

147 FERC ¶ 61,148
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. ER14-500-001

ORDER DENYING CLARIFICATION AND REHEARING

(Issued May 27, 2014)

1. In this order, the Commission denies clarification and rehearing of its January 28, 2014 order,¹ which accepted, subject to condition, a filing by the New York Independent System Operator, Inc. (NYISO) to revise section 5.14.1.2 of its Market Administration and Control Area Services Tariff (Services Tariff) to define the demand curves for the Installed Capacity (ICAP) market for the 2014/2015, 2015/2016, and 2016/2017 Capability Years.²

I. Background

2. NYISO is required to determine the amount of ICAP that each load serving entity must acquire to ensure that adequate resources are available to meet projected load on a long-term basis taking into account reliability contingencies. The ICAP obligations for load serving entities and the spot market auction prices for the associated monthly ICAP requirement are determined using downward-sloping ICAP demand curves that NYISO files every three years. NYISO determines the overall ICAP requirement for NYCA as well as separate location-specific ICAP requirements for load serving entities in New York City (NYC) and Long Island (LI), which reflect the existence of transmission constraints in those areas. In the January 28, 2014 Order, the Commission accepted an additional locational ICAP requirement for NYISO's new capacity zone, the G-J Locality.

¹ *New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043 (2014) (January 28, 2014 Order).

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.

3. 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. On November 27, 2013, NYISO filed proposed revisions to its Services Tariff to update the existing demand curve parameters for NYC, LI, and NYCA, as well as proposing to establish the first ICAP demand curve for the new G-J Locality, which locality was approved in an order issued August 13, 2013, in Docket No. ER13-1380-003.³ NYISO also proposed a “phase-in” of the new demand curve parameters for the G-J Locality.⁴

4. In the January 28, 2014 Order, the Commission accepted NYISO’s proposed tariff revisions, subject to NYISO refiling to reflect the demand curve parameters without any phase-in adjustment.

II. Requests for Rehearing of the January 28, 2014 Order

A. Procedural Matters

5. On February 24, 2014, as amended and supplemented on February 27, 2014, Independent Power Producers of New York, Inc. (IPPNY) requested rehearing of the January 28, 2014 Order. On February 27, 2014, the New York Transmission Owners (NYTOs);⁵ the New York Public Service Commission (NYPSC); Astoria Generating Company, L.P. and the NRG Companies (jointly, Indicated Suppliers); NYISO; and the New York Supplier and Environmental Advocate Group (NY-SEA Group)⁶ filed requests

³ *New York Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126 (2013) (August 13, 2013 Order).

⁴ Under NYISO’s proposed phase-in, the reference price for the 2014/2015 capability year would be determined from 76.06 percent of the G-J Locality annual reference value; for the following capability year, it would be 88.03 percent of the G-J Locality annual reference value; and the full rate would apply for the third capability year.

⁵ For purposes of this intervention, the New York Transmission Owners consists of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc. (Con Edison), 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.

⁶ The NY-SEA Group is comprised of Dynegy Marketing and Trade LLC; Empire Generating Co., LLC; Exelon Corp.; Invenergy 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

for rehearing of the January 28, 2014 Order. On March 13, 2014, NYTOs filed an answer to IPPNY's supplement to its rehearing request. On March 14, 2014, NYISO filed an answer to IPPNY's and NY-SEA Group's requests for rehearing.⁷

6. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2013), prohibits an answer to a request for rehearing. Accordingly, we reject the answers filed in this proceeding. We also reject IPPNY's supplement to its rehearing request. The Commission may reject evidence proffered for the first time on rehearing.⁸ This is because, as noted above, other parties are not permitted to respond to a request for rehearing. Further, "such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."⁹

B. Substantive Matters

1. Process for the Proxy Unit Selection

7. As detailed in the January 28, 2014 Order, NYISO began its periodic review of its ICAP demand curves in September 2012, and after a series of stakeholder meetings, on September 6, 2013, NYISO staff submitted the NYISO Staff Report on revised demand curves to the NYISO Board. The NYISO Board decided that additional review was warranted with respect to the selection of the proxy unit for the NYC, LI, and G-J Locality. NYISO then retained the Brattle Group (Brattle) with Licata Energy & Environmental Consulting (Licata) to conduct further analysis. Brattle and Licata produced the Brattle Report, which concluded that the Siemens SGT6-5000F (5) class frame simple-cycle combustion turbine (F class frame) with selective catalytic reduction emissions controls (SCR) should be the proxy unit for the NYC, LI, and G-J Locality. Stakeholders were then given a one-week period to review and comment.

Group has separately intervened in this proceeding.

⁷ On April 30, 2014, Central Hudson filed a motion in this proceeding and in Docket No. ER13-1380-000, the demand curve reset proceeding, requesting expeditious rulings on rehearing or, alternatively, a stay of capacity auctions for the new capacity zone. With the issuance of Commission orders in both of these proceedings, that motion is now moot and accordingly, we dismiss it.

⁸ *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117, at P 39 (2005) (*Entergy*).

⁹ *Entergy*, 112 FERC ¶ 61,117 at P 39 (citing, e.g., *Cities and Villages of Albany and Hanover, Illinois*, 61 FERC ¶ 61,362, at 62,451 (1992)).

8. In the January 28, 2014 Order, the Commission agreed with protestors that NYISO's change to the unit it selected could have been done in a timelier manner, but found that NYISO did not violate its Services Tariff. The Commission stated that 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 and that, in this instance, the Board gave stakeholders an additional opportunity to provide input before acting on the choice of a proxy unit. The Commission concluded that stakeholders' procedural rights have not been violated, but suggested that, in the future, NYISO perform this process with more transparency in order to avoid any appearance of impropriety and to allow adequate time throughout the process for stakeholder input.

a. Request for Clarification or, in the Alternative, Rehearing and Request for Rehearing

9. Indicated Suppliers state that the Commission should clarify, or, in the alternative, grant rehearing with respect to its suggestion 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."¹⁰ Specifically, Indicated Shippers state that the Commission should make clear that it will not tolerate a repetition of the "opaque and inadequate process" by which NYISO, at the last minute, substituted an F class frame with SCR for the proxy unit recommended by their consultants, NERA and Sargent and Lundy (NERA/S&L), and its own staff.¹¹ Indicated Suppliers contend that NYISO's actions and the Commission's apparent ratification of those actions have effectively eviscerated the collaborative nature of the demand curve process.

10. IPPNY argues that the Commission failed to address the fact that the Brattle Report was commissioned too late in the process to be probative in that it allowed Brattle only two weeks to conduct its study, develop conclusions, and issue a report and allowed stakeholders only one week to review and comment on that report. Thus, according to IPPNY, Brattle's retention violated the spirit of the NYISO tariff's procedural process and the Commission's dismissal of IPPNY's protest, without detailed discussion, was unreasonable.

b. Commission Determination

11. We deny clarification and rehearing regarding this issue. With regard to NYISO's process, we note that stakeholders had multiple opportunities throughout the process for

¹⁰ Indicated Suppliers Request for Rehearing at 17 (citing January 28, 2014 Order, 146 FERC ¶ 61,043 at P 29).

¹¹ *Id.*

participation, as provided by NYISO's tariff. Further, as we stated in the January 28, 2014 Order, the Services Tariff gives the Board 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. The NYISO Board was within its authority both in asking for additional investigation and in changing its recommendation based on the information that was forthcoming. In the January 28, 2014 Order, we specifically found that neither the Services Tariff, nor the procedural rights of stakeholders were violated and we uphold that finding here. Accordingly, we reject the requests for clarification or rehearing. Further, once again we recognize Indicated Suppliers' concerns regarding both the timing and transparency of how NYISO conducted its stakeholder process, and once again remind NYISO that such processes should be conducted as transparently as possible to avoid the appearance of impropriety and to ensure sufficient time for stakeholder participation.

12. IPPNY argues that the Commission failed to address the fact that the Brattle Report was commissioned too late in the process to be probative. As noted above, the Commission did address concerns raised in protests about the process by which NYISO retained and relied on Brattle in the January 28, 2014 Order. In that order, we found that the Services Tariff gives the Board clear authority to accept or reject any of the recommendations in the NYISO Staff Report.¹² We also found that the Board acted within its authority to conduct additional due diligence regarding the viability of the F class frame unit with SCR. We found in the January 28, 2014 Order that neither IPPNY nor any other stakeholder has had their procedural rights violated as they have had numerous opportunity to pursue their positions within NYISO and in the instant proceeding and have done so. Thus, IPPNY has raised no new arguments beyond those already addressed in the January 28, 2014 Order. Here, based on the reasons expressed in the January 28, 2014 Order, we affirm our finding that the Board did not violate the Services Tariff in retaining and relying on Brattle to make its decision regarding the proxy unit choice. Accordingly, we deny rehearing on this issue.

2. Selection of the F-Class Frame Unit with SCR as the Proxy Unit for NYC, LI, and G-J Localities

13. In the January 28, 2014 Order, the Commission found that the record of evidence presented in support of the F class frame unit with SCR was adequate for the Commission 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. The Commission found that 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.

¹² January 28, 2014 Order, 146 FERC ¶ 61,043 at P 29.

a. Requests for Rehearing

14. IPPNY and Indicated Suppliers request rehearing on this issue, arguing that the Commission either failed to address or rejected the evidence and objections raised in their protests.

15. IPPNY contends that IPPNY presented evidence that demonstrated substantive deficiencies in the Brattle Report, which, to the extent the Commission addressed them, it unreasonably rejected them. IPPNY states that the Commission acknowledged the absence of any dual-fueled F class frame with SCR in actual operation¹³ but accepted summary statements from NYISO and an SCR manufacturer that there would be no technical difference in the design of SCR technology for the LMS-100 and F class frame unit when operating on natural gas and fuel oil. Further, IPPNY states that the Commission failed to address IPPNY's evidence that two plants the Commission accepted as support for the economic viability of the F class frame with SCR were, in fact, much smaller and less frequently operated than will be required of the NYC, LI, and the G-J Locality.

16. IPPNY argues that the Commission failed to address several additional points IPPNY raised with respect to the economic viability of the F class frame with SCR, including, whether dual fuel operation could meet the nitrogen oxides (NOx) emissions control requirements in New York State, the inadequate amount of operational data available and the lack of market acceptance, the fact that the operating data used in the Brattle Report was not representative of the hours a peaking plant in New York would be expected to operate, California's Marsh Landing facility's struggle to meet NOx standards as reflected by the limited environmental data available to date, and the lack of any data on ammonia slip, a key indicator of an SCR's performance. IPPNY contends that, by neglecting to address these points establishing that NYISO failed to meet its burden demonstrating that the F class frame unit with SCR was economically viable, the Commission failed to perform reasoned decision making, which renders its decision arbitrary and capricious.

17. IPPNY argues that the Commission failed to respond to the evidence in IPPNY's January 17, 2014 answer which provided a full record addressing the deficiencies in NYISO's January 9, 2014 answer. According to IPPNY, the Commission did not address the conflict regarding the absence of evidence that an F class frame unit with SCR can run on fuel oil and the requirement that the proxy unit be a proven technology. Also, according to IPPNY, the Commission did not address NYISO's reliance on the McClellan plant's aggregate run hours, or NYISO's failure to account for each Marsh Landing unit's de-greening period.

¹³ IPPNY February 26, 2014 Request for Rehearing at 7 (citing January 28, 2014 Order, 146 FERC ¶ 61,043 at P 57).

18. Indicated Suppliers contend further that the Commission did not point to any evidence in the record establishing that an F class frame unit is capable of switching fuels in 45 seconds, as it asserts was required by Con Edison. Indicated Suppliers state that they submitted affidavits from Liam T. Baker which indicated that Siemens had made clear to US PowerGen that an F class frame would take approximately ten minutes to switch from natural gas to Ultra Low Sulfur Diesel,¹⁴ that neither the F class frame nor the H class frame currently has the capability to automatically switch fuels within 45 seconds, and that there are no such units with that capability in operation.¹⁵ Indicated Suppliers argue that selection of the F class frame with SCR was not supported by substantial evidence insofar as neither NYISO nor the January 28, 2014 Order made any effort to explain how the F class frame can be deemed to have satisfied NERA/S&L's requirement that the technology has "been successfully operated to generate electricity," and instead rested on unsupported, unstated, and erroneous assumptions of fact regarding the commercial availability of an F class frame able to satisfy Con Edison's stringent fuel switching requirements.¹⁶

19. Indicated Suppliers assert that the question of whether Siemens currently sells an F class frame that can switch fuels in 45 seconds at all load levels does not involve a difference of opinion between experts but, rather, is a factual question. They argue that, to the extent that the Commission was not prepared to reject the use of an F class frame as the proxy unit for NYC based on Mr. Baker's testimony and the NYISO Staff Report, it was obligated to set the matter for hearing because there was a disputed issue of material fact that could not be resolved based on the evidence presented thus far.

b. Commission Determination

20. We deny rehearing with respect to the selection of the F class frame unit with SCR as the proxy unit for NYC, LI, and the G-J Locality. IPPNY states that there are substantive deficiencies in the Brattle Report that the Commission unreasonably rejected. First, IPPNY argues that the Commission was unreasonable in accepting statements from NYISO and an SCR manufacturer regarding the dual fuel operation of an F class frame unit with SCR. The record NYISO presents includes information regarding technical aspects of the F class frame unit with SCR, affidavits from professionals regarding the feasibility of this technology, and evidence of real-world applications of similar

¹⁴ Indicated Suppliers December 20, 2013 Protest, Baker Aff. ¶ 15.

¹⁵ Indicated Suppliers January 15, 2014 Answer, Baker Supplemental Aff. ¶ 5.

¹⁶ Indicated Suppliers February 27, 2014 Request for Rehearing at 9. Indicated Suppliers further assert that evidence that an F class frame can be deemed to be commercially available or practically constructed is comprised of hearsay testimony of Mr. Anthony Licata of Licata Consulting and Mr. Edwin Thompson of Con Edison and a vaguely worded unverified e-mail from a Siemens employee to Mr. Licata.

technologies. We continue to believe that this body of evidence is sufficient to conclude that NYISO's proposal to use the F Class frame unit with SCR for the proxy unit is a reasonable one.

21. IPPNY relies on the fact that the Commission acknowledged that there are currently no F class frame units with dual fuel technology that are currently in operation as proof that the Commission was unreasonable in accepting this as a proven technology. The Commission did reconcile this issue in the January 28, 2014 Order. We pointed to the fact that according to the SCR manufacturer at the existing Marsh Landing plant in California, the SCR design would not have to change were the plant dual-fuel equipped. We continue to believe that an F class frame unit with SCR is a proven technology and the fact that it would need modifications to be able to comply with the specific technological requirements of a proxy unit does not conflict with this finding.

22. The Services Tariff requires that the proxy unit be economically viable. In the January 28, 2014 Order, the Commission considered arguments regarding the viability of the F class frame unit and the question of whether such a unit could be practically constructed in NYC, LI, and the G-J Locality. Both IPPNY and Indicated Suppliers argue that the Commission unreasonably rejected or failed to give sufficient consideration to the many arguments that, according to these parties, showed the inability of the F class frame unit with SCR to be economically viable. These arguments included the 45 second fuel switching requirement for NYC units, oil burning environmental regulations, NOx emission controls requirements, amount of operational data, market acceptance, specific environmental data available, and specific technical requirements in the NYC zone. In the January 28, 2014 Order, the Commission fulfilled its requirement to articulate the principal justifications for the holdings regarding the proxy unit selection, which were based on adopting expert testimony in the record, and addressed some issues in greater detail. This order, like the January 28, 2014 Order, will present and consider opposing views of the central issues in the dispute, and will address the salient points raised in the requests for rehearing.

23. In the January 28, 2014 Order the Commission ruled on NYISO's representation (through its witness Mr. Licata) that the F class frame unit with SCR could comply with the 45 second fuel switching requirement. Protestors to NYISO's filing argued that NYISO provided no documentation of Mr. Licata's statement that he verified with the manufacturer the capability to switch fuels in 45 seconds. Protestors further argued that the Brattle Report does not present evidence that the unit burning oil would comply with applicable environmental standards. On rehearing, Indicated Suppliers reiterate these arguments and point to their submitted affidavit that offers evidence of a conversation indicating that it would take the unit ten minutes to switch fuels.¹⁷ The Commission

¹⁷ Indicated Suppliers February 27, 2014 Request for Rehearing at 6-7 (citing Indicated Suppliers December 20, 2013 Protest, Baker Aff. ¶ 15).

denies the requests for rehearing on this issue and continues to find that the selection of proxy unit is reasonable.

24. NYISO's original filing included an affidavit from Anthony Licata including an e-mail from a Siemens engineer, in which Mr. Licata stated that he was able to verify that the F class frame unit is capable of meeting the 45-second fuel switching requirement in NYC. Indicated Suppliers submitted an affidavit from Liam Baker, in which Mr. Baker states that Siemens had made clear to US PowerGen that a Siemens unit would not be able to meet the fuel switching requirement. However, in addition to NYISO's witness, the record also includes an affidavit from NYTOs' witness, Edwin Thompson, technical specialist for Con Edison, that directly rebuts Mr. Baker's testimony and further bolsters the position of NYISO.¹⁸ Mr. Thompson states that Mr. Baker's affidavit misinterprets Con Edison's Planning Criteria in that the criteria are not violated if, as a result of the swap, the unit's output level is reduced, provided that the generator returns to its previous output level. Further, according to Mr. Thompson, Mr. Baker's assertion of a ten-minute time frame to switch fuels applies to a manual fuel swap performed by operators rather than an auto-swap which must occur within 45 seconds.¹⁹ Mr. Thompson states that: (1) he finds Mr. Licata's conclusion regarding the 45 second time frame to be reasonable; (2) a conversation he had with Siemens confirmed Mr. Licata's conclusions; and (3) Con Edison has experience with the General Electric F turbine technology and knows that it is capable of switching fuels reliably.²⁰ Further he notes that for a transfer requirement of 45 seconds, General Electric also identifies relatively basic equipment upgrades to improve the performance of the liquid fuel system during a fuel swap.²¹

25. We find that the evidence in the record regarding the ability of the F class frame unit to be upgraded and to comply with the Con Edison fuel switching requirements is sufficient to determine that NYISO has met its burden in proving that its proxy unit proposal was a reasonable one. Indicated Suppliers also assert on rehearing that the fact that an F class frame unit with SCR that has dual fuel capability does not currently exist is determinative of the fact that it is not a viable technology. We disagree. The record shows that these technologies exist and we believe, with the confirmation of multiple expert witnesses in the record, that such a plant can be practically constructed to comply with all requirements.

¹⁸ NYTOs January 10, 2014 Answer, Thompson Aff. ¶¶ 10-14.

¹⁹ *Id.* ¶ 14.

²⁰ *Id.* ¶ 16.

²¹ *Id.*

3. Selection of F Class Frame Unit without SCR for NYCA

26. In the January 28, 2014 Order, the Commission accepted NYISO's recommendation of the F class frame unit without SCR as the proxy unit for NYCA. The Commission found that this unit can meet emissions requirements as well as the tariff requirement of being the lowest fixed cost, highest variable cost unit that is economically viable. The Commission rejected arguments that possible future emissions regulations prevent this unit from being economically viable and stated that a future demand curve reset process would be a more appropriate forum to consider any future developments. The Commission agreed with NYISO that the cap on operating hours ensures that the emissions of NO_x will be below the applicable regulatory significant levels and allows the unit to avoid the installation of emission control technology otherwise required to meet the Best Available Technology Requirement (BACT)/Lowest Achievable Emission Rate (LAER) requirements.²² With respect to the recently instituted Article 10 of the New York Public Service Law, which provides for the siting review of major electrical generating facilities in New York State and requires that all adverse environmental impacts be minimized,²³ the Commission was persuaded by NYISO's argument that the F class frame unit without SCR was designed to comply with such regulations and that the law would permit the developer to identify specific measures it will take to avoid any adverse disproportionate environmental impact.²⁴

a. Requests for Rehearing

27. IPPNY argues that, in the January 28, 2014 Order, the Commission failed to account adequately for the risk that the limitations of Article 10, New York's new siting law, and the likelihood of increasingly strict environmental standards, render the F class frame unit without SCR commercially unviable. IPPNY also states that its January 17, 2014 answer demonstrated that, if NYISO found the F class frame unit with SCR to be a viable technology for the NYC, LI, and G-J Localities, it should designate that unit as the proxy unit for the NYCA region as well. IPPNY asserts that on rehearing, the Commission should reject the F class frame unit without SCR and select the LMS-100 with SCR as the proxy unit or, in the alternative, direct NYISO to designate the F class frame unit with SCR as the NYCA proxy unit.

²² January 28, 2014 Order, 146 FERC ¶ 61,043 at P 61. BACT/LAER requirements are requirements under the Clean Air Act's New Source Review preconstruction permitting procedures. These requirements take into account technical feasibility, cost, and other energy, environmental, and economic impacts, among other things when determining siting for major sources of pollutants. 6 New York Codes, Rules, & Regulations § 251.

²³ 6 New York Codes, Rules, & Regulations § 487.10.

²⁴ January 28, 2014 Order, 146 FERC ¶ 61,043 at P 75.

28. The NY-SEA Group argues that the Commission erred in accepting NYISO's selection of the F class frame unit without SCR as the proxy unit for NYCA as a commercially viable technology. The NY-SEA Group argues that reasonable decision-making by the Commission requires that the Commission take into account facts, including the 20-year history of permitting in New York, the recent enactment of Article 10, the lack of experience with the Article 10 process, the more stringent requirements outlined by their environmental consultant witness, and the additional concerns set forth in the NY-SEA Group's protest and answer. The NY-SEA Group asserts that by ignoring facts that a reasonable developer would have to account for in its investment decisions, and instead relying entirely on NYISO's assumptions and theory, the Commission failed to satisfy its obligation to engage in reasoned decision-making. The NY-SEA Group also argues that the potential impact of future regulations should not have been discounted when assessing the project risk and economic viability. They state that possible new and more stringent environmental regulations would necessitate the addition of new emissions controls, a further decrease in the allowed hours of operation, and/or result in the early shutdown of a unit. The NY-SEA Group argues that on rehearing, the Commission should direct NYISO to select a proxy unit for the NYCA capacity zone that includes an SCR.

29. The NY-SEA Group asserts that the Commission violated its due process rights by failing to acknowledge the existence of issues of material fact and by failing to set the matter for hearing. The NY-SEA Group states that the issue regarding the economic viability of the proposed technology subject to operating restrictions presents a battle of the experts. Such a battle, NY-SEA Group argues, cannot be resolved outside of an evidentiary hearing. The NY-SEA Group contends that its evidence regarding the ability for an F class frame unit without SCR to be permitted under Article 10 is more compelling than NYISO's, but having raised a pivotal issue of material fact, the NY-SEA Group believes it is entitled to an opportunity to be heard through an evidentiary process.

b. Commission Determination

30. We deny IPPNY and NY-SEA Group's requests for rehearing on the issue of the proxy unit selection for NYCA. The crux of IPPNY and NY-SEA Group's protests to the original filing and requests for rehearing here is the ability of the proxy unit to comply with environmental regulations in order to be sited and operate in New York. In the January 28, 2014 Order, the Commission considered and rejected these arguments, finding that NYISO fulfilled its requirement of showing that the F class frame unit without SCR can meet environmental requirements and meets the Services Tariff definition of the proxy unit for NYCA. Protestors disagree with this choice, but did not provide sufficient evidence to persuade us that NYISO's choice was an unreasonable one.

31. IPPNY and NY-SEA Group argue that the new Article 10 of the New York Public Service Law would preclude the development and siting of the F class frame without SCR. Their assertions that the SCR would not be permitted under this law ignore the due

diligence performed by NYISO in selecting the appropriate proxy unit for NYCA. NYISO confirmed with the New York State Department of Environmental Conservation that the unit can meet all relevant requirements. The NY-SEA Group argues in its request for rehearing that its opinion should be more persuasive than NYISO's because it is made up of a group of developers and environmental advocacy groups. This, however, does not change the fact that Article 10's implementation is still speculative, something that the NY-SEA Group readily acknowledges.²⁵ Both IPPNY and NY-SEA Group's assertions that the proposed proxy unit will fail to be sited under Article 10 are conjecture that does not render NYISO's proposal unreasonable.

32. The NY-SEA Group also argues that the potential impact of future regulations should not have been discounted when assessing the project risk and economic viability. In addition to being speculative, the NY-SEA Group's arguments ignore the fact that the F class frame unit without SCR has served as the proxy unit for the NYCA ICAP demand curve in every reset since initial implementation of demand curves in 2003.²⁶ Additionally, in order to meet *current* environmental standards, the unit will have an annual cap on its operating hours. As the Commission stated in the January 28, 2014 Order, "[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."²⁷ The F class frame unit without SCR and with an annual hourly operating limit is the lowest fixed cost, highest variable cost peaking unit among those that are economically viable in NYCA. That tariff requirement contemplates what the current costs are for units in NYISO, not speculative future costs that generators may incur if regulations are changed.

4. Use of a Two Percent Adder to Reflect the Cost of Modifying the F Class Frame Unit

33. In its November 27, 2013 filing NYISO stated that its capital cost estimates for the proxy unit in New York City included an adder of two percent on gas turbine cost for the F class frame unit in New York City for the ability to swap fuel during operation.²⁸

²⁵ NY-SEA Group's Protest, Gerlach Aff. ¶ 11 (stating "developers do not know how the current siting process will be conducted for fossil-fired facilities and cannot predict the view the Siting Board will take on emissions controls technology.").

²⁶ NYISO January 9, 2014 Answer at 27 (citing *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,299, at P 20 (2008)).

²⁷ January 28, 2014 Order, 146 FERC ¶ 61,043 at P 74.

²⁸ NYISO November 27, 2013 Filing at 20, & Attachment IV, Staff Report, at 17. In its protest to the filing, Indicated Suppliers stated that in NYC, in order to maintain reliability, Con Edison requires that fuel switching be automatically accomplished within

Indicated Suppliers argued that the genesis of the two percent adder was unclear and there was no evidence that it was anything more than a guess, given that NYISO provided no evidentiary support that the adder represents actual cost. In the January 28, 2014 Order, the Commission approved the choice of proxy plant and cost estimates related to the proxy units and found that 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, but did not specifically address the two percent adder.

a. Request for Rehearing

34. On rehearing, Indicated Suppliers assert that the Commission failed to provide a reasoned basis for accepting an adder of two percent to represent the cost of modifying an F class frame to meet Con Edison's 45 second fuel-switching requirement. They assert that NYISO's expert, Mr. Ungate, testified that the two percent adder was only an estimate. They contend that NYISO and its experts failed to provide any evidentiary support showing that this two percent adder was based on anything more than a guess and they point to the Ungate affidavit stating that the adder was based only on S&L's "experience working with clients and turbine vendors."²⁹ The Indicated Suppliers also argue that NYISO failed to explain why they would need to resort to an estimate if an F class frame with the ability to switch fuels in 45 seconds is, as NYISO and its consultants claim, "commercially available." They assert that NYISO cannot have it both ways: an F class frame is either commercially available, in which case that capability should have a price, or it is not.

b. Commission Determination

35. We deny rehearing on this issue. NYISO's witness, Mr. Ungate is a consultant at S&L, who was retained to provide NYISO with the estimation of capital and operating and maintenance costs for the Siemens SGT6-5000F(5) turbine with SCR technology. As part of this analysis, Mr. Ungate estimated that adding the ability to switch fuels in 45 seconds to the F class frame unit would add two percent to the cost estimate. He stated that this adder was based on S&L experience working with clients and turbine vendors. This information was in the record filed by NYISO and is an estimate provided by a qualified consultant on a familiar topic. For this reason, it was reasonable for NYISO to rely on Mr. Ungate's testimony in proposing the two percent adder and, for the same reason, for the Commission to accept it. The Indicated Suppliers also argue that just 45 seconds of experiencing low system gas pressure or loss of gas. Indicated Suppliers December 20, 2013 Protest, Docket No. ER14-500-000, at 26 (citing Consolidated Edison Co. of New York, Inc., EP-7100-10. Transmission Planning Criteria, § 1.13 (November 22, 2011)).

²⁹ Indicated Suppliers February 14, 2014 Request for Rehearing at 14 (citing NYISO January 9, 2014 Answer, Ungate Aff. ¶ 16).

NYISO failed to explain why they would need to estimate the cost of switching fuels in 45 seconds if such a unit is “commercially available.” The Indicated Suppliers argue that those scenarios are inconsistent. We disagree. The Indicated Suppliers are taking an extremely narrow approach to what is considered “commercially available.” According to NERA, it is the technology that should be commercially available, not necessarily an actual unit with that technology.³⁰ The fact that a unit with all of the particular characteristics of one that must be built in NYC has not yet been built, does not, as the Indicated Suppliers suggest, make it commercially unavailable. Hence, it was reasonable for Mr. Ungate to estimate what it would cost to add the ability to switch fuels in 45-seconds to the F class frame unit by including the two percent adder.

5. 20-year Amortization Period for Proxy Units

36. In the January 28, 2014 Order, the Commission accepted NYISO’s proposed 20-year amortization period for the F class frame unit, a reduction from the 30-year proxy unit amortization period used in the two previous demand curve reset proceedings. The Commission found that the 20-year amortization period was reasonable in light of the inherent technological, market, and environmental risks in investing in the proposed proxy unit.³¹

a. Request for Rehearing

37. IPPNY argues that although the Commission was correct in accounting for risks associated with the choice of proxy unit for each capacity zone by decreasing the amortization period to 20 years, the Commission failed to account adequately for the degree of those risks. IPPNY states that increased risks faced by suppliers in all four capacity regions include insufficient average excess capacity level and flaws in the buyer side mitigation rules. IPPNY argues that these risks warranted further reducing the amortization period. IPPNY concludes that the Commission failed to address why NYISO’s proposal of 20 years is reasonable in light of all of these issues and was thus arbitrary and capricious.

b. Commission Determination

38. We deny IPPNY’s rehearing request on the issue of amortization period and find that the acceptance of a 20-year amortization period was reasonable. IPPNY argues that the Commission did not adequately account for the degree of risk and that the

³⁰ See January 28, 2014 Order, 146 FERC ¶ 61,043 at n.40 (“The five criteria that NERA uses to determine viability are: . . . (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 . . .”).

³¹ January 28, 2014 Order, 146 FERC ¶ 61,043 at P 117.

amortization period should have been further shortened to 14 years and 18 years for NYC and the G-J Locality, respectively. IPPNY asserts that the market risks of insufficient mitigation and a distorted level of excess capacity warrant these shortened time frames. We find that the Commission adequately addressed IPPNY's concerns and that a 20-year amortization period balances concerns regarding certain technological and market risks with the fact that a proxy unit may remain economic beyond that period.

39. IPPNY argued that, in its view, the proposed amortization period does not adequately account for price suppression attributable to inadequate market mitigation measures and an insufficient level of assumed excess capacity and, on that basis, asserts that even a shorter amortization period than what NYISO proposed should be imposed. Although different parties may arrive at different conclusions regarding adjustments to the demand curve parameters depending on the emphasis given to a variety of factors that affect prices and surplus capacity levels, we remain convinced that NYISO's approach was balanced and supported the 20-year amortization period. NYISO relied on the NERA analysis that took into account major technological progress, environmental considerations, and risk allowances from other aspects of the demand curve to arrive at 20 years. NYISO also considered the impact of regulatory risk when determining the demand curve parameters. Both the consultants and NYISO concluded that the parameters, including a 20-year amortization period, adequately accounted for the risks associated with investment in New York. NERA and NYISO built an analysis around certain factors that they believed were critical in determining the economic recovery period. As we stated in the January 28, 2014 Order, there are several ways to arrive at demand curve adjustments and it is the Commission's responsibility to determine whether these judgments and the resultant outcomes fall within the zone of reasonableness. We find now, as we did in our prior order, that NYISO and their consultants provided reasonable explanations for the determination of the amortization period.

40. We reject IPPNY's assertion that NYISO's proposed 20-year amortization period was unreasonable because it did not specifically assume that the buyer-side mitigation rules contribute to the level of excess capacity in its analysis. NYISO's buyer-side mitigation rules are not at issue in this proceeding and, after having undergone intense scrutiny in a number of Commission proceedings, have been found to be just and reasonable.³² IPPNY's assumption that they are insufficient and contribute to the level of excess capacity are unsupported and beyond the scope of this proceeding. If IPPNY believes that NYISO's buyer-side mitigation rules need revision, it is more appropriate

³² See, e.g., *New York Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126 (2013); *Astoria Generating Company, L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 (2012); *Astoria Generating Company, L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 (2012); *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,160 (2012).

for it to pursue such revisions through NYISO's stakeholder process or file a complaint, rather than attempt to adjust a demand curve parameter.

6. Exclusion of Original Issue Discount Costs from the Demand Curves' Debt Financing Cost Assumptions

41. In the January 28, 2014 Order, the Commission accepted NYISO's proposal to exclude any original issue discount costs from financing cost assumptions.³³ The Commission rejected IPPNY's argument that, based on the financing fees from Astoria Energy II (Astoria) and Bayonne Energy Center (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. The Commission cited NERA's conclusion that an original issue discount is not typical of the debt financings in New York³⁴ and that the financing cost for Astoria and Bayonne was higher because the debt and equity issuances for those projects were for substantially larger amounts. The Commission concluded that for the Astoria and Bayonne projects, the total financing fees were comparable to those of the proxy unit when expressed as a percent of total project debt.

a. Request for Rehearing

42. IPPNY states that, in their protest, they presented the financing costs associated with two recently completed units, Astoria and the Bayonne, and demonstrated that those costs were approximately three to six times the level underlying NYISO's proposed demand curves. IPPNY argues that, without any detailed reasoning, the Commission failed to account for these substantial financing costs and accepted NYISO's demand curves without requiring NYISO to make an adjustment for original issue discount costs, thus rendering its decision arbitrary and capricious.

b. Commission Determination

43. We reject IPPNY's request for rehearing on this point. In the January 28, 2014 Order, we acknowledged that Astoria and Bayonne's financing costs were substantially higher than those assumed in NYISO's proposed demand curves. The Commission reasoned that NYISO's proposal to exclude any original issue discount costs in its calculation of the cost of the proxy unit was reasonable because the financing cost for Astoria and Bayonne was higher than the cost used for the proxy unit because the debt and equity issuances for those projects were for substantially larger amounts. However,

³³ The January 28, 2014 Order noted that NYISO explained 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. 146 FERC ¶ 61,043 at P 119.

³⁴ January 28, 2014 Order, 146 FERC ¶ 61,043 at P 120.

the Commission found that for the Astoria and Bayonne projects, the total financing fees were comparable to those of the proxy unit when expressed as a percent of total project debt. This “percent of total project debt” is an appropriate comparison metric for financing costs. Also, as stated in the January 28, 2014 Order, NERA analyzed debt issues in NYISO and concluded that an original issue discount is not typical of the debt financings in New York.³⁵ IPPNY has presented no new arguments to warrant changing our ruling on this issue. Therefore, we deny IPPNY’s request for rehearing on this issue and continue to find that NYISO’s proposal to exclude any original issue discount costs from financing cost assumptions is a reasonable one.

7. Uniform Property Tax Rate for Regions Outside of NYC

44. In the January 28, 2014 Order, the Commission accepted NYISO’s proposal to use a uniform property tax rate of 0.75 percent in all regions of the state except NYC. The Commission explained that the 0.75 percent rate 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 negotiated reduced property tax rates with the local jurisdictions (payments in lieu of taxes, so called PILOT agreements), while others have not. The Commission found that NYISO’s proposal was a reasonable means of using a uniform tax rate while accurately representing available data from all jurisdictions in the state.

a. Request for Rehearing

45. IPPNY states that in accepting NYISO’s proposal to use a uniform tax rate of 0.75 percent in all regions of the state except NYC, the Commission failed to account for the fact that PILOT agreements typically last for only 15 or 20 years, whereas the model used by NYISO assumes PILOT tax levels continue for the life of the asset. IPPNY argues that the Commission found NYISO’s assumptions reasonable despite IPPNY’s demonstration that they were unreasonable. According to IPPNY, NYISO’s assumptions were unreasonable because they were based on inaccurate facts most notably that the tax benefits of PILOT agreements continue for the life of the asset.³⁶ IPPNY concludes that the Commission was incorrect in stating that it failed to show that NYISO’s assumptions were unreasonable, and therefore the Commission failed to engage in reasoned decision making, rendering its decision arbitrary and capricious.

³⁵ NYISO November 27, 2013 Filing, Attachment IV, NYISO Staff Report at 25-26.

³⁶ IPPNY February 24, 2014 Request for Rehearing at 16.

b. Commission Determination

46. In the January 28, 2014 Order, the Commission found that NYISO was reasonable in accepting the uniform tax rate. In fact, we noted that IPPNY's claim that NYISO's model did not take into account the fact that PILOT agreements expire after 15 or 20 years was incorrect. We addressed IPPNY's concerns in the January 28, 2014 Order by observing that NYISO did "take into account the fact that property taxes will increase after the PILOT Agreements end contrary to IPPNY's assertions [that the PILOT agreements would expire after 15 or 20 years]." ³⁷ IPPNY argues the same point on rehearing, and we again reject this argument for the same reasons as stated in the January 28, 2014 Order.

8. Assuming Full Property Tax Abatement for All Three Years

47. In its November 27, 2013 filing, NYISO stated that, in May of 2011, the New York State Legislature enacted legislation 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 stated 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. NYISO also later argued that the assumption of NYC property tax abatement is reasonable because it is very likely that the abatement will be legislatively extended. 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.

48. In the January 28, 2014 Order, the Commission found that NYISO was reasonable in concluding that property tax abatement should be assumed in developing the proxy unit Net CONE in NYC and that it was 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 three-year demand curve reset period on May 1, 2014. ³⁸

³⁷ January 28, 2014 Order, 146 FERC ¶ 61,043 at P 94.

³⁸ *Id.* P 90.

a. Request for Rehearing

49. Indicated Suppliers argue that the Commission's finding that it was reasonable for NYISO to assume a full property tax abatement throughout the demand curve reset period for NYC was arbitrary and capricious. They assert that no party disputes that the existing legislation providing property tax abatement for peaking units in NYC will expire on April 15, 2015, a month before the end of Capability Year 2014/2015. They state that the January 28, 2014 Order departs from the Commission's prior orders³⁹ where the Commission found that property taxes should be included in, or excluded from, CONE based on any abatement in effect, not the date when a unit would have entered service. They state that, after the legislature reinstated the tax abatement, in the May 19, 2011 Order, the Commission immediately allowed NYISO to assume full tax abatement in its demand curves without any "permitted by" reasoning like that employed in the January 28, 2014 Order. They assert that this ruling, therefore, departs from the broader scheme of the reset process, in which CONE is developed based on estimated costs of a proxy unit during the reset period, not at a future in-service date. They assert that it ignores the requirements of the NYISO Services Tariff, which requires the review of "the current" cost of a peaking unit.⁴⁰ Thus, they assert that it makes no sense to assume full property tax abatement for periods when tax abatement may have expired. Indicated Suppliers state that if the Commission does not grant rehearing on this issue, it should clarify that, to the extent the tax abatement is not extended, no tax abatement should be assumed in the next calculation of CONE for the next demand curve reset cycle for Capability Year 2017/2018.

b. Commission Determination

50. We reject the request for rehearing on this issue. Indicated Suppliers are incorrect in their understanding of the May 19, 2011 Order in which the Commission concluded that under the new law, "the developer of an LMS 100 peaking unit in NYC shall be eligible for 100 percent tax abatement for a fifteen-year period provided a building permit is issued on or before April 1, 2015," and therefore, the inclusion of the tax abatement assumption in calculating the NYC Net CONE for purposes of designing the demand curves for Capability Year 2011/2012 and later years of that reset period was appropriate. The Commission's ruling did not need to include any assumptions regarding when the construction permit requirement of the new tax law would be met since the permit April 1, 2015 deadline of the law falls beyond the end of reset period of that proceeding (April 30, 2014). Further, regarding the Commission's assumption here in the

³⁹ Indicated Suppliers February 27, 2014 Request for Rehearing at 15 (citing *New York Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,170, at P 42 (2011) (May 19, 2011 Order)).

⁴⁰ *Id.* at 16 (citing NYISO Services Tariff, § 5.14.1.2).

January 28, 2014 Order that the tax abatement would apply during this reset period, it must be assumed that the proxy unit enters the market at the start of the first Capability Year of the demand curves, in this case on May 1, 2014, because the demand curves that become effective on that date are calculated based on CONE of the proxy unit, not the CONE of an actual project. Thus, the building permit required for the tax abatement to apply to the proxy unit must be assumed to have been obtained prior to that date, which meets the tax law's permit requirement. Therefore, the demand curves do, in fact, reflect the "current" CONE of the proxy unit as required by the Services Tariff.

51. Further, any project that meets the permit deadline is granted tax abatement for 15 years notwithstanding that the opportunity to obtain the property tax abatement ends on April 15, 2015. That is, the tax abatement does not end on April 15, 2015, if the right to that abatement was obtained prior to that date.

52. Regarding the matter of application of tax abatement to actual projects, we agreed with NYISO that it is reasonable to assume that any unit in NYC that is completed and goes into service during the upcoming reset period (and which would then sell its capacity at prices governed by the subject demand curves) would have applied for its construction permit prior to the expiration of the tax abatement permit requirement currently in effect, that is, prior to April 15, 2015. Under the NYISO tariff,⁴¹ all applications for required state and local permits must be submitted prior to any generation project even applying to enter an interconnection Class Year. And the often lengthy construction time and Class Year cost allocation process must also be considered. This does not constitute estimating the cost for some future in-service date, but rather the most likely cost during the reset period.

9. Phase-in of the New ICAP Demand Curve for the G-J Locality

53. In the January 28, 2014 Order, the Commission rejected NYISO's request for waiver to permit it to phase-in the ICAP demand curves for the G-J Locality. The Commission stated that the Commission previously rejected a proposed phase-in of the ICAP demand curves for G-J Locality in the New Capacity Zone Order⁴² and we are not persuaded now to reconsider that decision. The Commission stated that, 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. The Commission stated 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.⁴³ The

⁴¹ NYISO OATT, Attachment S, §§ 25.6.2.3.1 and 25.6.2.3.1.1.

⁴² January 28, 2014 Order, 146 FERC ¶ 61,043 at P 162.

⁴³ *Id.* P 164.

Commission also found that information regarding possible rate impacts that may occur in the G-J Locality have been considered extensively throughout a seven-year time period and, therefore, there was sufficient notice provided so that a phase-in is not necessary to further address “rate-shock” to consumers. The Commission also agreed that a phase-in would suppress prices for two years, which would discourage competitive supply and could increase the likelihood of regulatory actions to meet capacity needs.⁴⁴

a. Requests for Rehearing

54. NYISO argues that the Commission’s ruling on the phase-in should be reversed on rehearing because it gives too little weight to substantial record evidence regarding short-term consumer impacts and does not explain its departure from the precedent established by recent ISO-New England orders on the importance of protecting consumers from “rate shock.”⁴⁵ NYISO states that the fact that issues relating to the creation of the G-J Locality have been discussed for seven years cannot be taken as actual notice to impacted customers that might justify ignoring equitable concerns regarding rate shock. NYISO further argues that the Commission’s concern for possible impacts on short-term supply responses tips the balance too far in the direction of promoting relatively small benefits for a relatively small number of investors at the expense of imposing disproportionately high costs on a larger class of consumers.

55. The NYPSC argues that the Commission’s decision rejecting 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 NYPSC asserts that the progress of State programs such as the Energy Highway, raises serious doubts regarding the effectiveness of implementing the full new capacity zone demand curves at this time. It argues further that implementing the new capacity zone in 2014 will provide misleading price signals to new entrants, and will only result in a short-term economic windfall for incumbent generators in the Lower Hudson Valley. The NYPSC also states that estimated price impacts were only made available by NYISO as late as March 2013, and even then were considerably understated.

56. The NYTOs argue that the Commission exceeded its statutory authority when it rejected NYISO’s proposed phase-in of the new ICAP demand curve in the G-J Locality even though the Commission did not dispute NYISO’s showing that the phase-in will produce rates that fall within the zone of reasonableness. The NYTOs argue that the Commission has a “passive and reactive” role, and as such, is not at liberty to dictate rates to be charged, or service terms to be imposed, by the public utility proposing a rate

⁴⁴ *Id.*

⁴⁵ NYISO February 27, 2014 Request for Rehearing at 5, 6 (citing *New England Power Generators Association, Inc. v. ISO New England, Inc.*, 146 FERC ¶ 61,039, at P 52 (2014); *ISO New England, Inc.*, 146 FERC ¶ 61,038, at P 26 (2014)).

change unless the Commission finds that those rates or terms fall outside the zone of reasonableness or are otherwise unlawful. The NYTOs contend that it does not matter whether the Commission believes that it would be better to impose higher capacity prices on consumers immediately without a phase-in. They argue that what matters is whether phasing in the impact falls within a range of reasonable options. The NYTOs also state that the Commission erred as a matter of law by failing to give effect to the NYISO's request for a phase-in, which constitutes a permissible deferral of the effective date of the new ICAP demand curve in the G-J Locality without a finding that the phase-in will produce unjust and unreasonable rates.

57. The NYTOs argue that the Commission's reliance on the New Capacity Zone case was erroneous because the phase-in proposal in that case came from the NYTOs as intervenors, not the filing utility. The NYTOs state that this case differs from the New Capacity Zone proceeding because NYISO and the NYTOs presented new evidence as to the magnitude of the rate increase that was not before the Commission in the earlier docket and which the Commission was obligated to consider. The NYTOs point to the phase-in of the original implementation of the demand curves as a more relevant proceeding, and contend that the Commission's denial of phase-in here is inconsistent with the previous pertinent decision.

58. The NYTOs further argue that the Commission's rationale that full capacity prices will guide efficient investment decisions did not respond to NYISO's showing that phasing-in the price increase would produce reasonable rates and not adversely affect market signals. The NYTOs assert that the Commission cited to no record of evidence that the phased-in discounts would make any difference to capacity supply. The NYTOs conclude that given the absence of any record evidence showing that NYISO's phase-in proposal will cause short-term supply alternatives (i.e., demand response and generation repowering) to stay out of or leave the market, the Commission's decision was not reasoned, and was not supported by the record.

b. Commission Determination

59. We reject NYISO's, NYPSC's, and the NYTOs' requests for rehearing on the topic of phasing in the ICAP demand curve for the G-J Locality. NYISO and the NYTOs argue on rehearing that the Commission gave too little weight to the possibility and magnitude of consumer rate shock and Commission precedent regarding protecting consumers from rate shock. In the past, the Commission has allowed variations of phase-ins to protect consumers from substantial rate increases. However, the Commission also has a long-standing policy of preventing inefficient outcomes because of artificially reduced rates.⁴⁶ Under the FPA, the Commission must ensure that rates are just and

⁴⁶ See, e.g., *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 (2008) at P 103 (explaining that while suppressed prices may appear beneficial to consumers in the short term, it will only serve to inhibit new entry, raise prices and harm reliability in

reasonable. The courts have long held that establishing just and reasonable rates involves a balancing of consumer and investor interests.⁴⁷ The Commission has considered the extent to which rates in the Lower Hudson Valley will increase as a result of the implementation of a new ICAP demand curve, but the Commission concludes that the phased-in rates do not represent a balanced approach that will benefit both consumers and investors.

60. The failure to create a new capacity zone when one is called for (or delaying its creation through a phase-in) results in capacity market auctions that do not reflect the reliability need in the constrained area. In the absence of a new capacity zone, a capacity auction would select capacity in the unconstrained area that was less expensive than that in the constrained area – even when capacity in the unconstrained area could not be delivered to the constrained area, essentially ignoring transmission constraints. Capacity in the unconstrained area would displace existing (more expensive) resources in the constrained zone that are deliverable, causing the displaced capacity not to receive capacity payments. In this situation, the price signals sent to the constrained and unconstrained areas would not accurately signal the relative reliability needs for and values of capacity in the two areas of the broad zone and may lead to capacity shortages.

61. Failure to create a new capacity zone that reflects accurate price signals also discourages construction of new capacity and encourages premature capacity retirements in the import-constrained area because of the area's inefficiently low prices. Although it is more expensive to build capacity in the Lower Hudson Valley than in areas to the north (due to more stringent environmental regulations and other factors) in the absence of a new capacity zone and its resulting prices, capacity in the Lower Hudson Valley will receive the same price as capacity located to the north. The 2012 State of the Market Report described the effects of not having a separate capacity zone stating that the total amount of unforced capacity sold in Zones G, H, and I had fallen by 1 GW (or 21 percent) since the summer of 2006.⁴⁸ This fact demonstrates the precise concerns of the Commission and an underlying reason that NYISO's tariff calls for the creation of a new capacity zone when capacity resources are not deliverable throughout a zone - reliability.

62. Unfortunately, there is no simple solution to adequately address the problems caused by the constraint between upstate New York and the Lower Hudson Valley. The reality is that, in the short run, consumers may pay more but doing so is necessary to provide the appropriate price signals to incent developers to build or restore capacity and address a long-standing problem. Fortunately, consumers have not seen a situation in which their energy needs have not been met due to a capacity reserve shortage. The the long run).

⁴⁷ See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

⁴⁸ NYISO April 30, 2013 Filing, Attachment XI, Patton Aff. ¶ 11.

Commission hopes to emphasize that decision making based only on avoiding price increases in the short-term could threaten reliability and price stability in the long-term.⁴⁹ Indeed, the market will react most efficiently when provided with immediate and accurate price signals. In this regard, we note that Helios Power Capital, Inc. is seeking permission to restore to operational status the Danskammer generating plant due to the creation of the new capacity zone.⁵⁰ Moreover, NRG has stated that the recent approval of a new capacity zone with implementation to take effect beginning on May 1, 2014,

greatly improves the prospects of NRG restoring its Bowline 2 unit.⁵¹ As more capacity locates in the new capacity zone in response to the transparent price signal in the Lower Hudson Valley, capacity prices should decrease because the price determination is directly dependent on the level of available supply.

63. The NYPSC argues that progress of state programs such as the Energy Highway raises serious doubts regarding the effectiveness of implementing the full NCZ demand curves at this time. We are certainly cognizant that the NYPSC has two proceedings

⁴⁹ NYISO's 2014 Summer Capacity Assessment anticipates that there will be a 1,431 MW operating reserve shortage during the upcoming summer under extreme weather conditions; and that under such weather conditions, the need for capacity in Southeast New York would be greater than what could be supplied from upstate generation due, in part, to the constrained UPNY/SENY transmission interface which is limited to 3,000 MW. Fortunately, NYISO's presentation indicates that such reserve shortage can be ameliorated this year by invoking its Emergency Operating Procedures. NYISO, *2014 Summer Capacity Assessment* (Apr. 2014) *available at* http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-04-30/2014%20Summer%20Capacity%20Assessment%20-revised.pdf.

⁵⁰ See Helios Power Capital, LLC, Joint Application, Case 14-E-1077 at 2, 8 (NYPSC, April 1, 2014); *see also*, Order Adopting Emergency Action, Case 13-E-0012 at 17 (NYPSC March 28, 2014).

⁵¹ See NRG Energy, Inc. (NRG), Comments, Case No. 13-E-0012 at 2 (NYPSC, March 17, 2014). NRG stated:

Bowline has been significantly derated over the last several years and a large capital investment would be required to effect the restoration of Bowline Unit 2 to its full operating capability. Market prices to date, due in part to the lack of a Lower Hudson Valley capacity zone, have been insufficient to justify the capital investment. However, the recent approval of a new capacity zone with implementation to take effect beginning on May 1, 2014 greatly improve the prospects of NRG making this investment. In anticipation of the new market signal, NRG has made preparations to advance the restoration of Bowline 2.

underway⁵² that may result in the construction of major new transmission facilities during the 2016-2018 time frame and that, once built, they could alleviate the long-standing transmission constraint between Upper New York (UPNY) and Southeast New York (SENY) and reduce the deliverability issues that are leading to the creation of the new capacity zone. But, to date, no major new transmission facility has completed the certification review process required under Article VII of the New York State Public Service Law⁵³ and there is no assurance that any facilities would be completed during the 2016-2018 time frame. Moreover, the NYISO tariff required NYISO to make a section 205 filing to propose a new capacity zone with capacity prices to be determined by the application of demand curves that are calculated as required by the tariff. We therefore continue to believe that a delay or even a phase-in of the new capacity zone would not be appropriate given that it would only further delay a long-standing need to incent additional capacity in the Lower Hudson Valley, a need that has been known but not alleviated by maintaining the parity between the rest-of-state capacity prices and the prices in what is now the new capacity zone.⁵⁴ A further delay or phase-in would artificially reduce the appropriately determined prices resulting from the new capacity zone for two years based not on supply and demand, but rather on a desire to continue to shield consumers from costs that are reflective of actual system conditions.

64. We note that, because the need for a new capacity zone has been apparent for at least seven years, consumers have already been shielded from price increases during that time, but no significant additional generation or transmission solution to the capacity shortage in the Lower Hudson Valley has materialized. The result is a continuation of the transmission constraint, and a continued lack of incentive for more capacity in the Lower Hudson Valley. Failure to send the appropriate price signal will only further delay a competitive response to this long-standing need. The Commission believes that it is important that prices be reflective of competitive conditions. This notwithstanding, we separately note that, to the extent that the state's transmission construction initiatives relieve the transmission constraint, prices in the new G-J capacity zone should decrease,

⁵² 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.

⁵³ Article VII of the New York Public Service Law sets forth the existing certification review process for siting major utility transmission facilities in New York State.

⁵⁴ NYISO's phase-in proposal would set the first year capacity price in the new capacity zone to be similar to the annual reference value of the 2014/2015 NYCA ICAP demand curve. *See* January 28, 2014 Order, 146 FERC ¶ 61,043 at P 142).

because, as noted above for generation, the more supply that is available to the new capacity zone, the lower the capacity prices that will result.

65. The NYTOs argue that the Commission exceeded its statutory authority in the January 28, 2014 Order because it rejected NYISO's phase-in proposal without disputing NYISO's demonstration that the phase-in will produce capacity prices that will fall within the zone of reasonableness. The NYTOs mischaracterize the Commission's actions. In this case, the Commission is enforcing the NYISO Services Tariff and finds insufficient reason to depart from it. The Services Tariff authorizes NYISO to implement the demand curves set at the Net CONE for each respective demand curve that results from its periodic review. The tariff does not grant NYISO discretion to discount the demand curves. It is the discretion of the Commission to grant a waiver from the directives of the Services Tariff if the Commission finds that waiver is necessary. In this instance, the Commission has found that a waiver of the conditions of the NYISO Services Tariff would not appropriately address the long-standing problem of artificially suppressed prices in the Lower Hudson Valley. The Commission's approval of a new capacity zone, the G-J Locality, will help to ensure a competitive response to a long-standing need, but delayed price signals could result in a continuation of the transmission constraint and a lack of incentive for a competitive solution.

The Commission orders:

The requests for clarification and rehearing of the January 28, 2014 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.