

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): _____ Caption [use short title] _____

Motion for: _____

Set forth below precise, complete statement of relief sought:

MOVING PARTY: _____

- Plaintiff
- Appellant/Petitioner
- Defendant
- Appellee/Respondent

OPPOSING PARTY: _____

MOVING ATTORNEY: _____

[name of attorney, with firm, address, phone number and e-mail]

OPPOSING ATTORNEY: _____

Court-Judge/Agency appealed from: _____

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No

Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency: _____

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: _____ Date: _____

Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re People of the State of New York and Public Service
Commission of the State of New York,

Petitioners.

Docket No. ____.

**PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION
FOR STAY**

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Albany, New York

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii
THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF MANDAMUS.....	3
JURISDICTION.....	4
RELEVANT FACTS	4
STATEMENT OF REASONS TO ISSUE MANDAMUS.....	8
A. FERC Has Unreasonably Delayed the Issuance of Orders on Rehearing...8	
B. FERC’s Issuance of Tolling Orders Should Not Allow It to Evade Timely Judicial Review of Agency Actions.....	8
C. New York Ratepayers are Irreparably Harmed by the Implementation of the FERC Orders.....	10
AN EMERGENCY MOTION FOR STAY SHOULD BE GRANTED.....	11
RELEVANT FACTS	12
A. The New Capacity Zone	12
B. The Demand Curve Phase-in.....	16
ARGUMENT	18
A. The NYPSC Is Likely to Prevail on the Merits of Its Claims	19
1. FERC fails to explain how the windfall for incumbent generators is consistent with just and reasonable rates.....	20
2. FERC failed to rationally evaluate New York State’s efforts to relieve transmission constraints.....	23

3.	FERC irrationally refused to consider a phase-in of the NCZ impacts.....	26
B.	Lower Hudson Valley Electric Consumers Will Suffer Irreparable Harm Absent a Stay.....	28
C.	The Public Interest Requires a Stay of the FERC Orders	30
	CONCLUSION.....	34

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

Air Line Pilots Assoc. Int’l v. Civil Aeronautics Bd.,
215 F.2d 122 (2d Cir. 1954).....30

Am Rivers & Idaho Rivers United,
372 F.3d 413 (D.C. Cir. 2004)4

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962).....23

Canadian Ass’n of Petroleum Producers v. FERC,
254 F.3d 289 (D.C. Cir. 2001)20

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949).....20

Detsel v. Sullivan,
895 F.2d 58 (2d Cir. 1990).....23

Dilaura v. Power Authority of the State of New York,
982 F.2d 73 (2d Cir. 1992).....8

*Electricity Consumers Resource Council v. Federal Energy Regulatory
Comm’n*, 407 F.3d 1232 (D.C. Cir. 2005)16

Electricity Consumers Resource Council v. FERC,
747 F.2d 1511 (D.C. Cir. 1984)22

Farmers Union Cent. Exchange, Inc. v. FERC,
734 F.2d 1486 (D.C. Cir. 1984)25

FERC v. Pennzoil Producing Co.,
439 U.S. 508 (1979).....25

FPC v. Natural Gas Pipeline Co.,
315 U.S. 575 (1942).....25

Gardner v. Westinghouse Broadcasting Co.,
437 U.S. 478 (1978).....20

Maine PUC v. FERC, 520 F.3d 464 (D.C. Cir. 2008).....22

Motor Vehicle Manufacturers’ Association of the United States, Inc., v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983)19

Nken v. Holder, 556 U.S. 418 (2009)18, 19

Papago Tribal Utility Authority v. FERC,
628 F.2d 235 (D.C. Cir. 1980).....20

Permian Basin Area Rate Cases,
390 U.S. 747 (1968).....25

Plaza Health Laboratories v. Perales,
878 F.2d 577 (2d Cir. 1989).....18

Population Inst. v. McPherson,
797 F.2d 1062 (D.C. Cir. 1986).....20

PPL Wallingford Energy LLC v. FERC,
419 F.3d 1194 (D.C. Cir. 2005)..... 19-20

Public Citizen Health Research Group v. Comm’r. FDA
740 F.2d 21 (D.C. Cir. 1984)10

Reddy v. CFTC, 191 F.3d 109 (2d Cir. 1999).....10

Reynolds Metals Co. v. FERC,
777 F.2d 760 (D.C. Cir. 1985).....29

Simon v. Keyspan Corp.,
785 F. Supp. 2d 120 (S.D.N.Y. 2011)13, 16

Sithe New England Holdings LLC v. Federal Energy Regulatory Commission,
308 F3 71 (1st Circuit 2002)..... 30-31, 32

Telecomms. Research & Action Center v. FCC,
750 F.2d 70 (D.C. Cir. 1984)9

TC Ravenswood, LLC v. FERC,
741 F.3d 112 (D.C. Cir. 2013)19

FEDERAL STATUTES

Administrative Procedure Act

 5 U.S.C. § 555(b)19

 5 U.S.C. § 706(A)19

 5 U.S.C. §706(1)19

All Writs Act

 28 U.S.C. § 1651 4

Federal Power Act

 16 U.S.C. § 824d(a)19, 21

 16 U.S.C. § 825l(a)9, 18

 16 U.S.C. § 825l(b)3, 4, 8

Federal Rules of Appellate Procedure

 203

 213

 27(a)(3)(A)3

FEDERAL ADMINISTRATIVE CASES

New York Indep. Sys. Operator, Inc., Answer of the New York State Public Service Commission in Support of Motion for a Stay of New Capacity Zone Auctions and for Expedited Ruling on Requests for Rehearing, FERC Dockets ER13-1380-000 and ER14-500-000 (filed May 2, 2014).....7

Emergency Motion of Central Hudson Gas & Electric Corporation for Expeditious Rulings, or, Alternatively, for a Stay of Capacity Auctions for the New Capacity Zone in New York’s Lower Hudson Valley and Motion for Shortened Response Time of Three Business Days, FERC Dockets ER13-1380-000 and ER14-500-000 (filed April 30, 2014)7, 11

New York Indep. Sys. Operator, Inc., Order Granting Rehearing for Further Consideration, FERC Docket No. ER14-500-000 (Mar. 24, 2014)6

Request for Rehearing of the New York State Public Service Commission, FERC Docket ER14-500-000 (filed Feb. 27, 2014)6

New York Indep. Sys. Operator, Inc., Order Accepting Tariff Filing Subject to Condition and Denying Waiver, 146 FERC ¶ 61,043 (Jan. 28, 2014)1, 5

Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing, NYSPSC Case 12-E-0503 (November 4, 2013)15, 33

New York Indep. Sys. Operator, Inc., Order Granting Rehearing for Further Consideration, FERC Docket No. ER13-1380-000 (Oct. 10, 2013)5, 9

Request for Rehearing and Clarification of the New York State Public Service Commission, FERC Docket ER13-1380-000 (filed Sep. 12, 2013).....5

New York Indep. Sys. Operator, Inc., Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference, 144 FERC ¶ 61,126 (Aug. 13, 2013)1, 5, 8

New York Independent Sys. Operator, Inc., Notice of Intervention and Protest of the New York State Public Service Commission, FERC Docket No. ER13-1380-000 (May 21, 2013).....15

Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.,127 FERC ¶ 61,121 (May 6, 2009), *reh’g pending*.....29

New York Independent Sys. Operator, Inc., Order Conditionally Approving Proposal, FERC Docket No. EL07-39-000, 122 FERC ¶ 61,211 (Mar. 7, 2008)12, 13

California Indep. Sys. Operator, Order granting in Part and Denying in Part Requests for Clarification and Rehearing, and Denying Motion to Reopen the Record, 120 FERC ¶ 61,271 (Sept. 24, 2007)29

STATE STATUTES

N.Y. Pub. Serv. L. § 12 (McKinney 2000).....1

STATE ADMINISTRATIVE CASES

*Proceeding on Motion of the Commission to Examine Alternating Current
Transmission Upgrades, Order Instituting Proceeding, NYPSC Case 12-T-0502
(Nov. 30, 2012).....33*

*Proceeding on Motion of the Commission to Review Generation Retirement
Contingency Plans, Order Accepting IPEC Reliability Contingency Plans,
Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing,
NYPSC Case 12-E-0503 at 47 (November 4, 2013).....33*

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Docket No. ____.

**PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION
FOR STAY**

The People of the State of New York and the Public Service Commission of the State of New York (“NYPSC”)¹ respectfully petition this Court to issue a writ of mandamus compelling the Federal Energy Regulatory Commission (“FERC”) to issue final orders in response to the NYPSC’s September 2013 and February 2014 requests for rehearing of FERC Orders issued August 13, 2013, and January 28, 2014, respectively.² Through these Orders, FERC has imposed dramatic electricity cost increases on the lower Hudson Valley by establishing a new capacity zone (or “NCZ”) in New York electricity capacity markets. By failing to act on the requests

¹ NYSPC Counsel appears for the Commission and the People of the State of New York in matters affecting the rates, charges and services of local electric distribution utilities. N.Y. Pub. Serv. L. § 12 (McKinney 2000).

² *New York Indep. Sys. Operator, Inc.*, Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference, 144 FERC ¶ 61,126 (2013) (“August Order”), Attachment A hereto; *New York Indep. Sys. Operator, Inc.*, Order Accepting Tariff Filing Subject to Condition and Denying Waiver, 146 FERC ¶ 61,043 (2014) (“January Order”), Attachment B hereto.

for rehearing of the NYPSC and others, FERC is effectively denying any possibility of relief from imposition of charges flowing from the first of the NCZ auctions, held in April 2014. The NYPSC accordingly seeks a writ of mandamus directing FERC to issue its orders responding to requests for rehearing of the orders at issue within **45 days** so that the legality of FERC's decisions can be subjected to judicial scrutiny.

Pending full judicial review of FERC's decision, the NYPSC moves this Court in an emergency motion to stay the FERC orders insofar as they approve the implementation of capacity auctions in the NCZ. FERC accepted the proposed tariff revisions of the New York Independent System Operator, Inc. ("NYISO") establishing the NCZ for the purposes of conducting installed capacity ("ICAP") auctions. By requiring the implementation of the NCZ through the auctions, FERC will have imposed \$158 million dollars in additional and unnecessary capacity costs on electric utility ratepayers in the lower Hudson Valley just for this summer. These price increases, which will increase to \$280 million within the next year, will provide no corresponding benefits to the ratepayers, in violation of the statutory requirement that electric rates be "just and reasonable." Once the auctions are held it is difficult, if not impossible, to undo them and, in any event, FERC will probably decide not to provide refunds. Accordingly, ratepayers in the lower Hudson Valley will be irreparably harmed by continuation of the auctions.

As noted above, the first of the capacity auctions in the NCZ have already been held, and they demonstrate the dramatic price increases that result from the NCZ. The ICAP auctions for June are currently being held, with the June spot market auction scheduled for May 23, 2014. Thereafter, the auctions for July will begin on June 9, 2014. The NYPSC therefore moves this Court to shorten the time granted to file an answer under Federal Rule of Appellate Procedure 27(a)(3)(A) and to require answers to this Petition and Emergency Motion to be filed within **eight (8) calendar days**, with **(3) days for replies**. Petitioner respectfully requests this Court to issue its order on this Petition and Motion by **June 6, 2014**, in advance of the July market auction cycle that will begin on June 9, 2014.

**THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF
MANDAMUS**

Under the Federal Power Act, FERC rehearing is a precondition of judicial review. 16 U.S.C. § 825l(b). In response to the NYPSC and other parties' requests for rehearing, FERC has issued tolling orders ostensibly granting rehearing, but has not issued final reviewable orders. On April 30, 2014, Central Hudson Gas & Electric Corporation ("Central Hudson") filed with FERC an emergency motion for expedited rulings or a stay of capacity auctions for the new capacity zone; the NYPSC submitted an answer in support of the motion on May 2, 2014. As of May 11, 2014, FERC has neither stayed the implementation of capacity auctions in the NCZ nor made a final ruling on the rehearing requests.

The implementation of the Orders, the execution of new capacity auctions, began on April 2, 2014 and will continue indefinitely on a biweekly basis. Since it is very difficult to revisit the auction results, irretrievable costs are being imposed on electricity customers in the lower Hudson Valley as the auctions proceed. Absent an order of this Court to FERC, the agency's Orders have been and will continue to be implemented without opportunity for judicial review and with continuing irreparable harm to electricity customers in the lower Hudson Valley.³

JURISDICTION

Pursuant to the Federal Power Act, 16 U.S.C. § 825l(b), this Court has jurisdiction to issue the requested writ. *See In re Am Rivers & Idaho Rivers United*, 372 F.3d 413, 417 (D.C. Cir. 2004). This Court has authority to issue the requested writ under the All Writs Act, 28 U.S.C. § 1651, and Federal Rules of Appellate Procedure and Circuit Rules 20 and 21.

RELEVANT FACTS

FERC's two orders together establish a new geographic zone in the lower Hudson Valley for the marketing of electricity generation "capacity" and authorize the commencement of auctions to trade that capacity in the new zone. On April

³ The emergency motion for a stay, *infra*, is supported by the Affidavit of Adam Evans in Support of Motion for Stay ("Evans Aff."), Attachment C, which describes the irreparable harm resulting from continuation of the auctions.

30, 2013, the NYISO, which operates New York's electric grid, filed proposed revisions to its Market Administration and Control Area Services Tariff ("Services Tariff") and its Open Access Transmission Tariff ("OATT") to establish the NCZ. August Order at ¶ 1. By order issued August 13, 2013, FERC accepted the NYISO's proposed tariff revisions. *Id.*

On September 12, 2013, the NYPSC submitted a request for rehearing of the August Order. Request for Rehearing and Clarification of the New York State Public Service Commission, FERC Docket ER13-1380-000 (filed Sept. 12, 2013), Attachment D. In a 'tolling order' issued on October 10, 2013, FERC granted rehearing and stated that it would address the rehearing request in a future order. *New York Indep. Sys. Operator, Inc.*, Order Granting Rehearing for Further Consideration, FERC Docket No. ER13-1380-000 (Oct. 10, 2013). No such further order has issued.

On November 29, 2013, the NYISO filed further revisions to its Services Tariff, proposing to establish the first ICAP demand curve for the new capacity zone and proposing a phase-in of the new demand curve parameters for the new capacity zone. January Order at ¶ 1. FERC accepted the proposed ICAP demand curve and rejected the NYISO's proposed phase-in of the ICAP demand curve parameters for the NCZ in January 2014. January Order at ¶ 1. On February 27,

2014, the NYPSC submitted a request for rehearing of the January Order.⁴ In a tolling order issued on March 24, 2014, FERC granted rehearing.⁵ It has not, however, ruled on the merits of the rehearing request. The first auction in the NCZ was conducted on April 2, 2014.⁶

In its request for rehearing of the January Order, the NYPSC argued that FERC's actions would increase capacity costs for lower Hudson Valley consumers by \$230 million per year, without any tangible benefit in return. Request for Rehearing of the New York State Public Service Commission, FERC Docket ER14-500-000 (filed Feb. 27, 2014) at 2.⁷ Now that the capacity auctions have commenced, however, it is apparent that the annual financial impact will be even greater. On April 29, 2014, the NYISO released the results of the May 2014 ICAP

⁴ Request for Rehearing of the New York State Public Service Commission, FERC Docket ER14-500-000 (filed Feb. 27, 2014), Attachment E.

⁵ *New York Indep. Sys. Operator, Inc.*, Order Granting Rehearing for Further Consideration, FERC Docket No. ER14-500-000 (Mar. 24, 2014).

⁶ NYISO, Installed Capacity Strip Auction Summary, http://icap.nyiso.com/ucap/public/auc_view_strip_detail.do (last visited May 9, 2014).

⁷ In the August Order, FERC claimed that it was imposing higher costs to encourage investment in new generation facilities in the lower Hudson Valley because of a constraint on transmission into the Valley. August Order at ¶¶ 23-24. The NYPSC is addressing the constraint; meanwhile, incumbent generators are receiving a windfall.

spot auction.⁸ Those results show that the impact on prices will be at least \$280 million annually. Evans Aff. ¶ 6.

Immediately following the ICAP spot auction, on April 30, 2014, Central Hudson submitted an emergency motion for expedited rulings or a stay of capacity auctions for the new capacity zone, requesting that FERC issue final orders in the NCZ and the NCZ demand curve proceedings.⁹ The NYPSC submitted an answer in support of Central Hudson's motion for stay and expedited ruling request on May 2, 2014.¹⁰ As of May 11, 2014, FERC has not taken any action in response to Central Hudson's Motion and the NYPSC's Answer.

⁸ NYISO, Installed Capacity Auction Summary, http://icap.nyiso.com/ucap/public/auc_view_spot_detail.do (last visited May 2, 2014).

⁹ Emergency Motion of Central Hudson Gas & Electric Corporation for Expeditious Rulings, or, Alternatively, for a Stay of Capacity Auctions for the New Capacity Zone in New York's Lower Hudson Valley and Motion for Shortened Response Time of Three Business Days, FERC Dockets ER13-1380-000 and ER14-500-000 (filed April 30, 2014) ("Central Hudson Motion").

¹⁰ *New York Indep. Sys. Operator, Inc.*, Answer of the New York State Public Service Commission in Support of Motion for a Stay of New Capacity Zone Auctions and for Expedited Ruling on Requests for Rehearing, FERC Dockets ER13-1380-000 and ER14-500-000 (filed May 2, 2014) ("NYPSC Answer"), Attachment F.

STATEMENT OF REASONS TO ISSUE MANDAMUS

A. *FERC Has Unreasonably Delayed the Issuance of Orders on Rehearing*

Under the Administrative Procedure Act, a federal agency is obligated to “conclude a matter” presented to it “within a reasonable time.” 5 U.S.C. § 555(b). A reviewing court may “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* at § 706(1). By order issued August 13, 2013, FERC approved the establishment and implementation of the NCZ on May 1, 2014. *See* August Order at ¶ 1. Although the first round of the capacity auctions for the new capacity zone have already been held, FERC has yet to address the merits of the NYPSA’s request for rehearing of the establishment of the NCZ. Thus, FERC has unreasonably delayed issuance of a reviewable order, notwithstanding that its initial orders are legally binding, have been effectuated in ways that are difficult or impossible to reverse, and are imposing significant financial harm upon consumers of electric power.

B. *FERC’s Issuance of Tolling Orders Should Not Allow It to Evade Timely Judicial Review of Agency Actions*

The Federal Power Act (“FPA”) makes FERC rehearing a prerequisite to judicial review. 16 U.S.C. § 825l(b) (judicial review may be commenced “within sixty days after the order of the Commission upon the application for rehearing”); *Dilaura v. Power Authority of the State of New York*, 982 F.2d 73, 79 (2d Cir.

1992). In order to protect aggrieved parties' access to judicial review of FERC orders, the FPA allows parties the opportunity to apply to FERC for rehearing; in the absence of FERC action within 30 days from the date that a rehearing request is filed, the NYPSC request for rehearing would be deemed denied. 16 U.S.C. § 825l(a).

FERC's order granting rehearing for the "limited purpose of further consideration," *New York Indep. Sys. Operator, Inc.*, Order Granting Rehearing for Further Reconsideration, Docket No. ER13-1380-003 (October 13, 2013) at 1, has rendered the initial orders non-final, while holding off judicial review until after an order on rehearing is issued. Yet the implementation of the initial orders has begun. That implementation is creating a real and significant impact upon the regulated community and the general public.

To remedy the avoidance of judicial review while that impact continues, this Court should direct the agency to issue an order on rehearing. *Cf. Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction").

C. *New York Ratepayers are Irreparably Harmed by the Implementation of the FERC Orders*

In assessing whether agency delay in concluding a matter is unreasonable, courts consider, *inter alia*, “the nature and extent of the interests prejudiced by delay.” *Reddy v. CFTC*, 191 F.3d 109, 120 (2d Cir. 1999) (quoting *Public Citizen Health Research Group v. Comm’r*, 740 F.2d 21, 35 (D.C. Cir. 1984)). Because FERC has not acted prior to the implementation of the NCZ capacity auctions, New York electricity ratepayers face the possibility of paying an additional \$158 million for electricity in the summer of 2014, without realizing a corresponding benefit. If the Court reverses FERC it will be difficult, if not impossible, to rerun the auctions to reflect whatever relief the Court provides. Moreover, the purpose of FERC’s capacity charges is to provide an incentive for the development of new electric generation, but such generation will not benefit from, or be influenced by, the \$158 million increase in capacity charges this summer that will be borne by ratepayers. Electricity customers in the lower Hudson Valley are therefore subject to irreparable harm and a petition for writ of mandamus should be issued.¹¹

¹¹ Such irreparable harm is also a basis for an emergency stay, as discussed more fully *infra*.

AN EMERGENCY MOTION FOR STAY SHOULD BE GRANTED

In addition, because of the ongoing financial harm to lower Hudson Valley ratepayers being brought about by the FERC Orders at issue herein, the People and the NYPSC request that this Court stay those orders to the extent required to prevent further NCZ capacity auction results from being reflected in the ICAP market and, ultimately, in consumer electric rates.

The Chairman of the NYPSC, by letter submitted to FERC April 24, 2014, requested that FERC stay its Orders implementing the NCZ.¹² Shortly thereafter, on April 29, 2014, the NYISO released the results of the May 2014 ICAP spot auction.¹³ The Central Hudson Motion seeking issuance of a decision and a stay was filed on April 30, 2014, and the NYPSC Answer supporting that motion on May 2, 2014. As of May 11, 2014, FERC has not taken any action in response to the Motion and Answer.

Meanwhile, capacity auctions that will result in electric rate increases of at least \$26 million per month have already occurred. FERC approved these increases, purportedly, in order to encourage the construction of new generation.

¹² Letter to FERC Acting Chair LaFleur, FERC Dockets ER13-1380-000 and ER14-500-000 (filed April 24, 2014).

¹³ NYISO, Installed Capacity Spot Auction Summary, http://icap.nyiso.com/ucap/public/auc_view_spot_detail.do (last visited May 9, 2014).

But it takes at least two to three years to site and build new generation; thus, customers will not benefit in the short term. These auctions will continue on a biweekly basis; their results will be difficult, if not impossible to reverse. This stay is necessary to prevent irreparable harm to New York ratepayers, which is already occurring and will compound, absent action of this Court. Accordingly, the Court should direct FERC to order that the capacity auctions must be conducted in accordance with the geographic capacity zones as they existed prior to the agency's orders at issue herein.

RELEVANT FACTS

A. The New Capacity Zone

The New York Independent System Operator, Inc. (“NYISO”) operates the power grid and wholesale electricity markets in New York State. One of the markets administered by the NYISO is the ICAP Market. Installed capacity is a measure of electric generation capability; it does not represent an actual unit of physical energy, but rather is a regulatory construct, created by the NYISO, that measures the “capability to generate or transmit electrical power.” *New York Independent Sys. Operator, Inc.*, Order Conditionally Approving Proposal, FERC Docket No. EL07-39-000, 122 FERC ¶ 61,211, at ¶ 2 n.1 (Mar. 7, 2008). A payment for capacity ensures that a generator is available to provide energy at times of peak electricity demand. Revenue from ICAP auctions is intended to

encourage the construction of new generating facilities, as needed, to maintain adequate and reliable sources of electricity. *Simon v. Keyspan Corp.*, 785 F. Supp. 2d 120, 124 (S.D.N.Y. 2011).

FERC requires distributors of electricity, or load serving entities (“LSEs”), to purchase installed capacity from suppliers. *New York Independent Sys. Operator, Inc.*, Order Conditionally Approving Proposal, FERC Docket No. EL07-39-000, 122 FERC ¶ 61,211, at ¶ 2 (Mar. 7, 2008). Capacity is procured separately from electric energy. *Evans Aff.* ¶ 8. Locational ICAP procurement requirements mandate that LSEs serving customers in certain zones purchase minimum amounts of capacity from electricity suppliers located in those zones; LSEs in the NCZ must purchase a minimum of 88% of their ICAP obligation from generating facilities located in the NCZ. *See id.* at ¶ 11.

In order to price its energy and capacity market products, the NYISO has divided the State into eleven geographic zones, designated by the letters A through K. Until April 2014, the NYISO managed three capacity zones: New York City (Zone J), Long Island (Zone K) and the New York Control Area (“NYCA”), encompassing all zones (Zones A-K). *See Evans Aff.* at ¶ 9. On April 30, 2013, the NYISO filed proposed revisions to its Services Tariff and OATT to move certain zones from the NYCA market and merge them with the New York City zone to establish a new capacity zone. *See August Order* at ¶ 5. Under this

proposal, load-serving entities in the lower Hudson Valley no longer rely on the upstate market for ICAP purchases, but are now grouped with New York City in ICAP auctions. The NCZ was established and implemented for the May 1, 2014 start of the 2014/2015 Capability Year. *See id.* at ¶ 6.

The NYISO proposed the establishment of the NCZ and its associated price signals due to the NYISO's identification of constraints limiting the amount of power that can be transmitted into the region comprising the NCZ. *See August Order* at ¶ 6. According to estimates made by the staff of the NYPSC, the establishment of the NCZ will increase capacity prices by approximately \$280 million within the next year for customers located in current NYISO load zones G, H and I. *See Evans Aff.* at ¶ 6. Between May and October 2014, the increase is estimated to be \$158 million. *See id.* at ¶ 16.

FERC has opined that higher capacity prices in the NCZ will help encourage the development of new generation capacity to mitigate the transmission constraints. *See August Order* at ¶ 24. It takes at least three years, however, to build a new generator from the time that it is first proposed. *See Evans Aff.* at ¶ 19. Meanwhile, the NYPSC has been actively addressing the transmission constraints in the lower Hudson Valley. When issuing its August Order, FERC

was aware that NYPSC-directed AC transmission upgrades¹⁴ were being implemented and were expected to create an additional 1000 megawatts of transmission capacity in the NCZ region. *See* August Order at ¶ 17 n.21. In November 2013, the NYPSC approved three transmission projects in the NCZ region that will provide an additional transmission capacity, and therefore additional ICAP, in the region.¹⁵ *Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing, NYPSC Case 12-E-0503 at 47* (November 4, 2013). NYPSC staff showed that the NCZ price signal will not benefit ratepayers because the generation projects that they are designed to encourage are unlikely to materialize before these transmission upgrades come into operation. *See New York Independent Sys. Operator, Inc., Notice of Intervention and Protest of the New York State Public Service Commission, FERC Docket No. ER13-1380-000* (May 21, 2013) (“Protest”).

¹⁴ *Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing, NYPSC Case 12-E-0503 at 47* (November 4, 2013).

¹⁵ Increased transmission capability lowers the locational capacity procurement requirement. By decreasing the capacity that needs to be purchased in the zone, it lowers prices in the same manner as would an increase in generation supply within that zone.

In the August Order, FERC dismissed the NYPSC's showings by stating that the NYISO was limited to the rules in its tariff, which FERC claimed did not allow the NYISO to consider future transmission upgrades in evaluating whether to establish a new capacity zone. *See* August Order at ¶¶ 21, 23. FERC, however, regulates NYISO auctions through its approval of, and modifications to, the NYISO Services Tariff, *Simon*, 785 F. Supp. 2d at 125, and therefore is not bound by the confines of the NYISO tariff in considering tariff revision proposals. Yet FERC refused to examine thoughtfully the NYISO's proposal in light of the possibility, and, indeed, likelihood, of future State-led transmission projects.

B. The Demand Curve Phase-in

The NYISO uses demand curves to help price capacity.¹⁶ The NYISO accepts ICAP supply offers and compares them to the pre-set demand curve; the intersection of the supply quantity offered and the demand curve line determines the market-clearing price. A separate demand curve is set for each capacity zone based on the Net Cost of New Entry ("CONE") of a new proxy plant located in each capacity zone. *Evans Aff.* at ¶ 12. Because the demand curve is based on the

¹⁶ The demand curve is a graph that places ICAP value on the y-axis (in dollars per kilowatt-month) and ICAP quantity on the x-axis (in percentage of the minimum ICAP requirement for each capacity zone). The result is a line with a negative slope that decreases the value of capacity as the supply of capacity increases. *See Electricity Consumers Resource Council v. Federal Energy Regulatory Comm'n*, 407 F.3d 1232, 1235 (D.C. Cir. 2005) (showing graph).

CONE, higher fixed costs of generators in downstate New York generally result in higher ICAP prices than upstate (and, therefore, higher fixed prices than for the entire state, or the NYCA). *See id.* at ¶¶ 10, 13. Thus, the most recently-set reference prices, prior to the establishment of the NCZ, were \$19.62 per kilowatt-month for the New York City capacity zone, compared to \$9.72 per kilowatt-month for the NYCA. *Id.* at ¶ 13.

The NYISO operates three types of ICAP auctions, “strip” (*i.e.*, seasonal), “monthly,” and “spot” auctions. *See Evans Aff.* at ¶ 14. Spot auctions are held shortly before the start of each month; as the final auction in the series, it is the point where all LSEs are required to purchase sufficient capacity to fulfill their obligations. *See id.* Most capacity in the NYISO auctions is traded in the spot market. *Id.* at ¶ 15. The price set by the May spot auction was \$12.38 per kilowatt-month, an increase of over \$2.00 from the strip and monthly auctions. *Id.*

Extrapolating from the results of the May 2014 spot auction, prices are expected to increase, in the affected zones, by over 100% for the six-month Summer period and by over 150% for the six-month Winter period. The effects of the auctions cannot be undone without great difficulty. *Id.* at ¶ 20. Doing so would require the issuance of refunds, which necessitates re-running the capacity auctions without the new capacity zone. *See id.* Because there may be sellers of capacity who cleared the auctions at the NCZ prices but would not have cleared at

the statewide capacity price, the statewide clearing price and quantity would be altered, as would bilateral ICAP contracts settled off of the results of the spot auction. *See id.*

ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 18, this Court may stay a federal agency order pending judicial review. As noted in the Petition for Writ of Mandamus, *supra*, the FPA normally limits judicial review to final FERC orders on rehearing, 16 U.S.C. § 825l(a); however, “when parties face the prospect of irreparable injury, with no practical means of procuring effective relief after the close of the proceeding ... they [may] be entitled to immediate review of a nonfinal order.”¹⁷ Here, as discussed *infra*, irreparable injury is caused through the NCZ auctions, which began in April 2014, and FERC has not responded to motions for stay submitted to it regarding the NCZ auctions. A stay may be granted when the petitioner establishes likelihood of success on the merits; that irreparable harm will likely result absent a stay; whether a stay will substantially injure other parties; and where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Plaza Health Laboratories v. Perales*, 878 F.2d 577, 580 (2d Cir.

¹⁷ *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980) (citing *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

1989). Where the opposing party is a government agency, the last two factors merge. *Nken*, 556 U.S. at 435.

A. The NYPSC Is Likely to Prevail on the Merits of Its Claims

The NYPSC is likely to succeed in demonstrating that, both in its decision to approve the establishment of the NCZ, and, particularly, in its decision to reject the phase-in of the proposed demand curves, FERC failed to consider whether the resulting rates would be “just and reasonable.” Section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a), requires that proposed demand curves for capacity auctions be “just and reasonable.” *Cf. TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 115 (D.C. Cir. 2013).

Further, FERC’s decision to approve the implementation of capacity auctions in the NCZ is arbitrary and capricious. The Administrative Procedure Act, 5 U.S.C. § 706(A), requires agency actions to be set aside when the agency has failed to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Manufacturers’ Association of the United States, Inc., v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

Moreover, “[a]n agency’s ‘failure to respond meaningfully’ to objections raised by a party renders its decision arbitrary and capricious.” *PPL Wallingford Energy*

LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

In evaluating the likelihood of success on appeal, the NYPSC “need not establish an absolute certainty of success.” *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). FERC’s decision to approve the NCZ and reject the phase-in was not in accordance with the FPA’s requirement of just and reasonable rates. FERC also failed to consider rationally the impact of the price increases that the NCZ created, and its rejection of the phase-in of the NCZ’s demand curve failed to explain satisfactorily its conclusion that a phase-in would discourage competitive supply.

1. FERC fails to explain how the windfall for incumbent generators is consistent with just and reasonable rates.

FERC insists that establishment of the NCZ is needed now in order to attract new generation investment within the lower Hudson Valley. August 13 Order at ¶¶ 24-26. FERC further claims that electric rates must necessarily increase as a result. *Id.* ¶ 23; January 28 Order at ¶ 163. But the only justifications that FERC can muster are to assert that higher price signals are needed *over the long run*, August 13 Order at ¶¶ 23-24,¹⁸ and that there may be potential for “shorter term

¹⁸ *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980) (citing *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

supply responses,” January 28 Order at ¶164. As to the first, however, FERC entirely fails to explain why capacity charges must now be dramatically increased to fund resources that do not yet exist and therefore cannot benefit from the increases. To the extent it recognizes (which it must) that those revenues instead represent a windfall to existing resources, it likewise fails to explain why encouraging new resources requires that existing resources obtain a windfall. As to the second, FERC has not justified the immediate increases; a \$158 million increase in capacity charges this summer will not provide equivalent value for ratepayers this summer.

FERC’s failure to offer a reasoned explanation for allowing such a windfall, and the corresponding adverse impacts upon consumers, is arbitrary and capricious. The NYPSC informed FERC that massive electric rate increases, initially estimated at 25 percent, could result from the full implementation of the NCZ. January Order at ¶ 158. FERC brushed this information aside, holding that “stakeholder discussions” about the NCZ provided all the notice that was needed to prevent consumer “rate shock.” *Id.* at ¶ 163. FERC does not explain, however, how those discussions raised public awareness about, and allowed responses to, the rate impacts to which consumers will be subjected.

FERC is obliged to ensure that electric rates are just and reasonable. 16 U.S.C. § 824d(a). In determining just and reasonable rates, “mere reliance on

economic theory cannot substitute for substantial record evidence and the articulation of a rational basis for [FERC's] decision.” *Electric Consumers Resource Council v. FERC*, 747 F.2d 1511, 1514 (D.C. Cir. 1984). In the face of evidence undermining the efficiency of price signals associated with the NCZ, FERC relied on the full implementation of the NCZ to send price signals to encourage new capacity development in order to address a transmission constraint. FERC failed to examine whether the theory of efficient price signals would hold in the lower Hudson Valley in the following years, and whether efficient decision-making would in fact be impeded by a phase-in of the NCZ demand curve parameters. It did not consider the potential impacts upon consumer rates or the actual likelihood of any improvements in electric power deliverability, nor did it evaluate whether the former justifies the latter. Instead it stated, in conclusory fashion, that “[s]uch price changes promote efficient decisions and are not unreasonable.” August Order at ¶ 24. FERC, however, is required to quantify and review the extent of the possible price impacts to ensure that they fall within a reasonable range of rates. *Maine PUC v. FERC*, 520 F.3d 464, 472 (D.C. Cir. 2008) (stating that “FERC cannot pluck rates out of thin air; it must rely on record evidence to establish a reasonable range of rates”). Given the absence of evidence and reasoned explanation, FERC’s determinations cannot result in just and reasonable rates.

2. FERC failed to rationally evaluate New York State's efforts to relieve transmission constraints.

In order to pass muster even under the deferential standard of review accorded administrative agency decisions, the agency still must “articulate a logical basis for [its] decisions, including ‘a rational connection between the facts found and the choices made.’” *Detsel by Detsel v. Sullivan*, 895 F.2d 58, 63 (2d Cir. 1990) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Because FERC has not drawn any logical connection between short-term price increases and long-term deliverability, its conclusions must be rejected as arbitrary and capricious.

In the August Order, FERC rejected the NYPSC's concerns about the price impacts of the NCZ, given state initiatives to address the constraints, by agreeing with the NYISO that the existence of a transmission constraint in the lower Hudson Valley required a new capacity zone. FERC stated that the NYISO “found that a binding transmission constraint exists. Therefore, a new capacity zone must be created under the terms of NYISO's tariff.”¹⁹ FERC's approach to tariff construction fails to achieve just and reasonable rates, because it overlooks that the new prices created by the NCZ are likely only to provide a temporary benefit to generators in light of state initiatives to eliminate the transmission constraint.

¹⁹ August Order at ¶ 23.

Potential generation investors would be looking to the price-reducing effects of New York State's transmission initiatives in considering long-term generation investments. Therefore, in the context of a state-initiated transmission overhaul, FERC's rationale for the NCZ, "to encourage new resources to be built in the new capacity zone," August Order at ¶ 23, is irrational.²⁰

While FERC claims that it need not consider upcoming transmission projects in deciding whether to approve the NCZ,²¹ it nonetheless inconsistently claims it can adopt the NCZ to encourage such projects. FERC asserts that "resulting higher capacity prices in the new capacity zone will help to encourage

²⁰ The lack of a rational FERC approach to state initiatives to upgrade transmission is further shown by the inconsistent treatment of the possibility of such initiatives between the August and January Orders. FERC did not assert in the August Order that the State-led transmission upgrades are in danger of being left incomplete absent NCZ price incentives. In the January Order, however, FERC expresses concern that ICAP price suppression "could increase the likelihood of regulatory actions to meet capacity needs." January Order at ¶ 164. The NYPSC-led transmission initiatives are regulatory actions which FERC warns could increase as a result of price suppression; they are also the upgrades that FERC refused to consider as a reason to reject the NCZ, but then states will be provided with an incentive by the NCZ price differential. August Order at ¶ 23-25.

²¹ FERC stated both that "the criteria specified in NYISO's tariff for creating a new capacity zone "does [*sic*] not consider whether transmission constraints will be alleviated in the future," *id.*, and that the Service Tariff does require consideration of "any upgrades that would be required to be built to make new resources capacity qualified [*sic*]." *Id.* at ¶ 21. That is, under FERC's interpretation of the tariff, certain transmission upgrades (those connecting the new generation to the grid) must be considered in a new capacity zone study, while other transmission upgrades, eliminating the need for new generation, may not be considered at all.

the development of new generation or transmission capacity to help alleviate the constraint.” August Order at ¶ 24. The “long-run” prices FERC imposes might well not be available for developers when completing their projects in light of the State transmission initiatives. FERC’s insistence on providing an incentive, no matter what, fails to ensure prices to consumers are not excessive, and is impermissible. *Cf. Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1501-02 (D.C. Cir. 1984) (citing *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) and *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968) in support of statement that FERC may not issue orders resulting in excessive rates); see also *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

Finally, FERC’s cursory dismissal of the NYPSC’s concerns about the reasonableness of rates resulting from the NCZ stands in sharp contrast to FERC reliance on reliability, which is not an explicit new capacity zone trigger under the NYISO Services Tariff. FERC rejected the NYPSC’s protest that higher price signals are unnecessary in light of changes in transmission infrastructure by asserting that the transmission upgrades would not eliminate “the reliability need for some capacity to be located within the new capacity zone.” *Id.* at ¶ 26. Yet the NYISO’s NCZ study was spurred by a transmission congestion, rather than

reliability, finding. August Order at ¶ 23.²² Despite rejecting the NYPSC's argument because of its failure to address an ostensible reliability need, throughout the August Order, FERC states that the impetus for the NCZ is the NYISO-identified transmission constraint, rather than a generation-based reliability finding. Therefore, FERC dismissed the NYPSC's argument against the price impacts of the NCZ by asserting an unfounded, additional reliability basis for the NCZ.

3. FERC irrationally refused to consider a phase-in of the NCZ impacts.

In the January Order, FERC expressed its agreement with the assertion, made in the filing of Entergy Nuclear Power Marketing LLC, that a phase-in of the demand curve parameters for the NCZ would “discourage competitive supply of capacity and could increase the likelihood of regulatory actions to meet capacity needs.” January Order at ¶ 164. Even if FERC correctly concluded, in the August Order, that the NCZ would encourage new entry into the capacity market, FERC fails to satisfactorily explain why new entry would be discouraged by the phase-in of price signals. The goal of the NCZ was to provide for long-term price signals. August Order at ¶ 25. The NCZ's expected long-term price signals would be effective through a gradual implementation, which would minimize their

²² In the August Order FERC states that the purpose of the NCZ is to ease the transmission constraint in the region: “The price differential that is expected to develop when a new capacity zone is created will provide incentives to alleviate this constraint...” *Id.*

immediate negative effects and provide developers of new capacity with a signal over their planning horizon.

Generation projects are built over the course of several years. *See* Evans Aff. at ¶ 19 (three years to build a new generator); *see also* January Order at ¶ 154 (reciting Multiple Intervenor claims that it typically takes two years to build generating capacity). A two-year phase-in, as proposed by the NYISO, would not impede new entry, because it would send efficient price signals to potential investors in capacity and would not affect the capacity revenues of any party developing new capacity in the NCZ. FERC dismisses this contention by stating that “this argument fails to take into account the potential for shorter term supply responses, i.e., demand response and repowering options, to meet capacity needs.” January Order at ¶ 164. The impetus of the NCZ’s ICAP demand curve, however, is not to provide short-term price hikes for the benefit of demand response providers and repowered power plants, but, as stated in the August Order, to encourage new investment in generating and transmitting capacity. August Order at ¶ 26 (stating that “the new capacity zone needs its own ICAP Demand Curve, reflecting its higher net cost of new entry, in order to send the necessary price signals over the long run and provide the higher capacity revenue over the long run needed to encourage new investment”). Therefore, FERC failed to state a rational

connection between the need for the NCZ ICAP demand curve and its rejection of the demand curve's phase-in.

B. Lower Hudson Valley Electric Consumers Will Suffer Irreparable Harm Absent a Stay

FERC's establishment of the NCZ has increased the capacity prices in the lower Hudson Valley by approximately \$280 million per year. Consumers, who bear the burden of this increase, are receiving absolutely no benefit in return. Rather, the sole beneficiaries of the increase are incumbent electric generators in the NCZ, who are obtaining a windfall without providing added value to consumers or to the robustness of the region's electricity infrastructure. And this price increase is being implemented through auctions, the results of which cannot practically be reversed or refunded. Because the financial harm to consumers is significant and cannot be undone, that harm is irreparable.

The estimated impact to consumers resulting from the NCZ capacity auctions will be \$158 million over the period of May through October 2014, Evans Aff. ¶16, and \$123 million during November 2014 through April 2015, *id.* ¶17. That translates to an immediate impact of approximately \$26 million per month this summer.

Should the NYPSC prevail on the merits, FERC will probably exercise its discretion to refuse to order refunds.²³ In any event, there will be no practical way to refund the excessive capacity revenues that consumers will have paid during the pendency of this case. To determine refunds, it would be necessary to re-run the NYCA auction with the NCZ capacity resources included in the NYCA. *Evans Aff.* ¶ 20. But that is impractical because some capacity has already cleared through the NCZ auctions held in April. *Id.* Moreover, contracts based upon spot market prices set thus far would have to be undone. *Id.*

In a Court of Appeals case involving a FERC-imposed price increase, the District of Columbia Circuit declined to stay FERC's action only because refunds were apparently available. *Reynolds Metals Co. v. FERC*, 777 F.2d 760 (D.C. Cir. 1985). There, the challenger could only state that the action "may eventually render more difficult the imposition of a refund obligation." *Id.* at 763. Presumably, then, if granting refunds had been nearly impossible, the court would

²³ For example, in *Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,121 at ¶ 157 (2009), *reh'g pending*, FERC stated that "In cases involving changes in market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market." Similarly, in *California Indep. Sys. Operator*, Order Granting In Part and Denying in Part Requests for Clarification and Rehearing, and Denying Motion to Reopen the Record, 120 FERC ¶ 61,271 (2007) at ¶ 25, FERC ruled that re-running the markets to pay refunds to consumers is "the exception, not the rule."

have granted a stay. *Id.* That is precisely the relevant circumstance in the instant case. As demonstrated above, granting refunds would be very difficult.

Because no refund mechanism will likely be available to ameliorate the \$26 million per month harm to lower Hudson Valley consumers, the stay prerequisite of irreparable harm has been met. *Air Line Pilots Assoc. Int'l v. Civil Aeronautics Bd.*, 215 F.2d 122, 125 (2d Cir. 1954) (holding that a stay may be granted where irreparable injury is likely to occur).

C. The Public Interest Requires a Stay of the FERC Orders

A stay halting auctions on June 9, 2014 and thereafter, pending resolution of this matter, will not only preclude irreparable harm, but it will also be in the public interest. Capacity charges are intended to provide an incentive for construction of new generation and/or repowering of existing generation and a penalty for customers that do not obtain peak capacity. Generators have no entitlement to the windfall that will result from implementation of the New Capacity Zone while FERC's orders are being challenged. End-users should not be required to bear the unavoidable penalty arising from immediate implementation of a capacity market.

The strong public interest against imposition of capacity charges while review is pending arises from the unique nature of such charges. Capacity charges do not compensate generators for the investment incurred to sell electricity. *Sithe*

New England Holdings LLC v. Federal Energy Regulatory Commission, 308 F.3d 71, 77 (1st Circuit 2002). Rather, capacity charges are “designed to ... give providers an extra incentive to construct new plants.” 308 F. 3d at 77. Here, continuation of capacity charges pending judicial review will simply provide a windfall to existing generators.

FERC’s ostensible goal in establishing the NCZ is to incent development of new electric generation facilities in the lower Hudson Valley. August Order at ¶ 24 . But the capacity price increase is in effect now, before any new facilities are even in the planning stage. Even if an entity were to decide now to build generation, the process of receiving siting approval and constructing new generation typically takes at least three years. *Evans Aff.* ¶ 19. While FERC claims that retired facilities will be given an incentive to resume operation, it only mentions one such facility that has indicated any interest in doing so. January Order at ¶ 161. Moreover, FERC offers no time estimate as to when that facility might re-start.

Thus, for the foreseeable future, the NCZ will benefit only those sellers of capacity who are already in the market. In exchange for collecting additional capacity revenues, those sellers are under no obligation to build new capacity or to create any other enhancements to the region’s electric infrastructure.

Consequently, consumers are receiving no benefit whatsoever in return for the additional \$26 million per month that they are being forced to spend.

In addition to being designed to providing an incentive to new investment, capacity charges “impose a hefty penalty on those buyers who fail to acquire the reserve capacity that FERC has decreed they shall have.” *Sithe New England Holdings LLC v. FERC*, 308 F.3d at 77. Just as incumbent generators should not receive a windfall from capacity charge, because it will take time to yield new capacity, so too buyers should not be penalized for not acquiring reserve capacity that is not yet available. That is, ratepayers in the lower Hudson Valley should not pay an additional \$158 million in capacity charges this summer when they will not see an equivalent increase in capacity.

The NYISO recognized the inequity to buyers and the windfall for sellers of capacity in immediate implementation of the NCZ. It accordingly proposed a phase-in of the New Capacity Zone. January Order at ¶ 1. FERC rejected the phase-in in part because of its desire to give an incentive to the repowering of generation facilities. January Order at ¶ 164. A phase-in would do little to no harm to producers and investors considering restarting units. They will have as much revenue certainty as they need to plan their business strategies and will be able to project their likely revenues. Full implementation of the demand curve parameters, and the resulting windfall to existing generators, conversely, causes

immediate harm to consumers. The Court should thus stay implementation of the new capacity zone pending review.

That the public interest supports a stay is further shown by the evanescent nature of the deliverability constraint on which FERC relies. FERC concluded that the inclusion of the lower Hudson Valley in the new capacity zone was needed because of the difficulties of delivering power to the lower Hudson Valley. *See* August Order at ¶ 23. New York State has, however, begun to address that deliverability constraint by providing for additional transmission capability into the lower Hudson Valley. In November 2013, the NYPSC approved three enhancements to the downstate transmission system (the TOTS projects) that will create additional capacity for the NCZ.²⁴ The NYPSC's alternative current transmission upgrade proceeding is expected to provide 1,000 megawatts of transmission capability into the lower Hudson Valley.²⁵

²⁴ *Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing*, NYPSC Case 12-E-0503 at 47 (November 4, 2013).

²⁵ *Evans Aff. at ¶ 19; see also Proceeding on Motion of the Commission to Examine Alternating Current Transmission Upgrades, Order Instituting Proceeding*, NYPSC Case 12-T-0502 (Nov. 30, 2012).

CONCLUSION

Because the FERC Orders at issue have and will continue to be implemented without opportunity for judicial review, and for the other reasons stated above, the NYPSC petitions this Court to issue a writ of mandamus directing FERC to issue final orders within 45 days responding to the NYPSC's September 2013 and February 2014 Request for Rehearing. Further, the People of the State of New York and Public Service Commission of the State of New York respectfully requests that prior to June 9, 2014 the Court immediately stay so much of the FERC orders at issue herein insofar as they implement capacity auctions in the new capacity zone, pending issuance and completion of judicial review of FERC's orders on rehearing.

Respectfully submitted,

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Dated: May 12, 2014
Albany, New York

ATTACHMENT A

144 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

New York Independent System Operator, Inc. Docket No. ER13-1380-000

ORDER ACCEPTING PROPOSED TARIFF REVISIONS AND ESTABLISHING A
TECHNICAL CONFERENCE

(Issued August 13, 2013)

1. On April 30, 2013, the New York Independent System Operator, Inc. (NYISO) filed proposed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) and its Open Access Transmission Tariff (OATT) to establish and recognize a new capacity zone that would encompass NYISO Load Zones G, H, I, and J (the G-J Locality). In this order, we accept NYISO's proposed tariff revisions to become effective July 1, 2013, with the exception of certain sections listed below that shall become effective January 15, 2014, and January 27, 2014, respectively, as requested. We also direct Staff to hold a technical conference, in a separate proceeding, to discuss with interested parties whether or not to model Load Zone K as an export-constrained zone for a future Demand Curve reset proceeding.

I. Background

2. NYISO's Installed Capacity (ICAP) market currently uses NYISO-determined demand curves for each of three ICAP pricing zones: New York Control Area (NYCA or Rest-of-State), New York City (NYC, comprised of Load Zone J), and Long Island (LI, comprised of Load Zone K). The entire NYCA has a reliability requirement for minimum capacity meeting a one day in ten year (0.1 day per year) Loss of Load Expectation (LOLE).¹ The NYC and LI capacity zones are referred to as "locational" zones because they each have a separate requirement that a certain minimum percentage of the zone's required generating capacity must be physically located within that zone

¹ New York State Reliability Council Reliability Rule A-R1, available at <http://www.nysrc.org/pdf/Reliability%20Rules%20Manuals/RR%20Manual%2027%20final-2%20July%2010-10.pdf>.

defined formally as Locational Minimum Installed Capacity Requirements (Locational Capacity Requirements).²

3. In a June 30, 2009 order,³ the Commission accepted NYISO's proposal to work with stakeholders to address dynamic changes to the NYCA that might warrant the creation of additional capacity zones within the ICAP market. In a September 8, 2011 order,⁴ in compliance with the June 30, 2009 Order, the Commission accepted in part and rejected in part NYISO's proposed criteria and considerations that would govern the evaluation and potential creation of new ICAP zones in the NYCA. In an August 30, 2012 order, the Commission accepted tariff revisions that implement Commission-approved Criteria for evaluating, identifying and, if necessary, establishing new capacity zones in the NYCA.⁵ According to those provisions, the new capacity zone process begins with a new capacity zone study (NCZ Study) in accordance with the methodology set forth in section 5.16.1 of the Services Tariff. If the NCZ Study identifies a constrained Highway⁶ interface into one or more load zones, NYISO must file with the Commission, on or before March 31, of a Demand Curve reset year, proposed tariff revisions necessary to establish and recognize the new capacity zone or zones and a report of the results of the NCZ Study.⁷ Section 5.16.1.1.5 of the Services Tariff provides that NYISO will perform the NCZ Study by applying the deliverability methodology from Attachment S of the NYISO OATT.⁸

² NYISO Services Tariff, § 2.12.

³ *New York Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,318 (2009) (June 30, 2009 Order).

⁴ *New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,165 (2011) (September 8, 2011 Order).

⁵ *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,160 (2012) (August 30, 2012 Order).

⁶ Highway is generally defined as 115 kV and higher transmission facilities. See NYISO April 30, 2013 Filing Letter at 25.

⁷ NYISO Services Tariff § 5.16.4. If the NCZ Study does not identify a constrained highway interface, NYISO must file with the Commission its determination that the NCZ Study did not indicate that any new capacity zone is required pursuant to this process, along with a report of the results of the NCZ Study.

⁸ NYISO is to apply sections 25.7.8.2.6, 25.7.8.2.7, 25.7.8.2.8, 25.7.8.2.9, 25.7.8.2.12, and 25.7.8.2.13.

4. Section 5.16.3 of the Services Tariff directs NYISO to establish an Indicative NCZ Locational Minimum Installed Capacity Requirement (Indicative Locational Capacity Requirement)⁹ for each load zone or group of load zones identified in the NCZ Study as having a constrained Highway interface, on or before March 1 of each ICAP Demand Curve reset year. The Services Tariff provides that the Indicative Locational Capacity Requirement will be used solely for establishing revised ICAP Demand Curves.

5. On April 30, 2013, NYISO filed proposed tariff provisions to provide for a new capacity zone encompassing the G-J Locality and provided its NCZ Study Report. NYISO requests an effective date of July 1, 2013 with the exception of its proposed revisions to sections 2.7, 2.12, 2.18, and 23.2.1. NYISO is requesting an effective date of January 27, 2014, for these provisions because that date is sixty days after the ICAP Demand Curves are filed and thus, it will be the effective date for all ICAP Demand Curves including the Demand Curve for the G-J Locality. NYISO is also requesting an effective date of January 15, 2014, for section 26.4.3(iv), regarding credit exposures and credit requirements in a new capacity zone. On June 6, 2013, a deficiency letter (Deficiency Letter) was issued to NYISO regarding the new capacity zone. On June 12, 2013 and June 14, 2013, NYISO filed responses to the Deficiency Letter.

II. Summary of NYISO's Filing

6. NYISO states that the NCZ Study identified a Highway deliverability constraint which triggered the requirement to create a new capacity zone. NYISO proposes to establish a new capacity zone that would encompass NYISO Load Zones G, H, I, and J (the G-J Locality). NYISO states that it examined and considered the transmission system, capacity market, and economic consequences of its proposal and concluded that establishing and implementing the G-J Locality for the May 1, 2014 start of the 2014/2015 Capacity Year is necessary to send more efficient price signals, enhance reliability, mitigate potential transmission security issues, and serve the long-term interest of all consumers in New York State. NYISO also states that its Independent Market Monitoring Unit (MMU) supports NYISO's proposal.

7. To recognize the creation of the new capacity zone, NYISO proposes revisions to (1) several existing Services Tariff and OATT definitions; (2) certain tariff provisions related to the ICAP market to accommodate the fact that the new capacity zone will be a

⁹ Section 2.9 of the Services Tariff defines "Indicative NCZ Locational Minimum Installed Capacity Requirement" as "[t]he amount of capacity that must be electrically located within a New Capacity Zone, or possess an approved Unforced Capacity Deliverability Right, in order to ensure that sufficient Energy and Capacity are available in that NCZ and that appropriate reliability criteria are met."

Locality that contains another Locality,¹⁰ to specify that certain capacity cannot be used to satisfy a Locational Capacity Requirement,¹¹ and to modify language describing the payment of ICAP suppliers to specify that their compensation will be computed using the ICAP Demand Curve applicable to their offer; (3) specify a pivotal supplier threshold for the new capacity zone in Attachment H to the Services Tariff; and (4) the credit provision of Attachment K of the Services Tariff to reflect, *inter alia*, what the potential exposure will be, based on the fact that there will be a Locality contained within another Locality. NYISO also proposes a number of minor OATT revisions and certain ministerial formatting revisions.

8. NYISO further notes that, although it met the March 1 tariff deadline to establish an Indicative Locational Capacity Requirement, the Commission granted its request for a waiver of the deadline so that NYISO could adjust the Indicative Locational Capacity Requirement, if necessary, after further technical analysis. NYISO notes the application of its methodology for the proposed G-J Locality resulted in an Indicative Locational Capacity Requirement of 88 percent.¹²

III. Notice of Filing and Responsive Pleadings

9. Notice of NYISO's April 30, 2013 Filing was published in the *Federal Register*, 78 Fed. Reg. 28,210 (2013), with interventions, comments and protests due on or before May 21, 2013. Notice of NYISO's June 12, 2013 Filing was published in the *Federal*

¹⁰ Proposed G-J Locality and the existing NYC Locality (Load Zone J). NYISO's tariff defines "Locality" as a single LBMP Load Zone or set of adjacent LBMP Load Zones within one Transmission District or a set of adjacent Transmission Districts (or a portion of a Transmission District(s)) within which a minimum level of Installed Capacity must be maintained, and as specifically identified in this subsection to mean (1) Load Zone J and (2) Load Zone K. On June 19, 2013, in Docket No. ER12-360-003, NYISO filed to revise this definition to add "and (3) Load Zones G, H, I, and J collectively (i.e., the G-J Locality)" to its list of localities. That filing is pending before the Commission.

¹¹ NYISO states that capacity associated with External Capacity Resource Interconnection Rights (CRIS), Grandfathered External Installed Capacity Agreements listed in Attachment E of the ICAP Manual, and Existing Transmission Capacity for Native Load for the NYSEG are not eligible to satisfy a Locational Capacity Requirement. NYISO adds that the restriction would not apply to External capacity associated with Unforced Capacity Deliverability Rights (UDRs). NYISO April 30, 2013 Filing at 15.

¹² NYISO April 30, 2013 Filing Letter at 5 and notes 17-19.

Register, 78 Fed. Reg. 38,707 (2013) with a comment date of June 19, 2013. Notice of NYISO's June 14, 2012 Filing was published in the *Federal Register*, 78 Fed. Reg. 38,706 (2013) with a comment date of June 21, 2013. Calpine Corporation; TC Ravenswood, LLC; New York Association of Public Power; CPV Valley, LLC; Exelon Corporation; Transmission Developers, Inc.; Direct Energy Services, LLC; and PSEG Energy Resources & Trade LLC and PSEG Power New York LLC; Independent Power Producers of New York, Inc. (IPPNY); H.Q. Energy Services, Inc.; and NRG Companies filed motions to intervene.

10. Consolidated Edison Solutions, Inc. (ConEd Solutions); Multiple Intervenors;¹³ Entergy Nuclear Power Marketing, LLC (Entergy Nuclear); Central Hudson Gas & Electric Corporation (Central Hudson), Indicated New York Transmission Owners (Indicated NYTOs);¹⁴ and Consolidated Edison Company of New York, Inc. (ConEd), Orange and Rockland Utilities, Inc. (O&R), and Central Hudson (collectively, the Companies) filed motions to intervene and protests. New York State Public Service Commission (NYPSC) filed a notice of intervention and protest. Long Island Power Authority (LIPA) filed a motion to intervene and comments.

11. On June 5, 2013, ConEd and O&R; LIPA; Entergy Nuclear; and NYISO filed answers to various pleadings. On June 13, 2013, Indicated NYTOs filed an answer. On June 20, 2013, Central Hudson filed an answer to LIPA's and NYISO's answers. On June 18, 2013, Multiple Intervenors filed an answer. On June 19, 2013, Entergy Nuclear and the Companies each filed an answer to NYISO's June 12, 2013 Filing. On June 24, 2013, NYISO filed an answer to the Companies' June 19, 2013 answer.

IV. Discussion

A. Procedural Issues

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

¹³ Multiple Intervenors state that they are an unincorporated association of over 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

¹⁴ Indicated NYTOs collectively consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc. and Rochester Gas & Electric Corporation.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Issues

1. Need for a New Capacity Zone

a. NYISO's Filing

14. NYISO states that the NCZ Study determined that the Upstate New York/Southeast New York (UPNY/SENY) Highway interface into Load Zones G, H, and I was constrained because it was bottling¹⁵ 849.2 MW of generation from Load Zones A through F, and therefore, NYISO was required to create a new capacity zone.¹⁶ NYISO explains that the NCZ Study applied the assumptions and methodology required under section 5.16.1.1 of the Services Tariff.

b. Comments and Protests

15. LIPA supports NYISO's proposed revisions to implement and establish the G-J Locality and asserts that the proposed revisions are consistent with the requirements of NYISO's Services Tariff. LIPA states that it is not necessary for the Commission to examine issues related to the functions of NYISO's ICAP markets, such as the computation of the ICAP market Demand Curve for the new capacity zone, or the computation of the Locational Capacity Requirement in the new capacity zone.¹⁷ Rather, according to LIPA, the Commission should solely consider whether NYISO has complied with the existing provisions of the Services Tariff related to the creation of a new capacity zone.¹⁸

¹⁵ If the net generation available upstream is greater than the calculated First Contingency Incremental Transfer Capability (FCITC), that amount of generation above the FCITC is considered to be constrained or "bottled" capacity and may not be fully deliverable under all conditions, NCZ Study Report at 5.

¹⁶ NYISO April 30, 2013 Filing, NCZ Study Report at 13.

¹⁷ LIPA May 21, 2013 Comments at 4.

¹⁸ *Id.* at 5.

16. Entergy Nuclear also supports the creation of the new capacity zone and asserts that the erosion of the electric system in the Lower Hudson Valley over time provides proof of the harm that results when inaccurate price signals fail to adequately value capacity in a region. It states that the capacity price signal for the Lower Hudson Valley zones was suppressed by the excess capacity levels in the remainder of the Rest-of-State region that cleared against the NYCA curve, but were not deliverable to the Lower Hudson Valley zones due to the UPNY/SENY constrained interface.¹⁹ It asserts that the new capacity zone must be established without any further delay in order to address, among other things, reliability needs and the need to send accurate price signals.²⁰

17. The NYPSC argues, to the contrary, that the Commission should find that there is no need to implement a new capacity zone at this time and that the new capacity zone will result in unjust and unreasonable rates. The NYPSC asserts that NYISO's filing ignores the fact that the NYPSC has two proceedings underway²¹ that will result in the construction of major new transmission facilities during the 2016-2018 timeframe, thus alleviating the congestion that is leading to the creation of the new capacity zone.²² The NYPSC is concerned that implementation of NYISO's proposal at this time would cost ratepayers almost half a billion dollars over a three-year Demand Curve reset period without achieving any benefits. Further, according to the NYPSC, the benefits to ratepayers from implementing this new zone in 2014 are speculative and unlikely to materialize as the planned transmission upgrades will come into operation over the same period. The NYPSC also argues that NYISO's filing inappropriately emphasizes the MMU's contention that the lack of a price signal in the Lower Hudson Valley zones has contributed to a reduction of 1 GW of unforced capacity (UCAP) since 2006. The NYPSC states that most of the generation retirements were coal-fired units that were retired due to environmental restrictions and not because of low capacity prices.²³

¹⁹ Entergy Nuclear May 21, 2013 Comments at 10.

²⁰ *Id.* at 11.

²¹ The NYPSC states that it has solicited proposals for new generation and transmission projects that could be placed in service by the summer of 2016 in the event that Indian Point nuclear units are not relicensed, and it is seeking to secure approximately 1000 MW of AC transmission upgrades to address constraints on the UPNY/SENY and Central-East interfaces and to place such upgrades in service by 2018.

²² NYPSC May 21, 2013 Protest at 4.

²³ *Id.* at 6.

Docket No. ER13-1380-000

- 8 -

c. Answers

18. In its answer, NYISO asserts that the scope of this proceeding should be limited to the questions of whether NYISO properly conducted the NCZ Study, whether it correctly concluded that there was a constrained Highway interface, and whether the proposed new capacity zone boundary is just and reasonable.²⁴ NYISO states that the Services Tariff establishes a straightforward new capacity zone implementation “trigger,” i.e., if the NCZ Study identifies a constrained Highway interface, a new capacity zone must be created. NYISO states that the current tariff does not allow NYISO to consider other factors. NYISO contends that no party disputes that the Services Tariff contains this requirement, no party sought rehearing of the August 30, 2012 Order that accepted those tariff provisions, and there is no dispute that NYISO correctly identified a constrained Highway interface and adhered to the tariff requirements that it identify a new capacity zone boundary. NYISO argues that the NYPSC’s argument that NYISO should not create a new capacity zone despite the results of the NCZ Study is an impermissible collateral attack on the Commission’s September 8, 2011 Order and August 30, 2012 Order.

19. Entergy Nuclear asserts that the NYPSC overlooks the need to ensure that NYISO’s market design is efficient and sends accurate price signals, principles which are necessary for competitive markets to be sustainable over the long run. Furthermore, Entergy Nuclear states that, while no party has challenged the fact that severe constraints exist in the UPNY/SENY Interface, the NYPSC’s reliance on regulatory solutions to the constraints is an approach that will harm NYISO’s markets. Entergy Nuclear also states that the NYPSC fails to provide evidence to counter the MMU’s core assertions that the new capacity zone will provide incentives to properly value capacity to reflect reliability needs.

d. Commission Determination

20. For the reasons explained below, we find that NYISO has properly followed its tariff provisions for identifying a constrained Highway interface and adhered to the tariff requirement that it identify a new capacity zone boundary.

21. In the September 8, 2011 Order, the Commission found that:

NYISO should use the methodology contained in the existing Attachment S Deliverability Test in section 25.7.8 of Attachment S to the NYISO OATT in determining whether to create new [capacity] zones. That is, a new zone should be created when the total transmission transfer capability (including

²⁴ NYISO June 5, 2013 Answer at 4.

any upgrades that would be required to be built to make new resources (capacity qualified) is insufficient to allow all of the capacity resources in a pre-existing zone to be deliverable throughout the pre-existing zone.²⁵

According to criteria accepted in the August 30, 2012 Order, if the NCZ Study identifies a constrained Highway interface into one or more load zones, NYISO must file with the Commission, on or before March 31, of a Demand Curve reset year, proposed tariff revisions necessary to establish and recognize the new capacity zone or zones and a report of the results of the NCZ Study.²⁶

22. NYISO's NCZ Study identified a Highway deliverability constraint, which triggered the requirement to create the proposed new capacity zone. Therefore, we find that NYISO complied with its tariff in identifying a need for and proposing a new capacity zone.

23. The NYPSC argues that there is no need to implement a new capacity zone at this time because it expects two large transmission upgrades to be built in the near future that will alleviate the existing congestion. But the criteria specified in NYISO's tariff for creating a new capacity zone does not consider whether transmission constraints will be alleviated in the future. Rather, it considers whether binding transmission constraints exist at present. As noted above, NYISO applied the Attachment S test and found that a binding transmission constraint exists. Therefore, a new capacity zone must be created under the terms of NYISO's tariff. In any event, the transmission upgrades that the NYPSC expects to result from its proceedings have not yet been built. The record in this proceeding suggests that the UPNY/SENY transmission constraint has been binding for several years. The price differential that is expected to develop when a new capacity zone is created will provide incentives to alleviate this constraint, such as by completing the transmission upgrades.

24. Further, we disagree with the NYPSC's assertions that a new capacity zone will result in unjust and unreasonable rates. The results of NYISO's application of the Attachment S Deliverability test demonstrate that a significant transmission constraint currently exists into NYISO's proposed new capacity zone. Any resulting higher capacity prices in the new capacity zone will help to encourage the development of new generation and/or transmission capacity to help alleviate the constraint. Such price changes promote efficient decisions and are not unreasonable. As noted below, a separate price signal in the G-J Locality will encourage capacity additions to a locality that is experiencing increasing reliability needs.

²⁵ September 8, 2011 Order, 136 FERC ¶ 61,165 at P 52.

²⁶ NYISO Services Tariff § 5.16.4.

Docket No. ER13-1380-000

- 10 -

25. Finally, we disagree with the NYPSC that creating a new capacity zone would provide no economic benefits and would needlessly increase customers' bills. We conclude that creating a new capacity zone is necessary to provide more accurate price signals over the long run to encourage new investment in the new capacity zone when it is needed.

26. The NYPSC is concerned that prices in the new capacity zone would be higher than in the Rest-of-State, because the higher net cost of new entry in the new capacity zone would raise the new capacity zone's ICAP Demand Curve. In the NYPSC's view, the transmission upgrades expected to be completed in the next few years would eliminate the need to create a new capacity zone and the resulting higher prices, because the upgrades would relax the transmission constraint that has bottled generation capacity. But no one argues that the upgrades would eliminate the reliability need for some capacity to be located within the new capacity zone. In order to encourage new resources to be built in the new capacity zone when they are needed, capacity prices on average over time must approximate the net cost of new entry in the new capacity zone. Otherwise, developers will be reluctant to build the new capacity that will be needed as load grows and resources retire over time. Because the net cost of new entry in the new capacity zone is higher than in the Rest-of-State, the new capacity zone needs its own ICAP Demand Curve, reflecting its higher net cost of new entry, in order to send the necessary price signals over the long run and provide the higher capacity revenue over the long run needed to encourage new investment.

2. Phase-In of the New Capacity Zone

a. NYISO's Filing

27. NYISO did not propose tariff revisions that would provide for the phase-in of a new capacity zone.

b. Protests

28. Indicated NYTOs protest that NYISO's proposal does not provide for a phase-in of the new capacity zone, even though NYISO's filing shows that the new capacity zone will likely cause an immediate and substantial capacity price increase to consumers in the G-I region.²⁷ Indicated NYTOs assert that the new capacity zone price impacts should be phased-in over a period of time consistent with the phase-in period that was applied for

²⁷ Indicated NYTOs assert that NYISO's simulations show capacity charges for customers in load zones G through I will nearly double, increasing by \$168 million per year solely as the result of the creation of the new capacity zone, and, combined with the impact of recent retirements, mothballing, and other factors, to quintuple.

Docket No. ER13-1380-000

- 11 -

the implementation of the original demand curves and the Commission should convene a technical conference to determine the price parameters of the phase-in so that they can be considered as part of the upcoming demand curve reset process.

c. Answers

29. In its answer, NYISO states that it believes that the establishment and implementation on May 1, 2014, of a G-J Locality will be in the ultimate long-term economic interests of all New York consumers, but it takes no position on whether the phase-in of capacity price impacts is warranted on non-economic grounds. NYISO states that the MMU argues against the phase-in of capacity prices in the 2012 State of the Market Report, and that a phase-in would delay the capacity markets' ability to send more efficient investment price signals.²⁸ NYISO notes that it is not yet able to evaluate if the administrative considerations of phasing-in price impacts of a new capacity zone would delay implementation of a new capacity zone.²⁹

30. Entergy Nuclear disagrees with Indicated NYTOs' argument to phase-in the price impacts of a new capacity zone and contends that the argument glosses over the fact that the value of capacity in the Lower Hudson Valley has been significantly understated for years. Entergy Nuclear states that the Commission has long emphasized the need for NYISO to create new capacity zones to send efficient price signals and, over the time period since the Commission orders were issued, the need for capacity in the Lower Hudson Valley has grown. Entergy Nuclear concludes that, given seven years of undervalued capacity in the Lower Hudson Valley, any further arbitrary diminution of the value provided by capacity in this region will only turn merchant generation investment away from the New York markets.

²⁸ NYISO June 5, 2013 Answer at 34-35 (citing Potomac Economics, *2012 State of the Market Report for the New York ISO Markets* (April 2013) at 52 available at <http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_ma

aterials/2013-04-24/4_NYISO%202012%20SOM%20Report.pdf> (“2012 SOM Report”))

(“In summary, the creation of a SENY capacity zone before 2014 would have facilitated more efficient investment in both new and existing resources where the Reliability Needs Assessment has identified resources are necessary for resource adequacy over the next ten years. Nonetheless, it should remain a high priority for NYISO to move forward expeditiously to create and price the SENY zone.”).

²⁹ NYISO June 5, 2013 Answer at 34.

d. Commission Determination

31. We do not agree with Indicated NYTOs that the effect of the new capacity zone should be phased in, and thus, we will not require such a phase-in. We agree with the MMU that a phase-in would delay the capacity market's ability to send more efficient investment price signals. Moreover, stakeholder discussions about the need for a new capacity zone in the Lower Hudson Valley have been ongoing over several years and have provided notice to stakeholders of the need for a new capacity zone. We also agree with Entergy Nuclear that the Commission has long emphasized the need for NYISO to explore creating new capacity zones to send efficient price signals to influence capacity investment decisions, and over the time period since the Commission's orders were issued, the need for a new capacity zone in the Lower Hudson Valley has only become more pronounced. We also agree that these issues have been considered over a seven-year time period with extensive focus placed on them over the past two years and parties have been on notice of these impending market design changes. For example, the 2006 State of the Market Report by NYISO's MMU identified the potential need for such a new capacity zone.³⁰ The report stated that "[o]ne location where long-term reliability concerns have arisen is in the lower Hudson Valley.... Hence, we recommend that the NYISO initiate an assessment to determine whether a new capacity zone with local requirements is warranted to address the Hudson Valley reliability requirements."³¹ Additionally, NYISO's capacity deliverability tests beginning in 2008 identified that the UPNY/SENY transmission interface between the Upper Hudson Valley and the Lower Hudson Valley was overloaded.³²

3. Boundaries of the New Capacity Zone

a. NYISO's Filing

32. As noted above, NYISO's proposed new capacity zone encompasses Load Zones G, H, I, and J, but excludes Load Zone K. NYISO states that, pursuant to section 5.16.2 of the Services Tariff, if the NCZ Study identifies a constrained Highway interface into one or more load zones, NYISO is required to identify the boundary of one or more new capacity zones by considering the extent to which incremental capacity in individual constrained load zones could impact the reliability and security of the constrained load

³⁰ Entergy Nuclear, May 21, 2013 Comments, Younger Aff. ¶ 12 (citing 2006 State of the Market Report at vi).

³¹ 2006 State of the Market Report at vii.

³² *Id.*, Younger Aff. ¶ 15.

Docket No. ER13-1380-000

- 13 -

zones.³³ That is, NYISO must determine which of the load zones on the import side of the constrained interface to include in the new capacity zone. Five load zones – G, H, I, J, and K – exist on the import side of the UPNY/SENY interface.

33. NYISO states that it determined the boundary of the new capacity zone based primarily on resource adequacy assessments. In those assessments, NYISO indicates that it ran simulations using General Electric’s Multi-Area Reliability Simulation model, as well as, “unified” or “Tan 45” methodology where capacity was relocated from Load Zones G, H, and I to Load Zones J and K while monitoring compliance with New York State Reliability Council (NYSRC) LOLE requirements.³⁴ The simulations reveal that almost 6,000 MW could be relocated from Zones G, H, and I to Zone J before the LOLE criterion would be violated, but only 300 MW could be relocated from Load Zones G, H, and I to Zone K before the LOLE criterion would be violated.³⁵ The simulations also found that if 3500 MW was added to Zone J, LOLE in Zones G, H, and I dropped from 0.1 days per year to 0.001 days per year.³⁶ But when the same amount was added to Zone K, LOLE in Zones G, H, and I dropped from 0.1 to only 0.012.³⁷

34. NYISO states that these simulations indicated that capacity in Load Zones G, H, and I was more fungible with capacity in Load Zone J than it was with Load Zone K. According to NYISO, this means that capacity in Load Zone K could only provide limited support to Load Zones G, H, and I. NYISO, therefore, proposes to establish a new capacity zone that would encompass Load Zones G, H, I and J and implement this new G-J Locality for the May 1, 2014 start of the 2014/2015 Capability Year.³⁸

35. As further justification for the G-J Locality, NYISO notes that the reliability needs of the G-J Locality are significant and increasing. NYISO notes that the MMU’s 2012 State of the Market Report referenced recent generator retirements in Load Zones G and H that resulted in higher Locational Capacity Requirements for Load Zones J and K and

³³ See NYISO April 30, 2013 Filing Letter at 6. See also Chao/Adams Aff. ¶ 5.

³⁴ NYISO April 30, 2013 Filing Letter at 12.

³⁵ NYISO April 30, 2013 Filing, Chao/Adams Aff. ¶ 21.

³⁶ *Id.*, Chao/Adams Aff. ¶ 25.

³⁷ *Id.*, Chao/Adams Aff. ¶ 26.

³⁸ NYISO Load Zones G, H and I collectively are also sometimes referred to as the “Lower Hudson Valley” zone.

Docket No. ER13-1380-000

- 14 -

commensurate price increases in these Localities.³⁹ In addition, NYISO notes that the amount of UCAP in Load Zones G, H, and I has fallen by 1 GW since the summer of 2006 and NYISO asserts that this capacity reduction has occurred in part because of the lack of a separate price signal in these load zones.

36. Furthermore, NYISO states that including Load Zone K in a new capacity zone would be inconsistent with sound market design principles because it would incent capacity additions in an area with less reliability value to Load Zones G, H and I and the NYCA region. NYISO also notes that the Patton Affidavit⁴⁰ agrees with NYISO that creating the G-J Locality is consistent with market design principles and is a reasonable configuration.

37. In its June 12, 2013 response to the Deficiency Letter, NYISO states that the only direct ties between Zone K and NYCA are with Zones I and J. NYISO explains that because the NYCA minimum ICAP requirement includes the requirements of Zone K, capacity located in Zone K does in fact contribute directly to meeting the NYCA requirement. But because capacity in Zone K has very little ability to be transferred to Load Zones G, H, and I, it cannot adequately be relied on to satisfy the reliability needs of Load Zones G, H, and I. In response to Dr. Sasson's comment⁴¹ that adding 1000 MW of capacity to Zone K would reduce the LOLE of Zones G, H, and I from 0.087 to 0.012, which, according to Dr. Sasson, is a significant reliability benefit, NYISO states that most of the reduction in the Zone G, H, and I LOLE comes from the first 300 MW of capacity, since capacity in excess of 300 MW would become bottled due to transmission transfer limits.

38. The Deficiency Letter also asked about the minimum quantitative criteria to determine whether to include or exclude a load zone in a new capacity zone, and how the 300 MW from the LOLE study and the 344 MW from the transmission security analysis apply to determining whether to exclude Load Zone K. NYISO responds that its minimum quantitative criterion was whether the incremental capacity was fully fungible in the new capacity zone – that is, whether the incremental capacity would provide equivalent reliability as measured by LOLE to the other load zones on the constrained side of the Highway interface. NYISO states that the results of its simulation analysis showed that about 300 MW of incremental capacity in zone K would be fungible. NYISO also states that the 344 MW figure from the transmission security analysis is the

³⁹ NYISO April 30, 2013 Filing Letter at 7.

⁴⁰ NYISO April 30, 2013 Filing, Patton Affidavit (David B. Patton of Potomac Economics serves at the Market Monitoring Unit (MMU) for NYISO.

⁴¹ Dr. Mayer Sasson is a consultant for the Companies.

upper bound limit of the transfer capability from zone K under emergency conditions, that the lower bound is 144 MW, and that the normal transfer capability is 233 MW.

39. In response to the Deficiency Letter's question regarding the quantity of fungible transfer capacity that would have been sufficient for Zone K to be included in the proposed new capacity zone, NYISO responded that it would not be unreasonable to include Zone K in the new capacity zone if incremental capacity in Zone K equal to at least half of the total generation capacity in Zones G, H, and I (i.e., 2000-2500 MW) was fungible. NYISO's response is based on its assessment of the potential for retirements in the near future.

b. Protests and Comments

40. LIPA states that NYISO has correctly applied the provisions of the Services Tariff to establish the Zone G-J new capacity zone by: (1) properly identifying a constraint along a Highway interface; (2) establishing the boundaries of the new capacity zone based on the interface capability between load zones; and (3) providing proposed revisions to establish and recognize the new capacity zone along with the NCZ Study report.⁴² LIPA believes it is just and reasonable to create a new capacity zone that excludes Zone K because it will create a price signal to construct capacity in Zone G-J, where it is most beneficial relative to the identified constraint.

41. Multiple Intervenors state that NYISO announced, on January 30, 2013, a determination to include Zones G-K as the boundary of the new capacity zone based on analyses showing that Zone K can provide reliability and security benefits to the new capacity zone. Multiple Intervenors state that based on this determination, the requirements of section 5.16.2 of NYISO's Services Tariff call for the inclusion of Zone K in the boundary of the new capacity zone. Further, Multiple Intervenors note that, although NYISO confirmed this determination at subsequent Installed Capacity Working Group meetings and maintained this position for two months, it later decided that Zone K would be excluded from the new capacity zone boundary. Multiple Intervenors state that NYISO's decision to subjectively compare the level of reliability and security support provided by each zone under consideration for inclusion in the boundary of the new capacity zone is not provided for in NYISO's Services Tariff. Multiple Intervenors state that, therefore, NYISO's proposal to exclude Zone K from the boundary of the new capacity zone is fundamentally inconsistent with the results of its own analyses and with the requirements of section 5.16.2 of NYISO's Services Tariff.

⁴² LIPA May 21, 2013 Comments at 5-6.

Docket No. ER13-1380-000

- 16 -

42. Multiple Intervenors state that NYISO's analyses have shown that Zone K can provide 300 MW of reliability and security support to the new capacity zone and that such significant support would require inclusion of Zone K under any subjective criteria added to section 5.16.2 of NYISO's Services Tariff. Further, Multiple Intervenors note that this level of support is more than 50 percent greater than the capacity rating of the applicable ICAP Demand Curve proxy unit that would likely apply to the new capacity zone and therefore, justifies the inclusion of Zone K within the new capacity zone boundary. In addition, Multiple Intervenors state that this level of identified support available from Zone K can play a significant role in addressing reliability issues throughout the southeastern New York region. Multiple Intervenors also state that Zone K should be included in the new capacity zone boundary because it relies upon the Lower Hudson Valley region for reliability and security support, as well as for achieving 12 percent of the statewide minimum installed reserve margin.

43. Multiple Intervenors, however, state that if the Commission were to determine that the level of available support from Zone K warrants special considerations with respect to its inclusion in the new capacity zone, then the Commission should direct NYISO to further consider whether modeling Long Island as an export-constrained zone is warranted. Multiple Intervenors add that the Commission should require an examination of the costs and efforts necessary for NYISO to accomplish such modeling in order to determine if the pursuit of special considerations would be prohibitive from a cost perspective and result in imposing unnecessary costs on consumers. Further, according to Multiple Intervenors, if the Commission were to determine that: (1) modeling Zone K as an export-constrained zone is warranted, necessary, and not cost-prohibitive; and (2) NYISO is unable to implement export-constrained modeling in time for the implementation of the proposed new capacity zone, then the Commission should direct NYISO to include Zone K within the new capacity zone boundary without any restrictions in the interim and model Zone K as an export-constrained zone when, and if, the appropriate modeling capability becomes feasible.

44. Both Multiple Intervenors and the Companies argue that NYISO's proposal to exclude Load Zone K from the new capacity zone is unjust and unreasonable and not in compliance with NYISO's tariff. They state that the test in NYISO's tariff for including an additional load zone in a new capacity zone is the extent to which incremental capacity in the load zone could impact the reliability and security of the proposed new capacity zone, taking into account the interface capability between that load zone and the other load zones included in the proposed new capacity zones. Multiple Intervenors argue that the fact that New York City can provide a comparatively greater amount of reliability support to the new capacity zone than Long Island can is not only irrelevant, it is completely predictable given the size of the New York City market. They contend that the assessment must be done on a load zone by load zone basis. The Companies argue that NYISO's filing incorrectly discounts the support that Zone K could provide to the proposed new capacity zone, that the filing incorrectly determines that Zone K is

Docket No. ER13-1380-000

- 17 -

electrically isolated from the proposed new capacity zone, and that the filing incorrectly concludes that Zone K has limited ability to assist and support the proposed new capacity zone and could not fully satisfy a capacity need in the event of a generator retirement in the new capacity zone.

45. Dr. Sasson, testifying for the Companies, raises additional points. He asserts that NYISO's arguments largely rest on a comparison of the relative abilities of Zones J and K to provide capacity assistance to Zones G, H, and I. But, in Dr. Sasson's view, such a comparison is not an appropriate test; both Zones J and K could be included in the new capacity zone if they both provide sufficient assistance. Dr. Sasson agrees with NYISO that shifting more than 300 MW from Zones G, H, and I to Zone K would raise the NYCA LOLE, but he disagrees that the LOLE increase is due to a transmission limitation. Rather, in his view, it is due to the fact that the capacity shift would lower the LOLE of Zone K by less than it would raise the LOLE of Zones G, H, and I. As support for his view, Dr. Sasson presents data to show that there were flows from K to I for only 215 hours for the year and that, during those hours, the average flow from K to I was only 130 MW. The transfer capability limit flow was reached for an average of less than one hour.⁴³ Dr. Sasson states that the emergency transfer capability from Zone K to Zones G, H, and I is 530 MW. Dr. Sasson also describes another simulation test performed by NYISO in which generation capacity was added to Zone K until the transmission constraint bound. The constraint bound at a level of 3500 MW. This level of additional capacity would lower the LOLE of Zones G, H, and I from 0.087 to 0.012. In Dr. Sasson's view, these numbers are significant, and demonstrate that Zone K should be included in the new capacity zone.

c. Answers

46. NYISO asserts that the Commission should not review the proposed new capacity zone boundary as if there were only one correct configuration because the Services Tariff gives NYISO the flexibility to use its expertise and judgment to make a reasonable determination. NYISO states that its decision to exclude Zone K from the new capacity zone was based on its analyses, which showed that incremental capacity in Long Island cannot effectively provide reliability benefits to other Load Zones in the new capacity zone.⁴⁴ NYISO reiterates that its analyses included looking at Load Zone K separately from Load Zone J and jointly. However, NYISO avers that the pertinent consideration in determining the new capacity zone boundary is the impact on the one-day-in-ten-years

⁴³ The Companies May 21, 2013 Protest, Sasson Aff. ¶ 14.

⁴⁴ NYISO June 5, 2013 Answer at 19-20, 23-24.

LOLE requirement, not the potential increase in transfer capability, the factor on which ConEd's and Central Hudson's protests focus.⁴⁵

47. In response to the arguments of the Companies and their witness, Dr. Sasson, NYISO states that it is true that 530 MW is the maximum transfer limit from Load Zone K to Load Zones G, H, and I, but the actual limit will often be significantly lower because of simultaneous transfer and generator availability impacts.⁴⁶

48. NYISO witnesses Chao and Adams explain further that the fungibility test was the primary test utilized by NYISO in its new capacity zone boundary analysis, and that this test assesses whether capacity in a load zone can be substituted one-for-one with capacity in Load Zones G, H, and I. NYISO found that incremental capacity of 300 MW, equivalent to less than 7 percent of the existing capacity in load zones G, H, and I, is fungible with capacity in Load Zone K, and that such a small value confirms that excluding Load Zone K from the new capacity zone is reasonable.⁴⁷ By contrast, NYISO's analysis found that incremental capacity in Load Zone J could replace all of the capacity in Load Zones G, H, and I.⁴⁸

49. Chao and Adams also dispute Dr. Sasson's claim that transmission transfer limits did not cause the NYCA LOLE to exceed 0.1 when more than 300 MW of capacity were relocated from Load Zones G, H, and I to Load Zone K under the fungibility test. Chao and Adams also disagree with Dr. Sasson that the proper transfer limit to use between Zones G, H, and I and Zone K is the emergency limit of 530 MW. Chao and Adams argue that Dr. Sasson focused only on the transmission path between Zones G, H, and I and K. However, they state, Zone K has transmission ties to both Zones G, H, and I and Zone J. In their view, while the maximum independent transfer capability between Zones G, H, and I and Zone K (taking into account only flows between these zones) is 530 MW, the simultaneous capability limit (taking account of flows to all locations) will often be lower. They add that of the simulation cases involving excess capacity in Zone K, the excess capacity was delivered solely to Zones G, H, and I in only 5 percent of the cases. By contrast, according to Chao and Adams, in 95 percent of the simulations when Zone K had excess capacity, Zone J received part or all of the excess. Thus, they argue, it is

⁴⁵ *Id.* at 24, 28-29.

⁴⁶ *Id.* at 25.

⁴⁷ *Id.*, Chao/Adams Aff. ¶¶ 27-29.

⁴⁸ *Id.*, Chao/Adams Aff. ¶ 31.

Docket No. ER13-1380-000

- 19 -

more appropriate to consider the simultaneous transfer limit rather than the independent transfer limit.⁴⁹

50. LIPA argues for the exclusion of Zone K. It asserts that ConEd, Central Hudson and Multiple Intervenors are motivated to include Zone K in the new capacity zone because doing so will more broadly socialize the new capacity zone implementation costs and also utilize Long Island's existing capacity to offset the purchase obligation of ConEd, Central Hudson and Multiple Intervenors in the new capacity zone auction. LIPA asserts that it is illogical to include Zone K in the new capacity zone and send a price signal to construct capacity in a zone that cannot benefit the constrained zone. According to LIPA, this price signal should be focused on New York City and the Lower Hudson Valley or Zones G-J, where generation is most able to relieve the area downstream of the UPNY/SENY transmission constraint. LIPA argues that including Long Island in a new capacity zone will both dilute and misdirect the price signal away from the Lower Hudson Valley and New York City.

51. In its June 19, 2013 answer to NYISO's response to the deficiency letter, the Companies (and its witness, Dr. Sasson) argue that since Zone K's capacity counts toward the NYCA capacity requirement, it must be reasonable to count the same Zone K capacity toward the new capacity zone and Zone GHI requirements. The Companies also argue that the fungibility test is not the most useful test for determining whether to include or exclude Zone K from the new capacity zone. In the Companies' view, the fungibility test ignores lesser but important reliability benefits, especially when requiring fungibility equal to 50 percent of Zones G, H, and I's capacity requirement. The Companies argue that the appropriate test is whether Zone K can, in some meaningful respect, impact the reliability and security of the proposed new capacity zone. Finally, the Companies argue that adding capacity in Zone K will increase the transfer capability between Zone K and Zones G, H, and I, because the additional generation capacity will need to provide additional transmission capacity in order to be deliverable within Zone K.

Commission Determination

52. As discussed below, we find NYISO's proposal to be reasonable; however we will also establish a technical conference to explore the concept of modeling Zone K as an export constrained Load Zone in the next Demand Curve Reset proceeding.

53. Five Load Zones – G, H, I, J, and K – are located south of the constrained UPNY/SENY interface. Under NYISO's proposal, the new capacity zone includes four of the five load zones – G-J. Two load zones – J and K – currently are separate capacity zones with separate Locational Capacity Requirements and separate ICAP Demand

⁴⁹ *Id.*, Chao/Adams Aff. ¶¶ 37-38, and ¶ 47.

Docket No. ER13-1380-000

- 20 -

Curves based on their respective Locational Capacity Requirements. Under NYISO's proposal, although Zone J would be a part of the new capacity zone, Zone J would also continue to be a separate capacity zone with its own Locational Capacity Requirement and its own ICAP Demand Curve. Therefore, Zones G, H, and I, by themselves, would not have a separate Locational Capacity Requirement or ICAP Demand Curve. Rather, Zones G, H, I, and J together would have an aggregate Locational Capacity Requirement and ICAP Demand Curve. This means that capacity located anywhere within the G-J new capacity zone could be used to meet the Locational Capacity Requirement of the new capacity zone. It is therefore important that capacity located in Zone J (or in any other location within the proposed G-J new capacity zone) be deliverable and capable of satisfying the reliability needs of loads in Zones G, H, and I. NYISO has concluded that sufficient transmission capability exists between Zones G, H, I and J to allow any amount of capacity located in Zone J to reliably satisfy the capacity needs of Zones G, H, and I. No party disputes this conclusion.

54. However, NYISO has not proposed to include Zone K in the new capacity zone. NYISO states that, based on its "fungibility" test,⁵⁰ insufficient transmission capability exists to allow capacity located in Zone K to reliably serve the needs of loads in Zones G, H, and I. NYISO acknowledges that approximately 300 MW of generation capacity added to Zone K would be "fungible" with capacity in Zones G, H, and I – that is, 300 MW added to Zone K could displace an equal amount of capacity in Zones G, H, and I while maintaining the LOLE.⁵¹ Many commenters dispute NYISO's conclusion that Zone K should be excluded based on the idea that Zone K can provide some level of support to Zones G, H, and I. In particular, Multiple Intervenors and the Companies argue that additional amounts of capacity added to Zone K could provide lesser, but significant, reliability benefits to Zones G, H, and I, and thus, that Zone K should be included in the new capacity zone. Multiple Intervenors also suggest that, if the Commission concludes that Zone K warrants special consideration, NYISO should be directed to model Zone K as an export-constrained load zone for the new capacity zone.

⁵⁰ NYISO explains its fungibility test as, "running simulations in which capacity was removed from Load Zones GHI and added to Load Zones J and K while monitoring whether compliance with the NYSRC rule of a loss-of-load event of not more than once in ten years (or a loss-of-load expectation ("LOLE") evaluated probabilistically of not more than 0.1 days per year) would be maintained. The degree to which capacity in Load Zones J and K could substitute for capacity on a reliability basis in GHI would measure how fungible GHI capacity was with capacity in Load Zones J and K and, thus provide guidance on which Load Zones should be included in the NCZ." *See* Chao/Adams Aff. ¶ 17.

⁵¹ *See* Chao/Adams Aff. ¶ 21. *See also* NYISO June 5, 2013 Answer at 25.

55. We find NYISO's proposal to exclude Zone K from the new capacity zone to be reasonable at this time. Section 5.16.2 of the Services Tariff states: "In determining the new capacity zone boundary, the ISO shall consider the extent to which incremental Capacity in individual constrained load zones could impact the reliability and security of constrained Load Zones, taking into account interface capability between constrained Load Zones." NYISO has considered, in its NCZ Study and in the instant filing, the extent to which capacity in Zone K could impact the reliability and security of the proposed G-J Locality. Thus, we find that NYISO has reasonably complied with the requirements of its tariff with respect to the determination of the boundary of the new capacity zone. We agree with NYISO that under section 5.16.2 considering "the extent to which incremental Capacity..." does not mean that *any* Load Zone that has *any* impact in adjacent constrained zones must be included in the new capacity zone.⁵²

56. However, commenters have raised the possibility of modeling Load Zone K as an export-constrained zone. NYISO's MMU also recommends modeling export-constrained zones, in the latest State of the Market Report for NYISO.⁵³ In light of the comments, the Commission would like to explore in a separate proceeding whether and how Zone K should be modeled as an export-constrained zone for future Demand Curve reset proceedings. Due to the complex nature of this issue, the Commission believes it should be explored in a Staff-led technical conference. Therefore, we direct Commission staff to conduct a technical conference in a separate docket to discuss with interested parties whether or not to model Load Zone K as an export-constrained zone for a future Demand Curve reset proceeding. The details of such conference will follow in a subsequent notice.

4. Calculation of the Indicative Locational Capacity Requirement

a. Protests

57. Central Hudson alleges that NYISO's filing to establish a new capacity zone will impact customers of Central Hudson in several ways, including: (1) higher capacity prices, (2) an unfair subsidy to customers of ConEd in Zone J and customers of LIPA in

⁵² See NYISO June 5, 2013 Answer at 19.

⁵³ "Placing additional capacity in a nested capacity zone typically provides reliability benefits to the larger region. As described above, however, the reliability benefits of additional capacity in the nested capacity zone is sometimes limited by inter-zonal transmission limitations when an excess exists. Modeling the export constraints between zones in the capacity market limits how much capacity is sold in the nested capacity zone in order to meet the requirement in the larger region." *2012 State of the Market Report* at vii, and 53 – 54.

Docket No. ER13-1380-000

- 22 -

Zone K, and (3) uncertain prospects for capacity rate relief for customers in Zones G, H, and I even if new transmission lines are built to relieve the congested UPNY/SENY interface.⁵⁴ Central Hudson attributes these results to NYISO's failure to take into account the impact that customers in Zones J and K have on the constrained UPNY/SENY interface and the benefits they receive from formation of the new capacity zone. Central Hudson states that customers in Zones J and K will not bear their proportionate share of the costs of the new capacity zone and customers in the Lower Hudson Valley may not see future rate relief even if the UPNY/SENY interface constraint is relieved because NYISO's method of developing the new capacity zone's LCR does not properly account for deliverability constraints in the first place. As a result, Central Hudson asserts that NYISO's method fails to satisfy cost causation ratemaking requirements and is therefore unjust and unreasonable.

58. Central Hudson asserts that NYISO has incorrectly developed the Locational Capacity Requirements by: (1) using system reliability concepts to develop the Locational Capacity Requirements instead of system deliverability concepts; (2) including all of the capacity installed in zones G-I with the result that even if new transmission lines are built to relieve the congested UPNY/SENY interface, capacity rate relief in Zones G-I would not occur; and (3) excluding Zone K in the new capacity zone despite the fact that the Zone K computed Locational Capacity Requirements will change depending on the addition or retirement of generation capacity in Zones G, H, or I.⁵⁵ Central Hudson further asserts that the NYISO method is at odds with the Commission's intent to promote more efficient price signals. It asserts that NYISO's "nested" capacity zone concept will allow Zones J and K to shift capacity costs to Zones "G-H-I."⁵⁶ It states that it estimates that recent system changes along with NYISO's "nested" proposal could increase capacity prices to its customers from \$19 million to as much as \$89 million annually, an increase of 475 percent.⁵⁷ It also asserts that NYISO has not attempted to ensure that costs are allocated to the boundaries of the new capacity zone, but instead has used a method that assumes Load Zones G-I should pay all of the capacity costs attributable to the UPNY/SENY interface, whether constrained or not, presumably indefinitely.⁵⁸

⁵⁴ Central Hudson May 21, 2013 Protest at 1.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.*

⁵⁷ *Id.*; Borchert Aff ¶ 15.

⁵⁸ Central Hudson May 21, 2013 Protest at 10.

59. Central Hudson states that it has developed an alternative Locational Capacity Requirement calculation method using deliverability concepts for all zones downstream of the UPNY/SENY interface (Zones G, H, I, J, and K).⁵⁹ Central Hudson's alternative method starts with NYISO's reliability based Locational Capacity Requirements, but then adds a deliverability based Locational Capacity Requirements component to reflect the impact of all zones downstream (i.e., zones G-K) on the UPNY/SENY interface. Central Hudson's witness Borchert estimates that, under Central Hudson's alternative method, the capacity cost impact to Central Hudson's customers, although still significant, would be lower than under NYISO's method, i.e., \$71 million for the 2013/2014 capacity year, compared to \$89 million.⁶⁰

60. Therefore, Central Hudson requests that the Commission reject NYISO's cost allocation method and order NYISO to modify its method for calculating the Indicative Locational Capacity Requirements to take into account the deliverability constraint across the UPNY/SENY interface using the alternative Locational Capacity Requirement calculation method discussed in the Borchert Affidavit. Further, Central Hudson states that the Commission has expressed its intent to promote correct price signals in connection with a new capacity zone, which is necessary to comply with cost causation ratemaking principles which require that costs must be allocated to customers in rough proportion to the benefits they receive. Central Hudson asserts that NYISO has not attempted to ensure that costs are allocated to the beneficiaries of the new capacity zone, but instead has used a method that assumes Load Zones G-I should pay all of the capacity costs attributable to the UPNY/SENY interface, whether constrained or not, seemingly indefinitely. Central Hudson argues that the Commission should resolve this unjust and unreasonable result by requiring that the new capacity zone Locational Capacity Requirements be based on the deliverability constraint and that the Locational Capacity Requirements must be eliminated when the deliverability constraint is removed.⁶¹ Central Hudson states that, in the alternative, the Commission should convene a technical conference where Central Hudson can work with NYISO to further address these issues.⁶²

61. Indicated NYTOs assert that the proposal reverts to a reliability approach that the Commission rejected rather than the deliverability approach that the Commission ordered. Indicated NYTOs argue that at a minimum, to the extent that reliability

⁵⁹ *Id.* at 8-9; Borchert Aff. ¶ 16.

⁶⁰ Borchert Aff. ¶ 22.

⁶¹ Central Hudson May 21, 2013 Protest at 10.

⁶² *Id.* at 11.

Docket No. ER13-1380-000

- 24 -

concerns are at issue, these concerns must be aired with Commission staff and stakeholders in a technical conference.⁶³

62. ConEd Solutions objects to NYISO's exclusion of UDRs from capacity that would satisfy the local capacity requirement. ConEd Solutions asserts that external supply not associated with UDRs, but deliverable to the new capacity zone should be allowed to satisfy the Locational Capacity Requirements of the new capacity zone. ConEd Solutions disagrees with NYISO's claim that external supply not associated with UDRs is not controllable, and therefore, must be counted as available only in Rest-of-State. ConEd Solutions believes that NYISO's position fails to recognize that capacity from ISO-NE is more deliverable to the new capacity zone as a result of the unique configuration of the NYISO transmission grid with lines such as Pleasant Valley to Long Mountain/Frost Bridge that connect directly to Load Zone G. Specifically, ConEd Solutions notes NYISO assigns a lower shift factor of 47.5 percent to imports from ISO-NE versus 92 – 93 percent shift factors applied to other external resources.⁶⁴ According to ConEd Solutions, those shift factors imply that resources from ISO-NE are twice as deliverable into the constrained Load Zones G, H, and I compared to other external resources because they use less of the constrained interface and should be eligible to satisfy Locational Capacity Requirements accordingly.⁶⁵

b. Answers

63. LIPA states that Central Hudson's alternative Locational Capacity Requirement computation proposal is unjust, unreasonable and unduly discriminatory because it uses LIPA's surplus capacity without compensating LIPA to benefit the rest of the participants in the new capacity zone and it also ignores the firm transmission rights that LIPA owns across the UPNY/SENY interface. Furthermore, according to LIPA, Central Hudson's proposal is beyond the scope of this proceeding because NYISO does not propose to modify its Locational Capacity Requirement methodology in the April 30, 2013 filing.

64. In its answer, NYISO asserts that the scope of this proceeding should be limited to the questions of whether NYISO properly conducted the NCZ Study, correctly concluded that there was a constrained Highway interface, and whether the proposed new capacity zone boundary is just and reasonable and that the current Services Tariff does not permit NYISO to consider other factors.⁶⁶ NYISO states that the Services Tariff and its filing

⁶³ Indicated NYTOs May 21, 2013 Protests at 11.

⁶⁴ ConEd Solutions May 20, 2013 Comments at 3, note 2.

⁶⁵ *Id.* at 3.

⁶⁶ NYISO June 5, 2013 Answer at 1-5.

Docket No. ER13-1380-000

- 25 -

are both very clear that the Indicative Locational Capacity Requirements are used “solely for establishing revised ICAP Demand Curves in accordance with section 5.14.1.2,” and that the Indicative Locational Capacity Requirements for the proposed G-J Locality will be an element of the November 2013 ICAP Demand Curve Reset filing.⁶⁷ Therefore, NYISO argues that arguments relating to Indicative Locational Capacity Requirements⁶⁸ are beyond the scope of this proceeding⁶⁹

65. In its answer, Central Hudson objects to NYISO’s assertion that Central Hudson’s methodology for calculating the new capacity zone Locational Capacity Requirement ignores reliability concepts. Central Hudson states that its proposed methodology is based on Locational Capacity Requirement values computed by NYISO itself and the NYCA Installed Reserve Margin, which is developed by use of the “unified” or “Tan 45” methodology.⁷⁰ Central Hudson states that, through this approach, system reliability will be maintained using Central Hudson’s proposed methodology.

c. Commission Determination

66. Central Hudson requests that the Commission direct NYISO to change its process for developing Locational Capacity Requirements in the proposed new capacity zone, resulting in a different process from that used for the existing capacity regions. We note, however, that NYISO is not proposing to change its methodology for calculating Locational Capacity Requirements in this proceeding.⁷¹ Moreover, the Indicative Locational Capacity Requirement for the new capacity zone is not used to determine whether a new capacity zone should be created or to establish the new capacity zone boundary; it is used solely for establishing an ICAP Demand Curve for the new capacity zone, in accordance with section 5.14.1.2 of the Services Tariff. Further, the Indicative Locational Capacity Requirement for the new capacity zone was only included in the April 30, 2013 filing to demonstrate to the Commission that NYISO has satisfied the

⁶⁷ *Id.* at 12.

⁶⁸ NYISO says that Indicative Locational Capacity Requirements are being discussed in the stakeholder process related to Demand Curve Reset proceedings.

⁶⁹ NYISO June 5, 2013 Answer at 12.

⁷⁰ Central Hudson June 20, 2013 Answer at 2.

⁷¹ “The actual Locational Minimum Installed Capacity Requirements that will be used to administer market rules for the G-J Locality will be established in the same manner as, and concurrent with, the [Locational Capacity Requirements] for existing Localities J and K.” NYISO April 30, 2013 Filing Transmittal Letter at note 17.

Docket No. ER13-1380-000

- 26 -

requirements under section 5.16.3 of the Services Tariff.⁷² This proceeding is narrowly focused on determining whether NYISO followed its tariff in determining that a new capacity zone should be created. We agree with NYISO that arguments regarding the computation of the Indicative Locational Capacity Requirements are beyond the scope of this proceeding.

67. We also clarify that, contrary to Central Hudson's assertions, the Commission did not in prior orders direct NYISO to develop Locational Capacity Requirements using system deliverability concepts. The Commission also did not direct a method of allocating the costs of capacity based on the impact of flows on the UPNY/SENY interface as Central Hudson argues for in this proceeding.

5. Elimination of a Capacity Zone and Mitigation

a. Summary of NYISO's Filing

68. NYISO did not propose tariff revisions that would govern the elimination of a capacity zone. Nor does NYISO's filing in the instant proceeding contain tariff revisions to establish market power mitigation rules in the new capacity zone; market power mitigation was the subject of the proceeding in Docket No. ER12-360. The Commission conditionally accepted NYISO's proposed market power mitigation measures for new capacity zones in that proceeding on June 6, 2013.⁷³

b. Protests and Comments

69. Indicated NYTOs are concerned that price separation will continue between the new capacity zone and the Rest-of-State region even after the deliverability constraints have been eliminated, resulting in consumers paying too much for capacity and sending the wrong incentives to generation and transmission developers. Indicated NYTOs also assert that the filing proposes that, even when the deliverability constraint is eliminated, new entrants will only be tested for deliverability to the boundary of the new capacity zone.⁷⁴ That is, once the new capacity zone is created, NYISO will not conduct an analysis to determine if the deliverability constraint has been removed and Rest-of-State

⁷² Section 5.16.3 of the Services Tariff directs NYISO to establish an Indicative Locational Capacity Requirement for each load zone or group of load zones "identified in the NCZ Study as having a constrained Highway Interface, on or before March 1 of each ICAP Demand Curve Reset Filing Year."

⁷³ *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,217 (2013).

⁷⁴ Indicated NYTOs May 21, 2013 Protest at 16.

capacity is deliverable to the new capacity zone. Indicated NYTOs contend that not analyzing the continuing existence of the constraint at the interface is completely inconsistent with the rationale underlying the deliverability requirement. Indicated NYTOs argue that it could also eviscerate one of the objectives of the Energy Highway initiatives, which is to create additional transmission transfer capacity across key interfaces, because there will be no test to determine if new resources would once again cause the interface to bind. To the extent that new resources do cause the interface to bind, Indicated NYTOs assert that the generator should be required to fund System Deliverability Upgrades to address the impact, as required in Attachment S. Therefore, Indicated NYTOs request that the Commission order NYISO to modify its tariff to provide for a procedure in which NYISO will perform an appropriate deliverability test at the reasonable request of a market participant, and that the precise details of such a procedure should be resolved in a technical conference.

70. Indicated NYTOs also note that NYISO has not yet begun to develop a mechanism for the removal of the new capacity zone when the deliverability constraint is eliminated, which they assert is contrary to the Commission's premise when it directed NYISO to evaluate the need for new capacity zones, that price separation would cease if the deliverability constraint were eliminated.⁷⁵ Indicated NYTOs ask the Commission to direct a technical conference to address the issue of continued price separation.⁷⁶

71. Indicated NYTOs are also concerned that NYISO's failure to provide for elimination of unneeded capacity zones will perpetuate unneeded mitigation in those capacity zones. Indicated NYTOs also request that the Commission require NYISO to eliminate the mitigation measures when the deliverability constraint is removed and ask that the Commission direct a technical conference to address this issue.

72. The NYPSC also asserts that NYISO should have included a mechanism to determine when a new capacity zone is no longer necessary and should be eliminated. The NYPSC asserts that new capacity zones will remain even after the deliverability issue dissipates resulting in a permanent capacity price increase for customers in the new capacity zone.

73. The NYPSC also argues that the Commission should reject the proposed mitigation measures, which are unjust and unreasonable. The NYPSC states that NYISO seeks to apply to the new capacity zone the same buyer-side mitigation rules that were crafted for the particular circumstances facing the New York City market. However, NYISO has not adequately justified the need to impose mitigation upon new entrants in

⁷⁵ *Id.* at 9 and note 27.

⁷⁶ *Id.* at 10.

the new capacity zone, and the presumption of mitigation and the uncertainty that it entails will most likely discourage new entry and harm the competitiveness of the NYISO markets.⁷⁷

74. LIPA supports NYISO's request for prompt Commission action on the pending tariff revisions that would implement buyer-side mitigation to all new capacity zones, but only to the extent Zone K is excluded from new capacity zones, or LIPA generation capacity is exempt from buyer-side mitigation. Entergy Nuclear further supports NYISO's request that the Commission act on its new capacity zone mitigation filing by August 30, 2013.

c. Answers

75. Entergy Nuclear states that Indicated NYTOs' arguments that zone elimination criteria must be established is an argument previously pursued by National Grid more than two years ago. However, Entergy Nuclear notes that Indicated NYTOs have not pursued this issue in the stakeholder process. Entergy Nuclear asserts the stakeholder process is clearly the appropriate venue for discussion of new provisions to eliminate a new capacity zone. Entergy Nuclear also asserts that the issues surrounding elimination of capacity zones are not well suited to a technical conference. Moreover, according to Entergy Nuclear, the fact that the zone elimination issue has not been pursued in any material manner until this proceeding provides no basis, at this time, for the Lower Hudson Valley new capacity zone to be established subject to refund.

76. In response to arguments about the elimination of zones, NYISO states that the Commission's prior orders directed NYISO to put in place rules for the creation of new capacity zones and expressly authorized NYISO to defer to the stakeholder process rules pertaining to the elimination of capacity zones.⁷⁸ According to NYISO, the development of rules to eliminate capacity zones is beyond the scope of this proceeding, which focuses on new capacity zone creation. Furthermore, NYISO's external market monitor, Dr. Patton, asserts that rules to eliminate capacity zones could put NYISO in the position of having to define, un-define, and then re-define new capacity zones as system conditions change.⁷⁹ Dr. Patton continues that such rapid changes could undermine the stability of the market and introduce substantial risk for investors. Therefore, Dr. Patton urges the Commission to reject the arguments presented by Indicated NYTOs, the NYPSC and Central Hudson and allow the market to determine when price separation occurs. Dr.

⁷⁷ NYPSC May 21, 2013 Protest at 8.

⁷⁸ *Id.* at note 17.

⁷⁹ *Id.*, Patton Answering Aff. ¶ 6.

Docket No. ER13-1380-000

- 29 -

Patton further asserts that there is no reason to actively eliminate capacity zones after they are created and notes that this is consistent with what the Commission has approved in both the PJM and MISO markets.⁸⁰

77. NYISO answers that Indicated NYTOs acknowledge that the Commission expressly held that the filing was not required to “define criteria regarding the potential elimination of capacity zones.”⁸¹ According to NYISO, the September 8, 2011 Order, clearly instructed NYISO to establish rules to govern the creation of new capacity zones, and it expressly authorized NYISO to defer stakeholder discussions regarding the potential elimination of unneeded capacity zones. NYISO argues that it is therefore an impermissible collateral attack on the September 8, 2011 Order, to oppose the filing on the grounds that it does not include capacity zone elimination or price separation provisions.⁸²

78. NYISO contends that the development of rules or criteria for the elimination of a Locality (i.e., a new capacity zone that has been established) even if not a collateral attack, would be beyond the scope of this proceeding. NYISO argues that new capacity zone elimination rules would apply to more than just the proposed new Locality that is the subject of this proceeding; they would apply to the existing Localities and to any new capacity zones that result from future triennial filings in accordance with section 5.16.4(a) of the Services Tariff.⁸³

79. Indicated NYTOs answer that NYISO’s mechanism to calculate the price of capacity in the new capacity zone will not ensure the elimination of price separation between capacity zones when deliverability constraints between those zones have been removed.⁸⁴ In addition, Indicated NYTOs note that evidence has not been presented in this proceeding that demonstrates that NYISO’s mechanism will eliminate price separation when the deliverability constraint is alleviated.⁸⁵

⁸⁰ *Id.*, Patton Answering Aff. ¶ 7.

⁸¹ September 8, 2011 Order, 136 FERC ¶ 61,165 at P 70.

⁸² NYISO June 5, 2013 Answer at 7-8.

⁸³ *Id.* at 8.

⁸⁴ Indicated NYTOs June 13, 2013 Answer at 2.

⁸⁵ *Id.* at 3.

Docket No. ER13-1380-000

- 30 -

80. Indicated NYTOs note that NYISO's MMU now states that price separation may remain, even if the binding deliverability constraint is alleviated and states that the Locational Capacity Requirement should determine locational capacity pricing.⁸⁶ Indicated NYTOs state that this finding is inconsistent with the rationale the Commission used in approving the new capacity zone framework and with the deliverability criteria that govern the creation of the new capacity zone.⁸⁷ Further, Indicated NYTOs state that, since there are other inputs to the new capacity zone ICAP demand curve, the Locational Capacity Requirement alone does not govern locational capacity pricing or the conditions under which price separation is eliminated.⁸⁸

81. With respect to the development of mitigation measures for the new capacity zone, NYISO answers that the scope of this proceeding should be limited to the questions of whether NYISO properly conducted the NCZ Study, correctly concluded that there was a constrained Highway interface, and whether the proposed new capacity zone boundary is just and reasonable and that the current Services Tariff does not permit NYISO to consider other factors.⁸⁹ Therefore, NYISO says that arguments relating to buyer-side mitigation rules are beyond the scope of this proceeding and should have been submitted in Docket No. ER12-360.⁹⁰ NYISO contends that there is no need to delay issuing an order to weigh the merits of, or to allow for, such an evaluation.

d. Commission Determination

82. We do not agree with the NYPSC and Indicated NYTOs that the Commission should require at this time a mechanism for determining whether a new capacity zone is no longer needed and should be eliminated. In our September 8, 2011 Order on NYISO's proposal of criteria for the creation of a new capacity zone, we explicitly declined to require NYISO to define criteria regarding the potential elimination of capacity zones as some commenters had suggested. We held that the impact of the failure to create a zone where one is needed is much more significant than the impact of a failure to eliminate an existing unneeded zone. However, we also said that NYISO is free to discuss with its stakeholders a mechanism to eliminate an unneeded capacity zone. We reiterate here that NYISO should work with its stakeholders, and if a mechanism for zone elimination is

⁸⁶ *Id.* at 3-4.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 5-6.

⁸⁹ *Id.* at 1-5.

⁹⁰ *Id.* at 10-12.

Docket No. ER13-1380-000

- 31 -

deemed necessary, NYISO should file appropriate tariff revisions with the Commission. We note that the fact that NYISO did not propose a new capacity zone elimination mechanism in this proceeding has no bearing on its requirement to establish a new capacity zone. Further, because any capacity zone elimination rules would apply not only to the Locality being proposed here, but also to existing Localities, and because NYISO has not proposed any such mechanism here, we find that the record in this proceeding is insufficient on which to make a determination.

83. Indicated NYTOs are concerned that, in the absence of a mechanism for the elimination of a capacity zone, price separation will continue between the new capacity zone and the Rest-of-State region even after deliverability constraints have been eliminated. We agree that price separation may well continue after the constraint leading to a new capacity zone disappears, but we believe such potential distinction between prices is appropriate. As indicated by Dr. Patton,⁹¹ once a new capacity zone is created, price will be based upon the ICAP demand curve for the new zone, which, in turn, is based upon the Locational Capacity Requirement. In other words, price separation reflects the cost of satisfying the Locational Capacity Requirement for the new capacity zone and is based upon reliability needs as indicated by LOLE. The deliverability test, in contrast, is not designed to provide an accurate indication of the reliability needs in the new capacity zone in that it is not formulated using the LOLE. As Dr. Patton explains, as long as the cost of entry is higher in the new capacity zone than in the surrounding area, eliminating the new capacity zone and its associated higher demand curve when the deliverability constraint is temporarily eliminated, jeopardizes the market's ability to attract and maintain adequate resources for market reliability in the new capacity zone.⁹²

84. With respect to mitigation measures, we find these issues to be beyond the scope of this proceeding. On June 6, 2013, the Commission accepted, subject to conditions, NYISO's proposed revisions to its Services Tariff to implement buyer-side and supplier-side market power mitigation measures for new capacity zones.⁹³

6. Conforming Tariff Revisions

85. NYISO states that as a result of identifying the need for creation of a new capacity zone it must make several conforming changes to its tariff. Some of NYISO's proposed tariff changes are minor typographical edits and others are more substantial. For example, because the new capacity zone will be an additional Locality (Load Zones G, H,

⁹¹ Patton Answering Aff. ¶¶ 11-15.

⁹² Patton Answering Aff. ¶ 15.

⁹³ *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,217 (2013).

Docket No. ER13-1380-000

- 32 -

I and J), NYISO must revise the definition of Locality accordingly.⁹⁴ NYISO also proposes to add a new defined term, “G-J Locality” to its tariff in section 2.7. In addition, NYISO proposes to set a new Pivotal Supplier Threshold in Attachment H as control over 650 MW of unforced capacity in the G-J Locality.⁹⁵ In comparison, the existing Pivotal Supplier Threshold for NYC Load Zone J is control of 500 MW. NYISO also proposes to make several other clarifying and conforming changes to its tariff to, among other things, redefine “Rest-of-State” as Load Zones A-F, revise the credit requirements in Attachment K for a Locality contained within another Locality, and update the rules regarding the Installed Capacity Requirement and the Load Serving Entities obligations regarding the new G-J Locality.

86. NYISO proposes similar definition changes in its OATT. NYISO states that the OATT definition of Locality requires revisions due to the creation of the G-J Locality. NYISO is also proposing to revise the existing OATT definition of Locational Installed Capacity Requirement to achieve consistency with the proposed Services Tariff definition. In addition, NYISO proposes revisions to Attachments S and X to change the definition of Capacity Region, the treatment of External CRIS rights and the definition of a Highway. NYISO states that the definition of a Highway is revised to remove the UPNY/SENY interface because in the new Capacity Region, the UPNY/SENY interface would no longer be considered a Highway interface, and instead, would be considered an “Other Interface.”⁹⁶ In conjunction, NYISO proposes changes to the definition of Other Interfaces. NYISO also proposes minor changes to OATT Attachments S, X and Y.

87. We accept NYISO’s conforming changes.

The Commission orders:

(A) NYISO’s proposed tariff revisions are hereby accepted, to be effective July 1, 2013, as discussed in the body of this order, with the exception of the revisions to sections 2.7, 2.12, 2.18, and 25.14.3.2(iv) and 23.2.1, which shall be effective January 27, 2014, as requested, and section 26.4.3(iv), which shall be effective January 15, 2014, as requested.

⁹⁴ NYISO April 30, 2013 Filing Letter at 13.

⁹⁵ *Id.* at 19-20.

⁹⁶ *Id.* at 25.

Docket No. ER13-1380-000

- 33 -

(B) The Commission's Staff is hereby directed to convene a technical conference, to be held at a date specified in a subsequent notice, and to report the results of the conference to the Commission, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary.

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Document Content(s)

ER13-1380-000.DOC.....1-33

ATTACHMENT B

146 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

New York Independent System Operator, Inc. Docket No. ER14-500-000

ORDER ACCEPTING TARIFF FILING SUBJECT TO CONDITION AND DENYING
WAIVER

(Issued January 28, 2014)

1. On November 29, 2013, the New York Independent System Operator, Inc. (NYISO) filed revisions to section 5.14.1.2 of its Market Administration and Control Area Services Tariff (Services Tariff) pursuant to section 205 of the Federal Power Act (FPA).¹ The proposed tariff revisions define the demand curves for the Installed Capacity (ICAP) market for the 2014/2015, 2015/2016, and 2016/2017 Capability Years.² The filing also proposes to establish the first ICAP demand curve for the new Locality encompassing Load Zones G, H, I and J (G-J Locality), and it proposes a phase-in of the new demand curve parameters for the G-J Locality. The filing includes the results of the periodic review of the ICAP demand curves.

2. In this Order, the Commission accepts NYISO's proposed tariff revisions, subject to NYISO re-filing to reflect the Demand Curve parameters without any phase-in adjustment. The Commission rejects NYISO's proposed phase-in of the new demand curve parameters for the G-J Locality and NYISO's associated request for waivers. The following discussion addresses only protested issues, as all other non-protested factors are found to be supported, reasonable, and are accepted.

¹ 16 U.S.C. § 824d (2012).

² NYISO's capability year consists of the summer capability period and the winter capability period that runs from May 1 through October 31 and November 1 through April 30.

Docket No. ER14-500-000

- 2 -

I. Background

3. NYISO is required to determine the amount of ICAP that each load serving entity (LSE) must acquire to ensure that adequate resources are available to meet projected load on a long-term basis taking into account reliability contingencies. The amount of ICAP, in megawatts, required to provide adequate resources to meet reliability contingencies for the New York Control Area (NYCA) includes the Installed Reserve Margin (IRM), which is currently 18 percent. The ICAP obligations for LSEs and the spot market auction prices for the associated monthly ICAP requirement are determined using separately established downward-sloping ICAP demand curves. NYISO determines the locational ICAP requirement for NYCA. There are currently separate location-specific ICAP requirements for LSEs in New York City (NYC) and Long Island (LI), which reflect the existence of transmission constraints in those areas. In this filing NYISO proposes an additional locational ICAP requirement for the new capacity zone, the G-J Locality.

4. Section 5.14.1.2 of the Services Tariff requires NYISO to perform a triennial review to determine whether the parameters for the ICAP demand curves should be adjusted. Specifically, section 5.14.1.2 of the Services Tariff requires that the periodic review assess:

(i) the current localized levelized embedded cost of a peaking plant in each NYCA Locality, the Rest of State, and any New Capacity Zone, to meet minimum capacity requirements, and (ii) the likely projected annual Energy and Ancillary Services revenues of the peaking plant over the period covered by the adjusted ICAP Demand Curves, net of the costs of producing such Energy and Ancillary Services. . . . The periodic review shall also assess (i) the appropriate shape and slope of the ICAP Demand Curves, and the associated point at which the dollar value of the ICAP Demand Curves should decline to zero; (ii) the appropriate translation of the annual net revenue requirement of the peaking plant determined from the factors specified above, into monthly values that take into account seasonal differences in the amount of capacity available in the ICAP Spot Market Auctions; and (iii) the escalation factor and inflation component of the escalation factor applied to the ICAP Demand Curves. For purposes of this periodic review, a peaking unit is defined as the unit with technology that results in the lowest fixed costs and highest variable costs among all other units' technology that are economically viable, and a peaking plant is

defined as the number of units (whether one or more) that constitute the scale identified in the periodic review.³

The remaining provisions of section 5.14.1.2 provide the process by which the above review takes place, and they provide that the demand curves as approved by the ISO Board of Directors incorporating the results of the periodic review, shall be filed with the Commission.

5. The demand curve values ICAP on the y-axis in \$/kW-month and ICAP quantity on the x-axis expressed as percentage of the Minimum Installed Capacity Requirement for NYCA, NYC, LI, or G-J Locality, as applicable. The maximum value for each ICAP demand curve is 1.5 times the net cost of new entry (Net CONE) or the estimated localized levelized cost per kW-month to develop a new peaking unit with energy and ancillary services revenues subtracted in each locality or in the rest of state, as applicable. The intersection of 100 percent of the ICAP requirement and an adjusted Net CONE determines the ICAP reference point. Two defined points, the ICAP reference point and the zero crossing point (set at 112 percent for NYCA, 115 percent for G-J, and 118 percent for NYC and LI), articulate a line segment with a negative slope that will result in higher values for capacity as available capacity declines.

II. Summary of the November 27, 2013 Filing

6. On November 27, 2013, NYISO filed revisions to the Services Tariff that implement revised ICAP demand curves for Capability Years 2014/2015, 2015/2016, and 2016/2017. NYISO states that the filing presents the results of the periodic review of the ICAP demand curves specified in section 5.14.1.2.11.⁴ In addition to updating the existing curves for NYC, LI, and the NYCA, NYISO states that this filing also proposed to establish the first ICAP demand curve for the new locality encompassing Load Zones G, H, I, and J (the “G-J Locality”). NYISO is also proposing a “phase-in” of the new

³ Services Tariff § 5.14.1.2.

⁴ NYISO states that prior to the present ICAP demand curve review, NYISO retained FTI Consulting to perform a comprehensive review of the New York capacity markets. FTI Consulting’s report⁴ contained three recommendations that NYISO states had a bearing on the development of the NYISO staff report (NYISO Staff Report). NYISO states that those recommendations related to: (i) the use of a combined cycle combustion turbine facility instead of a simple cycle combustion turbine to establish the cost of new entry (CONE); (ii) the feasibility of using a demand response resource to establish those CONE values; and (iii) the use of an incremental reliability value approach as the basis for setting zero crossing points.

demand curve parameters for the G-J Locality that NYISO believes will ameliorate the potential short-term consumer impacts that result from creating the new locality.

7. NYISO states that in accordance with the Services Tariff provisions, in the third quarter of 2012, it solicited proposals from qualified consultants to identify appropriate methodologies and to develop the ICAP demand curve parameters for the three Capability Years beginning May 2014. NYISO adds that it retained the team of National Economic Research Associates, Inc. (NERA), with Sargent and Lundy (S&L) as NERA's subcontractor (collectively identified as NERA/S&L). NYISO explains that NERA/S&L began their analysis in November 2012 and participated in twelve ICAP Working Group meetings between December 2012 and August 2013, during which stakeholders provided feedback on NERA/S&L's assumptions, methodologies, analysis, estimates, and preliminary results. On August 2, 2013, according to NYISO, NERA/S&L released the final version of their report.⁵

8. NYISO states that on September 6, 2013, as amended on September 12, NYISO staff submitted the NYISO Staff Report to the Board, which evaluated the NERA/S&L Report, addressed oral and written comments received through the stakeholder process and from the NYISO Market Monitoring Unit (MMU), and set forth NYISO staff's recommendation of demand curve parameters.⁶ NYISO states that the NYISO Staff Report accepted all but two of NERA/S&L's conclusions. Specifically, contrary to the NERA/S&L conclusions, the NYISO staff recommended: (i) no changes to the existing zero crossing points used for NYC, LI, and NYCA; and (ii) a change in temperature and relative humidity assumptions in some locations in determining net ICAP revenues.

9. NYISO states that on October 2, 2013, stakeholders provided written comments to the NYISO Board of Directors (Board) on the final NERA/S&L Report and the NYISO Staff Report and made oral arguments to the Board on October 14, 2013. The Board then determined that stakeholders had made a strong case that further review was warranted concerning the selection of the proxy peaking unit (proxy unit) for NYC, LI, and the G-J Locality and it explained to stakeholders that it was seeking additional information on the topic and would share the results of the review during the first week of November 2013 and provide additional opportunities for stakeholder input.

10. NYISO retained the Brattle Group (Brattle) with Licata Energy & Environmental Consulting (Licata) to conduct further analysis. NYISO states that after discussions with NERA/S&L, NYISO staff, and manufacturers and vendors of turbines and selective

⁵ NYISO Filing Attachment III.

⁶ NYISO Filing Attachment IV.

catalytic reduction emissions controls (SCR), Brattle and Licata produced the Brattle Report.⁷ It concluded that the Siemens SGT6-5000F(5) class frame simple-cycle combustion turbine (F class frame) with SCR should be the proxy unit for NYC, LI, and the G-J Locality. NYISO made this report available to stakeholders on November 1 and invited written stakeholder comments, which were submitted by November 8. On November 7, NYISO posted responses to sixteen written questions that IPPNY had submitted on November 5. NYISO states that, after considering all of the information available, the Board approved the Brattle Report's conclusion regarding proxy unit selection and approved all of the other recommendations in the NYISO Staff Report. The Board then directed NYISO to file proposed ICAP demand curves based on those determinations.

11. Section 5.14.1.2 of the Services Tariff specifies that the ICAP demand curve update shall be based upon and consider the following: (a) the current localized levelized embedded cost of a peaking plant in each NYCA Locality, the Rest of State, and any New Capacity Zone, to meet minimum capacity requirements; (b) the likely projected annual Energy and Ancillary Services revenues of the peaking plant over the period covered by the adjusted ICAP demand curves, net of the costs of producing such Energy and Ancillary Services, under conditions in which the available capacity would equal the minimum Installed Capacity requirement plus the capacity of the peaking plant; (c) the appropriate shape and slope of the ICAP demand curves, and the associated point at which the dollar value of the ICAP demand curves should decline to zero; and (d) the appropriate translation of the annual net revenue requirement of the peaking plant determined from the factors specified above, into monthly values that take into account seasonal differences in the amount of capacity available in the ICAP Spot Market Auctions.

III. Notice, Interventions, and Protests

12. Notice of NYISO's November 29, 2013 filing was published in the *Federal Register*, 78 Fed. Reg. 76,829 (2013), with interventions, and comments due on or before December 20, 2013. Motions to intervene were filed by; East Coast Power, LLC; Exelon Corporation; PSEG Energy Resources & Trade LLC and PSEG Power New York LLC; NRG Companies; Calpine Corporation; Dynegy Marketing and Trade, LLC; Brookfield Energy Marketing LP; Empire Generating Co., LLC; Invenergy LLC; New Athens Generating Company, LLC; Astoria Generating Company, L.P.; Pace Energy & Climate

⁷ Independent Evaluation of SCR Systems for Frame-Type Combustion Turbines, Report for ICAP Demand Curve Reset, The Brattle Group (November 1, 2013) ("The Brattle Report").

Docket No. ER14-500-000

- 6 -

Center and Natural Resources Defense Council; Environmental Advocates of New York; and CPV Valley, LLC.

13. Independent Power Producers of New York, Inc. (IPPNY); Electric Power Supply Association (EPSA); TC Ravenswood, LLC (Ravenswood); Multiple Intervenors⁸ and the City of New York (collectively, Multiple Intervenors); The New York Supplier and Environmental Advocate Group⁹ (NY-SEA Group); Astoria Generating Company, L.P. and the NRG Companies (jointly, Indicated Suppliers); and Entergy Nuclear Power Marketing, LLC (Entergy) filed motions to intervene and protests. The New York Transmission Owners¹⁰ (NYTOs) filed a motion to intervene and comments.

14. The New York State Public Service Commission (NYPSC) filed a notice of intervention and comments.

15. On January 6, 2014, Multiple Intervenors and Entergy filed answers.

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013) prohibits an answer to a protest or to an answer unless otherwise

⁸ Multiple Intervenors states that it is an unincorporated association of approximately 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State. In this proceeding we use the term "Multiple Intervenors" to include the City of New York in addition to these facilities.

⁹ The NY-SEA Group is comprised of Dynegy Marketing and Trade LLC; Empire Generating Co., LLC; Exelon Corp.; Invenegy LLC; The PSEG Companies; Brookfield Energy Marketing, LP; New Athens Generating Company, LLC; Environmental Advocates of New York; Natural Resources Defense Council; the Pace Energy & Climate Center; and LockPort Energy Associates, L.P. Each member of the NY-SEA Group has separately intervened in this proceeding.

¹⁰ For purposes of this intervention, the New York Transmission Owners consists of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

IV. Discussion

A. Choice of Proxy Unit

18. NYISO states that the Services Tariff requires that the demand curve reset review “shall assess... the current localized levelized embedded cost of a peaking unit in each NYCA Locality and the Rest of State” to meet minimum capacity requirements.¹¹ NYISO adds that for purposes of updating the ICAP demand curves, “a peaking unit is defined as the unit with technology that results in the lowest fixed costs and highest variable costs among all other units’ technology that are economically viable.”¹² NYISO states that, according to Commission precedent, the facilities must be able to be “practically constructed” and “economically viable,” as well as “able to comply with all applicable environmental limitations and utilize commercially available, proven technology.”¹³

19. With respect to the use of dispersed generating resources or demand side resources as the peaking technology, NYISO states that, it discussed this possibility with stakeholders in the 2010 demand curve reset and committed to considering the use of demand response as the peaking unit in the current reset cycle. NYISO states that the FTI Report recognized that demand response is an important participant in capacity markets but explained that neither the cost nor the offer price of demand response was an appropriate measure of the long-run cost of capacity. The NYISO Staff Report agreed with the FTI Report that demand response technology should not be considered as a potential peaking unit in this reset and the Board endorsed that recommendation.

1. The Selection Process

a. Comments and Protests

20. EPSA, Entergy, IPPNY, Indicated Suppliers, and Ravenswood object to the process by which the NYISO Board came to the conclusion to use the F class frame unit

¹¹ Services Tariff § 5.14.1.2.

¹² *Id.*

¹³ *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058, at 37 (2011) (2011 Demand Curve Order).

with SCR as the proxy unit technology for NYC, LI, and the G-J Locality. The parties argue that the retention of Brattle, a second consultant so late in the process, violated the spirit of the procedural requirements of NYISO's Services Tariff. They claim that because Brattle was solicited at the final stage of the stakeholder process and without the use of a stakeholder-reviewed request for proposals, the two-weeks analysis period and the one week given for stakeholder review and input were too short for meaningful review in violation of the Services Tariff requirement that NYISO provide stakeholders with the opportunity to review and comment on the consultant's data, assumptions, and conclusions. Indicated Suppliers argue that given the importance of the ICAP demand curves, the Services Tariff and ICAP Manual provide for a lengthy process that is intended to allow the proposed ICAP demand curves to be thoroughly reviewed and vetted by stakeholders. Further, according to Indicated Suppliers, the process by which NYISO retained Brattle and Licata has been shrouded in secrecy. While the Services Tariff requires NYISO to develop "with stakeholder review and comment" a request for proposals for a consultant "to provide independent consulting services to determine recommended values for the factors specified above, and appropriate methodologies for such determination,"¹⁴ according to Indicated Suppliers, NYISO has not disclosed the terms on which Brattle and Licata were retained.

21. Entergy contends that, in arriving at the conclusion that the F class frame unit with SCR is a proven technology, the Brattle Group utilized broad assumptions and sources that have not been included in this proceeding.¹⁵ IPPNY asserts that the request for proposal to choose the consultant was designed to ensure that only qualified consulting firms without any conflicts of interest could bid. However, according to IPPNY, Brattle is not truly unbiased in that Brattle could not find contrary to its recommendation of the F class frame to PJM two years earlier without damaging its reputation. IPPNY adds that Brattle's advice was rejected at the time by NYISO as lacking in rigor.

22. On the other hand, Multiple Intervenors, NYTOs, and NYPSC argue that the process of choosing the proxy unit technology was consistent with NYISO's Services Tariff. Multiple Intervenors argue that parties have been on notice of the potential use of a frame unit with SCR technology since early May 2013, when the issue was first raised. In fact, Multiple Intervenors assert that stakeholders specifically requested that NYISO staff and consultants develop cost estimates with respect to the frame unit with SCR for consideration of all parties and, ultimately, the NYISO Board. They argue further that

¹⁴ Indicated Suppliers December 20, 2013 Protest (quoting Services Tariff § 5.14.1.2.1).

¹⁵ Entergy December 20, 2013 Protest at 34.

Docket No. ER14-500-000

- 9 -

NYISO informed all parties that those cost estimates would be included in NYISO staff's draft recommendations.

23. Multiple Intervenors argue that the actions taken by the Board are well within their authority pursuant to section 5.14.1.2.9 of the Services Tariff, which provides that the Board has the authority to review and adjust the ICAP demand curves recommended by NYISO staff. Moreover, they argue, section 5.14.1.2.11 of the Services Tariff establishes that the ICAP demand curves filed for Commission approval be those demand curves approved by the NYISO Board. Multiple Intervenors argue that the Board ensured the procedural rights of all parties by establishing the additional process not required by the Services Tariff and that the Commission has previously held that such procedural safeguards are just and reasonable and would not result in overturning a decision by the NYISO Board to review and consider supplemental information during the latter stages of the ICAP demand curve Reset process.¹⁶

b. Answers

24. NYTOs argue in their answer that the Board had a sufficient record and was fully authorized under the Services Tariff to approve the F class frame unit with SCR as the proxy unit for NYC, LI, and the G-J Locality without further due diligence, based on the stakeholder comments received in early October and the entire record before it. With the additional analysis by Brattle, stakeholders were given additional time to address an issue that had been pending for months. Multiple Intervenors also argue that the process undertaken by NYISO was open, fully transparent, consistent with the requirements of the NYISO Services Tariff, and ensured the due process rights of all interested parties.

25. With respect to claims that NYISO lacked tariff authority to select the F class frame with SCR or to retain Brattle/Licata, NYISO asserts that while section 5.14.1.2 of the Services Tariff establishes an extensive, and collaborative stakeholder process for the selection of independent consultants to develop recommended ICAP demand curve parameters, the NYISO Board is responsible for deciding what is to be proposed to the Commission. NYISO states that protestors' reading cannot be squared with: (1) the fact that section 5.14.1.2.9 of the Services Tariff empowers the Board to "review and adjust" consultant and staff recommendations after hearing stakeholder arguments; (2) section 5.14.1.2.11's unambiguous statement that NYISO will file demand curves "as approved by the ISO Board of Directors"; and (3) various other provisions in the tariffs, NYISO's

¹⁶ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064, at P 24 (2008) (2008 Demand Curve Order).

Docket No. ER14-500-000

- 10 -

organic agreements, and Commission precedent that make independent Boards ultimately responsible for decision making in ISOs/RTOs.¹⁷

26. NYISO also responds that the Board already had a sufficient basis to exercise its authority to select the F class frame with SCR before it retained Brattle/Licata in that certain stakeholders had made a strong case for its adoption, the Commission had authorized PJM to use a similar technology for a similar purpose, and certain units in California (Marsh Landing units) had been in commercial operation for nearly six months, with all available information indicating that they were satisfying all applicable permit requirements. NYISO adds that, given both the commercial operation of the four Marsh Landing units under California's stringent emissions requirements and the significant fixed cost savings associated with the F class frame with SCR, the Board did not believe it could reasonably ignore these considerations. NYISO adds that it would be without reason or merit to interpret the Services Tariff to deprive the Board of its ability to conduct additional due diligence.

27. NYISO asserts that the Board went above and beyond the tariff's requirements by providing the greatest practicable transparency and opportunity for stakeholder input on the report produced by Brattle/Licata. Further, NYISO states that because Brattle/Licata was not retained for the purpose specified in section 5.14.1.2.1 of the Services Tariff, its selection was not subject to the request for proposal requirements.

28. NYISO also responds that allegations of bias in favor the F Class Frame with SCR technology are unsupported and irresponsible. NYISO states that it is a not-for-profit, impartial, and independent entity and Brattle/Licata personnel testify to the fact that they were directed to provide an independent review of a single issue, and to base their judgment on the ascertainable facts. NYISO's filing includes supplemental affidavits from Mr. Chupka and from Mr. Licata that state that further review and additional discussions with SCR manufacturers have reinforced and confirmed their initial judgment regarding the viability of the F class frame with SCR technology.¹⁸

¹⁷ NYISO cites to the 2008 Demand Curve Order where the Commission accepted modifications to NERA recommendations. 2008 Demand Curve Order, 122 FERC ¶ 61,064 at PP26, 31, 60-61.

¹⁸ NYISO January 9, 2014 Answer, Supplemental Licata Aff. ¶¶ 36-39 and Supplemental Chupka Aff. ¶ 5.

c. Commission Determination

29. Several protestors object to the process by which NYISO chose to use the F class frame unit with SCR as the proxy unit technology for NYC, LI, and the G-J Locality. While we agree with the protestors that NYISO's change to the unit it selected could have been done in a timelier manner, we find that NYISO did not violate its Services Tariff. We agree that the process by which NYISO develops the demand curves is designed to allow for meaningful stakeholder review and input. The Board ordered NYISO to conduct further due diligence in response to stakeholder input. This action allowed the Board and stakeholders to review all of the most up-to-date information possible and gather more stakeholder input to this information before the Board made its final decision. The Services Tariff gives the Board clear authority to accept or reject any of the recommendations in the NYISO Staff Report based on the information available to them at the conclusion of stakeholder arguments.¹⁹ In this instance, the Board gave stakeholders an additional opportunity to provide input before acting on the choice of a proxy unit. Therefore, we find that the Board acted within its authority to conduct additional due diligence regarding the viability of the F class frame unit with SCR and their authority to reject a recommendation contained in the NYISO Staff Report. Furthermore, we note that stakeholders have the opportunity to pursue their positions in the instant proceeding and indeed have done so. We therefore conclude that stakeholders' procedural rights have not been violated. While we conclude that NYISO did not violate the Services Tariff or the procedural rights of stakeholders, we suggest that in the future NYISO perform this process with more transparency in order to avoid any appearance of impropriety and allow adequate time throughout the entire process for stakeholders to voice their opinions and concerns.

2. Selection of the F Class Frame Unit with SCR for Long Island, NYC, and G-J Localities

a. NYISO's Proposal

30. NYISO states that after reviewing the Brattle Report and the stakeholder response, NYISO staff concluded that an F class frame with SCR was a technically and economically viable proxy unit technology for the following reasons: (1) the Brattle Report distinguished the failed F class frame with SCR installations from today's technology,²⁰ which is more advanced; (2) the Brattle Report provided additional

¹⁹ Services Tariff Section 5.14.1.2.11.

²⁰ NYISO states that the Brattle Report determined that the prior failures were due to poor engineering design specifications, inappropriate construction, and the use of a catalyst that is now off the market.

information regarding the continued successful operation and compliance with applicable environmental requirements by an existing F class frame unit with SCR, the Marsh Landing Station in California; and (3) Marsh Landing now has three additional months of operating data and this nearly equals the data that existed on the LMS100 at the time that the Board concluded that the LMS100 was viable in the 2007 demand curve reset,²¹ thus, according to NYISO, the reasons the Commission relied upon then, i.e., that it was a combination of mature and proven technologies, support finding that the F class frame with SCR is viable today; (4) the Brattle Report detailed other examples of hot temperature SCR applications functioning well in the electric generating sector; (5) NYISO's reliance on data from Marsh Landing is consistent with Commission precedent;²² (6) NYISO has more reason to believe that there is significant commercial interest in developing F class frames with SCRs than was the case at the time that the NERA/S&L Report was completed; and (7) the NERA/S&L Report, the Brattle Report, Meehan Affidavit, and Chupka Affidavit all affirm that there is no question that the F class frame with SCR units are the lowest fixed cost and highest variable costs option and are thus "economically viable" in NYC, LI, and the G-J Locality.

31. NYISO states that given its agreement with Brattle/Licata that the F class frame with SCR is technically and economically viable, it should be the peaking unit for NYC, LI, and the G-J Locality. NYISO adds that the total capital cost of the LMS100 proxy plant is approximately \$100 million more than the F class frame with SCR in all zones. NYISO asserts that Brattle's conclusion that SCR and F class frame units are two mature, proven technologies that can readily be integrated with proper engineering and design is reasonable and well-supported. NYISO states that the F class frame with SCR satisfies the Services Tariff requirement "as the unit with technology that results in the lowest fixed costs and highest variable costs among all other units' technology that are economically viable," and the Board accepted NYISO's recommendation.

b. Comments and Protests

32. EPSA, Entergy, NY-SEA, Ravenswood, IPPNY, and Indicated Suppliers protest NYISO's proposal to select a proxy unit that utilizes the F class frame unit with SCR technology for the Long Island, NYC, and G-J Localities. Protestors state that the

²¹ NYISO states that in the 2007 ICAP Demand Curve reset NYISO proposed and the Commission ultimately accepted the LMS100 as a proxy unit, even though certain stakeholders protested to the Commission that the viability of the LMS100 had not yet been demonstrated.

²² NYISO Filing at 15 (citing *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,299, at P 22 (2008)).

Docket No. ER14-500-000

- 13 -

Services Tariff requires utilization of an economically viable technology and a proven technology²³ and they argue that NYISO has failed to show that the F class frame unit meets these requirements.

33. Protestors disagree with NYISO's reliance on the Marsh Landing Station as evidence of viability. First, IPPNY and Indicated Suppliers argue that the Brattle Report failed to provide critical operating data related to Marsh Landing, such as "ammonia slip" data, which is a necessary prerequisite for a finding that the F class frame with SCR is economically viable. IPPNY states that while Marsh Landing operated 82 hours during the peak operating season in the third quarter of 2013, peaking plants in New York are expected to operate more than 1500 hours during the peak season. Second, IPPNY argues, the Marsh Landing operating data is not probative because that data is not representative of the hours that a peaking plant in New York is expected to operate. Third, IPPNY contends that the NOx emissions data from Marsh Landing suggest that the SCR systems are already struggling to perform based on the fact that their nitrogen oxide or NOx emissions are close to or above the permit limit about half of the time. Fourth, IPPNY argues that the Brattle Report fails to provide any data regarding the amount of excess ammonia that exits the stack at Marsh Landing, which IPPNY explains, is a key indicator of SCR performance.

34. Indicated Suppliers assert that consistent with the NERA Report and the NYISO Staff Report, an F class frame with SCR does not, at this time, meet the Services Tariff requirements for a proxy unit. Indicated Suppliers state that the conclusions in these reports reflect concerns regarding the feasibility of operating an SCR with high exhaust temperatures, the short track record of Marsh Landing, and the prior failures of F class frames with SCR in Kentucky and Puerto Rico.

35. Indicated Suppliers argue that in the second demand curve reset order,²⁴ the Commission approved the LMS100, which while not yet widely adopted, had sold eleven units and had five units in the NYISO interconnection queue. By contrast, Indicated Suppliers argue, NYISO has not provided any evidence that there have been any purchases of additional F class frame units with SCR or that anyone is even taking initial steps to install such technology in southeastern New York.

²³ Entergy December 20, 2013 Protest at 32; IPPNY December 20, 2013 Protest at 2 (citing 2008 Demand Curve Order, 122 FERC ¶ 61,064, at P 23 (2008)); NY-SEA December 20, 2013 Protest at 7-8.

²⁴ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064 (2008).

Docket No. ER14-500-000

- 14 -

36. Indicated Suppliers also argue that there is no indication that NERA/S&L engaged in any analysis of whether an F class frame with SCR is capable of switching fuel within the prescribed 45-second timeframe. Indicated Suppliers point out that although the Licata affidavit states that he was able to verify the ability to switch fuels with the manufacturer, Siemens, there is no documentation to support the claim. Indicated Suppliers assert that NYISO has not been able to point to an F class frame, with or without SCR, in operation anywhere that has demonstrated the 45-second fuel switching capability, and as a result, suppliers argue, the Commission should find that NYISO has not adequately proven that the F class frame with SCR is a viable proxy unit for NYC and the G-J Locality.

37. Indicated Suppliers further argue that NYISO's cost calculations for an F class frame with SCR are unsupported and erroneous. First, Indicated Suppliers argue that even if an F class frame with SCR facility is feasible, it is difficult to verify the accuracy of the cost estimates. Also, Indicated Suppliers assert, certain aspects of the cost analysis could not be completed due to the lack of available data and the fact that NYISO staff was not recommending the F class frame with SCR as the proxy unit at the time of the initial report. Second, Indicated Suppliers argue, NYISO has provided no evidentiary support that the 2 percent adder represents the actual cost of the fuel switching capability.

38. Third, Indicated Suppliers argue that the weighted average cost of capital estimates prepared by NERA/S&L that were used in developing net CONE did not account for the risk premium that would be required if an F class frame unit with SCR were used. Indicated Suppliers cite reasons why a developer of an F class frame with SCR will face more risk than with an LMS100 or an F class frame without SCR. These risks include the uncertainty of the technical feasibility of this technology, increased risk of cost overruns related to NYISO estimates, the fact that the F class frame is less efficient and less flexible than the LMS100, and the additional risk from future capital cost reductions and maturation of the technology. Indicated Suppliers argue that while the Brattle Report concluded that S&L's cost estimates for the F class frame unit were acceptably accurate and conservatively high, Indicated Suppliers do not believe there was enough information for S&L or Brattle to make such a conclusion.

39. In addition, protestors reject the Brattle Report's reliance upon operating data from two other examples of hot temperature SCR applications, the McClellan power plant and the McClure power plant, both located in California. Indicated Suppliers and IPPNY argue that reliance on the McClellan and McClure power plants is misplaced because they are GE Frame turbines of a different class that are much smaller and have much lower exhaust temperatures than the F class frame unit. Also, IPPNY argues, the McClellan power plant only operates approximately 50 hours per year, which is not representative of the thousands of hours a year a peaking plant in New York is expected to operate.

40. Entergy and Indicated Suppliers argue that NYISO has failed to prove that the F class frame unit with SCR is a proven technology because evidence demonstrating successful operation of the F class frame technology on oil or gas is not available. Entergy notes that this finding was echoed in the analysis conducted by NERA/S&L along with NERA/S&L's recommendation that the LMS100 unit with SCR technology be used as the proxy unit for the three NYISO Localities.²⁵ Indicated Suppliers state that NYISO's November 29, 2013 filing does not identify a single facility, existing or planned, that combines an F class frame with SCR and the required dual fuel capability, much less with the additional capability required in New York. Indicated Suppliers also state that in NYC, in order to maintain reliability, Con Edison requires that fuel switching be automatically accomplished within just 45 seconds of experiencing low system gas pressure or loss of gas.²⁶ They question whether the F class frame with SCR is capable of switching fuel within the prescribed 45-second timeframe and assert that there is no documentation provided to support Licata's statement that it verified such a capability through conversations with the manufacturer. They argue that there is no indication that NERA/S&L engaged in any analysis of whether an F class frame with SCR is capable of switching fuel. Further, IPPNY states that the Brattle Report provides no evidence regarding whether an F class frame unit with SCR burning fuel oil can control NOx emissions to levels required under New York State law. The SCR system at Marsh Landing, IPPNY argues, is distinguishable because it burns natural gas only.

41. IPPNY also observes that the emissions limits in NYC, LI, and the G-J Locality are more stringent than the emissions limits applicable to all of the generating plants that were reviewed in the Brattle Report.

42. IPPNY argues that the fact that S&L confirms that the F class frame with SCR has a significant cost advantage yet there are no orders being placed for this type of unit, means that the market has rejected the F class frame with SCR because its fixed cost advantage is outweighed by its operational uncertainty. This is in stark contrast, IPPNY points out, to the position of the LMS100 in 2007, which had many units sold and in the queue.

43. On the other hand, Multiple Intervenors argue that the Commission should adopt NYISO's proposed proxy unit technology. For the G-J Locality, LI, and NYC demand curves, Multiple Intervenors argue that the F class frame unit merely represents the

²⁵ Entergy December 20, 2013 Protest at 33.

²⁶ Indicated Suppliers December 20, 2013 Protest at 26 (citing Consolidated Edison Co. of New York, Inc., EP-7100-10. Transmission Planning Criteria, § 1.13 (November 22, 2011)).

Docket No. ER14-500-000

- 16 -

combination of two very mature and viable technologies. They argue that the Commission previously recognized the viability of the technology when it approved PJM's proposal to base its demand curves on the very same technology.²⁷ Multiple Intervenors assert that the NOx emissions limits that apply in California, where the Marsh Landing Station operates, are equivalent to the most restrictive limits that apply in New York (2.5 tons per year), and that the Marsh Landing Station has demonstrated its ability to maintain emissions within the applicable permit limitations.

44. Multiple Intervenors assert that the Commission has previously determined that an alternative technology with a limited historical track record may qualify as a proxy unit in New York in connection with the 2008-2011 demand curve reset process. In 2007, they argue, NYISO proposed the use of the LMS100 technology despite the fact that only a single LMS100 unit was in commercial operation in the U.S. They explain that when the Commission approved the use of the LMS100 unit during the previous reset process for 2008-2011, only a single such unit was in operation, and had only operated 587 hours, compared to the over 4000 hours of operational experience for the three frame units with SCR technology facilities. Multiple Intervenors contend that these figures demonstrate the viability of the frame unit with SCR technology and prove it should be used as the proxy unit for NYC and the G-J Locality.

45. Moreover, Multiple Intervenors argue that the Brattle Study distinguishes the prior examples of SCR deployments with frame units that were relied upon by NYISO consultants in recommending not using the technology for purposes of this ICAP demand curve reset process. Specifically, they explain, NYISO consultants noted the unsuccessful deployments of the technology at the Central Cambalache facility in Puerto Rico and the Riverside Generating Company facility in Kentucky. Multiple Intervenors state that that Brattle Report distinguishes those unit failures for several reasons. First, they explain, those projects were undertaken in the late 1990s and early 2000s and thus do not represent the technological advancements over the intervening years, which are reflected in newer installations like the Marsh Landing Station. Additionally, the Brattle Study found that those unsuccessful deployments were the result of improper design and/or use and therefore do not undermine the viability of the technology as a general matter.

46. Multiple Intervenors further argue that selection of the frame unit with SCR technology is also mandated by section 5.14.1.2 of the Services Tariff, which requires the peaking unit to be one with the lowest fixed costs and highest variable costs. They argue that this is because the fixed costs of the LMS100 are 70 percent higher than the fixed costs of the frame unit with SCR in the Lower Hudson Valley and more than 60 percent

²⁷ *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).

Docket No. ER14-500-000

- 17 -

higher than a frame unit with SCR in New York City. They contend that continued reliance on LMS100 technology would result in artificially inflated ICAP demand curves for the G-J Locality and NYC and impair their ability to provide appropriate price signals regarding the need for, and value of, additional capacity within those regions.

47. Multiple Intervenors explain that the Marsh Landing Station was constructed as a result of California's statutorily mandated long-term resource planning requirements, which, although it is a very different resource planning paradigm than that of New York, it does not undermine the significance of the Marsh Landing Station in demonstrating the commercial viability of the frame unit with SCR technology. In response to the argument that the risk of the Marsh Landing Station is less than that of a unit in New York, Multiple Intervenors argue that the Marsh Landing Power Purchase Agreement has a term of only 10 years, compared to the expected operational life of a generation facility, which is likely 30 years or more, meaning the power purchase agreement offsets only a limited portion of the risk that would otherwise be borne by the generator, NRG, had the facility been constructed on purely a merchant basis. In conclusion, they assert that the competitive procurement process through which the Marsh Landing Station was selected further demonstrates its viability.

48. The NYPSC argues that the use of an F class frame unit with SCR technology is appropriate in light of strict environmental regulations in NYC and the G-J Locality. The NYPSC contends that it is viable technology because the two technologies have been successfully coupled to meet those strict standards, as demonstrated by the successful operation of the Marsh Landing Station in California. The NYPSC also asserts that there is precedent in selecting this technology as a proxy unit in PJM, citing to the fact that PJM bases its demand curves on this same technology.

c. Answers

49. NYTOs argue that it is legally insufficient for the protestors to assert that their preferred proxy unit is better or more appropriate than the one filed by NYISO. They assert that the NYISO proposal is clearly within the zone of reasonableness outcomes and the protestors have not met their burden to establish that the rates produced by NYISO's proxy units are unjust and unreasonable.

50. Multiple Intervenors argue that given its demonstrated technical viability, selection of the frame unit with SCR is mandated by section 5.14.1.2 of the NYISO Services Tariff. The fixed costs of the LMS100 are more than 70 percent higher than the fixed costs of the frame unit with SCR in the Lower Hudson Valley, and more than 60 percent higher than a frame unit with SCR located in New York City. They further argue that continued reliance on the LMS100 technology would result in artificially inflated ICAP demand curves for the G-J Locality and NYC capacity regions and significantly impair the ability of such ICAP demand curves to provide appropriate price signals regarding the need for, and the value of, additional capacity within such regions.

Docket No. ER14-500-000

- 18 -

51. NYISO asserts that claims that Brattle/Licata did not have sufficient time to prepare a reliable analysis are inaccurate and misleading. NYISO adds that, in contrast to NERA/S&L, Brattle/Licata focused on a single issue and was able to build on the work of NERA/S&L. According to NYISO, Brattle/Licata approached the exhaust temperature issue as a primary question for their evaluation and also more closely investigated the causes of the failed SCR applications in Kentucky and Puerto Rico with an effort to determine if those failures were caused by inherent technical challenges for SCR presented by the F class frame turbines and how SCR and catalyst may have subsequently evolved to address these issues. NYISO asserts that the successful operation of the four Marsh Landing units is relevant in this proceeding and there is ample data showing that the units have been meeting their permit requirements going back to their initial startup.²⁸ NYISO states that Marsh Landing complied with permit conditions, with NOx emissions of 2 ppm demonstrated.²⁹ With respect to ammonia slip data,³⁰ NYISO states that the data provided shows ammonia slip values well below the 10 ppm levels specified in the Marsh Landing air permit.³¹

52. NYISO responds to protestors' assertion that the McClellan and McClure facilities are not valid references for the viability of the F class frame with SCR and that neither is an F class frame. NYISO asserts that both are clearly relevant to the engineering design issues of operating high temperature SCR applications, including those with dual fuel capability. Further, according to NYISO, Mr. Licata provides additional information showing that there are multiple SCRs on frame units in the United States and Japan that have operated for years above 900 degrees Fahrenheit.

53. Further, the Supplemental Licata affidavit describes the numerous design flaws and engineering failures that contributed to the problems at the Kentucky facility and why it is reasonable to conclude that the various errors would not be repeated today.

²⁸ NYISO specifies that this includes EPA data from the commercial operation of the first unit in May 2013 through the end of September 2013 as well as compliance testing data going back to January 2013. NYISO adds that although the facility did not run frequently in the third quarter, there is nothing to suggest this is attributable to SCR performance but rather to a lack of demand for the units' output at the time.

²⁹ The Supplemental Licata Affidavit cites a report submitted to the California Air Pollution control Board's Bay Area Air Quality Management District on June 6, 2013 (Compliance Report).

³⁰ See IPPNY December 20, 2013 Protest at 16-17.

³¹ Supplemental Licata Aff. ¶ 36

54. NYISO also argues that economic viability is not necessarily the same as widespread market acceptance but rather the term refers to technologies that can supply capacity and energy to the market and that while S&L believes that the F class frame should not be found to be viable until at least twelve months of operating data was available, the Services Tariff imposes no such requirement. NYISO states that other parties isolate individual factors that the Commission considered in its orders accepting the LMS100, but, according to NYISO, there is, at a minimum, as much reason to conclude that the F class frame with SCR is economically viable today as there was for the LMS100 in 2007-2008.³² NYISO states that according to IPPNY consultant Mr. Younger, NYISO should err on the side of selecting a proxy unit that is known with certainty to be economically viable in order to avoid the alleged risks that the cost of market suppression and out-of-market subsidies will be borne by consumers. NYISO responds that the Services Tariff does not allow, and does not require, NYISO to mitigate the risk of market suppression by a bias toward more expensive proxy units and higher demand curves. Further, according to NYISO, Mr. Younger's argument fails to recognize the risks associated with selecting a proxy unit that reflects an unrealistically high cost of new entry.³³

55. NYISO argues that its cost calculations for the F class frame with SCR were accurate, well-supported, and consistent with calculations approved in prior ICAP demand curve reset orders. It also argues that there is no need to include an additional risk premium in the capital costs for the F class Frame with SCR because this is not a "first-of-a-kind" technology.

56. NYISO responds to the assertion by Indicated Suppliers that the Marsh Landing units and other F class frames with SCR are unable to switch from firing natural gas to firing ultra-low sulfur diesel within 45 seconds, a requirement established by Consolidated Edison for all units interconnected in New York City. NYISO provides the Licata affidavit, including an email from a Siemens engineer, attesting to the fact that the Siemens turbine could meet the 45-second requirement.

³² NYISO January 9, 2014 Answer at 24.

³³ NYISO states that ICAP demand curves that significantly exceed the actual cost of new entry in a Locality could result in the construction of more capacity in that Locality than actually require, and such an overbuild, would artificially increase the excess capacity of any other Localities in which the Locality was nested and in the NYCA as a whole.

Docket No. ER14-500-000

- 20 -

d. Commission Determination

57. We find that NYISO's proposal to use the F class frame unit with SCR technology peaking unit for developing the capital cost estimate for NYC, LI, and the G-J Locality is reasonable. With regard to this choice, protestors first argue that the dual fuel requirement in NYC and proposed for the G-J Locality undermines the viability of the frame unit with SCR to serve as the proxy unit in these Localities. On the record before us, NYISO states that there is no technical difference between the design of SCR technology for burning both gas and oil for the LMS100 and a frame unit.³⁴ NYISO's technical expert concludes that performance of the SCR burning Ultra Low Sulfur Diesel (ULSD) can be expected to be equivalent or even better than its performance achieved burning natural gas.³⁵ It is true that the Marsh Landing units do not have dual fuel capability. However, NYISO's consultant points out that the designer of the SCR technology for Marsh Landing stated that the SCR design "would not have to change if it were to burn ULSD."³⁶ Therefore, we find that NYISO's conclusion that an F class frame unit with SCR will be able to comply with dual fuel requirements is a reasonable one.

58. Protestors including Entergy, EPSA, IPPNY, and Indicated Suppliers argue that there is insufficient industry experience to conclude that the F class frame with SCR is a viable technology. However, as stated by Multiple Intervenors and the NYPSC, through September 2007, the Marsh Landing units nearly equaled the operation of the LMS100 unit that provided an adequate basis upon which the Commission concluded such technology was viable in the 2008-2011 demand curve reset. NYISO and commenters also cite the McClellan and McClure power plants, which are Frame units equipped with SCR technology. These units provide more than 4,000 hours of additional operating experience. McClellan and McClure power plants are not F class units and they are smaller than the F class frame unit, but they are evidence of SCR technology working as intended on a Frame unit. The Commission does not look for a minimum number of hours in order to determine whether a technology is considered viable. In this case, there is a difference of opinion as to whether the Marsh Landing Station provided enough hours, and we find the record of evidence presented in support of the frame unit with SCR is adequate in order to find that NYISO reasonably concluded that the F class frame with SCR is a viable technology and able to serve as the proxy unit in NYC, LI, and the G-J Locality.

³⁴ Licata Affidavit at 11.

³⁵ *Id.* at 11-12.

³⁶ *Id.*

Docket No. ER14-500-000

- 21 -

59. Protestors further argue that the examples of failed units are probative to determine that the F class frame with SCR is not a viable technology. We disagree. NYISO and their consultants distinguished these units from the technology in question in this proceeding. The Brattle Report attributed the failed incidents to outdated technology and poor engineering design and NYISO states that technology has advanced since those failures and there is now evidence of successful high and mid-high temperature SCR applications. We believe that NYISO sufficiently distinguished the failed units in Puerto Rico and Kentucky, both of which occurred over 10 years ago,³⁷ in order to reasonably determine that these failed units did not have a bearing on whether an F class unit with SCR would be able to successfully operate today.

60. Protestors also argue that because the F class frame unit with SCR does not have proposed units in the queue, it is not considered commercially accepted, and is therefore not a viable option. We find that this argument is misplaced. The Commission stated in the 2008 demand curve reset that the Services Tariff does not specify a definition of “economic viability.”³⁸ An economically viable technology must be physically able to supply capacity to the market, but other than this requirement, the Commission stated that economic viability determinations are a “matter of judgment.”³⁹ NYISO states that it believes that an F class frame unit with SCR could be “practically constructed” in southeastern New York, and that it would supply both energy and capacity economically into the market. NYISO also states that the F class frame unit with SCR satisfies the five criteria that NERA/S&L uses to determine viability.⁴⁰ While protestors argue that

³⁷ The Cambalache Unit in Puerto Rico was fitted with SCR technology that failed to operate as expected from 1999 to 2001. The failures were attributed to catalyst poisoning arising from a grade of fuel oil which did not meet the manufacturers’ requirements. The Riverside Facility in Kentucky was fitted with SCR in 2001 and was not successful. This failure was attributed to improper installation and engineering. Brattle Report at 15-16.

³⁸ *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,299, at P 20 (2008).

³⁹ *Id.*

⁴⁰ See Supplemental Chupka Affidavit at P 6 (citing NERA/S&L Report at 18). The five criteria that NERA uses to determine viability are: (1) The technology can comply with applicable Federal and New York State environmental requirements; (2) The technology is commercially available, i.e., it is not in a pilot or demonstration phase of development, and it has been successfully operated to generate electricity; and it is replicable; (3) The technology is utility plant scale, i.e., it can be interconnected at transmission rather than distribution voltages; (4) The technology is available to most

(continued...)

Docket No. ER14-500-000

- 22 -

“market acceptance” is material to the question of economic viability, we find that NYISO’s method of judging economic viability is a reasonable one. NYISO provided information sufficient to conclude that the F class frame unit with SCR can be practically constructed in each Locality and is economically viable. We find that there is enough information in the record to conclude that NYISO’s proposal to use the F class frame unit with SCR as the proxy unit in NYC, LI, and the G-J Locality is a reasonable one.

3. Selection of the F Class Frame Unit Without SCR for NYCA

a. NYISO’s Proposal

61. NYISO’s proxy plant recommendation for the NYCA is the F class frame with dry low NO_x combustion for NO_x emissions control and a cap on operating hours. NYISO asserts that the cap on annual operating hours prevents the facility from having to conduct an analysis under the Clean Air Act and it could therefore be permitted in the NYCA region while meeting all emissions requirements. NYISO adds that this has been the proxy plant in the NYCA for multiple prior demand curve resets. The Board accepted the NYISO staff recommendation.

b. Comments and Protests

62. The NY-SEA Group, IPPNY, and Indicated Suppliers protest the NYISO proposal’s choice of proxy unit for the NYCA Locality. The NY-SEA Group, IPPNY, and Indicated Suppliers assert that developers would not be willing to develop an F class frame unit without SCR in the NYCA Locality due to environmental permitting and commercial risks and, as a result, the proposed proxy unit for the NYCA Locality cannot be considered “economically viable” and cannot be constructed.

63. Specifically, the NY-SEA Group and IPPNY argue that the F class frame unit without SCR cannot be accepted by the Siting Board under New York State’s Article 10 permitting process that requires a cumulative air quality impact analysis to determine compliance with the 1-hour NO₂ National Ambient Air Quality Standards, as well as Article 10’s Environmental Justice requirements.⁴¹ The NY-SEA Group notes that power

developers, i.e., there are no commercial terms restricting the ability of a developer to acquire or license the technology and fuel for the technology is not restricted or limited in availability; and (5) The technology is dispatchable by the NYISO to meet the daily or peak load demands. It has peaking or cycling characteristics and is capable of cycling off during off-peak hours on a daily basis. The technology can be started and achieve minimum load within an hour.

⁴¹ NY-SEA Group December 20, 2013 Protest at 16.

plants without SCR technology have not been permitted in New York State since 1993 and thus, claims that permitting of a generator in the NYCA Locality without an SCR to minimize NOx emissions is “improbable, if not impossible.”⁴² The NY-SEA Group argues that requirements such as these add risk for developers by introducing permitting timing issues and as well as affecting the economic viability of the project.

64. Further, the NY-SEA Group asserts that the proposed proxy unit for the NYCA Locality is not likely to comply with the applicable Greenhouse Gas Best Available Control Technology (BACT) determination requirements under the Federal Clean Air Act.⁴³ The NY-SEA Group contends that NYISO would have to limit operation of the proposed proxy unit further from 950 hours/year to roughly 781 hours/year in order to stay below the major source threshold for greenhouse gases and avoid triggering a BACT analysis.⁴⁴ The NY-SEA Group states that this further limitation would also reduce the proposed unit’s capacity factor by 2 percentage points, as well as bring about other economic and financing obstacles.

65. The NY-SEA Group also asserts that NYISO has failed to consider potential upcoming state and federal regulations which have a direct impact on the economic viability of a new unit within a 20-year investment cycle.⁴⁵ As an example, the NY-SEA Group states that the U.S. Environmental Protection Agency is currently considering amending certain ozone regulations which could result in more stringent state Reasonably Available Control Technology requirements and in turn, existing combustion units would require uneconomic retrofits to lower emissions. The NY-SEA Group states that risks associated with possible retrofits, and other emission controls in the near future will create issues for a developer seeking financing and demonstrate that the proposed proxy unit for the NYCA Locality cannot be considered an economically viable unit.⁴⁶

66. To the extent the Commission does not direct NYISO to select a proxy unit with an unlimited run time, the NY-SEA Group requests that the Commission require NYISO to select a proxy unit that can at least qualify as an Energy Limited Resource in accordance with the Services Tariff. The NY-SEA Group states that the Services Tariff

⁴² *Id.*

⁴³ *Id.* at 19.

⁴⁴ *Id.* at 20.

⁴⁵ *Id.* at 21-22.

⁴⁶ *Id.* at 22.

Docket No. ER14-500-000

- 24 -

requires that an Energy Limited Resource must be able to operate for at least four consecutive hours each day of the year or at least 1,460 hours/year.⁴⁷ The NY-SEA contends that a selected proxy unit must be capable of operating enough hours to qualify, at a minimum, as an Energy Limited Resource.

67. The NY-SEA Group requests that the Commission reject the F class frame without SCR for the NYCA Locality and instead approve NERA/S&L's recommendation of the LMS100 unit with SCR as the proxy unit.⁴⁸ In the alternative, the NY-SEA Group requests that the Commission set these issues for a full evidentiary hearing. Also in the alternative, the NY-SEA Group requests that the F class frame unit with SCR be utilized in the NYCA Locality.⁴⁹

68. Multiple Intervenors and the NYPSC support the proposal to use an F class frame unit without SCR in NYCA. The NYPSC asserts that this is the most economically viable technology for this region. Multiple Intervenors assert that the only substantive difference between the last reset and the present one is the level of emissions limitations, i.e., the implications of the 40 tons/year of carbon dioxide or CO₂ emissions limitation, which was not in effect during the last reset process.⁵⁰ They argue that even with this change, consultant's modeling indicates that the average annual economic dispatch of the unit would be minimally impacted (with dispatch ranging from 982 hours to 1025 hours),⁵¹ which demonstrates the continued viability of the non-SCR proxy unit for purposes of the present reset. They argue that, given all of this information, the frame unit without SCR is clearly a viable technology and, as required by the NYISO tariff, is clearly the technology that results in the lowest fixed costs and highest variable costs: the LMS100's fixed costs are nearly double the fixed costs of the frame unit without SCR.⁵²

⁴⁷ NY-SEA Group December 20, 2013 Protest at 26.

⁴⁸ *Id.* at 28.

⁴⁹ *Id.*

⁵⁰ Change from 100 tons/year of NO_x to 40 tons/ year. Multiple Intervenors December 20, 2013 Protest at 19-20.

⁵¹ NYISO Staff Recommendation at 14.

⁵² NYISO Staff Recommendation at 18.

c. Answers

69. NYTOs argue that the protesting suppliers have failed to provide any actual evidence that the F class frame unit without SCR is not a viable choice for the NYCA. They further argue that protestors rely on an unproven and speculative assertion that a frame unit without SCR could not be permitted in New York or, even if it were permitted, would not be built due to concerns that future regulatory changes would require modifications that would effectively shut the units down. NYTOs assert that these arguments ignore the due diligence performed by NYISO regarding environmental standards and that speculation about future regulations is inappropriate.

70. Multiple Intervenors argue that capacity suppliers make purely speculative claims as to the manner in which Article 10 theoretically could impact the siting of such a facility in New York, while flatly acknowledging that: (a) no fossil fuel-fired facility, such as the frame unit without SCR, has ever been reviewed under the recently-enacted provisions of Article 10; and (b) no party can accurately predict how the provisions of Article 10 are likely to be applied in practice given the absence of any precedent. They also argue that consideration of the annual operating cap placed on the frame unit demonstrates that it is likely to result in lower CO₂e (a unit of measurement of greenhouse gases) emissions than the LMS100, thereby invalidating any claims that the LMS100 would be required by BACT due to its higher efficiency.

71. NYISO responds that protestors fail to show that the F Class Frame without SCR would be unable to comply with currently applicable environmental regulations. NYISO states that accepting a federally enforceable annual operating limit ensures that the emission of NO_x will be below the applicable regulatory significance levels and allows the “major source” to avoid the installation of state-of-the-art emission control technology. NYISO states that it confirmed with the Division of Air Resources of the New York State Department of Environmental conservation that this would be a legitimate permitting approach. NYISO states that it also analyzed the compliance of the F class frame without SCR with New York’s CO₂ performance standards for major electric generating facilities and confirmed that it would comply.⁵³

72. NYISO states that the possibility that potential future environmental regulation might impact the long-term operational viability of the unit does not suffice to rebut NYISO’s conclusion based on known facts that the F class frame without SCR will be viable through the three-year ICAP demand curve reset period. NYISO adds that for this

⁵³ NYISO states that it confirmed that the permitting of the F class frame without SCR would not be obstructed by a BACT determination because there is no commercially available post-combustion control technology for CO₂.

Docket No. ER14-500-000

- 26 -

and previous ICAP demand curve reset studies, environmental control assumptions for the proxy unit have been based on the regulations currently in force, as it is impossible to know what regulatory requirements will be in the future and what controls might be needed to meet them.⁵⁴ NYISO also rejects the argument that Article 10 of the New York Public Service Law would be an insurmountable hurdle for the F class frame without SCR because, according to NYISO, is based on speculation and a misreading of Article 10. NYISO also states that the NY-SEA Groups argument that the proxy unit could not comply with the one-hour NO₂ standard when modeled with nearby facilities is speculative as these units are more readily able to demonstrate compliance with the one-hour NO₂ standard during start-up than units with higher combustion NO_x emissions that rely on SCR systems for additional NO_x control.

73. NYISO further states that the NY-SEA Group's concern that the F class frame without SCR may not be an eligible "Energy Limited Resource" is misplaced. First, according to NYISO, the Services Tariff does not require Energy Limited Resource status for the proxy unit or for a unit to sell capacity in the NYISO market. Second, the limit on the proxy unit's operating hours is not significantly less than the average annual expected estimated dispatch hours for this type of unit,⁵⁵ which indicates the unit would not need to participate in NYISO's energy markets as an Energy Limited Resource in order to comply with its operating limits.

d. Commission Determination

74. We are not persuaded by NY-SEA's, IPPNY's, or the Indicated Suppliers' arguments that the frame unit without SCR is not economically viable because of potential future emissions regulations. While there is always a risk that regulations will change in the future, we cannot base the finding of viability on speculation that the EPA or New York State regulators will act at some point in the future. A demand curve reset process takes place every three years so that changed circumstances, such as new regulations can be taken into account. A future reset process would be a more appropriate forum to consider any future developments.

⁵⁴ NYISO January 9, 2014 Answer at 30.

⁵⁵ NYISO states that the average annual expected estimated dispatch hours for a peaking unit ranges from 982 to 1025 hours. The average consists of units with annual operations that are well under this level as well as units with operations well in excess of 1075 hours per year. The proxy unit's annual operating limitation is 950 hours. NYISO Answer at 34 (*citing* NYISO November 29, 2013 Filing, Attachment IV at 14).

75. With regard to whether the frame unit without SCR can meet emissions requirements and satisfies the Services Tariff requirement of being the lowest fixed cost, highest variable cost unit that is economically viable, we find that it does. The NY-SEA Group argues that the F class frame unit without SCR will not be able to comply with the BACT emission rates required under the Clean Air Act's New Source Review requirements. NYISO states that accepting a federally enforceable annual operating limit ensures that the emissions of NOx will be below the applicable regulatory significant levels (i.e., 40 tons per year) and allows the "Major Source" to avoid the installation of state-of-the-art emission control technology necessary to meet BACT/LAER emission rates typically required under the Clean Air Act's New Source Review preconstruction permitting requirements. We agree. IPPNY and the NY-SEA Group also argue that Article 10 of the New York Public Service Law would preclude the development and siting of the F class frame unit without SCR. NYISO states that this is a new law so the manner in which it would apply to the F class frame unit without SCR is purely speculative at this point. However, as NYISO states, Article 10 requires that, if the facility is likely to result in "any significant and adverse disproportionate environmental impact," the developer must identify specific measures it will take to avoid that impact. NYISO states that the F class frame unit without SCR was designed to comply with such regulations. We are persuaded by the argument and believe that with the cap on operating hours, NYISO has reasonably chosen a proxy unit that best fits the requirements of a peaking unit while taking into account all current environmental regulations.

76. Therefore, NYISO's determination that the frame unit without SCR is economically viable for use as the proxy unit in NYCA is reasonable. NY-SEA also argues that the frame unit without SCR cannot be chosen as the proxy unit because it does not qualify as an Energy Limited Resource. We find that this argument is irrelevant as to the question of what the proxy unit technology should be because there is no such requirement in the Services Tariff.

77. While there are obvious differences of opinion as to what the appropriate proxy unit technology should be for NYCA, there is enough information in the record from NYISO and NERA/S&L for the Commission to conclude that NYISO acted reasonably in proposing an F class frame unit without SCR as the proxy unit in NYCA.

B. Need for Dual Fuel Capability in the G-J Locality

1. NYISO's Proposal

78. NYISO states that in the prior ICAP demand curve reset it was assumed that only the NYC peaking plant would require dual fuel capability. In the current reset, NERA/S&L determined that dual fuel capability was also required for the G-J Locality. The NYISO Staff Report agreed with this conclusion and the Board accepted the NYISO Staff Report's recommendation.

2. Comments and Protests

79. Multiple Intervenors, NYTOs, and the NYPSC argue that the Commission should reject the proposed dual fuel requirement assumption for the proxy unit for the G-J Locality. They assert that NYISO disregards the fact that a generation facility's direct connection to a natural gas pipeline, thereby bypassing the local distribution system, would render any such dual fuel capability unnecessary. Moreover, they observe the generation projects proposed in the NYISO interconnection queue to be added to the Lower Hudson Valley clearly demonstrate that a new natural gas fired facility would be highly unlikely to connect directly to the local distribution system and, instead, would connect directly to a pipeline. The NYPSC cites, for example, the prospective Cricket Valley Energy Project that is seeking to locate in the G-J Locality as a gas-only unit connected directly to the interstate pipeline. Further, NYTOs assert that neither NYISO's interconnection requirements nor its capacity market rules require generators to have dual fuel capability, and there is currently no pending proposal to create such a requirement.

80. Multiple Intervenors further argue that small peaking facilities, in contrast to larger combined-cycle baseload units, would expect to operate on a fairly limited basis and are not heavily reliant on energy and ancillary services revenues to justify their economic viability. In fact, they argue, the analysis demonstrates that the expected annual energy and ancillary services revenue offset for a peaking unit in the Lower Hudson Valley is approximately 50 percent less than the expected offset for a combined-cycle facility in the region. Therefore, they assert, a peaking unit does not possess the same incentive to electively implement dual fuel capability and would be unlikely to do so for economic reasons.

81. In contrast, IPPNY asserts that the consultants and NYISO staff properly concluded that the proxy unit for the G-J Locality must be equipped with dual fuel capability. IPPNY states that both Con Edison's and National Grid's gas tariffs require dual fuel capability to qualify for transportation service. IPPNY asserts that NYISO's approach is reasonable in that new generators in the G-J Locality will install dual fuel capability rather than pay extraordinary rates to secure firm interstate pipeline capacity. IPPNY also argues that as reliance on natural gas as the predominant fuel for generators continues to grow, the proxy unit must include dual fuel capability to be viable. IPPNY also believes that NYISO was correct to require dual fuel capability because the G-J Locality is a highly constrained part of the state with growing concerns about the adequacy of electric system and gas system coordination and the electric system's flexibility to address gas shortages. Entergy also notes its support of the NYISO determination that the proxy unit for the G-J Locality be equipped with dual fuel capability.

Docket No. ER14-500-000

- 29 -

a. Answers

82. NYISO states that proxy units in the NYC, LI, and G-J Locality would be subject to the dual fuel capability requirement as a contingency in the event of a system loss of gas supply if the operators purchase gas pursuant to a tariff or a local distribution company. NYISO adds that the Commission should accept NYISO's dual fuel assumption in order to expand the options for the economical siting of the proxy unit because without this capability, the unit could not be on the network of a local distribution company and would have to seek a site within a reasonable distance from an interstate pipeline, obtain firm pipeline capacity from that pipeline, and construct a lateral pipeline to connect to the interstate pipeline at a cost of \$2-3 million a mile. Further, according to NYISO, natural gas peaking contracts are not a viable option for the proxy units because these types of contracts have limited availability, are typically not available to units the size of the proxy unit, and often include a provision that requires the purchaser to re-supply the gas purchased on this basis, often within a short period of time.

3. Commission Determination

83. We find that the NERA/S&L determination and NYISO's proposal to assume dual fuel capability in NYC, LI, and the G-J Locality is a reasonable one. NERA stated that while new entrants locating outside NYC and LI have the option of connecting directly to interstate gas pipelines, recently installed and proposed gas-fired generating units in and around NYC have opted for and announced they will both directly interconnect to the interstate pipeline and install dual fuel capability.⁵⁶ While NYTOs, NYPSC, and Multiple Intervenors argue that it is unreasonable to assume that a generator constructed in the G-J Locality would interconnect to the local distribution system, NYISO and their Consultant believe otherwise. They assert that, because obtaining new firm gas transportation would be expected to be expensive, for a peaker, *i.e.*, a unit without a high capacity factor, a new peaking unit would realistically choose dual fuel capability over primary firm pipeline capacity. We agree. If a proxy unit did not have dual fuel capability, it could not be sited in the network of a local distribution company. The unit would then have to find a site that was close enough to an interstate pipeline and pay fees to obtain firm capacity and to build pipeline in order to connect. NYISO states that these costs could be prohibitively expensive and that the incremental costs of dual fuel capability would be more economical than the estimated cost of interconnecting to an interstate pipeline.⁵⁷ For these reasons, and the fact that reliance on natural gas as the

⁵⁶ NERA/S&L Report at p. 42, fn. 39.

⁵⁷ NYISO Answer at 36.

Docket No. ER14-500-000

- 30 -

predominant fuel for generators continues to grow, we find that NYISO's assumption of dual fuel capability is a reasonable one.

C. New York City Property Tax Abatement

1. NYISO's Proposal

84. NYISO states that the New York State Legislature enacted legislation in May 2011 that provided property tax abatements of 100 percent of the abatement base for the first 15 years to some electrical generating facilities located in NYC that are either peaking units, as defined by the NYISO tariffs, or units certificated before April 1, 2015 that average no more than 18 run hours per start annually. NYISO states that NERA/S&L indicated that the F class frame unit with SCR meets the hourly run time start criteria for tax abatement and that it is reasonable to assume that a peaking unit in NYC that is completed for operation during the period covered by this demand curve reset would have received its construction permit prior to April 1, 2015. Therefore, NYISO agreed with NERA/S&L's conclusion that the effect of the tax abatement should be accounted for in the determination of the Net CONE for the proxy unit in NYC. The Board accepted the NYISO Staff Report's recommendation.

2. Comments and Protests

85. Indicated Suppliers argue that the proposed ICAP demand curves for NYC are improperly based on the assumption that the existing property tax abatement for electric generating facilities in NYC will continue through the entirety of the current reset period, i.e., through April 30, 2017. Indicated Suppliers argue that assuming the New York Legislature will extend the existing property tax abatement is at odds with the 2011 demand curve reset order,⁵⁸ where the Commission ordered NYISO to exclude tax abatement from its calculation of NYC Net CONE because the law at that time meant that tax abatement was "discretionary" and "not a matter of right."⁵⁹ Indicated Suppliers argue that because the availability of property tax abatement and the extension of the existing program will be entirely at the discretion of the New York legislature, the Commission must ensure that the ICAP demand curves adopted in this proceeding reflect existing law, not speculation about what the New York legislature may or may not do in the future.

⁵⁸ *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058 (2011).

⁵⁹ *Id.* at P 88.

Docket No. ER14-500-000

- 31 -

86. Conversely, Multiple Intervenors and the NYPSC argue that the Commission should adopt the proposed treatment for the New York City tax abatement. They assert that because the proxy unit is assumed to operate during the entirety of the three year period encompassed by the current reset process, and it typically takes two years for new generation facilities to be constructed, to be operational as of May 1, 2014 (the beginning of the 3-year demand curve reset period), the proxy unit would have to obtain a building permit by the April 1, 2015 deadline, and therefore, it would be eligible for the 15-year tax abatement.

87. Multiple Intervenors along with the NYPSC also anticipate that the abatement will be extended in the near future. Multiple Intervenors explain that a measure to extend the current expiration was approved by the New York Legislature earlier this year, but was vetoed by Governor Cuomo because the bill expanded the current tax abatement instead of merely extending it. They state that Governor Cuomo indicated that he would sign a bill that extended the programs without the expansion provisions.

a. Answers

88. Multiple Intervenors assert that regardless of whether the current abatement is eventually extended, the proxy unit for the NYC ICAP demand curve would qualify to receive the as-of-right tax abatement so long as it obtains a building permit prior to April 1, 2015 or in the event that a building permit were not required, commences construction prior to April 1, 2015. By definition, one of those preconditions would have to occur in this case, thereby ensuring the eligibility of the NYC ICAP demand curve proxy unit for the tax abatement.

89. NYISO argues the inclusion of the assumption of NYC property tax abatement is reasonable because it is very likely that the abatement will be legislatively extended, and even if the abatement program is not extended, a unit that has been completed and is in commercial operation during the period in which the ICAP demand curves will be in effect would have necessarily received its permit in time to qualify for the existing abatement.

3. Commission Determination

90. We find that NYISO was reasonable in concluding that the property tax abatement should be assumed in developing the proxy unit Net CONE in NYC. We find it reasonable to conclude that a generator operating during the three year period encompassed by the current reset process (May 1, 2014 through April 30, 2017) would have to obtain a building permit well before the April 1, 2015 deadline in order to be operational by the start of the 3-year demand curve reset period, i.e., May 1, 2014.

91. The issue of whether the tax abatement is extended is irrelevant to the applicability of the abatement to this proceeding because the proxy unit for the NYC ICAP demand

Docket No. ER14-500-000

- 32 -

curve would have to have obtained a building permit prior to the April 1, 2015 deadline of the existing statute in order to be constructed and in service for the 3-year demand curve reset that begins May 1, 2014. Therefore, the proxy unit qualifies for the abatement regardless of whether such abatement is ultimately extended.

D. Payments in Lieu of Taxes

1. NYISO's Proposal

92. NYISO states that NERA/S&L recommended a uniform property tax rate in all regions of the state other than NYC of 0.75 percent. This rate, NYISO explains, takes into account the many projects in other jurisdictions that have been able to negotiate agreements on payments in lieu of taxes (PILOT) at rates substantially lower than the originally recommended rate of 2 percent. NYISO agreed with the recommendation and the Board accepted the NYISO Staff Report's recommendation.

2. Comments and Protests

93. IPPNY argues that NYISO erred in modeling the levelized carrying charge with the assumption that the agreed upon tax level will continue for the entire life of an asset. IPPNY asserts that agreements on payments in lieu of taxes typically last for 15 or 20 years at which point the facility goes on the general tax rolls. IPPNY contends that NYISO's error results in understating the levelized fixed charges for anything beyond the normal 15 to 20 year agreement. IPPNY urges the Commission to require NYISO to correct this error.

3. Commission Determination

94. We accept NYISO's proposal to use a uniform tax rate of 0.75 percent in all regions of the state except NYC. We reject IPPNY's argument that NYISO's consultants erred in assuming a 0.75 percent level of taxes over the life of the plant in their model for levelized carrying charges. NERA/S&L found that four projects were able to negotiate PILOT agreements at rates substantially below rates paid in other parts of the state. Three of these projects had escalating tax rates over twenty years. NYISO states that the consultants used a rate that was a balance between the reduced rates that some tax jurisdictions used and the full tax rates from others.⁶⁰ The 0.75 percent rate that the consultants arrived at was not an average tax rate, but rather a rate that the consultants determined in order to accurately represent the fact that some generating facilities have reduced tax rates with the localities, while others do not. NYISO states that the property

⁶⁰ NYISO Staff Report at 19.

Docket No. ER14-500-000

- 33 -

tax rate of 0.75 percent does, in fact, take into account the fact that property taxes will increase after the PILOT Agreements end contrary to IPPNY's assertion. While IPPNY may have estimated a different rate than the one proposed by NYISO, it has not shown that NYISO's or NERA/S&L's assumptions were unreasonable. We find that NYISO's proposal is a reasonable means of using a uniform tax rate while accurately representing available data from all jurisdictions in the state.

E. Development of Levelized Carrying Charges

95. Regarding the levelized carrying charge rate used in developing the levelized Net CONE, NYISO explains that NERA/S&L determined that the rate should be developed using the same methodology used for the previous demand curve reset study, with the exception that the NYC property tax abatement is more appropriately treated as a levelized carrying charge than as a fixed operations and maintenance cost because the tax varies over the plant's useful life (i.e., variable cost).

1. Return on Equity (ROE)

a. NYISO's Proposal

96. NYISO proposes a 50/50 ratio of debt to total capital, a 7.0 percent interest rate on debt, and a 12.5 percent ROE in determining the 9.75 percent weighted average cost of capital. NYISO's proposed ROE was calculated using the Capital Asset Pricing Model (CAPM) (Pricing Model), which, based upon the consultants' original inputs, yielded an average expected ROE of 11.29 percent.⁶¹ Then a 1.21 percent calibration adjustment was added based on the consultants' conclusion that the result yielded by the Pricing Model analysis appeared too low relative to allowed regulated rates of return. Additionally, the consultants noted the potential for the Federal Reserve quantitative easing program to change the historical relationship between government debt costs and market equity costs in a way that may distort the Pricing Model results. Accordingly, the consultants recommended, and NYISO concurred, that a calibration adjustment was necessary to increase the original Pricing Model results.

97. The NYISO Staff Report determined that the cost of capital parameters provided a reasonable balance between what the Pricing Model yields and what other regulated

⁶¹ NERA/S&L Report at pp. 83-88. NYISO estimated this 11.29 percent ROE using a risk-free rate of 3.68 percent (based upon 30-year U.S. Treasury bonds), an equity risk premium of 6.62 percent (based upon historical returns from 1926-2011), and an equity beta of 1.15 (based upon the publicly-traded stocks of merchant generators).

Docket No. ER14-500-000

- 34 -

utilities have been allowed and therefore agreed with NERA/S&L's recommendations. The NYISO Board accepted this conclusion.

98. The consultants calculated the calibration adjustment by applying the Pricing Model to a sample of regulated utilities and comparing their expected returns under the Pricing Model to the returns actually allowed by regulators. The consultants determined that the Pricing Model yielded an average expected ROE of 7.72 percent for regulated utilities overall and 7.65 percent for New York utilities, while the allowed ROEs for regulated utilities overall are between 9.5 and 10.0 percent and in New York State are slightly below average at 9.3 percent. The consultants applied the calibration adjustment to increase the Pricing Model return to reflect the difference between the observed Pricing Model returns and the lower-end regulated ROE of about 9.0 percent.⁶²

99. NYISO further contends that the equity market premium can deviate from its long-term average, which is likely why the Pricing Model yields ROEs for regulated entities lower than the prevailing ROEs allowed by regulators. As evidence for this deviation, NYISO cites the fact that quantitative easing is keeping long-term government bond yields low, but does not similarly reduce equity costs, meaning the equity market risk premium input used in the Pricing Model will be understated when it is based on the long-term historic average. This bias, NYISO asserts, must be corrected for by utilizing the 1.21 percent calibration adjustment to the Pricing Model results.

100. NYISO contends the calibration adjustment is not a change to NYISO's ROE calculation, but is instead an additional step necessary to conform Pricing Model results to data observed from current financial market conditions.

b. Comments and Protests

101. Multiple Intervenors assert that the Commission should direct NYISO to reduce the ROE input to the 11.29 percent actually calculated by the consultants' original conclusions. The NYPSC asserts that the ROE should be set no higher than 11.3 percent. In support, protestors assert that the ROE calculated by the Pricing Model adequately accounted for the financial risk associated with investment given current market conditions. Therefore, Multiple Intervenors and the NYPSC contend, the calibration adjustment amounts to a duplicative accounting of that risk.

102. Multiple Intervenors further assert that NYISO's proposed ROE value is a significant departure from ROE values recently approved for New York utilities by the NYPSC. Multiple Intervenors note that ROE values approved by the NYPSC and/or

⁶² NYISO November 27, 2013 Filing, Meehan Aff. ¶ 21.

recommended by NYPSC staff for adoption in currently active rate proceedings range from 8.7 to 9.4 percent. Multiple Intervenors further note that the 11.29 percent ROE initially calculated by the Pricing Model was 219 basis points above the 9.1 percent average approved/recommended ROE for regulated utilities in New York. Moreover, the NYPSC argues, the calibration adjustment would add over 100 basis points to the Pricing Model's calculation.

103. The NY-SEA Group argues that NYISO's financing assumptions and the 12.5 percent ROE are impractical in determining the economic viability of the proposed proxy units and will give rise to inefficient capacity price signals needed for new development and thus, the reliability of the system. Similarly, Indicated Suppliers contend that the weighted average cost of capital estimates did not account for the risk premium that would be required because the F class frame unit with SCR is a comparatively new technology when compared to the LMS 100 technology. Moreover, Indicated Suppliers argue that the risks associated with this newer technology bring into question whether financing could be secured at a cost that would make the project economically viable.

c. Answers

104. NYISO states that the protestors incorrectly conclude that the 1.21 percent increase was an arbitrary and unjustified adder. NYISO asserts that the addition of 1.21 percent was not to account for risk but, rather, was an adjustment that calibrates the ROE that resulted from the Pricing Model analysis to the regulated ROE, which is much higher. NYISO states that its calibration adjustment is conservative and a higher adjustment could easily be justified, as the regulated ROE in New York is among the lowest in the country.

d. Commission Determination

105. We find that NYISO's proposed ROE value of 12.5 percent is adequately supported by substantial evidence. NYISO argues that unique current conditions in financial markets created a downward bias in the CAPM results, necessitating a calibration adjustment of 1.21 percent to the calculated return on equity of 11.29 percent. Specifically, NYISO argues that the result yielded by the CAPM analysis "appeared potentially too low relative to regulated rates of return and as the CAPM is subject to bias at times during the interest rate cycle" because of the potential impact on the historic relationship between the market returns for government debt and common equities.⁶³ Given the recent trends of near-historic low yields for long-term U.S. Treasury bond

⁶³ NYISO November 27, 2013 Filing, Meehan Aff. ¶ 20.

Docket No. ER14-500-000

- 36 -

rates, the CAPM's input for the "risk-free" rate, we find that it is a reasonable assumption that the current equity risk premium (which is added to the risk-free rate to calculate the cost of equity data point that determines the slope of the CAPM curve) exceeds the 86-year historical average used as the consultants' CAPM input. The current low treasury bond rate environment creates a need to adjust the CAPM results, consistent with the financial theory that the equity risk premium exceeds the long-term average when long-term U.S. Treasury bond rates are lower than average, and vice-versa. Further, we disagree with the protestors who assert that the calibration adjustment amounts to a duplicative accounting of the risks associated with merchant generation, because the adjustment is tied to how the unique current conditions may distort the results derived from CAPM generally. Contrary to protestors' assertions, NYISO does not argue that the risks of merchant generators, as measured by the beta input, are understated. Instead, NYISO suggests that due to the abnormally low interest rate environment, the CAPM line itself should be redrawn at a higher level and with a steeper slope by raising the equity risk premium input. However, we do not agree that the higher ROE argued for by some generators due to the changed reference unit technology is consistent with the application of the CAPM model.

2. Amortization Period

a. NYISO's Proposal

106. NYISO states that NERA/S&L revisited the methodology used in previous ICAP demand curve resets, in that it did not strictly assume a fixed amortization period. Specifically, NYISO states that its methodology considers the risk of excess capacity, the slope of the ICAP demand curves and the slope of the energy and ancillary service revenue function. NYISO asserts that a primary benefit of this methodology is that it automatically adjusts the reference price to reflect the slope of the demand curve and therefore can account for revenue volatility associated with alternate slopes.⁶⁴ Accordingly, NERA/S&L recommended an economic analysis period of 25 years for the LMS100 unit and of 20 years for the F class frame, a reduction from the periods used in the two previous demand curve resets, which were 30 years. NYISO states that the shortened time period accounts for numerous risks.⁶⁵

⁶⁴ NYISO November 27, 2013 Filing at 24 (citing Meehan Aff. ¶ 14).

⁶⁵ NERA Report at 83. NERA/S&L note that the results produced using the recommended shape and slope of the Demand Curves show implied amortization periods of 17.5 years in NYCA and LI, 18.5 years in the G-J Locality, and 14.5 years in NYC. The 25 and 20 year economic analysis period imply these amortization periods used to establish reference prices. For example, were the zero crossing point closer to the origin,

(continued...)

Docket No. ER14-500-000

- 37 -

107. First, NYISO states NERA/S&L identified the possibility of technological change, embodied by the recommended change of peaking unit technology, which could result in lower than expected revenue. Such abrupt changes in technology are not accounted for in the 0.25 percent per year adjustment in the current ICAP demand curve model. NYISO notes the technological change from the higher cost LM 6000 to the LMS100 resulting from the 2008 demand curve reset process, as evidence of such an abrupt technology change.⁶⁶ NYISO asserts that in the face of such technology changes, investors will want to analyze a recovery period or economic life that is shorter than the physical life of the plant to allow for the potential reduced revenue from competing against new technology.

108. Second, NYISO states that the shortened economic analysis period reflects the possibility of increased environmental regulations. NYISO specifically notes potential for carbon regulations that will apply to what are now new units and will more heavily impact higher heat rate alternatives. NYISO states that this is a consideration in using a shorter, 20-year economic analysis period for the less efficient frame units than the more efficient aeroderivative and combined-cycle units.

109. Third, NYISO states that the demand curve revenue model reflects only a limited set of uncertainties, or deviation from forecast conditions. NYISO further states that the F class frame technology is a less efficient and higher emitting technology than the aeroderivative or combined-cycle units, which increases the risk that generator performance will not be as modeled, and that therefore a shorter amortization period of 20 years is necessary to attract investment. Lastly, NYISO notes that PJM has used an economic analysis period of 20 years for purposes analogous to those cited by NYISO in its own capacity market design.⁶⁷

b. Comments and Protests

110. Multiple Intervenors contend that NYISO and NERA/S&L provide little justification for reducing the 30-year amortization period approved in previous demand curve reset processes. Multiple Intervenors allege that NERA/S&L have articulated only two possible justifications for the proposed 10-year reduction. First, Multiple Intervenors point to NERA/S&L's vague reference to the need to address the risk of merchant generation investment through a reduced amortization period. Multiple Intervenors

the amortization periods would decrease, raising the reference price to reflect added merchant risk.

⁶⁶ NYISO November 27, 2013 Filing, Meehan Aff. ¶ 17.

⁶⁷ NYISO November 27, 2013 Filing, Meehan Aff. ¶ 19.

Docket No. ER14-500-000

- 38 -

contend that this risk is already addressed by the “risk premium” achieved by the NERA/S&L’s proposed ROE value that exceeds 300 basis points.

111. Multiple Intervenors next point to NERA/S&L’s assertion that the level of excess capacity assumed in the demand curve presents an additional risk that the amortization period should reflect. Multiple Intervenors and the NYTOs argue that the level of excess capacity is prescribed by the Services Tariff, meaning NYISO’s proposal to adopt the NERA/S&L methodology is a tariff violation because NYISO appears to be revising the Services Tariff by adjusting the amortization period. Multiple Intervenors further argue that in the last demand curve reset, NYISO revised section 5.14.1.2 of the Services Tariff to prescribe the level of excess capacity assumption to be used consistently throughout the development of the demand curves going forward. The Commission approved those revisions, and specifically noted that NYISO’s proposal “reduced uncertainty and added clarity to the triennial demand curve reset process.”⁶⁸ Moreover, Multiple Intervenors assert that the Commission observed that NYISO’s excess capacity revisions established that the proxy unit would be used as the basis for the excess capacity levels consistently throughout the analyses used to develop the demand curves.⁶⁹ Multiple Intervenors contend the Commission’s findings dictate that, absent a proposed change to the Services Tariff and subsequent Commission approval, the Commission should reject NYISO’s proposal to significantly reduce the assumed amortization period for each demand curve.

112. The NYTOs allege that the technological progress assumptions made by NERA/S&L, which the NERA/S&L now cite as a basis for reducing the amortization period, are identical to those in the last demand curve reset process, during which no reduction to the amortization period occurred. The NYTOs further argue that NERA’s own model indicates that each of the plants evaluated will remain economic beyond the 20-year life cycle, and further that simple cycle units older than 40 years are common in New York City. Beyond that, the NYTOs allege, NYISO’s proposal ignores the fact that market participants are willing to pay significant amounts for generators that are more than 20 to 25 years old, demonstrating the unreasonableness of assuming that the energy or capacity revenues realized more than 20 or 25 years after a generator enters service have little value. Therefore, the NYTOs contend, it is unreasonable to assume, as NYISO’s proposal does, that a developer could not finance the significant residual value of a plant beyond 20 years.

⁶⁸ *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,192, at P 63 (2011).

⁶⁹ *Id.* P 64.

Docket No. ER14-500-000

- 39 -

113. If NYISO elects to retain its 20-year amortization period assumption, the NYTOs argue, it should revise the residual value assumption for the proxy units to reflect that a 20-to-25-year old generator is more valuable than a 30-year old generator. The NYTOs contend that NYISO's proposal does not properly recognize the additional revenues the proxy unit will achieve over the remainder of its useful life, as demonstrated by the recent announcement that US Power Generating Company will be acquired by Tenaska Capital Management, implying a value of \$475/kW for US Power Generating Company's generation. The NYTOs lastly contend that they estimate NYISO's proposed reduction of the amortization period could increase capacity costs by as much as \$500 million over the three-year period.

114. The NYPSC argues that NYISO's proposed reduction to the amortization period from 30 to 20 years is unsupported and inconsistent with the operational experience of actual generators in New York State. The NYPSC specifically notes the operational experience of the Siemens SGT6-5000F fleet leader, which has over 104,000 hours of operation. Even with a 40 percent capacity factor, the NYPSC contends, the Siemens unit could run for 30 years and well beyond, assuming proper maintenance.

115. IPPNY contends that NYISO's proposed amortization period of 20 years may be appropriate if all of the following conditions were satisfied: (1) NYISO revises its buyer-side mitigation measures to increase the default offer floor from 75 percent to 100 percent of the Mitigation Net CONE value; (2) the average excess capacity level is modified as discussed in detail in IPPNY's comments; and (3) the demand curve is based upon a reasonable estimate of the cost of a mature and readily available technology. Otherwise, IPPNY asserts that an 18-year assumed capital recovery period for the G-J Locality and NYCA and a 14-year period for NYC are required to give the units a more reasonable period to recover their costs after accounting for the near certainty of uneconomic entry.

c. Answers

116. NYISO states that the decision to adopt an amortization period of 20 years for the frame units and 25 years for the LMS100 unit was explained at length in the Meehan affidavit submitted with NYISO's original filing. According to NYISO, no party provides compelling evidence in support of a different amortization period. Further, according to NYISO, the amortization periods cannot be viewed in isolation of all the parameters considered in the ICAP demand curve reset process. Moreover, NYISO states, the amortization period is not the same as the expected physical lifespan, but rather represents the timeframe over which a reasonable investor expects to recover a return on a potential investment, given a neutral set of assumptions about market conditions. NYISO asserts that, as Mr. Meehan explains, the risk that a developer will not recover his investment during the amortization period is balanced by the potential that revenues will accrue after the amortization period concludes.

Docket No. ER14-500-000

- 40 -

d. Commission Determination

117. We accept NYISO's proposed 20-year amortization period as reasonable in light of the inherent technological, market, and environmental risks in investing in the proposed proxy unit. Relative to the previous LMS100 proxy unit, the proposed proxy unit has greater market risk since it has a more limited ability to earn energy market revenues and is thus largely dependent on capacity revenues for cost recovery. In the NYCA the proposed proxy unit with no SCR has restricted run hours that are likely to become more restricted should environmental standards tighten. Retrofitting such a unit may not be economic with existing technology. We conclude that adjusting for these environmental risks and other market risks is appropriate and that a 20-year amortization period is one element of the demand curve reset process that takes these factors into account. For the other capacity zones, we conclude that the shorter amortization period is a reasonable basis for accounting for certain technological risks, such as the added uncertainty of the effect of dual fuel requirements and limited operating experience of SCRs with F-class frame units.

118. It is the Commission's responsibility to determine whether these judgments and the resultant outcomes fall within a zone of reasonableness and we conclude that, in this case, they do. While there are several ways to arrive at demand curve adjustments that fall within that zone, we conclude that, with respect to the amortization period adjustments, NYISO has reasonably selected a 20-year amortization period over which to measure the economic life of the proxy unit. Although a proxy unit may remain economic beyond that period, we find that it is reasonable to expect that significant investment would be required to achieve this outcome and that it would not be appropriate to reflect these additional investment decisions into the demand curve reset process.

3. Original Issue Discount

a. NYISO's Proposal

119. NYISO states that after it issued the NYISO Staff Report, IPPNY argued that some explicit original issue discount costs must be included in the financing charges. NYISO explains that a bond is issued at a discount to its par value (and thus includes an original issue discount) if its coupon rate is less than the return the market requires, given the riskiness of the debt. NERA estimated a 7 percent debt interest rate from the yield to maturity values of currently outstanding debt issues. Were those debt issues to include an original issue discount, the associated cost would be reflected in the yield to maturity values. However, NYISO explains, none of the debt issues analyzed by NERA included an original issue discount, so there was no associated cost embedded within the yield to maturity values. Thus, NERA concluded, an original issue discount is not necessarily typical of all debt financings, contrary to IPPNY's assertion, and a further adjustment for it would not be appropriate. The NYISO Staff Report reflected NERA's conclusion and

Docket No. ER14-500-000

- 41 -

the Board concurred with the NYISO Staff Report's conclusion not to include any original issue discount costs in the financing costs.

b. Comments and Protests

120. IPPNY argues that the Commission should require NYISO to correct NERA's debt financing cost assumptions to include original issue discount costs in the calculation. IPPNY states that the NERA/S&L report assumed total financing costs of \$5.8 million, which IPPNY asserts, is much lower than recently completed financings of units in New York such as Astoria Energy II and Bayonne Energy Center. IPPNY argues that the cost of debt that is reflected in the demand curve model should be consistent with real world experience and thus should be calculated using financing costs that approximate the properly adjusted average of recently completed financings in New York, some of which have the original issue discount costs imbedded in the cost of debt.

c. Commission Determination

121. We accept NYISO's proposal to exclude any original issue discount costs from financing cost assumptions. IPPNY argues that, based on the financing fees from Astoria and Bayonne, some original issue discount costs should be added to the assumed financing costs in order for the financing costs to be consistent with real world experience. However, as NYISO explains, NERA analyzed debt issues in NYISO and concluded that an original issue discount is not typical of the debt financings in New York.⁷⁰ NYISO further explains that the financing cost for Astoria and Bayonne was higher because the debt and equity issuances for those projects were for substantially larger amounts. For the Astoria and Bayonne projects, the total financing fees were comparable when expressed as a percent of total project debt. We therefore find that NYISO's proposal is reasonable.

F. Regulatory Risk

1. NYISO's Proposal

122. NYISO states that NERA/S&L considered whether a special "regulatory risk" adjustment was necessary. NERA/S&L found that a regulatory risk adjustment was not required for either the demand curve model or in the estimated cost of equity due to the NYISO initiatives to develop tariff revisions that would improve its capacity market power mitigation measures. However, NYISO adds that NERA/S&L recommended that

⁷⁰ NYISO November 27, 2013 Filing, Attachment IV, NYISO Staff Report at 25-26.

Docket No. ER14-500-000

- 42 -

this issue be considered again in future reset processes. The NYISO Staff Report accepted NERA/S&L's conclusion and the Board accepted the NYISO Staff Report's recommendation not to include a special "regulatory risk" adjustment.

123. NYISO adds that the Commission's recently accepted capacity market mitigation measures for the G-J Locality were substantially similar to the established ICAP market power mitigation rules in NYC. Therefore, NYISO contends, it is reasonable to conclude that they are adequate to address the risks that IPPNY would address through an additional risk premium. In addition, NYISO states, the risks facing suppliers were already considered in the development of other ICAP demand curve parameters, e.g., in setting the duration of the amortization period and by making a calibration adjustment to its return on equity estimate to ensure that it appropriately reflected the current market risk premium.

2. Comments and Protests

124. IPPNY argues that the NYISO filing fails to adequately account for the regulatory risks merchant developers face when proceeding with projects in New York State. As an example, IPPNY states that in the NERA/S&L Report, NERA incorporated a separate 10 percent regulatory risk factor to account for the 75 percent of Net CONE offer floor, which could result in capacity prices that never rise above 75 percent of Net CONE. IPPNY explains further that NERA ultimately removed the regulatory risk factor in light of NYISO's efforts to improve mitigation measures in the capacity market. IPPNY disagrees with this conclusion and argues that recent activities demonstrate that incorporating a regulatory risk factor into the demand curve model to address uneconomic entry is required more than ever before, citing recent projects such as the Hudson Transmission Project and the Astoria Energy II generating facility, both of which are supported by long-term power purchase agreements with the New York Power Authority.

125. IPPNY argues that even if NYISO adopts an amendment to increase the offer floor, it is unknown whether the amended mitigation rules will, in fact, prohibit uneconomic entry and the artificial suppression of prices. Specifically, IPPNY believes that the current rules have not adequately stemmed state intervention in NYISO's competitive markets. IPPNY argues that projects supported by long-term above-market contracts with the New York Power Authority (NYPA) as well as subsidized projects that are part of the New York Energy Highway Initiative are examples of uneconomic entry that could suppress market prices and need to be accounted for with a regulatory risk factor.

a. Answers

126. NYISO responds that IPPNY presents no information or evidence that would rebut NYISO's conclusion that the ICAP demand curves are reasonable without including a

regulatory risk adjustment. NYISO reiterates that the Commission has market power mitigation rules in effect and NERA/S&L, in developing the parameters of the new ICAP demand curves, took into account the alleged risks that IPPNY raises. Further, NYISO states that the ICAP demand curve process is not the appropriate vehicle to address IPPNY's claims regarding alleged problems with the NYISO market structure.

3. Commission Determination

We find that NYISO was reasonable in accepting NERA/S&L's recommendation that no additional regulatory risk factor be incorporated into the demand curve parameters. We reject IPPNY's assertion that the market power mitigation measures are inadequate to address regulatory risk. We note that in two recent proceedings involving the potential exercise of buyer side market power, the Commission took decisive action, based on NYISO's existing market power mitigation tariff safeguards, to ensure that uneconomic entry will not occur.⁷¹ Additionally, NYISO has underway three initiatives that further facilitate economic entry including (1) a repowering exemption, (2) a merchant plant exemption, and (3) raising the offer floor under the buyer-side mitigation rules from 75 percent to 100 percent of Net CONE.⁷² While we cannot completely rely on measures that have not yet been implemented, the fact that these measures are underway leads us to believe that NYISO is considering a reasonable, balanced approach to address the risks that IPPNY believes should be reflected in the ROE. Therefore, we agree with NYISO that a regulatory risk adjustment is not necessary at this time.

G. Expected Level of Average Excess Capacity

1. NYISO's Proposal

127. In the most recent demand curve reset order, the Commission directed that net energy revenues be determined at the locational minimum capacity requirements and the NYCA installed reserve margin plus the capacity of the proxy plant. In this proposal, NYISO assumes a one-unit proxy plant. NERA/S&L incorporated that excess capacity level into the development of both expected energy and ancillary services revenues and the Reference Price level used in the proposed demand curves. The NYISO Staff Report agreed with NERA/S&L's calculations and the Board accepted the NYISO Staff Report's recommendation, finding that the NERA/S&L model and its assumptions are reasonable.

⁷¹ See *Hudson Transmission Partners, LLC v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156 (2013); see also *Astoria Generating Company L.P., et al. v. New York Indep. Sys. Operator, Inc.* 139 FERC ¶ 61,244 (2012).

⁷² NYISO November 27, 2013 Filing, Attachment IV, NYISO Staff Report at 23.

Docket No. ER14-500-000

- 44 -

2. Comments and Protests

128. IPPNY argues that the excess capacity levels built into the demand curve model for this reset do not adequately account for risks new entrants might face such as forecast error, fluctuations in Installed Reserve Margin and locational capacity requirements, conservativeness of NYISO planning, and the State's focus on acting to prevent capacity shortages. IPPNY further argues that because NYISO has a directive to implement backstop solutions for possible reliability shortfalls, but no corresponding directive to retire plants producing excess energy, the markets have a clear bias towards carrying substantial excess. IPPNY asserts that the demand curves must recognize this excess in order to achieve their fundamental purpose of inducing new merchant entry when needed.

129. IPPNY also argues that NYISO's proposal to substantially reduce the size of the proxy unit directly affects some of the factors that result in the fluctuations of excess capacity. IPPNY argues that the Commission should direct NYISO to double the excess capacity level for the NYCA locality to reflect that the selected proxy unit is now a single unit rather than the pair of units selected in past resets. IPPNY also requests that in future demand curve resets, the Commission should direct NYISO to adopt the MMU's proposal for setting the average excess capacity level for the demand curves. IPPNY notes that the MMU recommends setting the excess capacity level at 1 percent of the capacity requirement, plus 50 percent of the capacity of the demand curve proxy unit.⁷³

a. Answers

130. NYTOs and Multiple Intervenors argue that granting IPPNY's request that the Commission require NYISO to double the amount of excess capacity that it has assumed for purposes of its NYCA locality analysis would also force NYISO to violate its Services Tariff, which specifies that the amount of excess capacity that NYISO should assume in its analyses should be equal to the amount of capacity provided by the proxy unit. They assert that IPPNY's request disregards the directives issued by the Commission in the last reset process that these analyses use consistent assumptions regarding the amount of excess capacity.⁷⁴

131. NYISO states that it implemented the directive in the Services Tariff in order to develop the level of excess capacity and IPPNY presents no justification for its requested waiver. NYISO adds that the fact that IPPNY disagrees with the results of that

⁷³ IPPNY December 20, 2013 Protest at 54 (*citing* MMU 2012 Report at 55).

⁷⁴ *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,192, at PP 21-25, 28-31 (2011).

application is not sufficient. Nor, according to NYISO, does the Commission's previous acceptance of a higher level of excess mean that the lower level is a result so unjust, unreasonable, or unlawful that it would justify the waiver of a provision of the Services Tariff. NYISO also states that IPPNY's request that the Commission order NYISO to implement the MMU's proposal in future resets is essentially a request to amend the Services Tariff, which should proceed through the stakeholder process.

3. Commission Determination

132. We find that NYISO's use of the prescribed excess capacity assumption was consistent with its tariff requirements and reasonable. In the most recent demand curve reset, the Commission determined how the level of excess capacity would be set. NYISO amended its Services Tariff to prescribe that level. Specifically, section 5.14.1.2 requires that:

[t]he cost and revenues of the peaking plant used to set the reference point and maximum value for each Demand Curve shall be determined under conditions in which the available capacity is equal to the sum of (a) the minimum Installed Capacity requirement and (b) the peaking plant's capacity equal to the number of MW specified in the periodic review and used to determine all costs and revenues.⁷⁵

In its order in the last demand curve reset, the Commission found that this excess capacity assumption takes into account uncertainties regarding load growth and decentralized investment decision making by competing suppliers.⁷⁶ The Commission also stated that the assumptions provide a margin of error to account for load forecasting uncertainties and account for the lumpiness of capacity additions.⁷⁷

133. In the aforementioned demand curve reset, IPPNY made arguments similar to those they make in the instant filing. For example, IPPNY argues about risks regarding fluctuations in the Installed Reserve Margin and uneconomic entry. In the prior Order, the Commission addressed these arguments by stating that IPPNY has not shown how NYISO could predict that changes, if any, will occur in future installed reserve

⁷⁵ NYISO Service Tariff Section 5.14.1.2.

⁷⁶ *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,192, at PP 57-59 (2011).

⁷⁷ "Lumpiness" refers to the fact that entry and exit necessarily occurs in discrete megawatt sizes for each generation technology.

requirements, and how these predictions should be included in the analysis of the demand curve. Then and now, IPPNY's arguments seem to assert that any risks or unaccounted for changes to the market will place only downward pressure on capacity prices, while in reality, such risks could result in the artificial inflation of capacity prices in New York. In the prior reset proceeding, the Commission accepted as just and reasonable an approach to determining the level of excess capacity based on reasoned judgment, and we believe it is appropriate to do so again here.⁷⁸

H. Zero Crossing Point

1. NYISO's Proposal

134. NYISO proposes to maintain the zero crossing points for the existing capacity zones (118 percent for NYC and LI and 112 percent for NYCA) and use a 115 percent zero crossing point for the G-J Locality. NYISO supports these values based on two analyses, as described below, and discussions with stakeholders and the MMU that agreed on a need for further study of the issue.

135. The zero crossing point is the point on the demand curve where additional capacity provides no measurable reliability benefit. Prior to selecting NERA/S&L to conduct the demand curve reset analysis, NYISO engaged FTI Consulting (FTI) to evaluate the design of its capacity markets, including the determination of its ICAP demand curves and alternative zero crossing points. FTI developed reliability-based demand curves using NYISO's Multi-Area Reliability Simulation model that determined the incremental value of capacity by shifting capacity between zones. A comparison of the FTI-developed reliability-based demand curves with NYISO's existing demand curves showed a close correspondence for capacity levels greater than the target requirement. Although existing and reliability-based demand curves were roughly consistent over this capacity range, FTI's analysis supported slightly flatter curves for LI and NYCA and slightly steeper curves for NYC. The MMU recommended a change to the FTI analysis that would consider adding capacity to a particular zone rather than shifting capacity between zones to develop alternative reliability-based demand curves. His preliminary analysis showed that over the capacity range likely to encompass market clearing (100-112 percent of the requirement); the alternative reliability-based demand curves also corresponded to NYISO's existing demand curves.

136. Based on the FTI analysis and a concern to maintain stable market expectations, NERA/S&L recommended changes to the zero crossing points that partially reflected

⁷⁸ See 2008 Demand Curve Order, 122 FERC ¶ 61,064 at P 26; *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,192 at P 60.

Docket No. ER14-500-000

- 47 -

FTI's findings and an initial zero crossing point for the new zone at 115 percent. However, further discussions with stakeholders and the MMU led NYISO to conclude that the analyses conducted thus far did not provide a sufficient basis for altering the zero crossing points for this demand curve reset. Both the FTI and MMU analyses were sensitive to underlying assumptions, and NYISO concluded that the benefits of changing the zero crossing points were ambiguous and might be offset by adding to market uncertainty.

2. Comments and Protests

137. The NYTOs argue that, for the G-J Locality, the zero crossing point should be set to 114 percent of the requirement, consistent with what, according to the NYTOs, is the only analysis that has been performed of the appropriate zero crossing point for that zone. NYTOs assert that the MMU's representative, Dr. Patton's analysis indicates that the zero crossing point should be set at 114 percent of the ICAP requirement for the G-J Locality and there is no analysis supporting any other figure. Dr. Patton found that the marginal impact that additional capacity in the G-J Locality has when the loss of load expectation reaches zero is when the amount of capacity provided in that Locality is about 114 percent of its requirement.

138. Entergy notes its support of NYISO's determination that the zero crossing point for the G-J locality demand curve should be set at 115 percent.⁷⁹ IPPNY also supports NYISO's determination of the zero crossing point. IPPNY asserts that the Commission should find that NYISO properly rejected the NERA Report's flawed recommendation to significantly steepen the NYC demand curve from its current zero crossing point of 118 percent to 116.5 percent. IPPNY argues that the NERA Reports recommendation was flawed in several material aspects including not adjusting financing costs to account for decreased revenue stability, not considering practical implications such as the impact on incentives for retirement or entry of new capacity, considering the zero crossing point in isolation, and the fact that the analysis is sensitive to differing underlying assumptions.

a. Answers

139. NYISO states that it is incorrect to assert that the zero crossing point of 114 percent was recommended by the MMU. According to NYISO, a 114 percent zero crossing point was discussed with stakeholders on August 22, based on the MMU's preliminary results, using a newly proposed methodology and an incomplete data set. NYISO states that the MMU's analysis after receiving the complete data set resulted in a zero crossing point of 114.6 percent. NYISO further states that, in its review of the

⁷⁹ Entergy December 20, 2013 Protest at 35-38.

Docket No. ER14-500-000

- 48 -

various methodologies and recommendations regarding the zero crossing points, NYISO found that the analyses conducted were highly sensitive to methodology, input assumptions, and transmission system topology and NYISO agreed that adopting any methodology to adjust the zero crossing point at this time could result in fluctuations to the recommended zero crossing point at each demand curve reset, introducing undue volatility and uncertainty in the market.

3. Commission Determination

140. We accept NYISO's proposal to use existing zero crossing points for NYISO's demand curves for this reset period. Zero crossing points and reference points determine the slope of the various demand curves. For given reference levels and capacity levels in excess of the ICAP requirement, the existing zero crossing points yield demand curves that reasonably reflect the value of incremental capacity according to the FTI and MMU analyses. We agree with NYISO's judgment that the existing zero crossing points for the existing capacity zones, given the sensitivities in the analyses to underlying assumptions, do not merit changes at this time. We agree with NYISO that while there are many methodologies to determine the zero crossing point, the sensitive nature of these methodologies to different inputs and assumptions warrants hesitation to just choosing one over another. Adjusting the zero crossing point at this time pursuant to a new methodology could result in fluctuations to the recommended zero crossing point at each demand curve reset and possibly introduce uncertainty to the market. We also accept NYISO's proposed 115 percent zero crossing point for the G-J Locality as reasonable. NYISO states in its answer that when the MMU performed its analysis with the complete data set for the G-J Locality, the result was a 114.6 percent zero crossing point. We do not conclude that the MMU's preliminary analysis determining a 114 percent zero-crossing point is sufficient to override NYISO's recommendation of 115 percent.

V. Proposed Phase-in of the Price Impacts of the ICAP Demand Curve for G-J Locality

1. NYISO's Proposal

141. NYISO states that the proposed ICAP demand curve for the G-J Locality would be effective for the start of the 2014/2015 Capability Year, but in order to reconcile concerns regarding its short-term consumer impacts, NYISO is proposing values that are less than the full net CONE of the peaking plant for the first two years of the ICAP demand curves for the G-J Locality. NYISO reiterates the arguments it previously made in a Request for Reconsideration in Docket No. ER13-1380-000 that a phase-in of price impacts is necessary to ameliorate effects on consumers and mitigate what has been described as potential "rate shock." NYISO states that it continues to believe that a properly structured phase-in would not interfere with long-term investment decisions given the

Docket No. ER14-500-000

- 49 -

longer-term revenue forecast horizon typically used by developers so long as a sufficient price signal is present in the third-year of the G-J Locality ICAP demand curve and beyond.

142. NYISO states that for the 2014/2015 Capability Year, the ICAP demand curve is established using the G-J Locality peaking plant net CONE. Under NYISO's proposal, the reference price for the first year would be determined from 76.06 percent of the G-J Locality annual reference value for the peaking plant identified in the Brattle Report.⁸⁰ According to NYISO, that determined value is equal to the annual reference value of the 2014/2015 NYCA ICAP demand curve. Thus, NYISO states, the reference price for Load Zones G, H, and I would be similar to the reference price that would have applied in those load zones but for the creation of the G-J Locality. However, NYISO further states that capacity prices in the G-J Locality are not likely to be the same as those in the NYCA for the 2014/2015 Capability Year because of an anticipated lower level of excess capacity in the G-J Locality than in the NYCA, resulting in higher clearing prices for the G-J Locality. Nonetheless, according to NYISO, the magnitude of the price increase would not be nearly as great as it would be if the full G-J Locality reference value were used.

143. NYISO states that for the 2015/2016 Capability Year, the G-J Locality reference price would be determined from 88.03 percent of the G-J Locality annual reference value, which is equivalent to the average of (a) the proposed NYCA annual reference value escalated to 2015/2016 dollars using the escalation factor proposed for all ICAP demand curves and (b) the annual reference value identified by the Brattle Report for the G-J Locality, escalated to 2015/2016 dollars in the same manner.⁸¹ NYISO states that for the 2016/2017 Capability Year, the proposed G-J Locality ICAP demand curves would be set using 100 percent of the inflation-adjusted annual reference value identified in the Brattle Report.

144. In summary, according to NYISO, the proposed phase-in would reduce the potential price increase of the G-J Locality ICAP demand curves (by comparison to curves based on the full annual reference value) for the 2014/2015 and 2015/2016 Capability Years, while steadily increasing prices each year until the full effect is reached in the 2016/2017 Capability Year. NYISO adds that the actual price impacts for those years would depend upon other factors, particularly changes in supply.

⁸⁰ NYISO states that the 2014/2015 G-J Locality annual reference value is a decrease of 7.10 percent compared to the 2013/2014 NYCA annual reference value.

⁸¹ NYISO states that the proposed annual reference value for the 2015/2016 Capability Year represents an increase of 18.29 percent from Capability Year 2014/2015

Docket No. ER14-500-000

- 50 -

145. NYISO states that it believes the proposed phase-in appropriately balances short-term consumer interests and the need for investment signals to the G-J locality. NYISO states that by the third year of the proposed phase-in, the ICAP demand curve reference price would increase to 100 percent of the escalated annual reference value, and thus, the phase-in would not unreasonably delay the price signals necessary to attract new investment in the G-J Locality. NYISO asserts that the proposed phase-in is just and reasonable and consistent with prior Commission rulings. NYISO adds that rates are just and reasonable so long as they fall within a “zone of reasonableness” that is bounded on the high end by the requirement to protect consumers against exorbitant rates and at the other end by the “investor interest against confiscation.”⁸² NYISO states that based upon the NYPSC’s predicted retail rate impacts, it is concerned that setting the G-J Locality ICAP demand curve using the full net CONE for the peaking plant might result in “exorbitant” short-term consumer impacts in the first two years of this new Locality. NYISO states that it sees little cause for concern that its proposed phase-in would result in “confiscatory” rates. According to NYISO, efficient new capacity would be attracted to the G-J Locality notwithstanding the fact that the proposed reference prices for the first and second years are derived from a value lower than the full net CONE.

146. NYISO states that if the Commission is concerned that the proposed phase-in would conflict with section 5.14.1.2(i) or any other tariff provision, NYISO asks that it waive those provisions. Section 5.14.1.2(i) specifies that the periodic review of revised ICAP demand curves “shall assess” the “current localized levelized embedded cost of a peaking plant in each NCYA Locality, the Rest of State, and any New Capacity Zone, to meet minimum capacity requirements.” According to NYISO, it could be argued that basing the first two years of the G-J Locality ICAP demand curve on a value less than the 100 percent of G-J Locality peaking plant net cost of new entry would be inconsistent with this requirement.

147. NYISO also states that the proposed phase-in would affect the evaluations that NYISO conducts under the buyer-side capacity market power mitigation rules pursuant to Attachment H to the Services Tariff. NYISO explains that the ICAP demand curve is used in both the Part A and Part B exemption tests, to determine the default Offer Floor, and in setting Offer Floors for projects that are subject to mitigation. NYISO requests a limited waiver of the Services Tariff so that rather than utilizing the ICAP demand curves for 2014/2015 and 2015/2016 proposed in this filing when performing the buyer-side mitigation examination of projects in the G-J Locality in Class Years 2011 and 2012 at the time of the completion of the respective Class Years, NYISO would utilize for those

⁸² NYISO November 27, 2013 Filing at 42 (citing *Jersey Cent. Power & Light Co. v. FERC*, 768 F.2d 1500 at 1503 (1985)).

Docket No. ER14-500-000

- 51 -

years the ICAP demand curve information set forth in Attachment X, i.e., the curves based on the full net cost of new entry of the peaking plant for the G-J Locality. NYISO believes that evaluating these projects using ICAP revenues under the Class Years 2011 and 2012 G-J demand curves is more consistent with the intent to examine the overall, long-term economics of an entry decision, rather than using the G-J Locality ICAP demand curves proposed for this filing.

2. Comments and Protests

148. EPSA requests that the Commission reject NYISO's proposed phase-in of the demand curve for the G-J Locality arguing that no supporting analysis has been presented in support of this proposal. EPSA states that the Commission has previously rejected a phase-in in the underlying proceeding establishing the new capacity zone.⁸³ Further, EPSA asserts that the new capacity zone proceeding is the appropriate venue in which the Commission should consider the proposed phase-in of the demand curve of the G-J Locality, given that NYISO has filed a Request for Partial Reconsideration raising the same issue discussed here.⁸⁴

149. Entergy states that NYISO's phase-in request is procedurally flawed. Entergy contends that NYISO is legally barred from proposing to phase in the G-J Locality given that the Commission has fully considered and expressly rejected requests to phase-in the G-J Locality demand curve in the New Capacity Zone Order. Therefore, Entergy argues that NYISO's phase-in request represents a collateral attack on the New Capacity Zone Order.⁸⁵ In addition, Entergy states that NYISO's phase-in request violates the requirements of the Services Tariff which requires that NYISO submit the full net CONE for each demand curve.⁸⁶ Entergy states that NYISO's request to waive these tariff requirements does not meet the Commission's standard for waiver requests.⁸⁷

⁸³ EPSA December 20, 2013 Protest at 7 (citing *New York Independent System Operator, Inc.*, 144 FERC ¶ 61,126 (2013) (New Capacity Zone Order)).

⁸⁴ On October 28, 2013, NYISO filed a Request for Partial Reconsideration of the New Capacity Zone Order.

⁸⁵ *Id.* at 15-19.

⁸⁶ *Id.* at 19 (citing Services Tariff, § 5.14.1.2(i)).

⁸⁷ Entergy December 20, 2013 Protest at 19. Entergy states that NYISO's waiver request (1) is not limited in scope, (2) does not address a concrete problem, and (3) would have undesirable consequences. Entergy explains that if the waiver request is granted, it

(continued...)

Docket No. ER14-500-000

- 52 -

150. Further, Entergy asserts that NYISO's phase-in request fails on its merits. Entergy states that NYISO's reliance on the NYPSC's unsubstantiated retail rate impact calculations to adopt suppressed demand curves for the G-J Locality is unjust and unreasonable given that discounted rates will lead to inefficient outcomes and higher cost impacts on consumers in the long run. Entergy also notes that information regarding possible rate impacts that may occur in the G-J Locality, after establishing the G-J Locality demand curve, have been considered extensively throughout a seven-year time period.⁸⁸ Entergy states that the Commission has previously found in the New Capacity Zone Order that a phase-in would delay efficient investment price signals reflecting the higher net CONE associated with the proxy unit in the G-J Locality.

151. Indicated Suppliers argue that NYISO has failed to establish good cause for the required waiver of section 5.14.1.2 of the Services Tariff and the buyer-side market power mitigation rules in Attachment H of the Services Tariff that would be necessary to implement the phase-in proposal. Indicated Suppliers argue that this requested tariff waiver is procedurally deficient, not of limited scope, does not remedy a concrete problem, and will have undesirable consequences, such as harming third parties.

152. IPPNY argues that NYISO's proposal to phase-in the G-J Locality demand curve must be rejected as a matter of law. IPPNY argues that the Services Tariff only instructs and authorizes NYISO to implement the demand curves set at the net CONE for each respective demand curve that results from the periodic review, and does not grant NYISO the proposed discretion to discount the demand curves. IPPNY asserts that allowing a discount would produce inaccurate market signals and therefore have a profound effect on the proper functioning of electricity markets. IPPNY, like Indicated Suppliers, also argues that NYISO has not met the standard to be granted a waiver of its tariff provisions.

153. IPPNY further argues that NYISO's phase-in request represents a collateral attack on the Commission's August New Capacity Zone Order. IPPNY states that in the New Capacity Zone Order, the Commission specifically considered and rejected the proposed phase-in, stating that it would "delay the capacity market's ability to send more efficient price signals." IPPNY argues that there is no new substantiated information and that NYISO's request to mitigate price impacts to retain customers appears to be politically motivated. IPPNY believes that the Commission should uphold its determination in the New Capacity Zone Order and that whatever the outcome of that proceeding, it remains

would have significant impacts on the New York capacity market by adversely affecting the capacity market clearing prices for the next three years.

⁸⁸ Entergy December 20, 2013 Protest at 25.

Docket No. ER14-500-000

- 53 -

the only proper avenue for NYISO to seek reconsideration of the matter from the Commission.

154. Multiple Intervenors argue that the Commission should approve the proposed phase-in of the G-J Locality ICAP demand curve. They assert that when NYISO first sought to incorporate the ICAP demand curves into its capacity market, the Commission approved its proposal to utilize a three-year phase-in.⁸⁹ Further, they state, the price impacts of the implementation of the G-J Locality are likely to be similar, and may be considerably greater than when the curves were initially implemented. Multiple Intervenors state that although the Commission originally declined to order a phase-in of the G-J Locality, very little information was known as to the likely rate and price impacts upon which the Commission could base a decision. They assert that the proposed phase-in is not anticipated to detrimentally impact the market's ability to send more appropriate price signals to existing or potential capacity supply resources in the Lower Hudson Valley. In fact, they assert, it typically takes two years for new generation facilities to be constructed, the proposed phase-in will send efficient price signals to entities contemplating new investment in capacity and will likely have no impact on the capacity revenues of any party developing new capacity in the G-J Locality. Multiple Intervenors further contend that the enormity of the potential impacts of implementing the new capacity zone ICAP demand curve should not be disregarded, that there is significant risk posed to consumers, and the Commission should act to prevent consumer rate shock by approving phase-in.

155. The NYTOs assert that the proposed phase-in reasonably accommodates competing interests due to the limited term of the three-year demand curve proposal. The phase-in, they argue, will not adversely affect the incentives that the new demand curve provides to construct new generating capacity in the G-J Locality, since it is very unlikely that any new generating capacity built there in response to the price signals provided by the new demand curves, would be in service before the 2016/2017 Capability Year, when the new demand curve would be fully phased in. The NYTOs also state that the Commission has previously approved phase-ins for new market design changes, such as when the first ICAP demand curves in New York were implemented in 2003.

156. The NYPSC argues that a phase-in is necessary to mitigate the price impacts of the implementation of the new demand curve in the G-J Locality. The NYPSC asserts that the Commission should recognize that there are two State transmission initiatives underway that will result in the addition of major transmission facilities in the G-J Locality, significantly easing congestion in that area, and that potential new entrants that

⁸⁹ See *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, at P 6 and fn. 4 (2003).

Docket No. ER14-500-000

- 54 -

will enter the market three or four years from now will not look at the prices from Summer 2014 as a valid and indicative long run price signal. The NYPSC contends that fully implementing the demand curve in the G-J Locality in 2014 will skew short-term prices, and bear no relation to the long-term price signals that the G-J Locality is intended to produce.

a. Answers

157. The NYTOs assert that although the Commission rejected a proposal for a phase-in in the proceeding establishing a new capacity zone in the G-J Locality, NYISO did not propose a phase-in at that time and has subsequently requested reconsideration of the Commission's order. The Commission has not yet acted on the NYISO's reconsideration request. Accordingly, the claim that the NYISO has attempted to do an "end run" around the Commission's prior order is completely erroneous.

158. NYISO reiterates that the NYPSC has stated that the implementation of the G-J Locality without a phase-in could result in a 25 percent retail rate increase to consumers in that region and that rate impacts are likely to cause large employers in the Lower Hudson Valley to experience multi-million dollar increases in annual energy costs which could be very detrimental to job growth and retention in the region. NYISO adds that protestors have not shown that concerns regarding the short-term consumer impacts of establishing a new Locality are unfounded. Nor, according to NYISO have they refuted NYISO's position that the phase-in should not affect the market entry decision for most new generating capacity. Further, NYISO argues that a phase-in would not violate the tariff and it is not a collateral attack on the New Capacity Zone Order accepting the new capacity zone. NYISO states that the New Capacity Zone Order stated that the Commission would not "require" a phase-in, but that finding does not preclude NYISO from proposing one. Further, NYISO notes that its November 27, 2013 filing included a valid and good faith request for a waiver.

159. Entergy submits an affidavit for Mr. Mark D. Younger (Supplemental Younger Affidavit) which states that: (1) during the last seven years, more than 1,250 MW of generating capacity has been lost in the G-J Locality due to retirements and reduced operating capability; (2) no significant generation capacity has been built and demand response participation has been virtually non-existent; (3) The persistent cost differential between the G-J Locality and the rest-of-state region has been clearly documented over the last three reset processes; and (4) NYISO's mere filing of the phase-in proposal brought to a halt the ongoing efforts to bring a significant amount of derated capacity back into the market. Entergy asserts that support for the phase-in proposal is based on factually inaccurate claims and is inconsistent with the underlying structure of the competitive markets in New York, generally, and the capacity market, in particular.

160. Entergy argues that the NYPSC's claims with respect to delaying the creation of a new capacity zone are procedurally barred as the Commission has specifically addressed

Docket No. ER14-500-000

- 55 -

and rejected these arguments in the New Capacity Zone Order. Entergy argues that the NYPSC's claims also fail on the merits. Entergy asserts that the NYPSC's proposal to supplant the market with regulated responses in lieu of correcting the market design is likely to lead to the need for further regulated response. Entergy adds that in order to ensure that efficient prices are produced that will foster the addition of new resources and the retention of existing resources to meet the long term reliability of the system and maintain an efficient level of supply in this region, the Commission should deny NYISO's phase-in proposal.

161. Entergy argues that phasing-in the demand curves in the G-J Locality will adversely affect investment in capacity. Entergy asserts that specific evidence was provided in the new capacity zone proceeding that the NRG Companies were "poised to respond swiftly to market signals such as the new Zone, that encourage reinvestment and in anticipation of the new zone, NRG has made preparations to advance the restoration of Bowline [generating facility]." ⁹⁰ Entergy further argues that the NYPSC's claims to the contrary are inconsistent with the NYPSC's recent adoption of a "wait and see" approach to see if any of the identified 1,500 MW of mothballed and derated generating capacity in this region would respond to these market signals before endorsing further regulated responses. ⁹¹

3. Commission Determination

162. We reject NYISO's proposal to phase-in the ICAP demand curve for the G-J Locality. The Commission previously rejected a proposed phase-in of the ICAP demand curves for G-J Locality in the New Capacity Zone Order and we are not persuaded now to reconsider that decision. Consistent with the New Capacity Zone Order, we find that a phase-in will not ensure that market-clearing prices will guide efficient investment decisions to add or retire capacity resources and meet reliability needs in this region.

163. NYISO states that a phase-in will ameliorate consumer impact of the rate increases that will occur in the G-J Locality as a result of the creation of this new zone. In the New Capacity Zone Order, the Commission stated that stakeholder discussions about the need for a new capacity zone in the Lower Hudson Valley have been ongoing for several years and have provided notice to stakeholders of the need for a new capacity zone. As Entergy states in its protest, information regarding possible rate impacts that may occur in

⁹⁰ Entergy January 6, 2014 Answer at 8 (quoting NRG Companies, Answer, Docket No. ER13-1380-003, at 2 (filed Nov. 12, 2013).

⁹¹ *Id.* at 9.

Docket No. ER14-500-000

- 56 -

the G-J Locality have been considered extensively throughout a seven-year time period.⁹² We find that there was sufficient notice provided so that a phase-in is not necessary to further address “rate-shock” to consumers.

164. As we concluded in the New Capacity Zone Order, a phase-in would delay the capacity market’s ability to send more efficient investment price signals to attract and maintain sufficient capacity to meet local demand.⁹³ We reject the assertion that the time line expected for new construction would ensure that a phase-in would not adversely affect incentives to supply capacity. This argument fails to take into account the potential for shorter term supply responses, *i.e.*, demand response and repowering options, to meet capacity needs. We agree with Entergy’s assertion that a phase-in that would suppress prices for a two-year period would discourage competitive supply and could increase the likelihood of regulatory actions to meet capacity needs.⁹⁴ For these reasons, we reject NYISO’s proposal to phase-in the ICAP demand curve for the G-J Locality and, therefore, we deny NYISO’s requested waiver.

165. The proposed tariff revisions are accepted, to be effective January 28, 2014, subject to NYISO refile to reflect the Demand Curve parameters, without any phase-in adjustment, in section 5.14.1.2 of the NYISO Services Tariff.

The Commission orders:

(A) NYISO’s revisions to section 5.14.1.2 of NYISO’s Services Tariff are hereby accepted, effective January 28, 2014, subject to the filing condition set forth in the body of this order.

(B) NYISO is directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

⁹² Entergy December 20, 2013 Protest at 13.

⁹³ New Capacity Zone Order at 25-26.

⁹⁴ Entergy December 20, 2013 Protest at 26-30.

Docket No ER14-500-000

- 57 -

(B) NYISO's request for a limited tariff waiver is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

20140128-3148 FERC PDF (Unofficial) 01/28/2014

Document Content(s)

ER14-500-000.DOCX.....1-57

ATTACHMENT C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re the People of the State of New York and the Public
Service Commission of the State of New York,

Petitioners.

**AFFIDAVIT OF ADAM
EVANS**

No. _____.

State of New York:

: ss

County of Albany :

ADAM EVANS, being duly sworn, deposes and states:

1. I am employed by the New York State Department of Public Service (“Department”) as a Utility Analyst 2 in the Department’s Office of Electric, Gas and Water.
2. I hold a Bachelor of Business Administration degree in Finance from James Madison University.
3. Prior to joining the Department in 2010, I held a professional position in Finance as an equities and commodities (including energy products) trader, with C + C Trading in New York City.
4. My duties with the Department include participating in the New York Independent System Operator (“NYISO”) Installed Capacity (“ICAP”) market processes, which involve participating in the triennial establishment of the ICAP demand curves, calculating the potential market price impacts of changes in the electric energy and ICAP markets, and meeting with utilities to discuss their procurement of electricity and gas.
5. I make this affidavit in support of the motion of the Public Service Commission of the State of New York (“NYPSC”) to stay further implementation capacity auctions in a new capacity zone, which was established by orders of the Federal Energy Regulatory Commission (“FERC”). The NYISO is currently holding auctions allowing incumbent electric generators to

obtain much higher prices to supply capacity to the electric market. Electricity consumers in the lower Hudson Valley will be subject to continuing and irreparable harm if a stay of implementation is not granted and the auctions continue.

6. I estimate that FERC's establishment of a new capacity zone ("NCZ") comprised of NYISO load zones G, H, I and J, which encompass the lower Hudson River Valley region and New York City, will cause electric capacity costs to increase by approximately \$280 million per year, cumulatively, for customers located in load zones G, H and I (i.e., excluding New York City, which is coterminous with load zone J).

7. "Capacity," in the context of electric power, means electric generation that is ready and immediately available to meet customer demands for electricity. Because electricity cannot be economically stored in large volumes, the amount generated must equal the amount consumed at any given time. Capacity, therefore, is needed to ensure that a sufficient supply of energy will be readily available during periods of maximum consumption.

8. Capacity is procured at wholesale separately from electric energy. In New York, public utilities and other such load-serving entities ("LSEs") are required to purchase capacity either through bilateral contracts or through auction-based markets administered by the NYISO. This is known as the Installed Capacity ("ICAP") market. The NYISO adjusts the amount of ICAP available to reflect electric suppliers' demonstrated performance and forced outage rates; this adjusted amount is called "unforced capacity" ("UCAP"). The NYISO auctions are settled in UCAP.

9. In order to administer its markets, the NYISO has geographically divided the state into eleven load zones, which it has designated with the letters A through K. The NYISO manages zones A through K as one single capacity zone, known as the New York Control Area

(“NYCA”). New York City (Zone J) and Long Island (Zone K) are separate capacity zones nested within the NYCA. FERC’s action separates the lower Hudson Valley region, i.e., zones G, H and I, from this NYCA capacity zone and incorporates them into the NCZ together with New York City (Zone J).

10. This is economically significant because ICAP prices are set for each capacity zone, in accordance with market conditions and the demand curve established for each capacity zone. Historically, fixed costs of generation have been substantially higher in New York City than elsewhere in the state. All else remaining equal, higher fixed costs translate into higher capacity prices.

11. In order to ensure a reliable supply of electricity, all LSEs are required to procure capacity in an amount that is at least equal to 117% of their projected peak load for the current Capability Year, May 2014-April 2015. This requirement is determined annually by the New York State Reliability Council (NYSRC) and is known as the Installed Reserve Margin (IRM). Importantly, in addition to the statewide IRM requirement, there are additional Locational Capacity Requirements that require LSEs in certain zones to purchase a minimum amount of capacity from electric suppliers located in those zones. A locational rule applies to the NCZ; LSEs serving customers in the NCZ must purchase capacity equal to a minimum of 88% of their peak load from supply located within the same zone.

12. NYISO uses “demand curves” to help price capacity. Each capacity zone has its own demand curve based on the Net Cost of New Entry (“Net CONE”) of a new proxy power plant located in that capacity zone. Demand curve pricing for each capacity zone is intended to ensure that sufficient capacity exists to meet system needs, while sending appropriate price signals to both existing suppliers and developers of new generation facilities. The demand curve

is anchored by the Reference Price, which is set by determining the Net CONE for each capacity zone. This Net CONE is determined by subtracting anticipated energy and ancillary service revenues from the annualized fixed cost of the proxy unit. Pricing will move along the demand curve depending upon supply; when supply is tight, the price will move higher; and when supply is abundant, prices will move lower.

13. Importantly, the upstate/downstate fixed cost difference is also reflected in demand curve pricing. For example, the current UCAP reference price is \$19.62 per kilowatt-month for the New York City capacity zone, but only \$9.72 per kilowatt-month in the NYCA market.

14. NYISO operates two long-term auctions for capacity. These are known as the “Strip” (*i.e.*, seasonal) and “Monthly” auctions. The Strip auctions occur in the month preceding the start of the Summer and Winter capability periods. They include all 6 months of the capability period. The Monthly auctions occur every month and cover each of the remaining months of the capability period. The Spot auction occurs at the end of the preceding month and is the point where all LSEs are required to fulfill their obligations. Prices in the Spot auctions are settled off of the relevant demand curves. The Strip and Monthly auctions provide indications of future UCAP prices on the Spot market. The Summer 2014 Strip and the May Monthly auction for the NCZ, held in April, cleared at \$9.96 per kilowatt-month and \$10.33 per kilowatt-month, respectively.

15. Due to less liquidity in the Strip and Monthly auctions, however, the majority of UCAP traded in the NYISO auctions is traded in the spot market. On April 29, 2014, the NYISO released the results from the May Spot Auction. The resulting price for the NCZ was \$12.38 per kilowatt-month and represented an unexpected jump by over \$2.00 from the Strip and

May Monthly auctions. I use the spot price for my calculations, because when the Strip and the May Monthly auctions occurred, there were many unknowns on the supply side. Now that most of those are known, I expect the rest of the Summer prices to clear around the May Spot price. Using the available Summer UCAP supply numbers published by the NYISO, and estimating the comparable available Winter supply, I estimate that the average Winter 2014-15 clearing price will be approximately \$8.23 per kilowatt-month for the NCZ. In contrast, the average prices for the capacity year ending April 30, 2014 for the Lower Hudson Valley were \$5.80 per kilowatt-month in the Summer and \$3.10 per kilowatt-month in the Winter. Thus, capacity prices for the Lower Hudson Valley are expected to increase over 100% in Summer 2014 and over 150% in Winter 2014 as compared to the previous year.

16. There are approximately 4,000 megawatts of available UCAP supply located in the Lower Hudson Valley (zones G-I) for the month of May. To estimate the aggregate cost increase for this Summer, I took the difference in price between this Summer and last Summer ($\$12.38 - \$5.80 = \$6.58$ per kilowatt-month), and multiplied it by 1,000 kilowatts per megawatt to obtain the UCAP price per megawatt. I then multiplied that price by 6 (Summer months), and 4,000 megawatts of supply. The increase, then, will be approximately \$158 million for the 6 months of Summer 2014.

17. Because the Winter supply numbers are not yet known, I estimated the Winter price based on adjusting the Summer supply. Typically, due to the colder temperatures in the Winter, units have increased capability and therefore more available UCAP. Nearly all of the increased capability for the new capacity zone is in Zone J (New York City). I project that the 2014-15 average Winter price will be approximately \$8.23 per kilowatt-month in the new capacity zone (assuming the available supply for zones G-I remains the same in the Winter

months). I assumed 4,000 megawatts of supply in the Lower Hudson Valley when estimating the NCZ cost increase. I used the same method as I did for the Summer; that is, subtracting this past Winter's average price of \$3.10 per kilowatt-month from next Winter's forecast of \$8.23 per kilowatt-month, calculating the number in megawatt form, multiplying by the available supply (4,000 megawatts), and by the number of Winter months. The resulting calculation is $\$5.13 * 1000 * 4000 * 6 = \123 million.

18. As a result, I estimate the increase in capacity costs in the Lower Hudson Valley to be approximately \$281 million (\$158 million + \$123 million) for the capability year May 2014-April 2015.

19. In November 2013, the Commission approved three enhancements to the downstate transmission system (the TOTS projects) that will create additional capacity for the NCZ. NYPSC AC transmission initiatives are underway that may create another 1000 megawatts of NCZ transmission capacity. It is also my understanding that it takes at least three years to build a new generator from the time it is first proposed

20. Absent a stay of FERC's implementation of the NCZ, the NYISO would experience great difficulty in attempting to fashion refunds in the capacity market. To determine refunds accurately, it would be necessary to re-run the capacity auctions without the NCZ. There could be some sellers of capacity who cleared at the NCZ prices who would not have cleared at the NYCA price. This could affect the NYCA clearing price and quantity traded, therefore impacting every capacity purchaser and supplier in the state. Further, the trading of bilateral contracts that are settled off spot results would be severely impacted. Moreover, there is already some capacity in the NCZ that has cleared in the Strip, May Monthly and May Spot Auctions. There will be more trading with the June Monthly Auction, taking place currently, and the June

Spot auction, to be held May 23. The next series of monthly auctions, for the month of July, will begin on June 9. The results and financial consequences of these auctions will be essentially impossible to reverse. Therefore, it is imperative that the implementation of these auctions be stayed to avoid this harm to electric consumers.

21. For all of the foregoing reasons, it is my opinion that the further implementation of capacity auctions in the NCZ will cause irreparable harm to lower Hudson Valley electric consumers.



ADAM EVANS
Utility Analyst 2
New York State Department of
Public Service
3 Empire State Plaza
Albany, New York 12223-1350

Sworn to before me this
9th day of May, 2014


NOTARY PUBLIC

JOHN C. GRAHAM
Notary Public, State of New York
No. 02GR6080602
Qualified in Rensselaer County
Commission Expires Sept. 16, 20 14

ATTACHMENT D

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
www.dps.ny.gov

PUBLIC SERVICE COMMISSION

AUDREY ZIBELMAN
Chair
PATRICIA L. ACAMPORA
GARRY A. BROWN
GREGG C. SAYRE
DIANE X. BURMAN
Commissioners



PETER MCGOWAN
General Counsel
KATHLEEN H. BURGESS
Secretary

September 12, 2013

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. ER13-1380-000 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

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

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment
cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System) Docket No. ER13-1380-000
Operator, Inc.)

REQUEST FOR REHEARING AND CLARIFICATION
OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

BACKGROUND

On April 30, 2013, the New York Independent System Operator, Inc. (NYISO) filed proposed tariff revisions to establish a New Capacity Zone (NCZ) (NCZ Filing). The NCZ Filing explained that the NYISO had identified a current Highway deliverability constraint driving the need to create an NCZ in NYISO Load Zones G, H, I, and J.¹ The asserted purpose of this NCZ is to induce developers of generation to build facilities within the new zone to address the identified constraint.

The NCZ Filing also requested that the Federal Energy Regulatory Commission (FERC or Commission) accept the NYISO's previously proposed market power mitigation rules applicable to the NCZ. The NYISO plans to implement the NCZ by May 1, 2014, to coincide with the start of the 2014/2015 Capability Year.

¹ Capitalized terms that are not otherwise defined herein have the meaning set forth in the NCZ Filing, the NYISO Services Tariff, or the NYISO Open Access Transmission Tariff.

On May 21, 2013, the New York State Public Service Commission (NYPSC) submitted its timely Notice of Intervention and Protest to the NCZ Filing (NYPSC Protest). The NYPSC opposed the NCZ Filing because it did not recognize the State's ongoing competitive procurement processes that would address the same deliverability constraint identified by the NYISO, within the same period that the NYISO seeks to impose the NCZ. In light of these State processes, the NYPSC maintained that the price signal from the NCZ would not be effective in incenting new generation over the short-term, since suppliers would be looking to the price signals that result from the State's initiatives and not the short-term price spikes associated with implementing the NCZ at this time. This price spike will require ratepayers to pay hundreds of millions of dollars in unjust and unreasonable increased Installed Capacity (ICAP) costs. In addition, the NYPSC advocated for a mechanism for determining when the NCZ is no longer necessary and should be eliminated. The NYPSC further opposed the NYISO's proposed mitigation measures for any new entrants in this NCZ, which would likely have the effect of deterring new entry that the NCZ is supposedly designed to incent.

On August 13, 2013, FERC issued an Order accepting the NCZ Filing and establishing a technical conference to discuss whether or not to model Load Zone K as an export-constrained

zone for a future Demand Curve reset proceeding (August 2013 Order).² The August 2013 Order dismissed the NYPSC's arguments related to the short-term ineffectiveness of price signals in the NCZ, and the concomitant windfall in ICAP revenues that would be extracted from ratepayers. As FERC stated, "[b]ecause the net cost of new entry in the new capacity zone is higher than in the Rest-of-State, the new capacity zone needs its own ICAP Demand Curve, reflecting its higher net cost of new entry, in order to send the necessary price signals over the long run and provide the higher capacity revenue over the long run needed to encourage new investment."³

In addition, FERC's August 2013 Order rejected the NYPSC's request to include a mechanism for determining when the NCZ is no longer necessary and should be eliminated. In rejecting this argument, FERC determined that the NYISO should work with its stakeholders to determine if a mechanism for eliminating the NCZ is "deemed necessary," and if so, "file appropriate tariff revisions with the Commission."⁴ The Commission also found that the NYPSC's arguments with respect to

² Docket No. ER13-1380, New York Independent System Operator, Inc., Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference, 144 FERC ¶61,126 (issued August 13, 2013) (August 2013 Order).

³ August 2013 Order, ¶26 (emphasis added).

⁴ August 2013 Order, ¶82.

the NCZ mitigation measures were beyond the scope of this proceeding.

REQUEST FOR REHEARING

The NYPSC requests rehearing of the August 2013 Order pursuant to Rule 713 of the Commission's Rules of Practice and Procedure.⁵ As discussed more fully below, the August 2013 Order contains numerous mischaracterizations and incorrect statements regarding the NYPSC's Protest, which led the Commission to make erroneous conclusions.

The NYPSC urges the Commission to revisit the NYPSC's arguments and to properly account for the NYPSC's on-going initiatives that carry out New York Governor Andrew Cuomo's Energy Highway Blueprint, and will address the deliverability constraint associated with the NCZ. Because these initiatives will directly impact the long-term price signals for encouraging new entry in the NCZ, implementing the NCZ at this time will result in improper and meaningless price signals to prospective developers, without any concomitant ratepayer benefits. The NYPSC estimates that these improper price signals will result in an economic windfall for incumbent generators and a significant price increase for ratepayers that may be upwards of \$350 million per year. This translates to a total bill rate increase

⁵ 18 C.F.R. §385.713.

of over 25% for some customers of Central Hudson Gas and Electric Corporation. The NYPSC anticipates that the bulk power transmission relief that will result from the NYPSC's initiatives will have a material impact on long term Installed Capacity prices in the NCZ. Therefore, to ensure FERC has a complete record, the Commission should direct the NYISO to analyze the long-term price signals that will result from the NYPSC's initiatives prior to implementing the NCZ. In the alternative, the Commission should phase-in the NCZ price signals to correspond with the implementation of the NYPSC's congestion relief initiatives.

The NYPSC also requests that the Commission direct the NYISO to file tariff amendments providing a process for the elimination of the NCZ when the deliverability issues that led to its formation are resolved. The Commission appears to suggest inconsistent standards by which the NCZ should be created (i.e., deliverability), and for which the NCZ should be retained (i.e., reliability and/or the cost-of-new-entry). Finally, we ask that the Commission direct the NYISO to address the need to modify the "buyer-side" mitigation measures for the NCZ, which would apply to any new entry in the NCZ and would deter the very entry that the NCZ is supposedly designed to incent. For these reasons, the Commission should grant the NYPSC's Request for Rehearing and Clarification.

I. STATEMENT OF ISSUES

- A. Whether FERC's decision, which incorrectly characterized the NYPSC's Protest and failed to consider arguments that the New Capacity Zone would result in unjust and unreasonable impacts, was arbitrary, capricious, inconsistent with reasoned decision-making, an abuse of discretion, or otherwise not in accordance with law.⁶
- B. Whether FERC's decision, which failed to provide tariff provisions for eliminating the New Capacity Zone that are comparable to the provisions for creating the New Capacity Zone, was arbitrary, capricious, inconsistent with reasoned decision-making, an abuse of discretion, or otherwise not in accordance with the law.⁷
- C. Whether FERC's decision, which failed to address the NYPSC's Protest that the mitigation measures applied to the New Capacity Zone are unjust and unreasonable, was arbitrary, capricious, inconsistent with reasoned decision-making, an abuse of discretion, or otherwise not in accordance with law.⁸

II. DISCUSSION

A. The Commission Incorrectly Characterized The NYPSC's Protest And Failed To Provide Meaningful Consideration Of Arguments That The New Capacity Zone Would Result In Unjust And Unreasonable Impacts

The August 2013 Order states that the Commission "disagree[s] with the NYPSC that creating a new capacity zone would provide no economic benefits and would needlessly increase

⁶ In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,...or, unsupported by substantial evidence." 5 U.S.C. §706; see also, Farmers Union Cent. Exchange, Inc. v. F.E.R.C., 734 F.2d 1486 (D.C. Cir. 1984).

⁷ Id.

⁸ Id.

customers' bills."⁹ The NYPSC did not dispute that creating an NCZ could have long-term reliability benefits, or that the creation of a new NCZ in Zones G-J may eventually incent new generation in that location,¹⁰ but instead disputed that these benefits would accrue from establishing the NCZ "at this time."¹¹

As the NYPSC demonstrated in its Protest, there are new State transmission initiatives underway that will address the deliverability constraint identified by the NYISO. In particular, two programs that address recommendations made by New York Governor Andrew Cuomo's Energy Highway Blueprint will result in the addition of major transmission facilities in the corridor identified in the NCZ Filing as congested.¹² The first of these seeks transmission solutions that can be constructed by the summer of 2016; the NYPSC anticipates making a decision on funding these solutions this fall.¹³ The second proceeding solicits alternating current transmission proposals, with the goal of adding at least 1,000MW of transfer capability over the

⁹ August 2013 Order, ¶25.

¹⁰ The NYPSC recognized that NCZs "have the potential to send appropriate price signals to retain existing generation resources and to encourage the entry of new resources." NYPSC Protest, p. 2.

¹¹ NYPSC Protest, p. 3 (emphasis added).

¹² See, Energy Highway Blueprint, pp. 37-49, http://www.nyenergyhighway.com/Content/pdf/Blueprint_FINAL.pdf

¹³ Case 12-E-0503, Generation Retirement Contingency Plans, Order Instituting Proceeding and Soliciting Indian Point Contingency Plan (issued November 30, 2012).

Upstate New York/Southeast New York and Central East interfaces.¹⁴ The Energy Highway Blueprint presented to the Governor calls for construction of the projects selected in this latter process by 2018.¹⁵

The progress of the State programs raises "serious doubts regarding the effectiveness of creating an NCZ at this time, while requiring ratepayers to pay hundreds of millions in additional Installed Capacity costs within the NCZ with no concomitant benefits to consumers."¹⁶ The Commission either failed to consider these imminent changes "on the ground," or arbitrarily and capriciously ignored them. The Commission should not put blinders on to the State's initiatives, which should be viewed as supportive of FERC's goals.

In light of the NYPSC's ongoing proceedings, potential new entrants contemplating entry in the Lower Hudson Valley three or four years from now will not look at the prices set in the summer of 2014 as a valid and indicative "long run price signal." Implementing the NCZ in 2014 will provide a meaningless price signal and will only serve to provide an

¹⁴ Case 12-T-0502, Alternating Current Transmission Upgrades, Order Instituting Proceeding (issued November 30, 2012). Application materials are due to the NYPSC by October 1, 2013.

¹⁵ See, Energy Highway Blueprint, p. 40.

¹⁶ NYPSC Protest, p. 3 (emphasis added). As noted above, the NYPSC estimates the price impacts may be upwards of \$350 million per year, which translates to a rate increase of over 25% for some customers.

extremely high short-term price that provides incumbent generators in the Lower Hudson Valley with an economic windfall. This skewed short-term price bears no relation to the long-term price signal the NCZ is intended to produce, and would be completely meaningless for prospective developers. The Commission failed to properly account for the NYPSC's on-going initiatives and to recognize the important distinction that the NYPSC was making between short-term and long-term benefits of the NCZ price signals.

FERC's rationale in approving the NCZ stressed the importance of a long-term price signal. The August 2013 Order indicated that "creating a new capacity zone is necessary to provide more accurate price signals over the long run to encourage new investment in the new capacity zone when it is needed."¹⁷ The Commission's goal of creating the NCZ to provide a long-term price signal would be successfully achieved by allowing for a delay until 2017 for the capacity price increase, or a phase-in approach as advocated by the New York Transmission Owners, so that prices in the NCZ would reflect the new configuration of the transmission system. Therefore, the Commission should direct the NYISO to analyze the long-term price signals that will result from the NYPSC's initiatives prior to implementing the NCZ. Alternatively, the Commission

¹⁷ August 2013 Order, ¶25.

should phase-in the NCZ price signals to correspond with the implementation of the NYPSC's congestion relief initiatives. Either approach would ensure the Commission establishes proper price signals, and achieves the required balance of just and reasonable rates for ratepayers and ICAP providers.¹⁸

In addition, the Commission incorrectly characterized the NYPSC's argument by stating that "[t]he NYPSC is concerned that prices in the new capacity zone would be higher than in the Rest-of-State, because the higher net cost of new entry in the new capacity zone would raise the new capacity zone's ICAP Demand Curve."¹⁹ This characterization is in fact contrary to the NYPSC's position. The NYPSC maintains that even if the Cost-of-New-Entry (CONE) was equal in the different zones, prices could be higher in the new zone because of the Locational Capacity Requirement (LCR) in the NCZ and the different lengths of the Demand Curve. Under a likely scenario, the CONE in the Lower Hudson Valley could equal or approximate the CONE in the Rest-of-State market. However, because of the LCR, prices may not be allowed to equilibrate. Therefore, it is possible that

¹⁸ This one-sided approach fails to ensure prices to consumers are not excessive, and is impermissible. See, Farmers Union Cent. Exchange, Inc. v. F.E.R.C., 734 F.2d 1486, 1501-02 (D.C. Cir. 1984) (citing FERC v. Pennzoil Producing Co., 439 U.S. 508, 517 (1979); Permian Basin Area Rate Cases, 390 U.S. 747, 797 (1968)); see also FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

¹⁹ August 2013 Order, ¶26.

even if the deliverability issue is resolved and there is no difference in CONE, prices could remain higher in the NCZ. Because the NYISO has not included a process for determining whether to eliminate the new capacity zone if the Highway deliverability constraints are longer binding, as discussed in the following section, it further exacerbates the problem.

B. The Commission Improperly Concluded That Tariff Provisions Were Not Needed To Determine When The Elimination Of The New Capacity Zone Is Warranted

By failing to establish tariff provisions for determining when the NCZ may be eliminated, the Commission has inappropriately skewed prices in favor of suppliers, and left ratepayers in the position of having to bear a permanent increase in ICAP prices. While the Commission maintained that relieving the binding deliverability constraint will result in price convergence between the Rest-Of-State market and the NCZ, the NYISO's recent analysis presented at various working group meetings demonstrates that even if the deliverability constraint dissipates, prices will not be able to "equilibrate" or converge unless there is such an abundance of excess capacity in the new capacity zone that the supply approaches the zero crossing point

on the Demand Curve.²⁰ The Commission must address this flaw in the market design by ensuring the NCZ can be eliminated when it is no longer needed.

Moreover, the NYPSC is concerned that the Commission appears to suggest a different standard may be appropriate for NCZ elimination than NCZ creation. In the separate proceeding where the NYISO originally proposed two main criteria for defining when to create an NCZ, the NYISO filed a deliverability test and a reliability test. The NYISO also proposed to include a CONE analysis to determine if the cost of entry was substantially different in a particular zone. The Commission rejected both the reliability criteria and the CONE criteria, and determined that the deliverability test should be the single threshold for creating an NCZ.²¹

While the August 2013 Order indicates that the "NYISO should work with its stakeholders, and if a mechanism for zone elimination is deemed necessary, NYISO should file appropriate

²⁰ In the Consumer Impact Analysis presented at the March 28, 2013 Installed Capacity Working Group (ICAP) meeting, the NYISO projected clearing prices for 2018 under various scenarios. Even under the scenario with the largest increase of supply in the NCZ (*i.e.*, 1,500 MW of generation and transmission additions), the forecasted clearing prices in the NCZ did not equilibrate with the Rest-of-state prices. August 2013 Order, ¶51.

²¹ ER04-449, New York Independent System Operator, Inc. and New York Transmission Owners, Order on Compliance Filing, 136 FERC 61,165 (issued September 8, 2011).

tariff revisions with the Commission,"²² the Commission prematurely and inappropriately suggests different criteria for eliminating the NCZ. The NYPSC presented evidence that the system upgrades that will result from its two ongoing proceedings "would eliminate the need to create a new capacity zone and the resulting higher prices, because the upgrades would relax the transmission constraint that has bottled generation capacity." However, the Commission's rationale for dismissing the evidence relies on the same reliability criteria that it previously rejected in the NYISO's filing to establish criteria for creating an NCZ.²³ The August 2013 Order states that "no one argues that the upgrades would eliminate the reliability need for some capacity to be located within the new capacity zone."²⁴ Moreover, the Commission stated that

[i]n order to encourage new resources to be built in the new capacity zone when they are needed, capacity prices on average over time must approximate the net cost of new entry in the new capacity zone. Otherwise, developers will be reluctant to build the new capacity that will be needed as load grows and resources retire over time. Because the net cost of new entry in the new capacity zone is higher than in the Rest-of-State, the new capacity zone needs its own ICAP Demand Curve, reflecting its higher net cost of new entry, in order to send the necessary price signals over the long run and provide the higher

²² August 2013 Order, ¶82.

²³ ER04-449, New York Independent System Operator, Inc. and New York Transmission Owners, Order on Compliance Filing, 136 FERC 61,165 (issued September 8, 2011).

²⁴ August 2013 Order, ¶26.

capacity revenue over the long run needed to encourage new investment.²⁵

These statements attempt to provide a rationale for why the new zone is needed based on factors (i.e., reliability and CONE) that the Commission previously deemed irrelevant to the creation of an NCZ. As a result, New York is left with a tariff structure that allows for the creation of NCZs without allowing for their dissolution, and a sustained price separation even after the initial deliverability issue is resolved. This result is clearly unjust and unreasonable and improperly favors suppliers' interests to the detriment of ratepayers. The Commission should therefore direct the NYISO to include a process in its tariff for determining how to eliminate the new capacity zone if the Highway deliverability constraints are no longer binding. These provisions are necessary to ensure rates remain just and reasonable for ratepayers, and not just for suppliers.²⁶

²⁵ August 2013 Order, ¶26.

²⁶ According to the Commission, "the failure to create a zone where one is needed is much more significant than the impact of a failure to eliminate an existing unneeded zone." August 2013 Order, ¶82. As noted above, this one-sided approach fails to ensure prices to consumers are not excessive, and is impermissible. See, Farmers Union Cent. Exchange, Inc. v. F.E.R.C., 734 F.2d 1486, 1501-02 (D.C. Cir. 1984).

C. The Commission Improperly Rejected Arguments That The Mitigation Measures Applied To The New Capacity Zone Were Unjust And Unreasonable

The Commission summarily dismissed the NYPSC's arguments that the proposed mitigation measures were unjust and unreasonable, finding that they were "beyond the scope of this proceeding."²⁷ Although the Commission previously accepted market power mitigation measures for an NCZ, it was done on a generic basis. Given that the parameters of the NCZ have now been defined, the Commission should address whether such measures would be just and reasonable as applied to the specific NCZ. Moreover, the NYISO's NCZ Filing raised the issue of whether the mitigation measures were appropriate by requesting the approval of such measures.

The NYPSC's Protest maintained that the uncertainty of potential capacity earnings produced by the accompanying "buyer-side" mitigation rules in the NCZ will likely have more of a long-term adverse impact on reliability and prices in the NCZ. In particular, "[u]nder the proposed rules, even a pure merchant entrant would face the risk that it would be precluded from selling into the capacity market, thus effectively receiving a market price of \$0. This risk will inevitably increase the difficulty of financing merchant projects, and potentially exclude them from the capital markets altogether. Thus, while

²⁷ August 2013 Order, ¶84.

the "buyer-side mitigation" rules were intended to encourage merchant entry, their actual implementation will likely have the opposite effect. These rules would likely serve as a barrier to new entry, and act counter to the rationale stated for creating this new zone in the first place (i.e., to encourage the entry of new resources). The application of those rules to the NCZ should therefore be rejected."²⁸

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant the foregoing Request for Rehearing and Clarification.

Respectfully submitted,



Peter McGowan
General Counsel
Public Service Commission
of the State of New York

By: David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

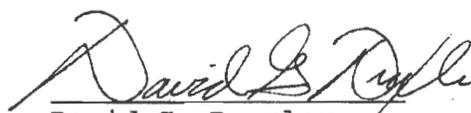
Dated: September 12, 2013
Albany, New York

²⁸ NYPSC Protest, pp. 8-9.

CERTIFICATE OF SERVICE

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

Dated: Albany, New York
September 12, 2013



David G. Drexler
Assistant Counsel
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Albany, NY 12223-1305
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ATTACHMENT E

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
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PUBLIC SERVICE COMMISSION

AUDREY ZIBELMAN
Chair
PATRICIA L. ACAMPORA
GARRY A. BROWN
GREGG C. SAYRE
DIANE X. BURMAN
Commissioners



KIMBERLY A. HARRIMAN
Acting General Counsel

KATHLEEN H. BURGESS
Secretary

February 27, 2014

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. ER14-500-000 - New York Independent
System Operator, Inc.

Dear Secretary Bose:

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

Very truly yours,

A handwritten signature in cursive script that reads 'David G. Drexler'.

David G. Drexler
Assistant Counsel

Attachment
cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System) Docket No. ER14-500-000
Operator, Inc.)

REQUEST FOR REHEARING OF THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

INTRODUCTION

On November 29, 2013, the New York Independent System Operator, Inc. (NYISO) filed amendments to its Services Tariff, proposing updated Installed Capacity (ICAP) Demand Curves for the three upcoming Capability Years (i.e., 2014/2015, 2015/2016, and 2016/2017) (November 2013 NYISO Filing). The NYISO proposed, among other matters, to phase-in the Demand Curves for Zones G through J (i.e., the Lower Hudson Valley New Capacity Zone (NCZ)) in order to mitigate the price impacts on consumers.

On January 28, 2014, the Federal Energy Regulatory Commission (FERC or Commission) accepted various provisions in the November 2013 NYISO Filing, but rejected the proposal to phase-in the Demand Curves in the NCZ (January 2014 Order).¹ The Commission concluded that a phase-in would adversely affect incentives to supply new capacity. The New York State Public

¹ Docket No. ER14-500-000, NYISO, Order Accepting Tariff Filing Subject to Condition and Denying Waiver, 146 FERC ¶61,043 (issued January 28, 2014) (January 2014 Order), at ¶¶162-65.

Service Commission (NYPSC) hereby requests rehearing, pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, to the extent the January 2014 Order rejected a phase-in for the Lower Hudson Valley NCZ.²

As discussed more fully below, the NYPSC continues to oppose the creation of the NCZ, but, in the alternative, supports the phase-in of the Demand Curves for the NCZ to ensure ICAP prices remain just and reasonable for consumers in the Lower Hudson Valley. The NYPSC maintains that the evidence clearly supports a conclusion by the Commission that a phase-in approach is needed to ensure ICAP prices are just and reasonable. We estimate that the price impacts may be over \$230 million per year, and well over half a billion dollars over the three-year Demand Curve reset period. The delay or phase-in of the NCZ Demand Curves would avoid these unreasonable price impacts on consumers within the NCZ, while not interfering with the Commission's objective of sending appropriate price signal to attract new entry in the NCZ. The NYPSC has sought rehearing of the Commission's August 2013 Order in a separate proceeding, based on similar grounds, although the NYPSC's request for

² 18 C.F.R. §385.713.

rehearing is still pending.³ We urge the Commission to act on the NYPSC's requests for rehearing of the August 2013 Order and the January 2014 Order, and find, in the absence of postponing the NCZ, that a phase-in approach is warranted for the NCZ for the reasons discussed herein.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUE

Whether FERC's decision rejecting the phase-in of the New Capacity Zone Demand Curves would result in unjust and unreasonable prices, and was otherwise arbitrary, capricious, inconsistent with reasoned decision-making, an abuse of discretion, or otherwise not in accordance with law.⁴

II. DISCUSSION

The Commission's Decision Rejecting the NYISO's Proposal to Phase-In the New Capacity Zone Demand Curves Results in Unjust And Unreasonable Prices and is Otherwise Inconsistent With the Law

The Commission's January 2014 Order rejected the NYISO's proposal to phase-in the ICAP Demand Curve for the NCZ

³ Docket No. ER13-1380-000, NYISO, Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference, 144 FERC ¶61,126 (issued August 13, 2013) (August 2013 Order), at ¶¶25-26. (finding that a phase-in would delay the capacity market's ability to send more efficient investment price signals to attract and maintain sufficient capacity to meet local demand).

⁴ In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,...or, unsupported by substantial evidence." 5 U.S.C. §706; see also, Farmers Union Cent. Exchange, Inc. v. F.E.R.C., 734 F.2d 1486 (D.C. Cir. 1984).

based on a finding that "a phase-in will not ensure that market-clearing prices will guide efficient investment decisions to add or retire capacity resources and meet reliability needs in this region."⁵ The Commission noted that it previously concluded in its August 2013 Order that a phase-in would delay the capacity market's ability to send more efficient investment price signals to attract and maintain sufficient capacity to meet local demand.⁶ The Commission's determinations in its Orders erroneously rejected the evidence provided by the NYPSC.

As the NYPSC has repeatedly demonstrated in its filings, there are new State transmission initiatives underway that will address the deliverability constraint identified by the NYISO as the basis for establishing the NCZ. In particular, two programs that address recommendations made by New York Governor Andrew Cuomo's Energy Highway Task Force will result in the addition of major transmission facilities in the corridor identified in the NCZ Filing as congested.⁷ The first of these sought transmission solutions that can be constructed by the

⁵ January 2014 Order, at ¶162.

⁶ Docket No. ER14-500-000, NYISO, Order Accepting Tariff Filing Subject to Condition and Denying Waiver, 146 FERC ¶61,043 (issued January 28, 2014) (January 2014 Order) (citing NYISO, Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference 144 FERC ¶61,126 (issued August 13, 2013) (August 2013 Order), at 25-26.

⁷ See, Energy Highway Blueprint, pp. 37-49, http://www.nyenergyhighway.com/Content/pdf/Blueprint_FINAL.pdf

summer of 2016; the NYPSC recently decided that several of the proposed transmission solutions should proceed.⁸ The second proceeding solicited alternating current transmission proposals, with the goal of adding at least 1,000MW of transfer capability over the Upstate New York/Southeast New York and Central East interfaces.⁹ The Energy Highway Blueprint presented to the Governor calls for construction of the projects selected in this latter process by 2018.¹⁰

The progress of the State programs raises serious doubts regarding the effectiveness of implementing the full NCZ Demand Curves at this time. In light of the NYPSC's ongoing proceedings, potential new entrants contemplating entry in the Lower Hudson Valley three or four years from now would be ill-advised to look at the prices set in the summer of 2014 as an indicative "long run price signal." Implementing the NCZ in 2014 will provide a misleading price signal to such new entrants, and will only result in a short-term economic windfall for incumbent generators in the Lower Hudson Valley. This

⁸ 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).

⁹ Case 12-T-0502, Alternating Current Transmission Upgrades, Order Instituting Proceeding (issued November 30, 2012). Application materials were submitted to the NYPSC on about October 1, 2013, and are currently being considered.

¹⁰ See, Energy Highway Blueprint, p. 40.

skewed short-term price bears no relation to the long-term price signal the NCZ is intended to produce, and would be completely meaningless for prospective developers.

The Commission's rejection of the NYPSC's arguments supporting the phase-in was apparently based on the "potential for shorter term supply responses, i.e., demand response and repowering options, to meet capacity needs."¹¹ However, the Commission's new emphasis on short-term supply ignores FERC's rationale for approving the NCZ, which stressed the importance of a long-term price signal.¹² Any supply responses, therefore, should be looking to the long-term price signal, rather than the price signal over the next three years. Accordingly, the Commission should conclude that its goal of creating the NCZ to provide a long-term price signal would be successfully achieved by allowing for the phase-in approach advocated by the NYISO.

The result of the Commission's January 2014 Order is that consumers will be forced to pay hundreds of millions in additional Installed Capacity costs within the NCZ, with no concomitant benefits. The Commission may not lawfully impose

¹¹ January 2013 Order, at ¶164.

¹² The August 2013 Order indicated that "creating a new capacity zone is necessary to provide more accurate price signals over the long run to encourage new investment in the new capacity zone when it is needed." August 2013 Order, at ¶25.

such a burden on ratepayers.¹³ Current estimates are that the price impacts may be over \$230 million per year, and well over half a billion dollars over the three-year Demand Curve reset period.¹⁴

Moreover, the Commission erroneously determined that "sufficient notice [was] provided so that a phase-in is not necessary to further address 'rate shock' to consumers."¹⁵ By citing to Entergy's arguments that the price impacts "have been considered extensively throughout a seven-year time period," the Commission failed to recognize that the price impacts were only made available by the NYISO as late as March 2013, and even then were considerably understated.¹⁶ The Commission should therefore recognize the need to protect consumers from an abrupt and unreasonable price increase, and phase-in the NCZ Demand Curves

¹³ This one-sided approach fails to ensure prices to consumers are not excessive, and is impermissible. See, Farmers Union Cent. Exchange, Inc. v. F.E.R.C., 734 F.2d 1486, 1501-02 (D.C. Cir. 1984) (citing FERC v. Pennzoil Producing Co., 439 U.S. 508, 517 (1979); Permian Basin Area Rate Cases, 390 U.S. 747, 797 (1968)); see also FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 585 (1942).

¹⁴ See, Docket No. ER14-500-000, Motion for Leave to Answer and Answer of the New York Transmission Owners, Exhibit A, p. 10 (filed January 10, 2014).

¹⁵ January 2014 Order, at ¶163.

¹⁶ See, New Capacity Zone: Additional Impact Analysis, meeting materials presented by Tariq N. Niazi at NYISO ICAP Working Group on March 28, 2013.

consistent with its prior decisions designed to address rate shock.¹⁷

CONCLUSION

In accordance with the discussion above, the NYPSC respectfully requests that the Commission grant the foregoing Request for Rehearing.

Respectfully submitted,



Kimberly A. Harriman
Acting General Counsel
Public Service Commission
of the State of New York
By: David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: February 27, 2014
Albany, New York

¹⁷ See, NYISO, 103 FERC ¶61,201, at ¶6 (2003) (recognizing the need to phase-in the ICAP Demand Curves when first implemented in New York).

CERTIFICATE OF SERVICE

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

Dated: Albany, New York
February 27, 2014



David G. Drexler
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

ATTACHMENT F

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
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PUBLIC SERVICE COMMISSION

AUDREY ZIBELMAN
Chair
PATRICIA L. ACAMPORA
GARRY A. BROWN
GREGG C. SAYRE
DIANE X. BURMAN
Commissioners



KIMBERLY A. HARRIMAN
General Counsel
KATHLEEN H. BURGESS
Secretary

May 2, 2014

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

Re: Docket Nos. ER13-1380-000 and ER14-500-000 - New York Independent System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Answer of the New York State Public Service Commission to the Motion filed by Central Hudson Gas & Electric Corporation in the above-entitled proceedings. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David G. Drexler'.

David G. Drexler
Assistant Counsel

Attachment
cc: Service Lists

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System) Docket Nos. ER13-1380-000
Operator, Inc.) ER14-500-000

**ANSWER OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION
IN SUPPORT OF MOTION FOR A STAY OF NEW CAPACITY ZONE AUCTIONS
AND FOR EXPEDITED RULING ON REQUESTS FOR REHEARING**

INTRODUCTION

The New York State Public Service Commission (NYPSC) hereby responds, pursuant to Rule 213 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure (Procedures), to the Motion filed by Central Hudson Gas & Electric Corporation (CHG&E) on April 30, 2014. The NYPSC supports CHG&E's Motion, which seeks a stay of the New York Independent System Operator, Inc's (NYISO) Installed Capacity auctions for load zones G thru J (i.e., the "New Capacity Zone") beginning with the June monthly auction on June 8, 2014.

The stay requested by CHG&E is necessary while the requests for rehearing, which raise significant legal issues with the formation of the New Capacity Zone and seek to avoid, delay or, in the alternative, phase-in its implementation, are still pending in Dockets ER13-1380-000 and ER14-500-000. Granting a stay will avoid irreparable injury to electric consumers that will otherwise be required to pay hundreds of

millions in unjust and unreasonable costs while the parties await the Commission's final determinations on the requests for rehearing and seek judicial review of those determinations, as appropriate. The NYPSC joins CHG&E in urging FERC to expedite its rulings on the pending requests for rehearing.

DISCUSSION

I. The Commission Should Grant An Immediate Stay Of Any Additional Capacity Auctions For the New Capacity Zone

In determining whether to grant a stay, the Commission generally considers three factors, which include: 1) whether the party requesting the stay will suffer irreparable injury absent a stay; 2) whether issuing the stay may substantially harm other parties; and, 3) whether a stay is in the public interest.¹ Based on these factors and the circumstances present in this case, the Commission should find that a stay is warranted.

It is now clear that electric consumers in the New Capacity Zone are experiencing a significant and unwarranted increase in capacity prices. On April 29, 2014, the NYISO released the results from the May Capacity Spot Auction. The

¹ Docket QF87-237-000, et al., CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership, Order Denying Request for Rehearing, Rejecting Supplemental Filings and Denying Motion for Stay, 56 FERC ¶61,177 (issued July 31, 1991), at 61,631.

resulting price for the New Capacity Zone was \$12.38 per kilowatt-month, which represents an unexpected jump by over \$2.00 per kilowatt-month from the Strip and Monthly auctions held earlier in April. We estimate that FERC's establishment of the New Capacity Zone will now cause capacity prices to increase by approximately \$280 million per year, cumulatively, for customers located in load zones G, H and I (excluding New York City, which is coterminous with load zone J).² This updated projection of the ratepayer impact and the potential windfall to incumbent generators is even higher than anticipated at the time of our request for rehearing on the New Capacity Zone Demand Curves.

The increase in capacity costs to lower Hudson Valley consumers within the New Capacity Zones comes on the heels of extremely high energy bills associated with the extreme weather and natural gas shortages experienced in the northeast this past winter, which led to extremely high electric energy prices. For December, January, and February, electric Locational-Based

² We estimate that the Winter 2014-15 clearing price will be \$8.23 per kilowatt-month for the New Capacity Zone. In contrast, the average prices for the capacity year ending April 30, 2014 for the Lower Hudson Valley were \$5.80 per kilowatt-month in the Summer and \$3.10 per kilowatt-month in the Winter. Thus, capacity prices for the Lower Hudson Valley are expected to increase over 100% in the Summer and over 150% in the Winter. The increase, then, will be approximately \$158 million for the 6 months of Summer 2014. We therefore estimate that the increase in capacity costs in the Lower Hudson Valley will be approximately \$281 million (\$158 million + \$123 million) for the capability year May 2014-April 2015.

Marginal Prices in the New York Control Area (NYCA) increased 49%, 130%, and 44%, respectively, over 2013. These increases lead to an estimated increase of over \$2 billion in statewide energy costs on an unhedged basis.

Compounding the impacts to lower Hudson Valley consumers is the expectation that summer electric energy prices will be higher than normal, given weather forecasts that suggest the Northeast is likely to have a hotter than normal summer. This anticipated higher price is reflected in the NYMEX futures market for electricity for NYISO Zone G, which is priced at \$53.05 per MWh for June-September for this year,³ as compared to \$42.85 and \$40.45 per MWh for the same period in 2013 and 2012, respectively. This potential increase of over 20% in energy prices could lead to over \$70 million in increased electric energy costs for the Lower Hudson Valley for these four months alone. When taken in total, the consumers in the lower Hudson Valley will come out of a winter period of high energy prices straight into a summer period of high energy prices with no relief in sight. While the Commission should be looking for measures to mitigate the price impacts for consumers in the lower Hudson Valley, forcing a price spike through the

³ This price is the average of NYMEX Around-the-Clock Zone G futures prices for June-September as of April 23, 2014.

imposition of the New Capacity Zone will only aggravate these impacts.

Electric consumers in the New Capacity Zone are likely to experience irreparable harm from these high capacity prices. These harms are irreparable because of the difficulties the NYISO would experience in attempting to fashion refunds in the capacity market. To determine refunds accurately, it would be necessary to re-run the NYCA auctions with the Lower Hudson Valley capacity included in the Rest-of-State market. There could be some sellers of capacity who cleared at the New Capacity Zone prices that would not have cleared at the NYCA price. This could affect the NYCA clearing price and quantity traded, therefore impacting every capacity purchaser and supplier in the State. Further, the trading of bilateral contracts that are settled based on the spot market results would be severely impacted. Moreover, there is already some capacity in the New Capacity Zone that has cleared in the Strip and Monthly auctions based on the New Capacity Zone higher prices, and there will be more trading soon with the NYISO opening the next Monthly auction on May 8, 2014, and the June Spot auction on May 23, 2014.⁴ The results and financial consequences of these auctions will be difficult, if not

⁴ We note that most of the June capacity will likely trade at the June spot auction on May 23, 2014.

impossible, to reverse. Therefore, it is imperative that FERC stay further auctions harming electric consumers.

It is also apparent that other parties will not be substantially harmed by issuing the stay. FERC's policy goal is to incentivize new generation facilities in the Lower Hudson Valley region, in order to make up for limitations in the electric transmission grid's ability to transmit power into the region.⁵ However, it will take at least 3 years to build a new generator from the time it is first proposed. Thus, a stay in implementing the New Capacity Zone at this time will not affect such parties' response to a price signal expected in three years. Granting the stay will, however, prevent incumbent generators from receiving a \$280 million annual windfall that offers no compensating benefit to electric consumers. Alternatively, a stay in implementing the NCZ until next summer would avoid a near-term windfall for incumbent generators, but still allow some generating units in the lower Hudson Valley to come back on-line and provide relief from increasing electric capacity costs. Based on the foregoing reasons, a stay of the NYISO's planned auctions for the New Capacity Zone beginning

⁵ The NYPSC's initiatives to address congestion and deliverability constraints within the lower Hudson Valley, as fully described in the NYPSC's requests for rehearing, further justify a stay in implementing the New Capacity Zone.

with the June monthly auction on June 8, 2014 is in the public interest.

II. The Commission Should Act Expeditiously On The Pending Requests For Rehearing

The NYPSC continues to urge expedited action by the Commission in Dockets ER13-1380-000 and ER14-500-000. The NYPSC filed requests for rehearing in these proceedings on September 12, 2013, and February 27, 2014, respectively. However, the NYPSC's requests for rehearing, which seek to avoid the imposition of unjust and unreasonable rate increases on electric consumers within the New Capacity Zone in New York's lower Hudson Valley, are still pending. Given the need to ameliorate the significant and unwarranted price increases being thrust upon electric consumers in the lower Hudson Valley, we ask that the Commission act promptly on the petitions for rehearing.

As the NYPSC maintains in Docket ER13-1380-000, New York's efforts to address congestion and deliverability constraints are expected to address the underlying need for establishing the NCZ. Accordingly, the NYPSC requests that FERC reject the need to implement the NCZ in order to prevent improper and meaningless price signals to incumbent resources and prospective developers, without any concomitant ratepayer benefits. The NYPSC takes the same position in docket ER14-500-000, where the NYISO seeks to implement Installed Capacity

Demand Curves within the NCZ for the three upcoming Capability Years (i.e., 2014/2015, 2015/2016, and 2016/2017).

CONCLUSION

In accordance with the discussion above, the NYPSC respectfully requests that the Commission grant CHG&E's Motion for a stay in conducting further New Capacity Zone auctions, and act expeditiously of the pending requests for rehearing.

Respectfully submitted,

Handwritten signature of Kimberly A. Harriman in black ink, with the initials 'SH' written at the end of the signature.

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Dated: May 2, 2014
Albany, New York

CERTIFICATE OF SERVICE

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

Dated: Albany, New York
May 2, 2014



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