#### 181 FERC ¶ 61,227 UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER21-502-004

#### ORDER ON REMAND

(Issued December 16, 2022)

1. On August 9, 2022, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision<sup>1</sup> granting the Independent Power Producers of New York Inc.'s (IPPNY) petition for review of the Commission's decision to reject the New York Independent System Operator Inc.'s (NYISO) proposal to revise section 5.14.1.2 of its Market Administration and Control Area Services Tariff (Services Tariff)<sup>2</sup> to implement 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).<sup>3</sup> The D.C. Circuit vacated the Commission's order and remanded to the Commission for further proceedings consistent with the judgment in *IPPNY*.<sup>4</sup> As discussed below, upon further review of the record, we affirm that NYISO must continue to use the previously approved 20-year amortization period for the 2021-2025 DCR cycle.

<sup>1</sup> Indep. Power Producers of N. Y., Inc. v. FERC, No. 21-1166, 2022 WL 3210362 (D.C. Cir. Aug. 9, 2022) (*IPPNY*).

<sup>2</sup> New York Independent System Operator, Inc., NYISO Tariffs, NYISO MST, 5.14 MST Installed Capacity Spot Market Auction & Installed Capacity Supplier Deficiencies (32.0.0).

<sup>3</sup> N.Y. Indep. Sys. Operator, Inc., 175 FERC ¶ 61,012 (2021) (DCR Order).

<sup>4</sup> Although the Remand Order broadly vacated the DCR Order, we find that the other findings of the DCR Order do not need to be revisited to issue an order consistent with the D.C. Circuit's judgment. Accordingly, we reaffirm the remainder of the Commission's findings in the DCR Order. *See* DCR Order, 175 FERC ¶ 61,012 at PP 40-44, 63-66, 92-96, 127-135, 147-148.

### I. <u>Background</u>

2. 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 Demand Curve reset process and to establish the ICAP Demand Curves for the first Capability Year covered by that process.<sup>5</sup> 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),<sup>6</sup> and, if applicable, in any new load zone to meet minimum capacity requirements.<sup>7</sup> 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.<sup>8</sup> Part of this calculation is the term in years over which NYISO assumes the developer recovers its up-front investment costs (amortization period).<sup>9</sup> Once set, the amortization period is fixed for the entire demand curve reset cycle.<sup>10</sup>

3. On November 30, 2020, as amended February 12, 2021, NYISO filed revisions to the ICAP Demand Curves for the 2021-2025 DCR (DCR Filing). NYISO stated that after considering stakeholder feedback, it proposed to adopt a 17-year amortization period.<sup>11</sup> This represented a three-year reduction from the 20-year amortization period proposed in NYISO's two previous demand curve resets.<sup>12</sup> NYISO stated that a primary

<sup>5</sup> NYISO, Services Tariff, § 5.14 (30.0.0), § 5.14.1.2.

<sup>6</sup> 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).

<sup>7</sup> NYISO, Services Tariff, § 5.14 (30.0.0), § 5.14.1.2.2.

<sup>8</sup> N.Y. Indep. System Operator, Inc., Filing, Docket No. ER21-502-000, at 47 (filed November 30, 2020) (DCR Filing).

<sup>9</sup> To assist in this review process, NYISO engaged the consulting firm Analysis Group, Inc., which in turn hired Burns & McDonnell Engineering Company, Inc. to serve as subcontractor and assist in the development of certain data and information related to the 2021-2025 DCR. These two firms are herein referred to as the Consultants.

<sup>10</sup> See N.Y. Indep. Sys. Operator, Inc., 156 FERC ¶ 61,039, at P 15 (2016).

<sup>11</sup> DCR Filing at 51.

<sup>12</sup> N.Y. Indep. Sys. Operator, Inc., 146 FERC ¶ 61,043, at P 109 (2014); N.Y. Indep. Sys. Operator, Inc., 158 FERC ¶ 61,028, at P 40 (2017).

consideration for using a 17-year amortization period was New York State's recent enactment of the Climate Leadership and Community Protection Act (CLCPA), which requires electricity demand in the State to be served by 100% zero-emission resources by January 1, 2040.<sup>13</sup> 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.<sup>14</sup>

4. NYISO's proposal garnered divergent stakeholder feedback. The New York Transmission Owners (NYTO) agreed that NYISO's recommended 17-year amortization period reflected the conditions throughout the 2021-2025 DCR period.<sup>15</sup> IPPNY, on the other hand, agreed with NYISO's reasoning for reducing the proposed amortization period from 20 years, but argued that a 15-year amortization period was more reasonable.<sup>16</sup> According to IPPNY, a 15-year timeline would more realistically consider probable construction timelines based on projects that could be developed during the 2021-2025 DCR period and account for risk to in-service dates.<sup>17</sup> NYTOs, however, argued that a 15-year amortization period would inappropriately be based on the time remaining before 2040 at the end of the four-year DCR cycle.<sup>18</sup>

5. By contrast, Potomac Economics, Ltd. (MMU) and Consumer Stakeholders<sup>19</sup> opposed NYISO's proposal to shorten the amortization period from 20 to 17 years. The MMU asserted that a 20-year amortization period was already a "very conservative assumption" given that most generators have significant residual value after 20 years because they generally produce substantial net revenue for decades after the first 20 years of operation.<sup>20</sup> The MMU further argued that NYISO did not analyze the text of the CLCPA or explain why it was reasonable to conclude that the CLCPA would lead all

<sup>13</sup> CLCPA, N.Y. Statutes, Chapter 106 of the laws of 2019 (Jul. 18, 2019) (CLCPA).

<sup>14</sup> DCR Filing at 51.

<sup>15</sup> NYTOs Protest at 47.

<sup>16</sup> IPPNY Protest at 9.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> NYTOs Protest at 48.

<sup>19</sup> Consumer Stakeholders are: the New York State Public Service Commission (New York Commission), Multiple Intervenors, the City of New York, and Consumer Power Advocates.

<sup>20</sup> MMU Comments at 3.

fossil fueled generation to stop earning net revenue after 2039.<sup>21</sup> The MMU pointed out that that the CLCPA does not directly establish any requirements for how power generators will comply with the 2040 zero emissions target.<sup>22</sup> Rather, according to the MMU, the CLCPA requires the New York Commission to establish programs by June 30, 2021 designed to achieve zero emissions.<sup>23</sup> The MMU contended that, until regulations are issued, the implications of the zero emissions requirement are unclear.

6. Citing several studies in the record, the MMU contended that: (1) the retirement of all fossil fuel generation in 2040 was extremely unlikely; and (2) large quantities of dispatchable, flexible resources would be needed to preserve reliability in a system otherwise dominated by intermittent renewables and battery storage.<sup>24</sup> One study found a need for 20 to 33 GW of dispatchable thermal capacity in 2040, assuming the capacity would switch to a generic zero-emissions fuel.<sup>25</sup> The same study described an alternative scenario that did not allow such dispatchable thermal resources to remain in service. Such a scenario resulted in "extreme" outcomes including overbuild of renewable and storage capacity by over 100 GW and large curtailments of renewable generation. Another study found a need for firm capacity to ensure reliability as intermittent renewable penetration grows, including 17 GW of combustion turbine and combined cycle facilities switching to zero-emissions biogas.<sup>26</sup> Thus, the MMU asserted that "[a]vailable evidence does not support NYISO's treatment of retirement by 2040 as the default compliance option for" fossil fueled generators.<sup>27</sup> The MMU also asserted that a 17-year amortization period would result in "excessively high demand curves" and increase the net cost of new entry between 4.8% and 10.2% depending on the zone.28

<sup>21</sup> Id. at 3.

<sup>22</sup> Id. at 5.

<sup>23</sup> CLCPA § 66p(a).

<sup>24</sup> MMU Comments at 6-7.

<sup>25</sup> MMU Comments at 7 (citing The Brattle Group, New York's Evolution to a Zero Emission Power System, 13-15, 62-70 (2020), https://www.nyiso.com/documents/20142/13245925/Brattle%20New%20York%20Electr ic%20Grid%20Evolution%20Study%20-%20June%202020.pdf/69397029-ffed-6fa9cff8-c49240eb6f9d).

<sup>26</sup> Energy and Environmental Economics, New York State Decarbonization Pathways Analysis, 14-16 (2020) https://climate.ny.gov/-/media/Project/Climate/Files/2020-06-24-NYS-Decarbonization-Pathways-Report.pdf.

<sup>27</sup> MMU Comments at 6.

7. The MMU further contended that NYISO's proposed use of a 17-year amortization period "effectively assumes that investors will consider the downside risk associated with the CLCPA's 'zero-emissions' target, but not any of the upside effects that would result from this and other features of the CLCPA."<sup>29</sup> The MMU argued that this unbalanced approach led to an excessively conservative estimate of the hypothetical peaking plant's revenue requirement.<sup>30</sup>

8. Consumer Stakeholders agreed with the MMU that newly constructed fossil fueled units will not necessarily need to retire in 2039, and instead could implement plant modifications to continue operations.<sup>31</sup> Consumer Stakeholders contended that "[i]t is well established that because a fossil-fueled plant may not operate in its current configuration past a certain date does not mean that it necessarily must retire."<sup>32</sup> Consumer Stakeholders pointed out the Consultants' acknowledgement that fossil fueled plants could implement modifications to continue operations beyond 2039, and noted that NYISO's proposal failed to assess any such technology options. Consumer Stakeholders also argued that NYISO's own planning studies support the fact that there will be fuel switching in the future and that not all existing dispatchable sources will retire.<sup>33</sup> Moreover, Consumer Stakeholders agreed that reducing the amortization period to 17 years would significantly impact the total cost of capacity to consumers and that NYISO failed to explore options that might avoid such impacts.<sup>34</sup>

9. In response to arguments favoring a 15- or 20-year amortization period, NYISO asserted that the proposed 17-year amortization period did not reflect any supposition that all fossil fueled generation will cease operation as of January 1, 2040.<sup>35</sup> NYISO added that the proposed 17-year amortization period did not presume that potential retrofitting options will be unavailable or not pursued if economically rational. Moreover, NYISO explicitly recognized that meeting the CLCPA's zero-emission generation requirement

<sup>28</sup> *Id.* at 4.
<sup>29</sup> *Id.* at 9.
<sup>30</sup> *Id.*<sup>31</sup> Consumer Stakeholders Comments at 18.
<sup>32</sup> *Id.* at 19.
<sup>33</sup> *Id.* at 20.
<sup>34</sup> *Id.* at 18-19.
<sup>35</sup> DCR Filing at 52.

would require evolution of the resource mix to include flexible assets capable of operating in compliance with the CLCPA's zero-emission requirements.

10. Next, NYISO pointed out that in previous ICAP Demand Curve reset proceedings, the Commission required NYISO to take into account laws and regulations as currently effective and avoid speculation as to potential future changes in such laws and regulations.<sup>36</sup> NYISO went on to explain that, at the time of the DCR Filing, New York State had not implemented rules or regulations to specifically define the resource types, fuels, or retrofitting options eligible for compliance with the 2040 zero-emission requirement. For this reason, NYISO stated that there was no basis on which to assume that a fossil fuel facility will be able to retrofit or implement fuel conversion measures in order to achieve compliance with the CLCPA by 2040. According to NYISO, reliance on this kind of speculation would directly contradict the Commission's prior mandates regarding allowable considerations during each demand curve reset.<sup>37</sup>

11. NYISO explained that the ICAP Demand Curve reset process implicitly required that the resource be in-service as of May 1, 2021 to establish the ICAP Demand Curves for the 2021/2022 Capability Year. Based on its consideration of these factors, NYISO contended that a 17-year amortization period for peaking facilities was appropriate and reasonable for the 2021-2025 DCR.<sup>38</sup> NYISO added that, as additional data and information regarding resources, technologies, and fuels eligible for operation in compliance with the CLCPA's zero-emission requirement becomes available, NYISO would consider such information in future demand curve resets.

12. On April 9, 2020, the Commission issued an order accepting in part, subject to condition, NYISO's proposed revisions to its Services Tariff and directing NYISO to submit a compliance filing maintaining an amortization period of 20 years for the 2021-2025 DCR.<sup>39</sup> The Commission rejected NYISO's proposed 17-year amortization period and found that NYISO failed to demonstrate that the proposal was consistent with NYISO's Services Tariff requirement to assess the current localized levelized embedded cost of a peaking plant.<sup>40</sup> The Commission then stated that NYISO's basis for proposing the use of a 17-year amortization period was speculative and may result in unnecessarily high net cost of new entry (Net CONE) estimates, which would impact the ICAP Demand Curves. The Commission found that a 17-year amortization period

<sup>36</sup> Id.
<sup>37</sup> Id.
<sup>38</sup> Id. at 53.
<sup>39</sup> DCR Order, 175 FERC ¶ 61,012 at P 161.
<sup>40</sup> Id.

(corresponding to a new peaking plant retiring by January 1, 2040) was speculative because it failed to recognize that the CLCPA's compliance criteria for its zero emission requirement had not yet been finalized and that the CLCPA requirements may be modified, as necessary, to allow fossil fueled resources to remain in service beyond 2040 as a means of ensuring system reliability.<sup>41</sup> For this reason, the Commission found that there was insufficient support in the record to justify reducing the amortization period to 17 years.<sup>42</sup>

13. IPPNY sought rehearing of the DCR Order's finding that the amortization period for the 2021-2025 DCR should be set at 20 years.<sup>43</sup> Rehearing of the DCR Order was denied by operation of law.<sup>44</sup>

# II. IPPNY Remand

14. The D.C. Circuit held that the DCR Order's justification for rejecting NYISO's proposal to implement a 17-year amortization period was insufficient.<sup>45</sup>

15. First, the D.C. Circuit found that the Commission's suggestion that some fossilfueled 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."<sup>46</sup> The D.C. Circuit explained that, at the time of the DCR Filing, the New York Commission had not exercised its discretion to modify the CLCPA's zero-emission target, nor had it given any indication that it ever would. The

<sup>41</sup> Id.

<sup>42</sup> The Commission also rejected IPPNY's suggestion that NYISO implement a 15-year amortization period. The DCR Order found that IPPNY's proposal ignored that a peaking plant could achieve commercial operation in any of the four Capability Years during the 2021-2025 DCR period. The DCR Order added that IPPNY's argument relied on speculative assumptions about whether and when existing projects in the queue would be built. *Id.* P 162.

<sup>43</sup> IPPNY Rehearing Request at 1-2.

<sup>44</sup> N.Y. Indep. Sys. Operator, Inc., 175 FERC ¶ 62,159 (2021).

<sup>45</sup> *IPPNY*, 2022 WL 3210362, at \*2.

<sup>46</sup> *Id.* at \*2-\*3 (citing DCR Order, 175 FERC ¶ 61,012 at P 616; *N.Y. Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043, at P 74 (2014) ("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.")).

court further stated that the Commission is entitled to abandon its precedents and choose a new approach so long as it "'provide[s] reasoned explanation for its action' and acknowledges 'that it *is* changing position.'"<sup>47</sup> The court found that the DCR Order failed to recognize or explain the Commission's departure from precedent.

16. 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.<sup>48</sup>

17. Third, the D.C. Circuit found that the DCR Order failed to explain why the Commission found the MMU's comments, which claimed 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, compelling or why the Commission was persuaded that fossil-fueled plants may continue operating after 2040. According to the court, this resulted in the Commission's failure to "either critically review the third party's analysis or perform its own."<sup>49</sup>

18. 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.<sup>50</sup> The D.C. Circuit indicated that it expressed no view on whether the more detailed explanations the Commission offered in briefing before the court could support the 20-year amortization period if they were adopted by the Commission and supported by the record.

# III. Motion for Expedited Order on Remand and Comments

19. On October 5, 2022, IPPNY filed a Motion for Expedited Order on Remand (Motion) requesting that the Commission issue an order on remand before NYISO's November Spot Market Auction, consistent with the judgment of the D.C. Circuit.<sup>51</sup>

<sup>47</sup> *Id.* (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)).

<sup>48</sup> Id. (citing Cities of Bethany v. FERC, 727 F.2d 1131, 1136 (D.C. Cir. 1984)).

<sup>49</sup> *Id.* (quoting *In re NTE Conn.*, LLC, 26 F.4th 980, 988 (D.C. Cir. 2022) (cleaned up)).

<sup>50</sup> Id. (quoting Prometheus Radio Proj., 141 S. Ct. 1150, 1158 (2021)).

<sup>51</sup> IPPNY, Motion for Expedited Order, Docket No. ER21-502-000 (filed October 5, 2020) (Motion).

IPPNY requests that the Commission direct NYISO to file amendments to its Services Tariff replacing the 20-year amortization period parameter with NYISO's originally proposed 17-year amortization period.<sup>52</sup> IPPNY explains that, under NYISO's prompt capacity market structure, spot market auctions are held on a monthly basis to set the market clearing prices in all capacity zones for the following month. IPPNY contends that the Commission's rejection of NYISO's proposed 17-year amortization period caused the market clearing prices produced under the current ICAP Demand Curves to be "artificially low and . . . continue to fail to incentivize the development and maintenance of supply resources to meet minimum ICAP requirements in New York State."<sup>53</sup>

20. IPPNY contends that although it is likely that there will be a need for dispatchable generation after 2040, there is no way to know which resources or technologies will be feasible, economically viable or permitted to meet the goals of the CLCPA.<sup>54</sup> IPPNY argues that it is also unknown whether the proxy peaking unit will be one of the dispatchable resources that could continue to operate on the system. Furthermore, IPPNY asserts that it is speculative to rely on the MMU's arguments regarding repowering or retrofitting generation or exceptions to the CLCPA. IPPNY argues that any reliance on future technology, including costs of retrofits, or exceptions or changes to the CLCPA is speculative and notes that the New York Department of Environmental Conservation has denied permits to proposed gas fired repowering projects on grounds that the projects would be inconsistent with the goals of the CLCPA.<sup>55</sup>

21. On October 11, 2022, NYISO submitted comments in response to IPPNY's Motion. NYISO does not address the ultimate outcome advocated by IPPNY, but supports IPPNY's request for expedited action. NYISO states that the unresolved nature of this proceeding creates ongoing market uncertainty.<sup>56</sup> NYISO notes that the current reset period lasts until May 1, 2025, leaving approximately two and a half years in the reset period.<sup>57</sup> NYISO explains that the ICAP Demand Curves apply in monthly ICAP spot market auctions conducted by NYISO, which among other things, provide price signals to inform the value of capacity in the market.<sup>58</sup> NYISO asserts that the

<sup>52</sup> *Id.* at 1-2.
<sup>53</sup> *Id.* at 2-3.
<sup>54</sup> *Id.* at 11.
<sup>55</sup> *Id.* at 11-13.
<sup>56</sup> NYISO Answer at 2.
<sup>57</sup> *Id.* at 3 n.12.
<sup>58</sup> *Id.* at 4.

uncertainty engendered by the absence of resolution regarding the applicable amortization period and the impacts thereof on the ICAP Demand Curves adversely impacts confidence in the price signals produced by the ICAP spot market auctions. For this reason, NYISO argues that expeditious action on remand will provide important clarity to the marketplace regarding the ICAP Demand Curves applicable for the remainder of the current reset period.

22. On October 20, 2022, Consumer Stakeholders submitted an answer in reply to IPPNY's Motion. First, Consumer Stakeholders argue that IPPNY's Motion relies on a "gross mischaracterization" of *IPPNY*.<sup>59</sup> Specifically, Consumer Stakeholders rebut IPPNY's assertion that the D.C. Circuit's "vacatur of the [DCR Order] signals that the Commission's rejection of the NYISO's 17-year amortization period and replacement with a 20-year amortization period is gravely flawed."<sup>60</sup> Consumer Stakeholders emphasize that the D.C. Circuit did not direct a substantive outcome on the merits. Consumer Stakeholders restate their position that a plain reading of the CLCPA refutes the assumption that the 2040 zero-emissions target would mandate the retirement of all fossil-fuel generation in New York State. Consumer Stakeholders continue that the terms of the CLCPA demonstrate that New York State's climate objective is importantly linked to its commitment to maintain safe and reliable service.<sup>61</sup> Consumer Stakeholders add that the record in this proceeding demonstrates a need for some form of dispatchable generation in 2040 to ensure system reliability.

23. Consumer Stakeholders argue that pursuant to New York State's currently effective laws and regulations, there are viable options for units that are currently run by fossil fuels to remain in operation beyond 2039.<sup>62</sup> Moreover, Consumer Stakeholders assert that New York State still has substantial progress to make toward achieving the CLCPA's zero-emission target and adds that the pathway to this achievement remains largely undefined.<sup>63</sup> Thus, according to Consumer Stakeholders, the DCR Order does not speculate about future changes to the CLCPA because the CLCPA's mandates are still under development. Consumer Stakeholders contend that continuing a 20-year amortization period follows a plain reading of the CLCPA, which explicitly provides for these implementation processes to be developed over many years and does not require all generation currently running on fossil-fuels to retire by 2040.<sup>64</sup> Consumer Stakeholders

<sup>60</sup> Id. at 4 (citing IPPNY, 2022 WL 3210362, at \*3).

<sup>61</sup> Id. at 5.

62 Id. at 6.

<sup>63</sup> Id. at 7.

<sup>&</sup>lt;sup>59</sup> Consumer Stakeholders Answer at 3.

also 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.<sup>65</sup>

24. On October 20, 2022, the Electric Power Supply Association (EPSA) submitted an answer in support of IPPNY's Motion. EPSA states that it is critical that the Commission resolve the proceeding expeditiously because "market clearing prices produced under [a 20-year demand curve] are artificially low and will continue to fail to send price signals to incentivize the development and maintenance of supply resources need to meet the ICAP requirements in New York State."<sup>66</sup>

### IV. Discussion

## A. <u>Substantive Matters</u>

25. Considering the record as a whole, including what the record reflects as well as what it lacks, we 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. As discussed below, although NYISO indicates that it intends to take into account the CLCPA, there is no record evidence supporting its assumptions about how the New York Commission will implement the CLCPA, much less about how the market will be impacted by and react to a future CLCPA program. However, as noted in greater detail below, the New York Commission both supports retaining the 20-year amortization period and 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.<sup>67</sup> Moreover, there is record evidence that moving to a 17-year amortization period will significantly increase the cost of capacity. Viewing the record as a whole, we find that the increase in costs to be borne by consumers is not justified. Therefore, we affirm the DCR Order's rejection of NYISO's proposal and direct NYISO to continue to implement a 20-year amortization period for the 2021-2025 DCR cycle.

<sup>64</sup> Id. at 8.

<sup>65</sup> Id.

<sup>66</sup> EPSA Answer at 3.

<sup>67</sup> The New York Commission is part of the Consumer Stakeholders group. The Consumer Stakeholders' Protest and Answer were executed on behalf of the New York Commission by its General Counsel.

26. As an initial matter, we clarify that the Commission's rejection of NYISO's proposed 17-year amortization period, and requirement to instead maintain the 20-year amortization period, is not based on the possibility that the New York Commission might alter the CLCPA's requirements in the future, which could constitute a departure from Commission precedent, as the D.C. Circuit suggested, but rather is based on a reasonable weighing of the record evidence, as a whole, consistent with Commission precedent. As the D.C. Circuit explained, Commission precedent requires that demand curve resets take into account currently effective laws and regulations and "avoid speculating" about laws and regulations in the future.<sup>68</sup> On 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. Further, the law explicitly requires the New York Commission to consider and address the impacts of the zero-emission requirement on "safe and adequate electric supply."<sup>69</sup> To date, the New York Commission has not finalized compliance criteria indicating that the only means of complying with the law will be for existing fossil fuel generators to retire.<sup>70</sup> As noted above, however, the New York Commission recognized in its comments in this proceeding that, "[t]he assumption that the 2040 Target would mandate retirement of all generation currently running on fossil fuels was clearly refuted by record evidence, including a plain reading of the [CLCPA]."<sup>71</sup> As such, it is reasonable to find that NYISO's proposal goes beyond "currently effective laws and regulations" and instead is grounded in speculative assumptions about future action by the State. Such a finding is consistent with Commission precedent.

27. Indeed, the Commission's holding in this case is consistent with how the Commission addressed speculative reasoning in prior demand curve reset proceedings. For example, in a prior NYISO demand curve reset proceeding, the Commission held that "[w]hile there is always risk that regulations will change in the future, [the Commission] cannot base the finding of viability on the speculation that . . . New York State regulators will act at some point in the future."<sup>72</sup> The Commission has further held that "[a] demand curve reset process takes place every [four] years so that changed circumstances, such as new regulations[,] can be taken into account," and that "[a] future reset process would be

<sup>68</sup> DCR Order, 175 FERC ¶ 61,012 at P 161; *N.Y. Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043, at P 74.

<sup>69</sup> CLCPA §§ 66-p(2), 66-p(4).

<sup>70</sup> 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. DCR Filing at 52.

<sup>71</sup> Consumer Stakeholders Answer at 5.

<sup>72</sup> N.Y. Indep. Sys. Operator, Inc., 146 FERC ¶ 61,043, at P 74.

a more appropriate forum to consider any future developments."<sup>73</sup> NYISO's proposal is grounded in the speculation that the New York Commission will act in a specific way, despite the fact that there is no record evidence to support NYISO's position. Rather than departing from Commission precedent to base 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. Should the New York Commission ultimately adopt implementation criteria that explicitly requires the retirement of all fossil-fuel generators in New York State by 2040, those regulations can be properly taken into account in future demand curve resets.<sup>74</sup>

28. In the 2017-2021 NYISO demand curve reset, the Commission rejected NYISO's proposal to include selective catalytic reduction (SCR) emissions controls in the peaking plant design for the NYCA demand curve, concluding that NYISO's proposal was based on speculation.<sup>75</sup> In that proceeding, NYISO based its proposal on its interpretation of the New York State Board on Electric Generating Siting (NY Siting Board) authority under Article 10 of the New York Public Service Law, which required that a peaking plant must obtain a certificate of environmental compatibility and public need from the NY Siting Board.<sup>76</sup> NYISO argued that this requirement created significant uncertainty regarding whether the NY Siting Board would grant a certificate of environmental compatibility and public need to a peaking plant without SCR emissions controls. Protesting parties argued, and the Commission agreed, that NYISO incorrectly assumed that the implementation of this certification requirement would require a peaking plant to include SCR emissions controls to become certified.<sup>77</sup> Protesting parties also pointed out that there were no express requirements for SCR emissions controls in Article 10 and argued that NYISO failed to address alternative options for compliance with Article 10.78 The Commission agreed with protestors' arguments and found that NYISO's proposal was speculative and that NYISO had not supported its proposal as just and reasonable. Similarly, here we find that the undefined programmatic requirements under the CLCPA, and the associated impacts on generation resources after 2039, makes NYISO's proposal in this docket speculative and unsupported as just and reasonable and, therefore, the

<sup>73</sup> Id.

<sup>74</sup> We note that the New York Commission supports the Commission's ruling in favor of the 20-year amortization period. Consumer Stakeholders Answer at 7-8.

<sup>75</sup> N.Y. Indep. Sys. Operator, Inc., 158 FERC P 61,028, at PP 58, 61.

<sup>76</sup> *Id.* P 33.

<sup>77</sup> Id. P 55.

<sup>78</sup> Id. P 45.

Commission's treatment of the NYISO proposal in this docket is consistent with prior holdings.

29. The Commission first accepted NYISO's proposal to reduce the amortization period from 30 to 20 years in NYISO's 2014-2017 demand curve reset proceeding, in light of the inherent risks of investing in the proxy unit. In accepting NYISO's proposal, the Commission pointed out that the amortization period is an element of the demand curve reset process that takes multiple risk factors into account.<sup>79</sup> Importantly, those factors include technological risks as well as the economic viability of the proxy unit under potential future environmental regulations, and the use of dual fuel capability in multiple NYISO localities under the Services Tariff.<sup>80</sup> In the 2014-2017 demand curve reset, NYISO's proposal was primarily grounded in NYISO's recommendation to change the peaking unit technology, which NYISO stated could result in lower than expected revenue. NYISO explained that because the new technology was less efficient and higher emitting than the proxy unit used in earlier demand curve resets, there was an increased risk that the unit's performance would not meet modeled expectations and that a shorter amortization period was necessary to attract investment. NYISO now proposes to further reduce the 20-year amortization period and argues that the terms of the CLCPA compound the previously considered risks that supported the 20-year amortization period.<sup>81</sup> However, the terms of the CLCPA alone do not definitively alter these risks in a manner that supports further shortening the amortization period, and NYISO provides no other evidence of additional changed factual circumstances to support moving to a 17-year amortization period.

30. NYISO asserts that a 17-year amortization period is appropriate because, in light of the CLCPA's zero-emission requirement, a developer of a fossil fuel peaking plant would face substantial uncertainty about the financial returns of a fossil fuel peaking plant starting in 2040.<sup>82</sup> We find that NYISO's claim is unsupported and disagree that such uncertainty, on its own, adequately supports NYISO's proposal to further reduce the

<sup>79</sup> N.Y. Indep. Sys. Operator, Inc., 146 FERC ¶ 61,043, at PP 117-118 ("We conclude that adjusting for these environmental risk and other market risks is appropriate and that a 20-year amortization period is one element of the demand curve reset process that takes these factors into account. For the other capacity zones, we conclude that a shorter amortization period is a reasonable basis for accounting for certain technological risks, such as the added uncertainty of the effect of dual fuel requires and limited operating experience of [reference] units.").

<sup>80</sup> N.Y. Indep. Sys. Operator, Inc., 158 FERC P 61,028, at PP 74-77, 83.

<sup>81</sup> See DCR Filing at 51-53.

<sup>82</sup> DCR Filing at 51.

amortization period. Although the CLCPA required the New York Commission to, by June 30, 2021, establish "a program to require that ... by the year [2040] ... the statewide electrical demand system will be zero emissions," such a program has yet to be established and it is unclear when such a program will be established.<sup>83</sup> In addition, and as emphasized by the New York Commission and others in the most recent Consumer Stakeholders filing, NYISO's proposal is unreasonable because it fails to take into account other possibilities, given that the CLCPA also requires the New York Commission to consider and formulate the zero-emissions program to "address impacts of the [zero-emission] program on safe and adequate electric service in the state under reasonably foreseeable conditions," and allows the New York Commission to modify the emissions target upon consideration of certain factors, including reliability.<sup>84</sup> Further, the CLCPA does not explicitly state whether compliance with the zero-emissions requirement will be determined based on a gross or a net basis. This provides one example of how the text of the CLCPA refutes the assumption that the 2040 zeroemissions target mandates the retirement of all fossil-fuel generation in New York State, and as such does not foreclose the continued operation of a fossil fuel peaking plant after 2040.<sup>85</sup> It is 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 zeroemissions target itself will change. Until there is more certainty with respect to how the CLCPA will practically affect new and existing generators post-2040, we find that there is insufficient support for reducing the amortization period to 17 years.

31. Meanwhile, there is persuasive record evidence, provided by the MMU and Consumer Stakeholders, which includes the New York Commission itself, in support of maintaining the 20-year amortization period.<sup>86</sup> The MMU – the independent market monitor to NYISO which regularly reviews data and analyses related to the NYISO markets – presents cogent evidence that large quantities of dispatchable flexible resources will be needed to preserve reliability in a system otherwise dominated by intermittent renewables and battery storage.<sup>87</sup> Specifically, the MMU notes that in its long-term modeling of CLCPA goals, the Brattle Group concluded that 20 to 33 GW of dispatchable, zero-emissions thermal capacity in 2040 would be needed and without such dispatchable thermal resources there would be reliability concerns such as large curtailments of renewable energy resources.<sup>88</sup> The Energy and Environmental

<sup>83</sup> CLCPA § 66-p(b)(2).

<sup>84</sup> Id. Consumer Stakeholders Answer at 5.

<sup>85</sup> See CLCPA § 66(p); see also MMU Comments at 6.

<sup>86</sup> Consumer Stakeholders Answer at 5-6.

<sup>87</sup> MMU Comments at 6-7.

Economics study also reviewed potential pathways to meet the CLCPA's 2040 zeroemissions goal and determined a need for 17 GW of combustion turbine and combined cycle capacity to switch to zero-emissions biogas to ensure reliability as intermittent renewable resources grow.<sup>89</sup> We find that the conclusions presented in these analyses are reasonable and find that they support our conclusion that dispatchable resources will be needed to support reliability in NYISO. Although the studies point to a varying range of needed thermal capacity, they each demonstrate that significant capacity of dispatchable thermal resources will be needed to support reliability as New York State endeavors to meet the CLCPA's emissions goals.

Without addressing the evidence presented by the MMU, NYISO asserts that there 32. is no basis upon which to assume potential retrofitting of thermal plants or fuel conversion to achieve compliance with the requirements of the CLCPA.<sup>90</sup> But as explained herein,<sup>91</sup> the text of the CLCPA does not foreclose these or other options; as commenters have argued here, 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. There is also uncertainty about when the CLCPA will be fully implemented because the New York Commission is permitted to modify the CLCPA emissions targets upon consideration of certain factors, including reliability.<sup>92</sup> This uncertainty is demonstrated by the New York Department of Environmental Conservation's recent denial of two applications for air permits. Each application was denied based on the applicants' "uncertain and speculative" plan for complying with the CLCPA.<sup>93</sup> In fact, in denying both applications, the New York Department of Environmental Conservation recognized that the applicants' plans for compliance depend on "potential future action" by the New York Commission.<sup>94</sup> Although IPPNY cites these air permit denials in support of its position that the CLCPA requires a specific result, we find that the New

<sup>88</sup> See supra n. 25.

<sup>89</sup> See supra n. 26.

<sup>90</sup> DCR Filing at 52.

<sup>91</sup> See, supra PP 26, 30.

<sup>92</sup> Consumer Stakeholders Answer at 5.

<sup>93</sup> See Astoria Gas Turbine Power - Astoria, Queens County, No. 2-6301-00191/00014 at 12 (N.Y. Dept. Envtl. Conserv. Oct. 27, 2021) (Notice of Denial of Title V Air Permit); Danskammer Energy Center - Town of Newburgh, Orange County, No. 3-3346-0011/00017 at 10 (N.Y. Dept. Envtl. Conserv. Oct. 27, 2021) (Notice of Denial of Title V Air Permit).

<sup>94</sup> Astoria Notice of Denial at 13; Danskammer Notice of Denial at 11.

York Department of Environmental Conservation's denial of these permits supports the Commission's view that the CLCPA's zero-emissions goal, on its own, does not provide the clarity necessary to predict the manner in which the New York Commission will implement the CLCPA or the affected parties will comply with the CLCPA. Indeed, the New York Commission states in a filing supporting a 20-year amortization period that New York State "still has substantial progress to make and its pathway remains largely undefined."<sup>95</sup> Accordingly, an amortization period assuming that the CLCPA will require the closure of all greenhouse-gas-emitting resources remains speculative until the New York Commission issues its compliance criteria, because the proposal does not fully consider the range of outcomes that are possible under the CLCPA at this time or the uncertainty surrounding those outcomes.

33. While there is no record evidence that the New York Commission will implement the CLCPA and that market concerns will manifest in the specific manner NYISO suggests, there is indisputable record evidence that reducing the amortization period to 17 years would raise the estimated gross CONE and net CONE values, which would raise the zonal and system-wide demand curves (i.e., the price at any point on the demand curve will be higher for a given quantity demanded and vice versa).<sup>96</sup> The New York Commission agrees that a 17-year amortization period will raise prices.<sup>97</sup> This would, in turn, result in increased costs to customers compared to using demand curves based on a 20-year amortization period, since customers would pay a higher price for capacity (on a per-MW basis) while procuring additional, potentially unnecessary capacity.<sup>98</sup>

<sup>96</sup> DCR Filing, attach. V. at 10. NYISO's compliance filing submitted in this docket also confirmed that a reduced amortization period raised prices in NYISO. N.Y. Indep. Sys. Operator, Inc, Filing, Docket No. ER21-502-002, attach II. § 5.14.1.2 (filed April 16, 2021). NYISO did not refute or otherwise address the arguments in the record regarding rate increases from increasing the Net CONE value used to establish the demand curves in its answer to comments and protests in this proceeding.

<sup>97</sup> Consumer Stakeholders Protest at 21; Consumer Stakeholders Answer at 8.

<sup>98</sup> DCR Filing, attach. V. at 10; MMU Comments at 3-4. To further explain, if the supply curve is horizontal in the range where it would intersect the two demand curves— one based on a 17-year amortization and one based on a 20-year amortization—then capacity prices would be the same, but additional capacity would be procured using the demand curve based on a 17-year amortization, which would also increase total customer costs. If the supply curve is vertical in the range where the supply curve intersects the demand curves, then both curves would result in the same quantity being procured, but the price would be higher using the demand curve with a 17-year amortization period.

<sup>&</sup>lt;sup>95</sup> Consumer Stakeholders Answer at 7.

34. Although as a general matter the fact that a proposal might result in increased rates does not alone render the proposal unjust and unreasonable, there is no record evidence justifying the attendant rate increase here.<sup>99</sup> We acknowledge that NYISO's proposal seeks to take account of the CLCPA and anticipate how implementing the regulations will affect a peaking plant's ability to remain operational beyond 2039, but its proposal assumes too much. Consistent with the Commission's prior treatment of demand curve reset proposals that were based on speculative support, and the record evidence presented in this proceeding, we find that, on balance, NYISO has failed to demonstrate that its proposal is just and reasonable. Should the New York Commission issue compliance criteria before NYISO's next demand curve reset, that development could be considered by NYISO and its stakeholders at that time.

### The Commission orders:

The Commission affirms its earlier rejection of NYISO's proposal to revise section 5.14.1.2 of its Services Tariff 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.

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

(SEAL)

Kimberly D. Bose, Secretary.

<sup>&</sup>lt;sup>99</sup> IPPNY and EPSA turn the FPA section 205 inquiry on its head with the bald assertion that retaining the 20-year amortization period will result in "artificially low" prices. Their claim assails the existing rate without support while requiring us to assume that NYISO's proposed rate change is just and reasonable in order to accept it. Absent any such assumption, their argument otherwise says nothing about whether a 17-year amortization period, or any other amortization period, is just and reasonable.

#### UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. ER21-502-004

(Issued December 16, 2022)

DANLY, Commissioner, dissenting:

1. I dissent from the majority's order on remand issued today, as I did in the underlying proceeding.<sup>1</sup> This issuance continues to reject the 17-year amortization period for the peaking generator plant that the New York Independent System Operator, Inc. (NYISO) proposed as part of its demand curve reset and instead directs NYISO to use the earlier Commission-approved 20-year amortization period for the 2021-2025 demand curve reset cycle.<sup>2</sup>

2. Consistent with my earlier statement, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the Commission's justification for rejecting NYISO's proposal to implement a 17-year amortization period was "insufficiently reasoned and must be set aside."<sup>3</sup> According to the court, because the Commission "had previously approved NYISO's decision to index the price of capacity to the net cost of a peaking plant as just and reasonable," "NYISO needed to show that its amortization period represented a reasonable estimate of the number of years that an investor would expect a gas-fired plant built in New York between 2021 and 2025 to remain commercially viable."<sup>4</sup> The court determined that none of the reasons advanced by the Commission were "sufficient to demonstrate inconsistency with NYISO's Tariff and justify FERC's order."<sup>5</sup>

3. First, the D.C. Circuit found the order's suggestion—that some fossil-fueled plants may remain in service after 2039 because the law's requirements may be modified—was "squarely inconsistent" with Commission precedent requiring NYISO to "take into account currently effective laws and regulations and avoid speculating about laws and

<sup>1</sup> See N.Y. Indep. Sys. Operator, Inc., 175 FERC ¶ 61,012 (2021) (DCR Order) (Danly & Chatterjee, Comm'rs, dissenting in part).

<sup>2</sup> See N.Y. Indep. Sys. Operator, Inc., 181 FERC ¶ 61,227 (2022).

<sup>3</sup> *Indep. Power Producers of N.Y., Inc. v. FERC*, No. 21-1166, 2022 WL 3210362, at \*1 (D.C. Cir. Aug. 9, 2022) (unpublished) (*IPPNY*).

<sup>4</sup> Id. at \*2.

<sup>5</sup> Id.

regulations in the future."<sup>6</sup> The court noted that "at the time of NYISO's filing, the [New York State Commission] had not exercised its discretion to 'modify' the Act's zeroemission target and had given no indication it ever would."<sup>7</sup> Second, the D.C. Circuit found the Commission failed to explain why the NYISO's interpretation of the law, namely that the New York State Commission will require each power plant in New York to meet the 2040 zero-emission requirement, was outside the zone of reasonableness.<sup>8</sup> Third, the D.C. Circuit found the Commission failed to "either critically review the [Market Monitoring Unit's] analysis or perform its own" as to whether fossil-fueled plants will retire or continue to operate after 2040.<sup>9</sup> The court declined to express its "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."<sup>10</sup>

4. Now declaring that this issuance "[c]onsider[s] the record as a whole, including what the record reflects as well as what it lacks,"<sup>11</sup> the Commission largely recasts its former arguments and reaches the same result. It finds that there is "uncertainty about when the [law] will be fully implemented."<sup>12</sup> It also finds that the record reflects a 17-year amortization period that "will significantly increase the cost of capacity" and the cost is notjustified.<sup>13</sup>

5. Yet, the same New York State law remains on the books. It "requires electricity demand in the State to be served by 100% zero-emission resources by January 1, 2040."<sup>14</sup>

<sup>6</sup> *Id.* at \*2-3 (citing DCR Order, 175 FERC  $\P$  61,012 at P 161; *N.Y. Indep. Sys. Operator, Inc.*, 146 FERC  $\P$  61,043, at P 74 (2014) ("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.")).

<sup>7</sup> *Id.* at \*2 (citation omitted).

<sup>8</sup> Id. at \*3 (citing City of Bethany v. FERC, 727 F.2d 1131, 1136 (D.C. Cir. 1984)).

<sup>9</sup> *Id.* (quoting *In re NTE Conn., LLC*, 26 F.4th 980, 988 (D.C. Cir. 2022) (cleaned up)).

<sup>10</sup> Id.

<sup>11</sup> N.Y. Indep. Sys. Operator, Inc., 181 FERC ¶ 61,227 at P 25.

<sup>12</sup> *Id.* P 32; *see also id.* P 30 ("a program has yet to be established and it is unclear when such a program will be established") (footnote omitted).

<sup>13</sup> Id. P 25.

<sup>14</sup> DCR Order, 175 FERC ¶ 61,012 at P 149 (citing Climate Leadership &

The New York State Commission still has not taken action. NYISO's decision to revise the 17-year amortization period was taken in *response* to the law and based on a plain reading of the law. Notwithstanding the 2040 zero-emission requirement, the Commission contends that this does not explicitly require fossil fuel generator retirement nor has the New York State Commission acted as the law requires. The Commission concludes that, because the New York State Commission has not indicated that the only means to comply is for existing fossil fuel generators to retire, NYISO is speculating as to a future state issuance. The Commission points to studies that a "significant capacity of dispatchable thermal resources will be needed."<sup>15</sup> According to the majority, "[u]ntil there is more certainty with respect to how the [New York State law] will practically affect new and existing generators post-2040, we find that there is insufficient support for reducing the amortization period to 17 years."<sup>16</sup> Yet, the Commission itself is speculating as to what the New York State Commission will do or will not do. Although the New York State Commission is a signatory to comments in this proceeding,<sup>17</sup> that does not constitute an official action. The fact remains that the law is in effect and that NYISO is taking into account of it. The speculative arguments advanced by the Commission are inconsistent with precedent and fall short of addressing the deficiencies identified by the court.

6. This issuance also does not overcome the court's holding that the Commission failed to explain why NYISO's interpretation of the law, namely that the New York State Commission will require each power plant in New York to meet the 2040 zero-emission requirement, was outside the zone of reasonableness. Here too, the Commission speculates as to what might happen once the New York State Commission acts, when (and if) it does. The Commission identifies the denial by the New York Department of Environmental Conservation's of two air permits because they depended on potential future action by the New York State Commission, in further support of its position that the law.'s zero emission ignores the plain language of the law and states: "[s]hould the New York Commission ultimately adopt implementation criteria that explicitly requires the retirement of all fossil-fuel generators in New York State by 2040, those regulations can be properly taken into account in future demand curve resets."<sup>19</sup> The

Community Protection Act, N.Y. Statutes, Chapter 106 of the laws of 2019 (July 18, 2019)).

<sup>15</sup> N.Y. Indep. Sys. Operator, Inc., 181 FERC ¶ 61,227 at P 31.

<sup>16</sup> Id. P 30.

<sup>17</sup> See id. P 25.

<sup>18</sup> See id. P 32.

Commission's arguments are speculative and thus fail to reckon with whether NYISO's proposal is within the zone of reasonableness.

7. Today's order loses sight of our statutory mandate. We evaluate whether *NYISO's* proposal is just and reasonable under section 205 of the Federal Power Act.<sup>20</sup> The fact that others have proposed an alternative 15 or 20 year amortization period is irrelevant.<sup>21</sup> Considering the time to build a unit after the implementation of the new demand curves, I prefer a 15-year amortization period but I would not substitute my judgment that 15-years is *more* just and reasonable than NYISO's 17-year proposal.<sup>22</sup> I continue to believe NYISO's 17-year amortization period is just and reasonable.

8. As to the order's finding that the high cost of the shorter amortization period is not justified,<sup>23</sup> it is arbitrary and capricious to reject the proposed amortization period as too costly without considering the overall rate effect of the proposed demand curves. By requiring an artificially low demand curve today, we jeopardize reliability and only defer and increase the costs that consumers will ultimately have to bear when they eventually underwrite the construction of a new fleet of emissions-free generation resources.

For these reasons, I respectfully dissent.

James P. Danly Commissioner

<sup>19</sup> Id. P 27.

<sup>20</sup> 16 U.S.C. § 824d; see City of Bethany v. FERC, 727 F.2d at 1136.

<sup>21</sup> See N.Y. Indep. Sys. Operator, Inc., 181 FERC ¶ 61,227 at PP 4-5, 31.

 $^{22}$  DCR Order, 175 FERC  $\P$  61,012 (Danly & Chatterjee, Comm'rs, dissenting in part at P 2).

<sup>23</sup> See N.Y. Indep. Sys. Operator, Inc., 181 FERC ¶ 61,227 at P 25.