183 FERC ¶ 61,130
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

New York Independent System Operator, Inc. Docket No. ER21-502-005

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND SETTING ASIDE PRIOR ORDER

(Issued May 19, 2023)

1. On December 16, 2022, the Commission issued an order on remand[1] in response to a decision from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit),[2] vacating and remanding for further proceedings the Commission's April 9, 2021 order[3] that rejected New York Independent System Operator, Inc.'s (NYISO) proposal pursuant to section 205 of the Federal Power Act (FPA)[4] to revise section 5.14.1.2 of its Market Administration and Control Area Services Tariff (Services Tariff) to reflect a 17-year amortization period when calculating the net annual cost of the hypothetical peaking plant used to define the demand curves in the Installed Capacity (ICAP) market (ICAP Demand Curves) in the 2021-2025 Demand Curve reset (2021-2025 DCR). On January 17, 2023, Independent Power Producers of New York, Inc. (IPPNY) filed a request for rehearing of the Commission's Remand Order, which affirmed, with further explanation, its rejection of NYISO's proposed 17-year amortization period.

2. Pursuant to *Allegheny Defense Project v. FERC*,[5] the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by

[1] *N.Y. Indep. Sys. Operator, Inc.*, 181 FERC ¶ 61,227 (2022) (Remand Order).

[2] *Indep. Power Producers of N.Y., Inc.*, No. 21-1166, 2022 WL 3210362 (D.C. Cir. Aug. 9, 2022) (*IPPNY*).

[3] *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,012 (2021) (DCR Order).

[4] 16 U.S.C. § 824d.

[5] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

section 313(a) of the FPA,[6] we are modifying the discussion in the Remand Order and setting aside the prior order, as discussed below.[7]

I. Background

3. The ICAP auction price of capacity depends, in large part, on NYISO's estimate of the net annual cost of a hypothetical peaking plant in New York. To calculate this hypothetical peaking plant's net annual cost of new entry (Net CONE), NYISO's Services Tariff requires NYISO to estimate the plant's total lifetime cost, divide that amount by the projected number of years the plant is expected to remain operational (i.e., the amortization period), and then subtract the plant's expected annual revenue from energy and ancillary services markets.

4. Section 5.14.1.2 of NYISO's Services Tariff requires NYISO to perform a quadrennial review to identify the methodologies and inputs used for determining the ICAP Demand Curves for the four Capability Years covered by the relevant ICAP DCR process and to establish the ICAP Demand Curves for the first Capability Year covered by that process.[8] Among other things, this process requires NYISO to assess "the current localized levelized embedded cost of a peaking plant" in New York City; Long Island; the G-J Locality; Rest of State, i.e., the New York Control Area (NYCA);[9] and, if applicable, in any new load zone to meet minimum capacity requirements.[10] This assessment requires NYISO to translate the up-front capital investment costs for each peaking plant, including property taxes and insurance, into an annualized level.[11]

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[6] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[7] *Allegheny Def. Project*, 964 F.3d at 16-17.

[8] NYISO, Services Tariff, § 5.14 (30.0.0), § 5.14.1.2.

[9] NYCA comprises New York City (load zone J), Long Island (load zone K), the G-J Locality (load zones G, H, I, and J), and Rest of State (all other load zones, which currently includes load zones A through F).

[10] NYISO, Services Tariff, § 5.14 (30.0.0), § 5.14.1.2.2.

[11] N.Y. Indep. System Operator, Inc., Filing, Docket No. ER21-502-000, at 47 (filed Nov. 30, 2020) (NYISO Filing).

5. A significant part of the Net CONE calculation is the term in years over which NYISO assumes the developer recovers its up-front investment costs (amortization period). This period is the project's "economic life," which can differ from the potential physical life of the unit, due to financial considerations, particularly risks associated with assuming revenue streams far into the future.[12] NYISO originally used a 30-year amortization period for the DCR process, but in 2014 the Commission accepted NYISO's proposal to reduce the amortization period to 20 years, in light of the inherent technological, market, and environmental risks in investing in the proposed proxy unit.[13]

6. On November 30, 2020, as amended February 12, 2021, NYISO filed revisions to the ICAP Demand Curves for the 2021-2025 DCR (NYISO Filing). As part of its filing, NYISO proposed to adopt a 17-year amortization period,[14] reducing the previously approved amortization period by three years.[15] NYISO explained that its primary reason for proposing the 17-year amortization period recommended by its independent Consultant[16] was New York State's recent enactment of the Climate Leadership and Community Protection Act (CLCPA), which requires that "the statewide electrical system demand will be zero-emissions" by January 1, 2040, and the absence of the statutorily-required program, i.e., regulations, implementing the zero-emission target.[17] NYISO explained that the proposed 17-year amortization period represented the average period of years between the beginning of each Capability Year covered by the 2021-2025 DCR and the CLCPA's January 1, 2040 compliance deadline.[18]

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[12] *See* NYISO Filing, attach. III, Analysis Group, Inc. (Analysis Group) Aff. P 68.

[13] Remand Order, 181 FERC ¶ 61,227 at P 29.

[14] NYISO Filing at 51.

[15] *N.Y. Indep. Sys. Operator, Inc.*, 46 FERC ¶ 61,043, at P 109 (2014) (2014-2017 DCR Order); *N.Y. Indep. Sys. Operator, Inc.*,158 FERC ¶ 61,028, at P 40 (2017) (2017-2021 DCR Order).

[16] NYISO explained that its independent consultant is Analysis Group, Inc. (Analysis Group), which subcontracted with Burns & McDonnell Engineering Company, Inc. (BMCD) (collectively, Consultant). *See* DCR Order, 175 FERC ¶ 61,012 at P 6 n.14 (citing NYISO Filing at 3).

[17] NYISO Filing at 51 & n.299 (citing NYISO Final Recommendations at 27-29; Consultant Final Report at 61-63; and Analysis Group Aff. at P 25 and PP 68-69); CLCPA, N.Y. Statutes, Chapter 106 of the laws of 2019 (Jul. 18, 2019 (CLCPA); N.Y. PUB. SERV. Law § 66-p(2).

[18] NYISO Filing at 51.

7. NYISO further explained that its proposed amortization term reflects Commission precedent requiring NYISO in each DCR to follow existing laws and regulations as currently effective and avoid speculation as to potential future changes in such laws and regulations.[19] NYISO highlighted that, while the CLCPA requires zero-emission electric supply by January 1, 2040, it does not define eligibility for compliance with this requirement. Instead, NYISO asserted that the CLCPA directs the New York State Public Service Commission (New York Commission) to establish a program, i.e., develop and refine the regulations and program rules, for achieving the 2040 zero-emission requirement over the coming years.[20] Nonetheless, NYISO asserted that its proposed 17-year amortization period does not reflect any supposition that all existing fossil-fueled resources will cease operation as of January 1, 2040; nor does it presume that potential retrofitting options will be unavailable or not pursued if economically rational.[21] NYISO recognized that balancing costs and reliability with the zero-emission target "will require evolution of the resource mix to include flexible assets capable of operating in compliance with the CLCPA's zero-emission requirement."[22]

8. NYISO stated that the New York Commission has not yet implemented rules or regulations to specifically define the resource types, fuels, or retrofitting options eligible for operation in compliance with the 2040 zero-emission requirement. NYISO asserted that, absent such regulations, there is currently no basis upon which to assume potential retrofitting or fuel conversion to achieve compliance with the requirements of the CLCPA beginning in 2040.[23] Thus, NYISO concluded that, given the absence of eligibility rules at present, assuming fuel-conversion options, retrofits, or other modifications to permit a fossil-fired generator (such as the peaking plants proposed in NYISO's Filing) to operate as a zero-emission resource beginning in 2040 would require NYISO to speculate what the New York Commission may, in the future, define as compliant with the CLCPA.[24]

9. On April 9, 2021, the Commission issued an order accepting in part, subject to condition, NYISO's proposed revisions to its Services Tariff and directing NYISO to

[19] *Id*. at 52 & n.304 (citing e.g., 2017-2021 DCR Order, 158 FERC ¶ 61,028 at P 61; and 2014-2017 DCR Order, 146 FERC ¶ 61,043 at P 7).

[20] *Id*. at 52.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 52 & n.305 (citing NYISO Final Recommendations at 28; Consultant Final Report at 61-62; and Analysis Group Aff. at P 69).

[24] *Id*. at 52 & n.306 (citing Analysis Group Aff. at P 69).

submit a compliance filing maintaining an amortization period of 20 years for the 2021-2025 DCR.[25] The Commission rejected NYISO's proposed 17-year amortization period as speculative because "the CLCPA does not require that power generators retire to satisfy the 2040 zero-emission requirement;"[26] the CLCPA's compliance criteria for its zero-emission requirement had not yet been finalized; and "the CLCPA's requirements may be modified, as necessary, to allow fossil-fueled resources to remain in service beyond 2040 as a means of ensuring system reliability."[27] IPPNY sought rehearing of the DCR Order's finding that the amortization period for the 2021-2025 DCR should be set at 20 years,[28] and rehearing of the DCR Order was denied by operation of law.[29]

II. ***IPPNY* Remand**

10. On appeal, the D.C. Circuit held that the DCR Order's justifications for rejecting NYISO's proposal to implement a 17-year amortization period were insufficient.[30]

11. First, the D.C. Circuit found the Commission's suggestion that some fossil-fueled plants may remain in service after 2039 as a means of ensuring reliability to be "squarely inconsistent" with Commission precedent requiring NYISO to "take into account currently effective laws and regulations and avoid speculating about laws and regulations in the future."[31] The D.C. Circuit explained that, at the time of the NYISO Filing, the New York Commission had not exercised its CLCPA statutory discretion to modify the CLCPA's zero-emission target, nor had it given any indication that it ever would.[32] The

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[25] DCR Order, 175 FERC ¶ 61,012 at P 161.

[26] *Id*.

[27] *Id.* P 161 & n.255 (citing N.Y. Pub. Serv. Law § 66-p(2)). The Commission also rejected IPPNY's suggestion that NYISO implement a 15-year amortization period, finding that IPPNY's proposal ignored the fact that a peaking plant could achieve commercial operation in any of the four Capability Years during the 2021-2025 DCR period. *Id.* P 162.

[28] IPPNY Rehearing Request at 1-2.

[29] *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 62,159 (2021).

[30] *IPPNY*, 2022 WL 3210362, at *2.

[31] *Id*. at *2-*3 (citing DCR Order, 175 FERC ¶ 61,012 at P 161; 2014-2017 DCR Order, 146 FERC ¶ 61,043 at P 74 ("While there is always a risk that regulations will change in the future, [NYISO] cannot base [its filings] on speculation that … New York State regulators will act at some point in the future.")).

D.C. Circuit found that such "regulatory inaction is key" because NYISO was required to comply with the Commission's "no speculation" precedent noted above.[33] The court explained that the Commission is entitled to abandon its precedent and choose a new approach so long as it "'provide[s] reasoned explanation for its action' and acknowledges 'that it *is* changing position.'"[34] The court found that the DCR Order failed to recognize or explain the Commission's departure from precedent.[35]

12. Second, the D.C. Circuit found that the DCR Order failed to explain why NYISO's interpretation of the CLCPA—that the New York Commission will require power plants in New York State to meet the 2040 zero-emission requirement—falls outside of the zone of reasonableness.[36]

13. Third, the D.C. Circuit found that the DCR Order failed to explain why the Commission found the NYISO Market Monitoring Unit's (MMU) comments, stating that NYISO's proposed 17-year amortization period fails to consider that the CLCPA does not require that power generators retire in order to satisfy the 2040 zero-emission requirement, to be compelling. The court added that the DCR Order did not explain why the Commission was persuaded that fossil-fueled plants may continue operating after 2040. Such omissions, the court explained, resulted in the Commission's failure to "either critically review the third party's analysis or perform its own."[37]

14. The D.C. Circuit thus found that the Commission's reasons for rejecting NYISO's proposal in the DCR Order "were not reasonable and reasonably explained," and vacated and remanded the DCR Order to the Commission for further proceedings consistent with its judgment.[38] The D.C. Circuit added that it "expresse[d] no view on whether the more detailed explanations FERC offered in its briefing could support the same result if adopted by the agency and supported by the record."[39]

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[32] *Id*. at *2 (citing CLCPA § 66-p(2)).

[33] *Id*. at *2.

[34] *Id.* at *3 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001)).

[35] *Id.* at *3.

[36] *Id*. (citing *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984)).

[37] *Id.* (quoting *In re NTE Conn.*, LLC, 26 F.4th 980, 988 (D.C. Cir. 2022)).

[38] *Id.* (quoting *Prometheus Radio Proj.*, 141 S. Ct. 1150, 1158 (2021)).

III. Remand Order

15. On December 16, 2022, the Commission issued the Remand Order. The Commission affirmed its rejection of NYISO's proposed 17-year amortization period and required NYISO to continue to use the existing 20-year amortization period for the hypothetical peaking unit.[40]

16. Focusing on the text of the CLCPA, the Commission stated that the statute does not require that all existing fossil-fueled generators retire by 2040 in order to satisfy the 2040 zero-emission requirement.[41] In support, the Commission pointed out that the New York Commission, the agency that the CLCPA tasks with implementing the statute's zero-emission target, supports retaining the 20-year amortization period and also agrees that a plain reading of the CLCPA refutes the assumption that the CLCPA's zero-emissions goal mandates the retirement of all fossil-fueled generation by 2040.[42] The Commission also noted that the law explicitly requires the New York Commission to consider and address the impacts of the zero-emission requirement on "safe and adequate electric service."[43] Furthermore, the Commission added that the New York Commission had not finalized the CLCPA's compliance criteria indicating that the only means of complying with the law will be for existing fossil fuel competitors to retire.[44] The Commission therefore concluded that NYISO's proposal goes beyond "currently effective laws and regulations"[45] and is grounded in speculative assumptions about future action by the State. The Commission explained that, if the New York Commission were to adopt implementation criteria that explicitly require the retirement of all fossil-fueled generators in New York State by 2040, those regulations can be properly taken into account in future DCRs.[46]

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[39] *Id*. at *3.

[40] Remand Order, 181 FERC ¶ 61,227 at PP 1, 25.

[41] *Id*.

[42] *Id*. P 25 & n.67. The New York Commission was part of the Consumer Stakeholders group. *Id*. n.67.

[43] *Id*. P 26 & n.69 (citing CLCPA §§ 66-p(2), 66-p(4)).

[44] *Id*. P 26 & n.70. The Commission noted that NYISO acknowledges that the CLCPA does not define eligibility for compliance with the zero-emission requirement, nor has New York State issued regulations or programs that define eligibility requirements. *Id*. n.70 (citing NYISO Filing at 2).

[45] *Id*. PP 26-27.

17. The Commission found it was "far from clear at the present time how the New York Commission will define eligibility for compliance with the zero-emission requirement or whether the emissions target itself will change."[47] The Commission determined that, until there is more certainty with respect to how the CLCPA will practically affect new and existing generators post-2040, there is insufficient support for reducing the amortization period to 17 years.[48]

18. The Commission found that the MMU and Consumer Stakeholders (which includes the New York Commission) presented persuasive evidence to support maintaining the 20-year amortization period.[49] Highlighting findings culled from several studies in the record that the Commission re-examined on remand, the Commission pointed out that "[a]lthough the studies point to a varying range of needed thermal capacity, each demonstrated that significant capacity of dispatchable thermal resources will be needed to support reliability as New York endeavors to meet the CLCPA's emissions goals."[50]

19. Finally, the Commission found that there is record evidence that reducing the amortization period to 17 years during this DCR period would result in increased costs to customers compared to using demand curves based on a 20-year amortization period.[51] Based on these circumstances, the Commission found that the increase in costs to be borne by consumers is not justified.[52]

IV. Rehearing Request

20. In its rehearing request, IPPNY asserts the Remand Order "largely recasts" the same arguments that the D.C. Circuit previously found insufficient and otherwise "fall[s] short of addressing the deficiencies identified by the Court."[53] IPPNY contends that the

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[46] *Id*. P 27.

[47] *Id*.

[48] *Id*.

[49] *See id*. P 31 & n.86 (citing Consumer Stakeholders Answer at 5-6 (filed Oct. 20, 2022)); *see also* MMU Comments at 6-7 (filed Dec. 21. 2020).

[50] Remand Order, 181 FERC ¶ 61,227 at P 31.

[51] *Id.* PP 25, 33.

[52] *Id*. P 25.

[53] Rehearing Request at 12 & n.39 (quoting Remand Order, 181 FERC ¶ 61,227,

Commission: (1) "failed to explain why NYISO's interpretation of the law, namely that the New York Commission will meet the 2040 zero emission requirement, was outside the zone of reasonableness;" (2) ignored the "plain language of the law;" and (3) refused to acknowledge that its reasoning is speculative.[54]

21. IPPNY argues that by ignoring the plain language of the CLCPA and speculating about what future actions the New York Commission might or might not take to implement the CLCPA, the Commission departed without reasonable explanation from its precedent requiring that the DCR process "take into account currently effective laws and regulations and avoid speculating about laws and regulations in the future."[55] IPPNY asserts that it was unreasonable for the Commission, on the one hand, to find that it is "speculative" to assume that New York would enforce the CLCPA as written to preclude operation of fossil-fueled resources beyond 2040, while simultaneously, on the other hand, making the speculative assumption that New York would allow for continued operation of such resources.[56]

22. IPPNY argues that the record in this proceeding shows that NYISO correctly adhered to the CLCPA and therefore its proposed 17-year amortization period fell well within the zone of reasonableness. IPPNY contends that the Commission improperly substituted its preferred 20-year amortization period without first finding NYISO's proposed 17-year amortization period unjust and unreasonable.[57]

23. Further, IPPNY asserts that the Commission's requirement that NYISO adopt a 20-year amortization period, rather than the 17-year amortization period NYISO proposed, was not supported by substantial evidence and was, in fact, contradicted by the substantial evidence in the record, such as the sworn affidavit and Demand Curve reports of NYISO's independent consultant, Analysis Group, as well as NYISO staff's own Demand Curve report.[58] IPPNY asserts that the only "record evidence" the Commission

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Danly Dissent at PP 4, 5).

[54] *Id*. at 28 (quoting Remand Order, 181 FERC ¶ 61,227, Danly Dissent at P 6).

[55] *Id*. at 10 (citing *IPPNY*, 2022 WL 3210362, at * 4 (quoting DCR Order, 175 FERC ¶ 61,012 at P 161)).

[56] *Id*. at 10.

[57] *Id*. at 10.

[58] *Id*. at 11-12 & nn.41-42 (citing NYISO Filing, attach. III, Analysis Group Aff. at PP 68-69; Consultant Final Report at 61-63; NYISO Filing, attach. V., Ex. A., NYISO

marshaled to support its position was more speculative "other possibilities" about how the CLCPA's zero-emissions requirement could be implemented and enforced in the future.[59] IPPNY claims that the "the sum and substance" of the Commission's "weighing of the evidence" continues to be its own speculative assumption that "the CLCPA does not require that *all* existing fossil fuel generators retire by no later than 2040" and its erroneous conclusion that NYISO's contrary reading of the CLCPA "is grounded in speculative assumptions."[60] IPPNY argues the Commission's speculation stands in stark contrast to the CLCPA's language mandating that, by 2040, "the statewide electrical demand system *will* be zero emissions."[61]

24. IPPNY states that the New York Commission has not provided any indication that it could seek authorization to allow generators to comply with the zero-emission target on a net-emission basis or permit fossil-fueled generators to continue operating after 2040.[62] IPPNY adds that, while the CLCPA allows a limited subset of sources subject to greenhouse gas emission to offset their carbon emissions,[63] the CLCPA further provides that, unlike sources in other sectors, generators "shall not be eligible to participate" in "alternative compliance mechanism[s] to be used . . . to achieve net zero emissions."[64]

25. IPPNY asserts that, in contrast to the Commission's position, the D.C. Circuit recognized that NYISO's reading of the plain language of the CLCPA was reasonable, and that the New York State Legislature (Legislature) had directed the New York Commission to achieve zero emissions in the electric sector by 2040.[65] IPPNY states that the CLCPA has not been amended; nor has the Legislature or the New York Commission

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Final Report at 27-28).

[59] *Id*. at 13.

[60] *Id.* at 13 & n.44 (quoting Remand Order, 181 FERC ¶ 61,227 at PP 26, 30) (emphasis added by IPPNY).

[61] *Id*. at 14 & n.49 (citing N. Y. Pub. Serv. Law § 66-p(2)) (emphasis added by IPPNY).

[62] *Id*. at 19.

[63] *Id*. at 19 & n.68 (citing N.Y. Envt'l Law §§ 75-0107(4), 75-0109(4) (McKinney)); N.Y. Env't Conserv. Law § 75-0109(4)(c)(McKinney)).

[64] *Id*. at 19 & n.69 (citing N.Y. Envt'l Conserv. Law § 75-0109(4)(f)(McKinney).

[65] *Id*. at 16.

invoked the CLCPA's exception to modify or relax the emissions requirements. The New York law still requires that the generation of electricity throughout New York will produce *zero* carbon emissions by 2040[66] and, IPPNY asserts, "by definition, this means *fossil-fueled* peaking plants cannot continue to operate beyond 2039 because they cannot produce electricity without producing emissions."[67] IPPNY insists that therefore it is not speculative to conclude that the DCR reference unit is the exact type of fossil-fueled generator that the CLCPA seeks to displace by 2040.

26. IPPNY highlights the Commission's statement that "[o]n its face, the CLCPA does not require that *all* existing fossil fuel generators retire by no later than 2040 to satisfy the 2040 zero-emission requirement."[68] IPPNY argues that this assertion misses the point that the indisputable "2040 zero-emission requirement" leaves no room for the Commission to consider the possibility of fossil-fueled generators continuing to operate beyond 2040 unless or until: (1) the New York Commission takes an action, which it has not yet taken, to allow for their continued operation; or (2) these facilities convert to operate on some non-carbon-emitting fuel for which the necessary technology and infrastructure do not yet exist.[69]

27. IPPNY also argues the Remand Order accorded undue weight to comments to which the New York Commission was a signatory because the comments do not constitute official agency action.[70] IPPNY states that, even assuming *arguendo* that one can infer from the cited comments some present intent of the New York Commission to modify the CLCPA's requirements, such an inference cannot alter the current state of the law.[71]

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[66] *Id*. at 17 & n.58 (citing N. Y. Pub. Serv. Law § 66-p(2)) (emphasis added by IPPNY).

[67] *Id*. at 17 (emphasis added by IPPNY).

[68] *Id*. at 17 & n.59 (citing Remand Order, 181 FERC ¶ 61,227 at P 26; *id.* P 32 (stating that "a plain reading of the CLCPA invalidates the notion that the 2040 zero-emissions target would mandate retirement of all generation running on fossil fuels.")) (emphasis added by IPPNY).

[69] *Id*. at 17-18.

[70] *Id*. at 11, 18 (citing *CAlifornians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.,* 175 FERC ¶ 61,213, at P 13 (2021)).

[71] *Id*. at 19.

28. IPPNY further contends there is no basis upon which to assume potential retrofitting of thermal plants will achieve compliance with the CLCPA.[72] IPPNY states that there are no currently effective eligibility rules to specifically define the resource types, fuels, or retrofitting options eligible for operation in compliance with the 2040 zero-emissions requirement. IPPNY states that, while the studies the Commission identified may suggest that retrofitting of existing fossil-fueled generators may be necessary to maintain reliability after 2039, the State has not yet modified the CLCPA's requirements by acting on the studies' conclusions. IPPNY argues there is no way of knowing which resources or technologies will be feasible, economically viable, or eventually permitted by the State to meet the goals of the CLCPA.[73] IPPNY asserts that the Commission's reliance on the MMU's "cogent evidence" that large quantities of dispatchable flexible resources, which also must be "*emissions free*," will be needed to preserve system reliability does not change these facts.[74] Even assuming the CLCPA allows fossil-fueled resources to remain operating beyond 2040 for reliability, IPPNY contends that it is entirely speculative to assume that the proxy peaking plant entering commercial operation in the current DCR period will be deemed needed to maintain reliability beyond 2040.[75]

29. IPPNY asserts that a further problem is that neither the Commission nor any party made any attempt to quantify the costs of conversion or retrofitting or to explain why these costs can be ignored altogether if Net CONE is going to be calculated assuming conversion.[76] IPPNY argues the failure to do so is fatal to reliance on the possibility of conversion because the Commission "fail[ed] to consider an important aspect of the problem" in violation of the Administrative Procedure Act (APA).[77] IPPNY states that, to avoid this problem, the Commission must have assumed the potential conversion costs to be zero, which cannot be true and is irreconcilable with the Net CONE value submitted by NYISO and conditionally accepted by the Commission.[78]

[72] *Id*. at 22.

[73] *Id*. at 22-23.

[74] *Id*. at 22.

[75] *Id.* at 27.

[76] *Id*. at 7, 23.

[77] *Id*. at 23 & n.80 (citing *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 44 (1983)).

[78] *Id*. at 24.

30. IPPNY adds that the Commission did not adequately address the overall rate impact from using a 20-year amortization period.[79] IPPNY asserts that it demonstrated in this proceeding that, compared to the 2020-2021 Demand Curve reference point prices, the NYISO Filing's proposed reference point prices for 2021-2022 are as much as 20% lower in certain load zones.[80] IPPNY states that, as recognized by Commissioner Danly's dissent to the DCR Order, the majority engages in "cherry-picking" and "does not address record evidence raised in a protest that focused on the overall rate impact of the proposed demand curves, which is to significantly reduce capacity prices in critical zones."[81]

V. Discussion

31. Upon further consideration, we set aside the Remand Order and the Commission's rejection of NYISO's proposal to implement a 17-year amortization period when calculating the net annual cost of the hypothetical peaking facility used to define the ICAP Demand Curves in the 2021-2025 DCR. As explained below, based on the record in this proceeding, including the text of the CLCPA, we find that NYISO met its burden under section 205 of the FPA to show that its proposed 17-year amortization period is just and reasonable.[82] Accordingly, we direct NYISO to implement a 17-year amortization period prospectively[83] from issuance of this order as soon as reasonably practicable in consideration of the applicable auction timelines, i.e., by the date of the next possible auction.[84] We further direct NYISO to submit a compliance filing within

[79] *Id*. at 30.

[80] *Id*. at 29-30 & n.107 (citing IPPNY Protest, Docket No. ER21-502-000, at 6 (Dec. 21, 2020)).

[81] *Id*. at 30 & n.108 (citing DCR Order, 175 FERC ¶ 61,012, Danly Dissent at P 5).

[82] 16 U.S.C. § 824d.

[83] *See* NYISO Comments at 4 & n.14 (explaining the need for prospective implementation of a change in amortization period) (filed Oct. 11, 2022).

[84] *See id.* at 4 & n.16 (explaining that there is a need for certainty on or around the 10th day of the month to timely implement any revisions to the ICAP Demand Curves applicable for the ICAP Spot Market Auction conducted later in that month; so, for example, based on the certification deadlines from the December 2022, January 2023, and February 2023 ICAP Spot Market Auctions, NYISO would have needed certainty regarding the ICAP Demand Curves applicable for each such auction on or around November 7, 2022, December 9, 2022, and January 11, 2023, respectively).

21 days of issuance of this order identifying revisions to the ICAP Demand Curve values posted on NYISO's website on November 30, 2022 that implement the 17-year amortization period, and also stating when these values will be posted and become effective.[85]

32. NYISO stated that it proposed the 17-year amortization period in response to the recently-enacted CLCPA.[86] The CLCPA provides that "by the year two thousand forty . . . the statewide electrical demand system will be zero emissions."[87] The CLCPA also authorizes the New York Commission to establish the program to meet the 2040 zero-emission target, and to take into account "safe and adequate electric service in the state under reasonably foreseeable circumstances" in establishing such program.[88] It further authorizes the New York Commission to modify the target and/or obligations to ensure such safe and adequate electricity service, and to suspend obligations temporarily for safety and reliability, contractual, or affordability reasons.[89]

33. In submitting its proposal, NYISO noted that the New York Commission had neither established the requisite program nor modified the CLCPA's target and/or obligations.[90] And, NYISO pointed out, "the Commission has consistently held that determinations in each DCR must take account of laws and regulations as currently effective and avoid speculation as to potential future changes in such laws and regulations."[91] NYISO explained that therefore, consistent with precedent, it must consider the current state of the CLCPA and regulatory constructs developed to implement its requirements.[92] NYISO stated that "there is currently no basis upon which

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[85] *See* NYISO, Services Tariff, § 5.14.1.2.

[86] NYISO Filing at 52 ("A primary consideration for using a 17-year amortization period" is the recently enacted CLCPA.).

[87] CLCPA § 66-p(2).

[88] *Id.*

[89] *Id*.

[90] NYISO Filing at 51-52.

[91] *Id.* at 52 & n.304 (citing 2017-2021 DCR Order, 158 FERC ¶ 61,028 at P 61; 2014-2017 DCR Order, 146 FERC ¶ 61,043 at P 74).

to assume potential retrofitting or fuel conversion to achieve compliance with the requirements of the CLCPA beginning in 2040."[93] Thus, NYISO explained, to avoid speculating about future laws and regulations, it modeled its Demand Curves based on the status quo, i.e., existing fuels and technology.[94] As a result, for the purposes of the reference unit, based on the information available at the time of its filing, NYISO's Demand Curves reflected the modeling parameter that fossil-fueled resources will cease operating by 2040 to meet the CLCPA's zero-emission requirement.[95]

34. In the Remand Order, the Commission emphasized that, on its face, the text of the CLCPA does not require all fossil-fueled resources to cease operating by 2040 in order to meet the zero-emission requirement.[96] For example, as Consumer Stakeholders and the

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[92] *Id*. at 52.

[93] *Id*. at 52 & n.205 (citing NYISO Final Recommendations at 28; Consultant Final Report at 61-62; and Analysis Group Aff. at P 69).

[94] NYISO Filing at 51-52; *see also id.* attach. III, Analysis Group Aff. at PP 68-69.

[95] *See* MMU Comments at 4 (explaining that "using a 17-year amortization period is identical to assuming the Peaking Plant will cease operation in 2040, since it eliminates all residual value after that date"). While NYISO stated that its proposal "does not reflect any supposition that all existing fossil-fired generation will cease operation as of January 1, 2040," NYISO Filing at 52, it based its analysis and proposed demand curves on existing fuels and technologies. *See id*.; *see also* NYISO Answer at 18-20; NYISO Filing at attach. III, Analysis Group Aff. at PP 68-69; *id*. at attach. III, Ex. E (Consultant Demand Curve Study) at 27-28 (PP 68-69), 61 ("In effect, the CLCPA prohibits the operation of a peaking plant in New York burning fossil fuels after 2039," although "[i]n principle, the owner of a fossil generating facility constructed now could implement plant modifications that would allow the plant to continue to operate, for example, by using a zero-carbon fuel (e.g., hydrogen) or the acquisition of zero-carbon "drop in" fuels that could be used in place of the current fossil fuels. While we recognize this may be possible, the technology and/or markets to accomplish this" are not established, nor are the costs, nor are the regulations allowing this.).

[96] *See, e.g.*, Remand Order, 181 FERC ¶ 61,227 at P 25 ("On its face, the CLCPA does not require that all existing fossil fuel generators retire by no later than 2040 to satisfy the zero-emission requirement."); *id.* P 32 (stating that "a plain reading of the CLCPA invalidates the notion that the 2040 zero-emission target would mandate retirement of all generation running on fossil fuels."); *see also* DCR Order, 175 FERC ¶ 61,012 at P 161 ("As the MMU notes, NYISO's proposed 17-year amortization period fails to consider that the CLCPA does not require that power generators retire in order to satisfy the zero-emission requirement.").

MMU pointed out, new fuels or retrofits could enable zero-emission dispatchable resources to meet the 2040 zero-emission target, as would compliance on a net-emission basis.[97] We continue to find the CLCPA's zero-emission target could be achieved in more than one way.[98] That said, while NYISO's proposal may not reflect the only way to meet the zero-emission requirement, as IPPNY contends and the court recognized, NYISO's proposal is nevertheless based on one reasonable way to meet the zero-emission requirement.[99] As NYISO, IPPNY, and the court highlight, the New York Commission has neither established the requisite program nor issued regulations specifying how the zero-emissions target is to be attained.[100] Nor has the New York

[97] *See* Consumer Stakeholders Answer at 5-6; MMU Comments at 6-7; *see also* Remand Order, 181 FERC ¶ 61,227 at PP 30-31. We note here that, while IPPNY argues on rehearing that the CLCPA requires generators to adhere to the zero-emissions target on a gross rather than net basis, *see* Rehearing Request at 19 & n.69 (citing N.Y. Env't Conserv. Law § 75-0109(4)(f)), the provision that IPPNY relies on is in Section 2 of the CLCPA, which applies to the alternative mechanism to be established by the New York Climate Council. In contrast, Section 66-p(2) of the CLCPA, which authorizes the New York Commission to establish the program to meet the 2040 zero-emission target, is in Section 4 of the CLCPA, and the CLCPA places no such restriction on the program that it directs the New York Commission to establish. Canons of statutory interpretation support that where one section of a statute includes an express limitation but another section does not, meaning should be ascribed to this difference, and the limitation in one section of the statute does not apply to the other section of the statute. *See, e.g.*, *Russello v. United States,* 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks and brackets omitted)). Consequently, we disagree with IPPNY's contention that the CLCPA precludes compliance with the zero-emission target on a net basis. In any event, however, we decline to speculate here on how the New York Commission may or may not implement the zero-emission target.

[98] *Id*. PP 31-32. We therefore do not disagree with the New York Commission that, "given the extensive history of fossil-fueled power plants not retiring and instead electing to retrofit with new technologies including water injection, [selective catalytic reduction], and other emission controls," just "because a fossil-fueled plant may not operate in its current configuration past a certain date does not mean it necessarily must retire." Consumer Stakeholders Comments at 19. Indeed, even NYISO stated that "the proposed 17-year amortization period does not presume that potential retrofitting options will be unavailable or not pursued if economically rational." NYISO Filing at 52.

[99] Rehearing Request at 9, 17; *IPPNY*, 2022 WL 3210362, at *2-3.

[100] NYISO Filing at 51-52; Rehearing Request at 12-17; *IPPNY*, 2022 WL

Commission "exercised its discretion to 'modify' the [CLCPA's] zero-emission target."[101] Given the current circumstances, upon further consideration, we set aside the prior determination and conclude that NYISO's proposal reflects a reasonable interpretation of the CLCPA. As the MMU and Consumer Stakeholders point out, the CLCPA does not require all fossil-fueled resources to cease operating by 2040, and a 20-year amortization period could also be justified.[102] NYISO's proposal based on its interpretation of the statute is also reasonable, however, and therefore, pursuant to FPA section 205 precedent, we must accept it.[103]

35. Moreover, we set aside the prior determination that NYISO's proposal "assumes too much" and was based on improper speculation.[104] In establishing an amortization period, NYISO had to make certain assumptions, which NYISO made based on the currently-effective laws and regulations. Given the information available, NYISO's choices were reasonable. While the record indicates that dispatchable thermal resources[105] may be needed to maintain reliability in New York after 2039,[106] as NYISO noted in its filing and IPPNY emphasizes on rehearing, the New York Commission has not yet established the program or implemented regulations to allow for the continued operation of fossil fuels, or their conversion to operate on a non-carbon-emitting fuel.[107] Nor has the New York Commission established a program that allows compliance on a net basis.

3210362, at *2.

[101] *IPPNY*, 2022 WL 3210362, at *2; *see also* Rehearing Request at 12-17, NYISO Filing at 51-52.

[102] *See* MMU Comments at 4-6; Consumer Stakeholders Answer at 5-8.

[103] *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) ("FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable—and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs."); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103, at P 59 (2014) (Filing party "need only demonstrate that its proposed revisions are just and reasonable, not that its proposal is the most just and reasonable among all possible alternatives.").

[104] *See* Remand Order, 181 FERC ¶ 61,227 at PP 26, 34.

[105] Thermal resources, including fossil-fueled resources, are resources that burn a combustible fuel to generate electricity, such as gas, renewable natural gas, hydrogen, or another emissions-free fuel.

[106] Remand Order, 181 FERC ¶ 61,227 at P 31.

[107] NYISO Filing at 51-52; Rehearing Request at 17.

Moreover, there is significant factual dispute in the record regarding the feasibility of such technologies, now and in the future.[108] NYISO's decision to not consider the potential for new fuels and technologies enabled NYISO to avoid speculating about future technological development and costs. Therefore, upon further reflection, we conclude that, regardless of whether such resources will be needed after 2039, in the absence of regulations allowing the continued use of the reference unit with or without technological modifications, NYISO reasonably interpreted the CLCPA to establish a 17-year amortization period given the information available.

36. As we have explained, the amortization period is an element of the DCR process that takes multiple risk factors into account, such as technological risks, economic viability, and potential future environmental regulations.[109] Given the CLCPA's zero-emission target and the absence of eligibility rules at present to permit a fossil-fueled generator to operate as a zero-emissions resource beginning in 2040, we set aside the Commission's prior determination and find that 17 years is a just and reasonable amortization period.[110] As NYISO explained, 17 years represents the anticipated average service life for a hypothetical peaking plant like the ones used in the 2021-2025 DCR while also reflecting the fact that a peaking plant would face significant pressure to retire by January 1, 2040. Previously, in the 2014-2017 DCR Order, the Commission approved NYISO's proposal to reduce the amortization period from 30 years to 20 years, finding that the 20-year period appropriately adjusted for New York State's tightening environmental standards and uncertainty regarding facilities' future economic ability to retrofit.[111] We find that similar circumstances exist here.

37. Because we find that NYISO has justified its proposed amortization period pursuant to FPA section 205, we also conclude that the rates that result from the 17-year amortization period are just and reasonable. We note that, as IPPNY points out, the rates produced using the 17-year amortization period are even lower in some zones than they were using a 20-year amortization period during the prior DCR.[112]

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[108] *Compare* Rehearing Request at 17 (stating that the necessary technology and infrastructure for non-carbon emitting fuels does not exist yet); NYISO Filing at 51-52 *with* Consumer Stakeholders Protest at 18 (stating that "[s]uch technologies (as fully hydrogen combustion turbines) exist in the market today and are already in use around the world") (filed Dec. 21, 2020).

[109] Remand Order, 181 FERC ¶ 61,227 at P 29; *see also* 2017-2021 DCR Order, 158 FERC ¶ 61,028 at PP 74-44, 83.

[110] Rehearing Request at 9.

[111] Remand Order, 181 FERC ¶ 61,227 at P 29 & n.79 (citing 2014-2017 DCR Order, 146 FERC ¶ 61,043 at P 117).

The Commission orders:

(A) In response to IPPNY's request for rehearing, the Remand Order is hereby modified and set aside, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a compliance filing within 21 days of the date of this order to implement, as soon as practicable under the auction timelines, an amortization period of 17 years for the remainder of the 2021-2025 DCR, as discussed in the body of this order.

By the Commission. Commissioner Christie is dissenting with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

[112] Rehearing Request at 29-30.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc. Docket No. ER21-502-005

(Issued May 19, 2023)

CHRISTIE, Commissioner, *dissenting*:

1. I dissent to the majority's decision to change course from its now well-documented finding that NYISO must continue to use the previously approved 20-year amortization period for the 2021-2025 Demand Curve Reset (DCR) cycle. Both the New York State Public Service Commission (NYPSC) and the independent Market Monitoring Unit for NYISO (MMU) support the 20-year amortization.[1] I see no basis for us to reverse our earlier majority votes that were consistent with the positions of the NYPSC and MMU and well supported in the record.

2. As today's order sets forth, this Commission has now issued two substantive orders[2] finding that NYISO's 17-year amortization period should be rejected.[3] I continue to support those orders. Just a little over five months ago, a majority of the Commission clearly stated a 17-year amortization period was unjust and unreasonable:

> [W]e continue to find that there is *insufficient evidence to conclude* that NYISO's proposal to implement a 17-year amortization period when calculating the net annual cost of the hypothetical peaking plant used to define the ICAP Demand Curves in the 2021-2025 DCR is just and reasonable. . . . Rather than departing from Commission precedent to base

[1] The MMU notes in its comments that it "is responsible for monitoring the electricity markets. As the MMU, we are expected to provide comments on the ICAP [DCR] study and the NYISO's recommendations for the proposed curves." MMU December 21, 2020 Comments at 1 (footnote omitted). Therefore, the independent entity whose job it is to comment on NYISO's recommendations with regard to the proposed demand curves and the amortization period at issue in this docket asserted that the Commission should retain the 20-year amortization period and reject the 17-year amortization period. *Id*. at 14 and *passim*.

[2] *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,012 (2021); *N.Y. Indep. Sys. Operator, Inc.*, 181 FERC ¶ 61,227 (2022) (Remand Order).

[3] *N.Y. Indep. Sys. Operator, Inc.*, 183 FERC ¶ 61,130 at PP 9, 15-19 (2023) (Order).

> our findings in this case on NYISO's speculation, we rely on record evidence demonstrating that *a 17-year amortization period is not just and reasonable*.[4]

3. The NYPSC itself—the entity with the ability to establish the CLCPA program at issue here and modify obligations and targets—supports retention of the 20-year amortization period and rejection of the 17-year amortization period. The most recent filing in which the NYPSC participated decisively stated:

> The NYISO's decision to reduce the amortization period to 17-years makes an assumption about the future topology of the electric system that is not supported. While the [the Climate Leadership and Community Protection Act (the Act or CLCPA)] was enacted in July of 2019, the State has a detailed schedule in place for the phased implementation of its ambitious objectives. The State recognized that it would require substantial collaboration with stakeholders and experts to achieve the Act's mandates. Consistent with a phased approach, the Act directed the NYPSC to undertake a review, by July 1, 2024 and every two years thereafter, related to the 70 by 30 Target and the 2040 *Target* to determine, among other matters, "factors that will or are likely to frustrate progress toward the targets." In other words, the State still has substantial progress to make and its pathway remains largely undefined. *As such, [FERC] is not speculating about future changes to the Act while the Act's mandates are still being developed. While [FERC] precedent required the NYISO to "take into account currently effective laws and regulations and avoid speculating about laws and regulations in the future" when creating its DCR recommendations, continuing a 20-year amortization period follows the plain reading of the Act which explicitly provides for these implementation processes to be developed over many years and does not require all generation currently running on fossil-fuels or the hypothetical proxy unit to retire by 2040*.[5]

4. Thus, the NYPSC, which, by the majority's own admission, the CLCPA authorizes "to establish the program to meet the 2040 zero-emission target, and to take into account 'safe and adequate electric service in the state under reasonably foreseeable circumstances' in establishing such program. . . . [and] to modify the target and/or ~~obligations to ensure such s~~afe and adequate electricity service, and to suspend

[4] Remand Order at PP 25, 27 (footnotes omitted) (emphasis added).

[5] Consumer Stakeholders October 20, 2022 Answer at 7-8 (footnotes omitted) (emphasis added). The NYPSC is part of the Consumer Stakeholders group. The Consumer Stakeholders' Answer was executed on behalf of the NYPSC by its General Counsel.

obligations temporarily for safety and reliability, contractual, or affordability reasons,"[6] unequivocally states that selecting the 20-year amortization period is not the result of speculation (as the majority now insists) but is rather the result of the "plain reading" of the CLCPA and the direct result of applying current New York laws and regulations.

5. Finally, I note that I cannot agree with the majority's conclusion that "the rates that result from the 17-year amortization period are just and reasonable. We note that, as IPPNY points out, the rates produced using the 17-year amortization period are even lower in some zones than they were using a 20-year amortization period during the prior DCR."[7] The majority draws this conclusion while failing to acknowledge that in the Remand Order, the Commission recognized that Consumer Stakeholders, including the NYPSC, "contend that implementing a 17-year amortization period would result in unnecessarily high net CONE estimates for the proxy peaking unit. Specifically, Consumer Stakeholders estimate that a 17-year amortization period would cause an increase in over $100 million in unhedged capacity costs for customers in New York State."[8] The fact remains that this will lead to higher costs borne by consumers.

6. As I stated up front: I continue to find the proposal for a 17-year amortization schedule to be unjust and unreasonable and would have retained the 20-year amortization schedule.

For these reasons, I respectfully dissent

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Mark C. Christie
Commissioner

[6] Order at P 32 (footnotes omitted).

[7] *Id*. P 37 (footnote omitted).

[8] Remand Order at PP 23 (citing Consumer Stakeholders Answer at 8); *see id*. at P 33.