include national demand response and advanced energy management service and technology providers, as well as some of the largest demand response resources in the nation, who support advanced energy management solutions to realize the electricity cost savings those solutions provide to their companies. Association members include Responsible Interface Parties (“RIPs”), which aggregate various DR providers and coordinate between the providers and the applicable local utility or NYISO. As such, AEMA serves hundreds of New York customers, and is well-positioned to document the impact of subjecting DR resources to mitigation.

### **Purpose and Summary of Affidavit**

4. The purpose of my affidavit is to support the Complaint Requesting Fast Track Processing (“Complaint”) filed by the New York State Public Service Commission (“NYPSC”), New York Power Authority, Long Island Power Authority and its wholly-owned subsidiary Long Island Lighting Company d/b/a LIPA, New York State Energy Research and Development Authority, the City of New York, AEMA, and the Natural Resources Defense Council (collectively, the “Complainants”), which addresses the application of New York Independent System Operator, Inc.’s (“NYISO”) tariff provisions that mitigate certain DR providers, thereby limiting their participation in available DR programs. The Complaint and this affidavit represent the opinions of AEMA, and not the opinions of individual association members.

5. In my affidavit, I explain how DR providers would be harmed if the Federal Energy Regulatory Commission (“Commission”) declines to exempt utility-sponsored distribution-level DR programs from the NYISO’s buyer-side mitigation (“BSM”) rules. I demonstrate that, as early as the Summer 2016 Capability Period, new DR providers would be compelled to choose between participating in either the Special Case Resource (“SCR”) program administered by the NYISO, or one or more of the utility-administered DR programs if the exemption requested in the Complaint is not approved.

### **General Comments**

6. As described in the Complaint and detailed in the Affidavit of Adam B. Evans, utility-administered distribution-level DR programs and the NYISO-administered transmission-level SCR program serve different purposes and result in benefits that are

largely incremental to one another. These differences are reflected in the timing of program dispatch and the events that trigger program activation. Mr. Evans demonstrates that a majority of the hours called under the SCR program and the Distribution Load Relief Program (“DLRP”) and the Commercial System Relief Program (“CSRP”) administered by Consolidated Edison Company of New York, Inc. (“Con Edison”) from 2011 through 2015 occurred at different times.

7. Subjecting new DR providers to the NYISO’s BSM rules would create an artificial financial barrier that would lead many – if not most – of these resources to enroll in either the SCR program or a utility-administered program, but not both. The economic basis for this decision is explained through an illustrative analysis described later in my affidavit.

8. The result of the forced choice, however, would be an inefficient use of DR resources that fails to maximize the potential benefits they may provide. If new DR providers choose to participate in the SCR program, then utility programs such as the DLRP and CSRP administered by Con Edison would lose access to resources that could have enhanced distribution system reliability. In its 2015 report to the New York Department of Public Service on the cost effectiveness of demand response programs, Con Edison estimated that using the CSRP and DLRP programs for this purpose would result in \$250 million in net benefits over a 10-year period.<sup>1</sup>

9. On the other hand, enrolling DR resources in the SCR program alone could jeopardize local reliability and force the utility to make costly and unnecessary

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<sup>1</sup> Case 09-E-0115, et al., Proceeding to Consider Demand Response Initiatives, Con Edison Report on Program Performance and Cost Effectiveness of Demand Response Programs (filed December 1, 2015).

upgrades. For instance, a distribution network in Con Edison's service territory that is in danger of being overloaded would be unlikely to trigger activation of the SCR program. A distribution network can be overloaded when there is no contemporaneous bulk-system reliability emergency and, therefore, the NYISO would be unlikely to dispatch SCR resources in support of the network contingency. Con Edison would be unable to rely upon or dispatch those SCR DR resources to resolve the constraint. Moreover, Con Edison would be unable to depend on SCR resources for system planning, which would increase customer costs by removing one tool that the utility otherwise could use to defer costly infrastructure investments. Customer enrollment in the SCR program, therefore, would be of minimal value to Con Edison in resolving constraints and reducing costs on its distribution system.

10. New DR providers instead may choose utility-administered DR programs over the SCR program. In that event, the NYISO would be unable to rely on those DR providers to preserve bulk-system reliability when the SCR program is activated, while the NYISO capacity market would clear at a higher price than it would if the DR resources were offered into the market.

11. Ultimately, the result of the program choice, compelled by application of the BSM rules to DR providers, is that neither the SCR program nor the utility-administered DR programs will maximize potential enrollments.

**Potential Market Conditions During The Summer 2016 Capability  
Period Are Likely To Force Mitigated DR Providers To Choose  
Between Programs**

12. Mr. Evans describes the BSM rules as they apply to DR providers that bid installed capacity ("ICAP") into the NYISO's wholesale capacity market. Briefly, for

purposes of this affidavit, I note that new DR providers located in a Mitigated Capacity Zone that enroll in the SCR program must undergo a test to determine whether they will be subject to mitigation. At the time of enrollment, the NYISO will forecast the ICAP Spot Market Auction price for the first twelve months of entry. RIPs provide information used by the NYISO to determine an Offer Floor, which the NYISO tariff defines as being “equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party for providing Installed Capacity, or that is received by the Responsible Interface Party for the provision of Installed Capacity by the Special Case Resource.”<sup>2</sup>

13. Under the NYISO’s tariff, a new resource will be exempt from mitigation if the NYISO “projects that the ICAP Spot Market Auction price will exceed the Special Case Resource’s Offer Floor for the first twelve months that the Special Case Resource reasonably anticipated to offer to supply UCAP.”<sup>3</sup> Resources not meeting this test are subject to an Offer Floor, “beginning with the month of its initial offer to supply Installed Capacity, and until its offers of Installed Capacity have been accepted in the ICAP Spot Market Auction at a price at or above its Offer Floor for a total of twelve, not necessarily consecutive, months.”<sup>4</sup>

14. For illustrative purposes, I used current data to forecast potential market clearing prices during the Summer 2016 Capability Period. The purpose of this analysis

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<sup>2</sup> NYISO Market Administration and Control Area Services Tariff (“MST”) § 23.4.5.7.5.

<sup>3</sup> Id.

<sup>4</sup> Id.

was to evaluate the likelihood that mitigated SCRs would fail to clear the market under one potential set of market conditions. The analysis is sensitive to changes in data inputs and volatile market conditions, but the results demonstrate the harmful impact on DR participation that would likely result, starting in the Summer 2016 Capability Period, if new DR providers are subject to the NYISO's BSM rules. It should also be noted that the data inputs that the NYISO adopts for the mitigation test could be different from those embedded in my analysis.

15. My analysis reflects recent changes in the Locational Minimum Installed Capacity Requirements ("LCRs") adopted for the Zone J, K, and G-J Localities, beginning in May 2016. LCRs specify the minimum amount of ICAP that must be procured from within the ICAP Locality. For New York City (Zone J), the NYISO determined an LCR of 0.805 (80.5% of the NYC summer forecast peak load), which is a significant decrease from the 83.5% requirement currently in effect for the 2015 Capability Year. This change has a significant downward impact on projected Spot Market clearing prices for Summer 2016. My analysis also reflects: 1) data compiled from the NYISO tariff-based demand curves for 2017; 2) generator ICAP for Summer 2016 (based on the 2015 Load and Capacity Data prepared annually by the NYISO); 3) currently noticed generator deactivation/retirement notices; 4) historical locational forced outage rates; and, 5) a range of MWs associated with Unforced Deliverability Rights ("UDRs") and SCRs.

16. Based on these data inputs, Spot Market prices for NYC in Summer 2016 may clear around \$12.50/kW-month (“kW-mo”).<sup>5</sup> Winter prices are estimated to be roughly \$6.50/kw-mo. Total annual revenue (which is the basis for determining whether a new SCR is subject to mitigation) would therefore be the sum of the monthly clearing prices, or  $6*12.50/\text{kW-mo} + 6*6.50/\text{kW-mo} = \$114/\text{kw-year}$ .

17. I also estimated the Offer Floor that would be calculated for purposes of the BSM test for a prospective SCR resource that also participates in Con Edison’s DLRP and CSRP programs. Pursuant to Con Edison’s tariff, new DR resources participating in these programs would be paid by Con Edison at the following rates, recognizing that monthly reservation payments are made over the five months from May through September:

- DLRP only (Tier 1):  $5 \text{ months} * \$18/\text{kw-mo} = \$90/\text{kW-yr}$
- DLRP only (Tier 2):  $5 \text{ months} * \$25/\text{kW-mo} = \$125/\text{kW-yr}$
- CSRP only:  $5 \text{ months} * \$18/\text{kW-mo} = \$90/\text{kW-yr}$
- CSRP+DLRP (Tier 1):  $5 \text{ months} * (\$18/\text{kW-mo} + \$18/\text{kW-mo}) = \$180/\text{kW-yr}$
- CSRP+DLRP (Tier 2):  $5 \text{ months} * (\$18/\text{kW-mo} + \$25/\text{kW-mo}) = \$215/\text{kW-yr}$

18. Based on this analysis, DR providers that participate in DLRP in a Tier 2 network or the CSRP in combination with either DLRP program would be mitigated and subject to an Offer Floor if they also enroll as an SCR resource (i.e., in each case,

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<sup>5</sup> The NYISO’s Spot Market auction for May 2016 (the first month of the Summer 2016 Capability Period) in Zone J (NYC) cleared at \$12.41/kW-month; the June 2016 clearing price in Zone J was \$12.29/kW-month.

payments from the Con Edison programs would exceed the anticipated revenues from the NYISO capacity market and hence these SCRs would be subject to a floor price greater than the capacity market clearing price). Consequently, these resources would be unable to sell their capacity into the SCR program.

19. Given the sensitivity of NYC prices due to the demand curve slope, it is possible that any participation in one or more Con Edison programs would result in new SCRs being subject to a floor price.

20. RIPs are actively engaged in working with prospective demand response clients intending to participate in the NYISO's SCR program in the Summer 2016 Capability Period and beyond. As noted in the Complaint, the SCR program and the utility-administered distribution-level DR programs serve distinctly different roles in maintaining bulk power and distribution system reliability, respectively. Unless utility-administered demand response programs are exempted from the NYISO's Offer Floor calculation, prospective demand response resources in Mitigated Capacity Zones will have to choose among DR programs, rather than participating in all available DR programs for which they might be eligible. This choice will be based upon many factors, but in the end will likely be based upon economics, and the more lucrative program is likely to be selected. These economic evaluations are complicated and subject to the uncertainty of forecasts based on a volatile and unpredictable market, thereby making it difficult to predict how long a resource might be subject to an Offer Floor. The overall result will be that all programs, to some degree, will suffer lower MW enrollment levels than otherwise could have been obtained had the unique reliability benefits of utility-



administered DR programs been recognized and excluded from the SCR floor price calculation.

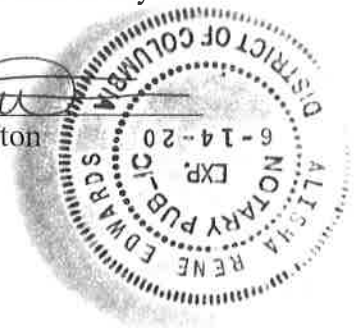
21. This concludes my affidavit.

ATTESTATION

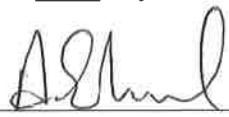
I am the witness identified in the foregoing affidavit. I have read the affidavit and am familiar with its contents. The facts set forth herein are true to the best of my knowledge, information, and belief.

  
Katherine Hamilton

June 24, 2016



Subscribed and sworn to before me  
this 24<sup>th</sup> day of June, 2016

  
Notary Public

My Commission expires:

**ALISHA RENE EDWARDS**  
**NOTARY PUBLIC DISTRICT OF COLUMBIA**  
My Commission Expires June 14, 2020

**EXHIBIT B**

**AFFIDAVIT OF ADAM EVANS**

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

**NEW YORK STATE PUBLIC )  
SERVICE COMMISSION, NEW )  
YORK POWER AUTHORITY, )  
LONG ISLAND POWER )  
AUTHORITY, NEW YORK )  
STATE ENERGY RESEARCH AND )  
DEVELOPMENT AUTHORITY, )  
CITY OF NEW YORK, ADVANCED )  
ENERGY MANAGEMENT )  
ALLIANCE, AND NATURAL )  
RESOURCES DEFENSE COUNCIL )  
 )  
COMPLAINANTS, )  
 )  
V. )  
 )  
NEW YORK INDEPENDENT )  
SYSTEM OPERATOR, INC. )  
 )  
RESPONDENT. )**

**DOCKET NO. EL16-\_\_\_-000**

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**COMPLAINT REQUESTING FAST TRACK PROCESSING OF THE  
NEW YORK STATE PUBLIC SERVICE COMMISSION, NEW YORK POWER  
AUTHORITY, LONG ISLAND POWER AUTHORITY, NEW YORK STATE  
ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, CITY OF NEW  
YORK, ADVANCED ENERGY MANAGEMENT ALLIANCE, AND NATURAL  
RESOURCES DEFENSE COUNCIL**

**AFFIDAVIT OF ADAM B. EVANS ON  
BEHALF OF THE COMPLAINANTS**

I, Adam B. Evans, being duly sworn, depose and say:

1. My name is Adam B. Evans and I am employed by the New York State Department of Public Service (“NYDPS”) as a Utility Analyst in the Office of Markets

and Innovation. My business address is Three Empire State Plaza, Albany, New York, 12223-1350. My duties with the NYDPS include analyzing and reporting on the New York Independent System Operator (“NYISO”) Installed Capacity (“ICAP”) market design and operations, evaluating the potential market price impacts of proposed changes in the electric energy and ICAP markets, and acting as the NYDPS Staff lead on NYISO Demand Response (“DR”) issues.

2. I hold a Bachelor of Business Administration Degree in Finance from James Madison University. Prior to joining the NYDPS in 2010, I held a professional position in Finance as an equities and commodities trader with C + C Trading in New York City.

#### **Purpose and Summary of Affidavit**

3. The purpose of my affidavit is to support the New York Public Service Commission (“NYPSC”), New York Power Authority, Long Island Power Authority and its wholly-owned subsidiary Long Island Lighting Company d/b/a LIPA, New York State Energy Research and Development Authority, the City of New York, AEMA, and the Natural Resources Defense Council (collectively, the “Complainants”) Section 206 Complaint under the Federal Power Act regarding the need to change the NYISO Market Administration and Control Area Services Tariff (“MST”) in a manner that results in buyer-side mitigation (“BSM”) rules for DR providers that are just and reasonable and not unduly discriminatory or preferential, and do not interfere with New York State policy objectives. In the Complaint, the Complainants seek a blanket exemption from the NYISO’s BSM rules for State programs supporting the implementation of distribution-level, utility-administered DR programs. Alternatively, if the Federal Energy Regulatory

Commission (“Commission”) declines to grant a blanket exemption for this purpose, the Complaint seeks program-specific BSM exemptions for the utility-administered programs because applying mitigation in relation to them interferes with legitimate State policy objectives.

4. In my affidavit, I: (i) explain how the NYISO’s BSM rules work; (ii) briefly describe the New York ICAP markets and utility-administered, distribution-level DR programs implemented to advance State policy objectives; (iii) describe how the BSM rules are implemented, focusing on their application to DR providers participating in the NYISO-administered, bulk system Special Case Resources (“SCR”) program; and, (iv) explain why the BSM rules are not just and reasonable as applied to DR providers, and how this improper application of the BSM rules treats DR providers in an unfair manner that impedes their participation in both the NYISO- and utility-administered DR programs, thereby obstructing legitimate policy objectives of New York State.

#### **Utility-Administered DR Programs**

5. Wholesale and retail DR programs serve different purposes and yield distinct benefits. DR providers are unique because they may be used to support both transmission and distribution system reliability. When the bulk system approaches shortage conditions, DR providers may support bulk system reliability by participating in the NYISO-administered SCR program by reducing load when called upon to do so by the NYISO. Similarly, constraints on a utility’s distribution system may be relieved either by reducing load or supplying generation at the local distribution level. DR providers participating in a retail program can alleviate distribution system constraints, whereas ICAP suppliers connected at the bulk system level generally cannot.

6. The NYPSC regulates investor-owned utilities in New York. Early last year, the NYPSC directed each such electric utility to develop and implement distribution-level, retail DR programs beginning in Summer 2015.<sup>1</sup> The NYPSC further directed the utilities to model their retail programs on the Distribution System Load Relief Program (“DLRP”) and Commercial System Load Relief Program (“CSR”) that Consolidated Edison Company of New York, Inc. (“Con Edison”) has been implementing successfully for years. The primary purpose of these retail programs is to reduce the need for expensive distribution system investments that are required to maintain reliability by satisfying distribution peak demand.

#### **The ICAP Market and Current BSM Rules**

7. For any given resource, ICAP refers to the maximum capability to provide electrical power, or the demonstrated amount of demand that can be curtailed, at the direction of the NYISO. In order to ensure that load can be served reliably, the NYISO requires a minimum level of ICAP to be procured. This minimum level is the forecast peak load plus a reserve margin called the Installed Reserve Margin (“IRM”) and is used to maintain system resource adequacy.

8. ICAP supply resources are made up of electric generators, transmission lines located in other regions that have Unforced Deliverability Rights (“UDRs”), and DR resources who participate in the Special Case Resource (“SCR”) program. A DR provider that participates in the SCR program can offer UCAP in a quantity equal to the amount of power that it can curtail when directed by the NYISO.

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<sup>1</sup> Case 14-E-0423, Dynamic Load Management Programs, Order Instituting Proceeding Regarding Dynamic Load Management and Directing Tariff Filing (issued December 15, 2014) at 1-2.

9. Both supply-side and buyer-side mitigation rules were developed to prevent the exertion of market power in the parts of the New York ICAP market that the Commission concluded are not workably “competitive” because a small number of buyers and sellers control a large portion of the market. Buyer-side mitigation rules are intended to prevent buyers with market power from intentionally suppressing prices below competitive levels.

10. FERC recently concluded that applying the BSM rules to projects developed on a merchant basis, certain self-supply resources, and a limited population of to-be-defined renewable generation projects is unjust, unreasonable, or unduly discriminatory or preferential pursuant to FPA Section 206.<sup>2</sup> In so ruling, FERC acknowledged that those resources would have little or no ability and/or incentive to suppress wholesale ICAP prices. FERC declined to grant a blanket BSM exemption for DR providers, thereby affirming that these resources should continue to BSM examination for potential mitigation.

11. New DR providers, therefore, remain subject to a “buyer-side mitigation test.” The BSM test determines whether or not bids submitted by an ICAP market participant are subject to a “bid floor” (the “Offer Floor”). DR providers that do not pass the test cannot submit UCAP bids less than the Offer Floor, which is determined by the NYISO.

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<sup>2</sup> New York Public Service Commission, New York Power Authority, and New York State Energy Research and Development Authority, 153 FERC ¶61,022 (dated November 8, 2015).



12. One part of the BSM test for generators centers on determining the Unit's Net Cost of New Entry ("Unit Net CONE"). The Unit Net CONE is defined as the embedded costs of a supplier of Installed Capacity, net of projected energy and ancillary services revenues.<sup>3</sup> For purposes of the NYISO's ICAP Mitigation Measures, contained in Section 23.4.5 of the MST (Attachment H) Unit Net CONE means the localized levelized embedded costs of a specified Installed Capacity Supplier, including interconnection costs, and for an Installed Capacity Supplier located outside a Mitigated Capacity Zone including embedded costs of transmission service. In either case, Unit Net CONE is net of likely projected annual Energy and Ancillary Services revenues, as determined by the ISO, translated into a seasonally adjusted monthly UCAP value using an appropriate class outage rate. The Unit Net CONE is compared to forecast capacity prices and the supplier is deemed to be either (i) "economic," if Unit Net CONE is less than forecast capacity prices, or (ii) "uneconomic," if Unit Net CONE exceeds forecast capacity prices. When a traditional generator enters the market, the main purpose is to provide power to the grid. It is possible, therefore, to estimate the Unit Net CONE as the embedded costs of the plant less its energy and ancillary services revenues. In contrast, DR providers typically are large industrial plants, apartment complexes, or other business whose primary concern is something other than supporting grid reliability by curtailing energy usage. Most of their embedded costs are completely unrelated to the provision of power to the grid. Thus, the standard definition of Unit Net CONE cannot be applied to DR providers.

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<sup>3</sup> Market Services Tariff at § 23.4.5.

13. The buyer-side mitigation test for DR providers instead is based on an “opportunity cost” assumed for the resource. As used by the Commission, this “opportunity cost” represents the DR provider’s “cost” of providing capacity.

Attachment H of the MST explains this as follows:

The Offer Floor for a Special Case Resource shall be equal to the minimum monthly payment for providing Installed Capacity payable by its Responsible Interface Party, plus the monthly value of any payments or other benefits the Special Case Resource receives from a third party *for providing Installed Capacity*, or that is received by the Responsible Interface Party for the *provision of Installed Capacity* by the Special Case Resource.

(emphasis added).

14. An SCR resource, therefore, will be deemed economic and exempt from mitigation if the NYISO projects that the UCAP Spot Market Auction price will exceed the SCR’s Offer Floor, as determined above for the first twelve months that the DR provider is reasonably anticipated to offer to supply UCAP.

15. FERC currently requires that the Offer Floor determination include payments received for participating in certain retail DR programs administered by Con Edison and the New York State Energy Research and Development Authority (“NYSERDA”). If the estimated Offer Floor exceeds forecast capacity prices, then the resource will be mitigated and forced to bid UCAP at the floor value, thereby increasing the risk that the bid will not clear the market and the resource will not be allowed to receive capacity payments.

**Wholesale and Retail DR Programs Compensate for Distinct Products  
and Services**

16. It is important to distinguish between ICAP that is provided through participation in the SCR market and distribution system relief that is provided through participation in utility-administered, distribution-level DR programs. As noted above, utility programs are designed to maintain distribution system reliability, whereas the SCR program is designed to support bulk transmission system reliability. Payments made under the utility programs do not relate, in any way, to either the bulk power system or the “provision of Installed Capacity” as it pertains to the calculation of an Offer Floor for a prospective SCR program participant. Utility payments for participation in a retail DR program instead are made to secure distribution system relief and not to procure ICAP, which is a separate and distinct product. Including retail DR program payments in the calculation of a “capacity resource” Offer Floor thus violates the plain language of the MST, and the practice should be abandoned.

17. The conclusion that utility-administered, distribution-level DR programs are independent of, and distinguishable from, the NYISO-administered, bulk transmission-level SCR program is reinforced by examination of how the programs have performed. Using data compiled from 2011 through 2015, I compared activations of the Con Ed CSRP and DLRP programs with activation of the NYISO SCR program. I divided the hours in which the program calls overlapped by the sum of (i) the total hours an event was called in each of Con Edison’s programs, and (ii) the total non-overlapping hours in which the SCR program was called. When the DLRP was called in different networks during the same hours, each hour was treated as a single event affecting multiple networks.

18. For instance, if the DLRP was called from 12:00 p.m. to 5:00 p.m., and the SCR program was called from 12:00 p.m. to 6:00 p.m., I divided the overlapped hours (5) by the sum of DLRP hours (5) and non-overlapping SCR hours (1) (i.e.,  $5 \div [1+5] = 83\%$ ). It would be inappropriate to simply add the hours and conclude that only 5 of 11 hours overlapped. Instead, the results of my analysis paint a clearer picture.

19. From 2011-2015, the DLRP and SCR programs were called in Zone J (i.e., New York City) in a total of 235.5 hours. Program calls, however, overlapped (i.e., the programs were called at the same time) only in 14 (approximately 6 percent) of those hours.

20. Over the same period, the CSRPs and SCR programs were called in Zone J in a total of 110 hours, 49 (45 percent) of which were overlapping.

21. The fact that most DLRP and CSRPs program calls do not overlap with SCR program calls reflects inherent differences in purpose and design between the wholesale and retail programs, as well as the services they procure. The SCR program is intended to support bulk transmission system reliability during shortage conditions. In contrast, the utility-administered programs were designed to relieve constraints on the distribution system that often do not occur when the bulk system is near peak load.

22. The NYISO SCR program is a bulk-system reliability program that is activated during periods of reserve shortages or when there is an unplanned event such as severe weather or unplanned outages. The utility programs – such as Con Edison’s DLRP and CSRPs – are called when there is stress on the distribution system. The events that trigger activation of the SCR program are distinct from, and occur at different times than, those that trigger activation of the DLRP or CSRPs, and vice versa. For instance,

local networks often peak at different times than the bulk system, or a localized need may activate a utility-administered program when there is no simultaneous need to call on SCR resources to support bulk system reliability.

**Mitigating Potential New SCR Resources Interferes With State Policy Objectives**

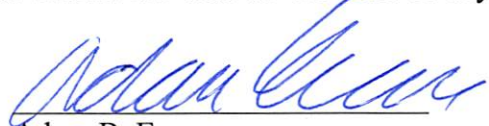
23. The Complaint details why both State and federal energy policy favors supporting the increased deployment of DR resources, which may contribute to both transmission system and distribution system reliability. State and federal policies and program rules should be harmonized to maximize resource deployment and the benefits that DR resources provide, thereby furthering State and federal policy objectives.

24. When a new DR resource is deciding whether to participate in one or more DR programs, it will evaluate the program requirements and the potential payment streams associated with available programs. When the NYISO's BSM rules are applied to prospective SCR program participants, however, dual participation in utility- and NYISO-administered DR programs brings the potential for an Offer Floor that creates a huge unknown for the resource. This uncertainty may force the DR provider to choose between participating in either the wholesale or the retail program. This artificially limits the ability of DR providers to support both transmission system and distribution system reliability and results in the sub-optimal and inefficient use of DR resources. Forcing prospective DR providers to choose between wholesale and retail markets makes it much more difficult for both FERC and the State to rely on DR to further their energy policy objectives.

25. This concludes my affidavit.

**ATTESTATION**

I am the witness identified in the foregoing affidavit. I have read the affidavit and am familiar with its contents. The facts set forth herein are true to the best of my knowledge, information, and belief.

  
Adam B. Evans

June 24, 2016

Subscribed and sworn to before me  
this 24 day of June, 2016

  
Notary Public

My Commission expires:

ALAN T. MICHAELS  
Notary Public, State of New York  
No. 02Mi6092164  
Qualified in Rensselaer County  
Commission Expires May 12, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document, by overnight service and email, on the respondent, the New York Independent System Operator, Inc., to the attention of the following individuals:

Robert Fernandez  
General Counsel  
New York Independent System Operator, Inc.  
10 Krey Boulevard  
Rensselaer, New York 12144

Dated at Albany, New York this 24<sup>th</sup> day of June, 2016.

A handwritten signature in blue ink that reads "S. Jay Goodman". The signature is written in a cursive style and is positioned above a horizontal line.

S. Jay Goodman, Esq.  
Assistant Counsel  
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