ORAL ARGUMENT HAS NOT BEEN SCHEDULED
No. 21-1166

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

MULTIPLE INTERVENORS,
Intervenor for Respondent.

On Petition for Review from the Federal Energy Regulatory Commission

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BRIEF OF INTERVENOR MULTIPLE INTERVENORS IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel of record certify the following:

A. Parties:

To counsel's knowledge, the parties before the Court are Petitioner Independent Power Producers of New York, Inc., and Respondent the Federal Energy Regulatory Commission. To counsel's knowledge, no other parties have intervened or sought to intervene in this proceeding with the exception of Multiple Intervenors.

B. Rulings Under Review:

The rulings of the Federal Energy Regulatory Commission under review are as follows:

1. *N.Y. Indep. Sys. Operator, Inc.*, Order Accepting, in Part, Subject to Condition and Directing Compliance Filing, Docket No. ER21-502-001, 175 FERC ¶ 61,012 (2021) (R32, JA__-__) ("Order").

2. *N.Y. Indep. Sys. Operator, Inc.*, Notice of Denial of Rehearings by Operation of Law, Docket No. ER21-502-003, 175 FERC ¶ 62,159 (2021) (R38, JA__-__) ("Rehearing Order").

C. Related Cases

This appeal has not previously been before this Court or any other court. There are no related cases.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Multiple Intervenors hereby submits the following disclosure statement in the above-captioned case. Multiple Intervenors is a trade association of large non-residential, energy-intensive consumers, with facilities located throughout New York State. Multiple Intervenors has no parent company, and no publicly traded company owns 10% or more of it. Multiple Intervenors does not issue stock. Multiple Intervenors is a trade association within the meaning of D.C. Circuit Rule 26.1.

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GLOSSARY

2040 Target	The New York Act's Objective to Achieve Zero Emissions from its Electricity Sector by 2040
Commission or FERC	Respondent Federal Energy Regulatory Commission
Consumer Stakeholders	Multiple Intervenors, the New York State Public Service Commission, and the City of New York
JA	Joint Appendix
Market Monitor	Market Monitoring Unit for the System Operator
New York Act	Climate Leadership and Community Protection Act, N.Y. Pub. Serv. Law § 66-p (LexisNexis 2021)
New York Commission	New York State Public Service Commission
Order	*N.Y. Indep. Sys. Operator, Inc.*, Order Accepting, in Part, Subject to Condition and Directing Compliance Filing, Docket No. ER21-502-001, 175 FERC ¶ 61,012 (April 9, 2021)
Power Producers	Petitioner Independent Power Producers of New York, Inc.
R	Record Item
State	New York State
System Operator	New York Independent System Operator, Inc.

STATEMENT OF THE ISSUE

Multiple Intervenors adopts the Statement of the Issue as described in Respondent's Brief.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Respondent.

STATEMENT OF THE FACTS

Multiple Intervenors adopts the Statement of the Facts set forth in the Respondent's Brief.

SUMMARY OF ARGUMENT

This appeal challenges the Federal Energy Regulatory Commission's ("FERC" or "Commission") approval of the New York Independent System Operator, Inc.'s ("System Operator") proposed revisions to section 5.14.1.2 of its Market Administration and Control Area Services Tariff pursuant to section 205 of the Federal Power Act. The revisions set forth the demand curves in the Installed Capacity Market for the 2021/2022 Capability Year, as well as the methodology to be used for updating the demand curves for the 2022/2023, 2023/2024, and 2024/2025 Capability Years. Specifically, this appeal narrowly challenges the FERC's determination to reject the System Operator's proposed reduction of the

amortization period from 20 years to 17 years. *N.Y. Indep. Sys. Operator, Inc.*, Order Accepting, in Part, Subject to Condition and Directing Compliance Filing, Docket No. ER21-502-001, 175 FERC ¶ 61,012 (2021) (R32, JA__-__) ("Order").

In short, Petitioner Independent Power Producers of New York, Inc.'s ("Power Producers") challenge is based on the assertion that the FERC's determination is arbitrary and capricious because the Commission engaged in speculation regarding New York's Climate Leadership and Community Protection Act ("New York Act") and failed to make the necessary finding pursuant to the Federal Power Act in rejecting the reduced amortization period. However, Petitioner's challenge must fail because the FERC's determination regarding the amortization period is consistent with the Administrative Procedure Act, the Federal Power Act, and Commission precedent and accordingly, is entitled to deference. Petitioner's entire argument is fatally reliant on a factually inaccurate and misrepresentative characterization of the New York Act and its mandates and accordingly fails in its entirety.

First, the Commission's determination is consistent with the reasoned decision-making contemplated by the Administrative Procedure Act. The New York Act establishes an objective to achieve zero emissions from New York's (the "State") electric grid by 2040 (hereinafter the "2040 Target"), but the State has not yet adopted requirements or regulations to achieve this objective. *See* N.Y. Pub.

Serv. Law § 66-p (LexisNexis 2021). Petitioner erroneously and unjustifiably assumes that the New York Act will require the retirement of all fossil-fueled generation pursuant to the 2040 Target. *N.Y. Indep. Sys. Operator Inc.*, Docket No. ER21-502-000, "Protest and Supporting Comments of Independent Power Producers of New York, Inc.," filed Dec. 21, 2020 at 9 (R15, JA __) ("Power Producers Comments"). However, as established on the record, the New York Act does not mandate retirement because the regulations implementing the New York Act have not yet been promulgated and further the proceeding delineating the State's path towards the 2040 Target has not been completed.

Furthermore, the challenged determination is consistent with Commission precedent and the agency's statutory role pursuant to the Federal Power Act. Petitioner asserted that the Commission departed from its precedent which requires the agency to avoid speculating about future laws or regulations, or modifications to existing laws or regulations. *See* Power Producers Br. at 24-30 (JA__-___). However, the record plainly demonstrates that the FERC did the opposite. The FERC declined to speculate about the substantive content of future regulations to be adopted by the State to achieve the 2040 Target and, instead, based its determination on the New York Act as it presently exists. Additionally, the FERC's treatment of the amortization period is consistent with its previous Demand Curve Reset proceedings and serves to protect consumers from unjust and unreasonable rates,

consistent with the Commission's statutorily mandated role pursuant to the Federal Power Act.

For the reasons set forth herein and in Respondent's Brief, this Court should uphold the FERC's determination because it is supported by substantial evidence on the record and consistent with Commission precedent and the Federal Power Act.

STANDARD OF REVIEW

The standard of review applicable to this matter is as set forth in Respondent's Brief.

ARGUMENT

I. THE COMMISSION'S DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD

It is well-established that an agency's determination should be upheld so long as it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). The reviewing court's role is a narrow one and it consistently has been recognized that the court may not substitute its judgment for that of the agency. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). Moreover, the Supreme Court has observed that "nowhere is that more true than in a technical area like electricity rate design." *Id.*; *see also New England Power Generation Ass'n v. FERC*, 757 F3d 283, 293 (D.C. Cir. 2014) (noting the court

"properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (citations omitted).

In undertaking its review, the court "is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 577 U.S. at 292. Indeed, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm.*, 383 U.S. 607, 620 (1966). Instead, the Court should defer to the agency's discretion absent a showing that its determination was arbitrary and capricious. *See e.g.*, *Motor Vehicles Ass'n*, 463 U.S. at 43; *see also Elec. Power Supply Ass'n*, 577 U.S. at 292.

As established in Respondent's Brief and herein, the Commission's determination is supported by substantial evidence on the record and should be afforded deference. This section will demonstrate that Petitioner's challenge to the Order must fail because it is factually erroneous and misrepresents the mandates and existing regulations applicable under the New York Act. Specifically, evidence before the FERC demonstrated that the New York Act does not require the retirement of fossil-fueled generation, and further, that it continues to prioritize the safe and reliable provision of electricity to consumers which will necessarily demand dispatchable, flexible generation. Based on the foregoing, the FERC drew a

reasonable conclusion from the evidence before it and the fact that a different conclusion allegedly could have been drawn from the record does not justify second guessing the agency's expertise.

A. The New York Act Does Not Mandate Retirement of All Fossil-Fueled Generation

The Power Producers' argument is premised on the assertion that the FERC's determination is arbitrary and capricious because the New York Act's 2040 Target mandates the retirement of all fossil-fueled generation by 2040 thereby justifying an amortization period of 17 years for the proxy peaking unit. However, as will be established more fully below, Power Producers' entire argument is grounded in the factually incorrect assertion that the 2040 Target mandates retirement of all fossil-fueled generation facilities by 2040.

At the onset, it must be emphasized that while the New York Act 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 New York Act directed the New York State Public Service Commission ("New York Commission") to commence a proceeding in 2021 to achieve the electric grid objectives, including the 2040 Target and the regulations implementing and enforcing the New York Act are not contemplated until 2024. *See* N.Y. Pub. Serv. Law § 66-p(1) (requiring the New

York Commission to establish a program by June 13, 2021); *see also* N.Y. Envtl. Conserv. Law § 75-0109 (LexisNexis 2021) (requiring the Department of Environmental Conservation to promulgate implementing regulations). In other words, the State still has substantial progress to make and its pathway remains undefined. The evidence before the FERC demonstrated exactly that. In this respect, Petitioner erred in stating that the FERC inappropriately speculated about future changes to the New York Act when actually, the New York Act's mandates still are being developed. Further, the evidence presented to the FERC demonstrated that absent regulations providing clear standards, it is most likely for fossil-fueled generation to evolve to permit for continued operation, especially in light of the demonstrated need for dispatchable, flexible generation.[1]

1. The Pathway Towards the 2040 Target is Undefined

Pursuant to the objectives codified in the New York Act, the State seeks to achieve zero emissions from its electricity grid by 2040. However, the New York Act does not define "zero emission" or specify the generation mix encompassed in

[1] As will be discussed, *infra* in Point I.B, studies commissioned by the State demonstrate a continued need for dispatchable, flexible resources to maintain electric service reliability in a generation mix dominated by intermittent renewable resources such as solar and wind. *See e.g.*, The Brattle Group, *New York's Evolution to a Zero Emission Power System* (May 18, 2020) at 13-15, https://www.nyiso.com/documents/20142/12610513/Brattle%20New%20York%20Electric%20Grid%20Evolution%20Study.pdf/6a93a215-9db3-d5a0-6543-27b664229d3e.

this makeup. Indeed, the State itself is still determining these answers as described above. Further, the New York Commission, the entity charged with commencing a proceeding to set forth the State's pathway to the 2040 Target, has not yet acted. Accordingly, it was reasonable for the FERC to reject the Petitioner's presumptive and inaccurate assertion that the 2040 Target will mandate retirement of fossil-fueled generation.[2]

Moreover, in stark contrast to its instant argument before this Court and in the underlying proceeding before the FERC, Petitioner has acknowledged the ambiguity surrounding the 2040 Target and the definition of "zero emissions." A petition submitted by Power Producers and a group of labor unions urged the New York Commission to take action on the 2040 Target. Therein it was highlighted that "the [New York Act] does not define 'zero emission sources,' leaving it to the [New York] Commission to establish this critical aspect of the [New York Act]." *See* NYPSC Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Petition of Independent Power Producers of New York, Inc., New York State Building and Construction Trades Council and New York State AFL-CIO for the Establishment of a Zero Emission Energy Systems Program Under the Clean Energy Standard

[2] It bears highlighting that the New York Commission, as part of the Consumer Stakeholders, advanced an argument opposing the Power Producers' interpretation of the New York Act.

(August 18, 2021) ("Power Producers' Zero Emission Petition").[3] Further, the Power Producers' Zero Emission Petition observed that absent action by the New York Commission to do so, there is "uncertainty in the electricity market and investment community" regarding what sources of generation may fit within this definition. *See id*. at 6; *but cf* Power Producers Comments at 9 (concluding "[p]ursuant to the [New York Act], the electric power sector must be zero carbon emitting by 2040, which means the . . . peaking unit technology will not be permitted to operate in 2040 and beyond.").

As explicitly recognized by Petitioner in its proceeding commenced before the State agency, absent action by the New York Commission to define what will constitute a zero emission resource and a pathway to achieving the 2040 Target, it is unclear what technologies will be permitted to operate beyond 2040. Based on this same ambiguity, the FERC reasonably concluded that without "finalized compliance criteria for [New York's] zero-emission requirements . . . there is insufficient support in the record here to justify reducing the amortization period to 17 years premised on the speculative assumption that all fossil-fueled resources will cease operation in 2040." Order at P 161 (JA__). In reaching this determination, the FERC considered the evidence before it detailing the regulatory regime in New York and reached the

[3] Power Producers' Zero Emission Petition is reproduced in the addendum of this Brief for the Court's reference.

conclusion that absent regulations implementing the New York Act, it could not speculate as to what would be required to achieve the 2040 Target. While Petitioner attempted to argue that the 2040 Target mandates the retirement of fossil-fueled generation, there was also evidence on the record demonstrating that absent an express mandate of retirement, it would be more likely for existing facilities to adapt than it would be to retire.[4] The fact that an alternate conclusion, that is that zero emissions may be defined to prohibit fossil-fueled generation, could have allegedly been reached from the evidence on the record, does not equate to a finding that the FERC's determination was not supported by substantial evidence. *See Consolo*, 383 U.S. at 620. Moreover, it would be beyond the scope of review for the Court to assess whether the FERC's determination was the preferable outcome among alternatives. *Elec. Power Supply Ass'n*, 577 U.S. at 292.

2. The Record Demonstrates that Retirement of Fossil-Fueled Generation is Unlikely

In the underlying proceeding before the FERC, parties established that it would be unlikely based on past examples for a fossil-fueled plant that is unable to operate in its current configuration past a specified date to retire.[5] As asserted by

[4] Aside from not mandating the retirement of fossil-fueled generation facilities, the New York Act also provides for the modification of the 2040 Target to permit a delay of any prohibition if needed to maintain electric service reliability. *See infra*, Point I.B.

[5] Based on a recent report produced by the System Operator, approximately 80% of the generating units in the State are at least 50 years old. N.Y. Indep. Sys.

Multiple Intervenors in a joint pleading with the New York Commission and the City of New York (collectively, the "Consumer Stakeholders"), it would be more likely for the plant to elect to retrofit with new technologies such as water injection, selective catalytic reductions, utilization of zero-carbon-fuel-capable technology, or other emission control technologies. *N.Y. Indep. Sys. Operator Inc.*, Docket No. ER21-502-000, "Comments and Protest of the Consumer Stakeholders," filed Dec. 21, 2020 at 19 (R19, JA __) ("Consumer Stakeholders' Comments"). Further, the Market Monitoring Unit for the System Operator ("Market Monitor") similarly asserted that it would be more likely for gas-fired units to utilize zero emission fuels to comply with the 2040 Target than it would be to cease all operations. *N.Y. Indep. Sys. Operator Inc.*, Docket No. ER21-502-000, "Motion to Intervene and Comments of the Market Monitoring Unit on the New York ISO's ICAP Demand Curve Reset," filed Dec. 21, 2020 at 8-9 (R13, JA__-__) ("MMU Comments"). Thus, the record supported that until the New York Commission takes action to define the pathway

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Operator, *2021 Load & Capacity Data* (Apr. 2021) at 79, tbl. III-2, https://www.nyiso.com/documents/20142/2226333/2021-Gold-Book-Final-Public.pdf/b08606d7-db88-c04b-b260-ab35c300ed64 at 79. Thus, to assume, as Power Producers do, that the proxy peaking unit used in the System Operator's Demand Curve Reset process would cease all operations after 17 years lies in the face of what actually occurs in practice.

towards the 2040 Target, there are plenty of viable options for a fossil unit to remain in operation beyond 2039.

Based on this evidence, the FERC reasonably concluded that it would be more likely for a newly developed fossil-fueled facility to adapt its technology to permit for continued operation. This determination was reasonable to draw from the evidence before the Commission. Contrary to Petitioner's characterization of the New York Act, there is no mandate for fossil-fueled generation to retire and the pathway towards achieving the 2040 Target is undefined and accordingly what technologies will be permitted has yet to be determined. Instead, by relying on existing evidence that demonstrates adaptation is more likely, the FERC declined to conclude that a fossil-fueled generation facility would cease operation entirely prior to 2040.

B. The New York Act Prioritizes Reliable Service

Petitioner's assumption that the 2040 Target would mandate retirement of fossil-fueled generation was refuted by record evidence, including a plain reading of the New York Act. In fact, the New York Act also permits continued reliance on fossil-fueled generation where it is necessary to maintain reliability. For example, the New York Commission is explicitly empowered to modify the 2040 Target if it finds that (1) the target impedes the provision of safe and reliable service; (2) the target is likely to impair existing obligations and agreements; or (3) that there have

been significant increases in arrears or disconnections related to the target. N.Y. Pub. Serv. L. § 66-p(4). Thus, while the New York Act does envision a zero emission electric grid by 2040, the State's climate objective is nonetheless secondary to its commitment to maintain safe and reliable electric service.

Petitioner noted in its brief that lawmakers in New York have expressed an intent for the New York Act to eliminate fossil-fueled electricity in the State by 2040. Power Producers Br. at 10 (JA __). While this may be true, it must be balanced against the New York Act's clear prioritization of reliability in the absence of defined standards for a zero emission grid. Again, the pathway to achieve this objective is unclear. Conversely, what has become clear from several studies commissioned by the State is a need for some form of dispatchable generation to ensure system reliability. For example, as raised by the Market Monitor during the underlying FERC proceeding, at least three studies conducted identified a need for dispatchable generation to continue the provision of reliable service among otherwise intermittent resources in 2040. MMU Comments at 7-8 (JA __-__).

As noted above, Petitioner agreed with this finding in a pending proceeding before the New York Commission, where it urged regulators to "act quickly to establish a program to incent the type of zero emitting technologies that will be needed to maintain reliability as progress is made towards the 70 by 30 Target and to meet the 2040 Target." Power Producers' Zero Emission Petition at 9. In fact,

citing to one of these studies, Power Producers recognize that the existing generation facilities may be modified to become zero emitting, noting that New York "can reliably meet growing electricity loads with 100% zero-emissions electricity by relying on a diverse mix of resources, including . . . existing and new combined cycles (CC) and combustion turbines (CT) utilizing zero-emission biogas . . . . " Power Producers' Zero Emission Petition at 8 (internal citations omitted). Therefore, while the State intends to move away from fossil-fueled generation, the pathway for that transition is unknown and there is a consensus that dispatchable resources will play an irreplaceable role. It is curious that Petitioner has a different argument before the FERC than it does before the New York Commission. Regardless, this further bolsters the claim that the FERC's determination was not arbitrary and capricious.

Thus, the Commission was offered conflicting perspectives as to what may happen in 2040 and determined that the record before it supported a finding that a fossil-fueled generator developed during the 2021-2025 Demand Curve Reset process would continue to operate beyond 2039 due to previous practice, as well as the need for dispatchable generation. This determination is consistent with the mandates of the Administrative Procedure Act and accordingly is entitled to deference. In fact, an agency finding will only be found arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicles Ass'n, 463 U.S. at 43 (citations omitted). Here, the Order demonstrates that the Commission considered the relevant factors and reached its determination based on the evidence before it. Petitioner has not established that the FERC failed to consider an "important aspect of the problem," because quite to the contrary, the FERC based its decision on the New York Act's mandates and the regulatory regime that currently exists today in the State. Thus, Petitioner failed to meet its burden in alleging the determination is arbitrary and capricious and the agency is entitled to deference.

II. THE COMMISSION'S DETERMINATION IS CONSISTENT WITH EXISTING PRECEDENT

An agency is bound by its precedent absent a rationale explaining why the circumstances before it justifies a departure or change in policy. *See e.g., FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 515 (2009); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007). It is therefore well-established

that an agency cannot depart from its precent *sub silentio* without demonstrating an awareness that it is changing course. *Fox Televisions Stations, Inc.*, 556 U.S. at 515.

Petitioner attempts to argue that the FERC departed from its existing precedent *sub silentio* by failing to consider the New York Act and its mandates. To the contrary, the Order demonstrates that the FERC undertook a careful review of the New York Act, and consistent with its existing precedent, declined to speculate about future regulations implementing the New York Act and its 2040 Target. Further, in doing so, the Commission remained consistent with its prior precedent finding that a 20-year amortization period falls within the zone of reasonableness required in establishing the parameters of the demand curves and that a reduction of that period would unnecessarily raise consumer costs, a finding consistent with its statutorily mandated role pursuant to the Federal Power Act. Federal Power Act § 205, 16 U.S.C. § 824(d).

A. The Commission Considered Existing Law in Reaching its Determination

As established in Point I, the FERC fully considered the New York Act and its mandates in reaching its determination. Rather, Petitioner's argument is fatally flawed due to its reliance on a factually erroneous characterization of the New York Act and the regulatory regime which exists in the State at this time.

Petitioner alleged that the FERC departed from its precedent in speculating about future modification or creation of laws or regulations. This argument is

defeated for the reasons detailed in Point I. As Petitioner noted in its Brief, the FERC has previously rejected speculation about future regulatory action reasoning that it "cannot base the finding of viability on speculation that . . . New York State regulators will act at some point in the future" and that the nature of a reoccurring Demand Curve Reset process is to permit the consideration of future developments. Power Producers Br. at 25 (citing 2014-2017 Demand Curve Order at P 74).

Thus Petitioner failed to recognize that the Commission was adhering to its precedent by declining to speculate about the substance of the undeveloped New York Act. The precedent cited by Petitioner more aptly supports the opposite conclusion—that the Commission adhered to its policy of considering laws and regulations as they exist at the time of the reset due to the nature of a reset proceeding which permits reconsideration in a few years to account for regulatory changes.

B. The Commission's Determination is Consistent with its Prior Demand Curve Reset Orders

The FERC has repeatedly found a 20-year amortization period in the recent Demand Curve Reset proceedings to be reasonable considering the risks associated with investment. *See N.Y. Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043 (2014) at P 117 ("2014-2017 Demand Curve Order"); *N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,028 (2017) at P 179 ("2017-2021 Demand Curve Order").

By rejecting the System Operator's proposal to depart from the status quo and reduce the amortization period to 17 years, the FERC was consistent with its

previous treatment of the amortization period. In its 2014-2017 Demand Curve Order, the FERC acknowledged that in setting the demand curves, it is the Commission's role to determine if the resultant outcome from those parameters falls within the zone of reasonableness. P 118. In proposing a reduction to the amortization period, the System Operator failed to demonstrate that the resulting tariff changes would be just and reasonable, and accordingly the FERC properly rejected the proposal.

C. The Commission's Determination is Consistent with its Statutory Role Pursuant to the Federal Power Act

The FERC "is obliged to assure that the rates and charges demanded or received by any public utility in connection with interstate transmission or sale of electric energy are just and reasonable." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 4 (D.C. Cir. 2002). Indeed, one of the FERC's essential functions is to oversee wholesale rates to protect consumers. *See e.g., Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952) (noting "[a] major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices."). Further, the reviewing court "afford[s] great deference to the Commission in its rate decisions because just and reasonable is obviously incapable of precise judicial

definition." *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 20 (D.C. Cir. 2018) (internal quotations and citations omitted).

The FERC's determination in this proceeding is consistent with its statutory mandate to protect consumers from excessive prices. In the Consumer Stakeholders Comments, they highlighted that reducing the amortization period would have significant, detrimental impacts on the total cost of capacity to consumers. Consumer Stakeholders Comments at 18-19 (JA__-__). Further, as aptly argued by the Market Monitor in the underlying proceeding,

> [w]hen establishing assumptions governing the determination of the Demand Curves under significant future uncertainty, it cannot be reasonable for [the System Operator] to employ one-sided assumptions that consider downward revenue risks while ignoring offsetting factors that would increase revenues. Such an approach promises to produce substantial inefficient costs that will be borne by the State's consumers.

MMU Comments 12-13 (JA__-___). In light of this evidence, the FERC reasonably concluded in rejecting the 17-year amortization period that reducing the period could result in unnecessarily high net cost of new entry estimates which would impact the Demand Curves. Order ¶ 161 (JA__).

This Court should defer to the Commission's finding that rejecting the reduced amortization period is reasonable and also will protect consumers from excessive rates. Indeed, this Court has previously recognized that the Commission is obliged to protect consumers from excessive rates and charges and that doing so

requires a balancing of investor and consumer interests. *See NextEra Energy Res., LLC*, 898 F.3d at 21. Further, the Court has acknowledged that this necessary balancing is "a classic example of ratemaking that 'involves policy determinations in which the agency is acknowledged to have expertise,' and, of course, [the court's] review of such determinations 'is particularly deferential.'" *See Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262-63 (2007) (citations omitted). The same deference should be provided to the Commission here.

CONCLUSION

Multiple Intervenors respectfully requests that this Court uphold the FERC's determination to reject a reduced amortization period. As has been established, Petitioner's argument is fatally constructed around a factually inaccurate and misrepresentative characterization of the New York Act and its mandates. Instead, the evidence before the FERC amply demonstrated that New York's pathway towards the 2040 Target is undefined and that a newly-constructed fossil-fueled generation facility reasonably may engage in modifications if needed to continue operating, as opposed to retiring completely prior to 2040. Moreover, the New York Act allows for any prohibition of certain forms of generation to be delayed if necessary in order to ensure the continued safe and reliable provision of electric service. Further, the FERC adhered to its existing precedent in fully considering the

New York Act and its statutory mandate pursuant to the Federal Power Act to protect consumers.

For the reasons set forth herein and in Respondent's Brief, the FERC's determination is supported by substantial evidence in the record and should be afforded deference.

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Dated: February 4, 2022
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of D.C. Circuit Rule 32(e)(2)(B) as it contains 4,615 words, excluding the parts of the brief exempt by the Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2022, I filed the foregoing brief with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ Amanda De Vito Trinsey
Amanda De Vito Trinsey, Esq.

Dated: February 4, 2022
Albany, New York

ADDENDUM

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ADDENDUM A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard — **Case 15-E-0302**

PETITION OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC., NEW YORK STATE BUILDING AND CONSTRUCTION TRADES COUNCIL AND NEW YORK STATE AFL-CIO FOR THE ESTABLISHMENT OF A ZERO EMISSIONS ENERGY SYSTEMS PROGRAM UNDER THE CLEAN ENERGY STANDARD

I. INTRODUCTION

Independent Power Producers of New York, Inc. ("IPPNY"), a not-for-profit trade association representing the independent power industry in New York State, New York State Building & Construction Trades Council ("NYSBCTC"), representing over 200,000 union construction workers across the State, and New York State AFL-CIO ("AFL"), a federation of 3,000 unions, hereby petition the New York State Public Service Commission (the "Commission") to establish a new competitive program or tier under the Clean Energy Standard ("CES") to encourage the development of zero emitting electric generating facilities that are not renewable energy systems, as defined in the Climate Leadership and Community Protection Act ("CLCPA") pursuant to paragraph (b) of subdivision 1 of Section 66-p of the New York Public Service Law ("PSL").[1] IPPNY member companies are involved in the development of electric generating facilities including renewable resources, the generation, sale, and marketing of electric power, and the development of natural gas and energy storage facilities in the State of

[1] *See* CLCPA, 2019 N.Y. Sess. Laws Ch. 106 (McKinney), § 4. The CLCPA became effective on January 1, 2020.

New York. IPPNY member companies produce a majority of New York's electricity, utilizing almost every generation technology available today, such as wind, solar, natural gas, oil, hydro, biomass, energy storage, waste-to-energy and nuclear. NYSBCTC and AFL represent union workers employed in every aspect of the State's energy infrastructure, including construction, generation, transmission, operations and maintenance.

Specifically, to assist meeting the CLCPA's target of having the statewide electrical demand system be zero emissions by 2040, the Commission should establish, after an appropriate notice and comment period, a competitive program to encourage private sector investment in a minimum of one gigawatt ("GW") of zero emissions energy systems that would commence commercial operation by 2030. The Commission should define "zero emissions energy systems" as systems, other than renewable energy systems, that generate electricity or thermal energy through the use of technologies that do not lead to a net increase in greenhouse gas emissions into the atmosphere at any time in the process of generating electricity.[2]

II. BACKGROUND

On August 1, 2016, in the above-captioned case, the Commission adopted the CES, which is comprised of a Renewable Energy Standard ("RES") and a Zero-Emissions Credit ("ZEC") requirement.[3] The CES Order adopted a goal whereby 50% of electricity consumed in New York by 2030 would be generated by renewable energy sources (the "50 by 30 goal") as part of a strategy to reduce statewide greenhouse gas emissions by 40% by 2030.[4] To achieve the 50 by 30 goal, the Commission ordered all load serving entities ("LSEs") in the State to serve

[2] The term "greenhouse gas" is defined by subdivision 7 of Section 75-0101 of the Environmental Conservation Law.

[3] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (Aug. 1, 2016) ("CES Order").

[4] *Id.* at 2.

their retail customers by procuring new "Tier 1" renewable resources, evidenced by the procurement of qualifying renewable energy credits ("RECs")[5] from the New York State Research and Development Authority ("NYSERDA") or other sources, or by making Alternative Compliance Payments, in specified, annually-increasing proportions of their total loads.[6] The Tier 1 mandate has been the core instrument by which the State incents the development of renewable resources to meet the State's 50 by 30 goal.

The CES Order also included a Tier 2 maintenance program as part of the CES which offered financial support to existing eligible renewable facilities at risk of deactivating due to being uneconomic.[7] Finally, the CES Order included the ZEC requirement as part of the CES, which mandates that LSEs procure ZECs from nuclear facilities in the State to fund their continued operation.[8]

On July 12, 2018, the Commission adopted its Offshore Wind Standard to incent the development of up to 2,400 MW of offshore wind capacity in New York State by 2030.[9] The Offshore Wind Standard mandates LSEs to obtain, on behalf of their retail customers, Offshore Wind Renewable Energy Certificates procured by NYSERDA in an amount proportional to their load.

In 2019, the State enacted the CLCPA. The CLCPA requires the Commission, by June 30, 2021, to establish a program (the "Program") to ensure (1) jurisdictional LSEs secure

[5] RECs represent the environmental attributes, including but not limited to estimated avoided carbon dioxide emissions, associated with electricity generated by facilities that meet the Tier 1 eligibility criteria established in the CES Order.

[6] CES Order at 78, 92–93, 109–110.

[7] *Id.* at 115–117.

[8] *Id.* at 147–150.

[9] Case 18-E-0071, *In the Matter of Offshore Wind Energy*, Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement (July 12, 2018) ("Offshore Wind Order").

adequate amounts of electricity generated by renewable energy systems to serve at least 70% of load in 2030 (the "70 by 30 Target"); and (2) "by the year [2040] (collectively, the 'targets') the statewide electrical demand system will be zero emissions" (the "2040 Zero Emission Target").[10] The CLPCA defines renewable energy systems as "systems that generate electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity."[11] The CLCPA also requires the Commission to conduct a biennial review, starting in 2024, of the Program, determining: "(a) progress in meeting the overall targets for deployment of renewable energy systems *and zero emission sources*, including factors that will or are likely to frustrate progress toward the targets; (b) distribution of systems by size and load zone; and (c) annual funding commitments and expenditures."[12]

In an order issued on October 15, 2020, the Commission updated its CES to implement the 70 by 30 Target part of the Program.[13] In its CES Modification Order, the Commission revised its CES by applying the existing regulatory and procurement structure it adopted to meet the 50 by 30 goal to satisfy the CLCPA's 70 by 30 Target. Among other modifications, the Commission modified RES eligibility to conform it with the definition of renewable energy systems in the CLCPA, which differs from the eligible resources under the existing RES, modified the RES Tier 1 program granting NYSERDA flexibility to conduct annual Tier 1

[10] PSL § 66-p(2).

[11] PSL § 66-p(1)(b). The CLCPA also requires the Commission to establish programs to achieve the deployment of 6 GW of photovoltaic solar generation by 2025, 3 GW of energy storage resources by 2030, and at least 9 GW of offshore wind by 2035. PSL § 66-p(5).

[12] PSL § 66-p(3) (emphasis added).

[13] Case 15-E-0302, *supra*, Order Adopting Modifications to the Clean Energy Standard (Oct. 15, 2020) ("CES Modification Order").

solicitations, beginning in 2021, in amounts necessary to achieve the 70 by 30 Target, added a new Tier 4 to the CES to encourage the delivery of renewable energy to New York City, and modified the Offshore Wind Standard to grant NYSERDA flexibility to conduct competitive solicitations for offshore wind to meet the CLCPA's statewide goal of 9 GW of offshore wind capacity by 2035.

The Commission has yet to update its CES to establish the 2040 Zero Emission Target part of the Program. IPPNY, NYSBCTC and AFL urge the Commission to do so now by developing a competitive zero emissions energy systems program to help ensure that target is met. Support for this type of program is evidenced by legislation, S.6497-A (Parker) / A.8094 (Cusick), which passed the New York State Senate unanimously (63-0) on June 9, 2021. The bill directed the Commission to establish a pilot program consistent with the provisions of this petition by a date certain to help ensure the State will meet the 2040 Zero Emission Target in a way that maintains electric system reliability. The CLCPA, through subdivision 2 of Section 66-p of the PSL, already gave the Commission the underlying legislative authority to establish the pilot program under this petition and the bill.

The Commission also should include quality-based contracting and labor provisions within the program as they are highly valuable in promoting successful project delivery, especially in light of the complexity and time sensitivity of affected projects. These provisions are also vital for the Just Transition envisioned by the CLCPA, in terms of prevailing wage, project labor agreements ("PLA"), and the Buy American provisions that will create and retain good paying union jobs in New York. IPPNY, NYSBCTC and AFL strongly support these labor provisions, and their applicability for a Just Transition and job creation under the program pursuant to this petition recently was evidenced by union support of Governor Andrew M.

Cuomo's announcement that the New York Power Authority ("NYPA") will undertake an industry-leading green hydrogen demonstration project at NYPA's Brentwood natural gas peaker plant on Long Island to evaluate the resource's potential role in displacing fossil fuels from dispatchable power generation.[14] The Governor's announcement points to the further need for, and appropriateness of, the program urged by this petition on a broader scale and basis.

III. RELIEF REQUESTED

A. THE COMMISSION SHOULD ESTABLISH A ZERO EMISSIONS ENERGY PROGRAM.

By establishing the 70 by 30 Target for renewable energy systems and requiring the remaining percentage of load be served with electricity generated by "zero emission sources," the Legislature intended that zero emissions sources include sources other than renewable energy systems. Notably, the CLCPA does not define "zero emission sources," leaving it to the Commission to establish this critical aspect of the CLCPA. The Commission's CES Modification Order established policies and mandates to achieve the 70 by 30 Target but was silent on how the State should achieve the 2040 Zero Emission Target or even designate the types of resources that could be used to meet such target. Nor did the Commission state in the CES Modification Order when it would consider establishing policies to achieve the 2040 Zero Emission Target.

The Commission's silence on these matters creates uncertainty in the electricity market and investment community, thereby potentially delaying, unnecessarily, the development of resources that are both zero emitting and capable of meeting electric system needs that cannot be

[14] Press Release, New York State Governor's Office, Governor Cuomo Announces New York Will Explore Potential Role of Green Hydrogen as Part of Comprehensive Decarbonization Strategy (July 8, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-will-explore-potential-role-green-hydrogen-part.

met fully by renewable energy systems due to their intermittence. As determined in a report recently prepared by Analysis Group for the New York Independent System Operator, Inc. assessing the potential impacts of system changes resulting from the CLCPA's mandates on electric system reliability in 2040, the timely development of fully dispatchable zero emitting resources is crucial to maintain reliability as the economy electrifies and reliance on intermittent renewable and duration limited resources increases.[15]

Because wind, solar, and limited-duration energy storage resources will be insufficient to meet electric demand in 2040, the Phase II Climate Study determined that removal of all the existing fossil-fueled generating resources by 2040 in compliance with the CLCPA's 2040 Zero Emission Target will require as much as 30,000 MW of installed capacity of new flexible and dispatchable resources to provide the necessary reliability services that have historically been provided by fossil-fueled generating resources.[16] The Phase II Climate Study does not make any assumptions about what technology or fuel source can fulfill this role, focusing instead on the characteristics required of such resources. These resources must be highly flexible, *i.e.*, they must be capable of coming on quickly and meeting rapid and sustained ramps in demand.[17]

The Phase II Climate Study also determined that battery storage resources will help meet system needs when output from renewable resources is reduced, but sustained periods of reduced renewable generation rapidly deplete battery storage. The study assumed approximately 15,600 MW of storage would be added to the system by 2040 and determined that the contribution of

[15] Paul J. Hibbard, et al., Climate Change Impact Phase II, An Assessment of Climate Change Impacts on Power System Reliability in New York State, Final Report (Sept. 2, 2020) ("Phase II Climate Study"), https://www.nyiso.com/documents/20142/15125528/02%20Climate%20Change%20Impact%20and%20Resilience%20Study%20Phase%202.pdf/89647ae3-6005-70f5-03c0-d4ed33623ce4.

[16] *Id.* at 83.

[17] *Id.*

storage would be quickly exhausted when the output from renewable resources is reduced for periods of days.[18]

The Climate Action Council, which was established by the CLCPA to develop a scoping plan to meet the CLCPA's emission reduction requirements and targets, received an analysis agreeing with the need for new flexible and dispatchable resources. The Climate Action Council's consultant, Energy and Environmental Economics, Inc. ("E3"), determined that "firm capacity resources will be needed to ensure year-round reliability, especially during periods of low renewables output," to balance the substantial growth in intermittent resources like wind and solar.[19] The E3 Report concluded that the State "can reliably meet growing electricity loads with 100% zero-emissions electricity by relying on a diverse mix of resources, including: onshore and offshore wind; large-scale and distributed solar; in-state hydro and existing and new hydro imports from Quebec; existing nuclear capacity; existing and new combined cycles (CC) and combustion turbines (CT) utilizing zero-emissions biogas; new natural gas-fired combined cycles with carbon capture and sequestration (CC-CCS)."[20] The E3 Report pointed to other studies that found that "complementing high penetrations of intermittent renewables with *firm, zero-emission resources*—such as bioenergy, hydrogen, carbon capture and sequestration, and nuclear generation—reduce total electric system costs under zero-emissions targets."[21]

The E3 Report determined that, while "battery storage can provide sufficient short-term (intraday) flexibility to balance high levels of variable renewable output," maintaining reliability

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[18] *Id*. at 1.

[19] Energy and Environmental Economics, Inc., Pathways to Deep Decarbonization in New York State (June 24, 2020), at 37 ("E3 Report"), https://climate.ny.gov/-/media/CLCPA/Files/2020-06-24-NYS-Decarbonization-Pathways-Report.pdf.

[20] E3 Report at 33.

[21] E3 Report at 38-39 (emphasis added).

requires long-duration (interday) resources, such as "large-scale hydro resources, renewable natural gas (RNG) or synthetic fuels such as hydrogen, Carbon Capture Storage (CCS), and nuclear power."[22]

The Power Generation Advisory Panel of the Climate Action Council also recognized the need for zero emissions energy systems that are dispatchable technologies in its May 3, 2021 recommendations to the Climate Action Council.[23] Its Initiative No. 10 recommends that the State "identify, explore, evaluate and develop dispatchable technologies as they emerge."[24] The Panel recommended that, if a substitute is needed for natural gas, "advanced green hydrogen and possible [renewable natural gas] could fill this gap to maintain reliability, if scalability, feasibility, and environmental impact and air quality issues can be addressed."[25]

In light of the recommendations and analysis provided by the Phase II Climate Study, the E3 Report, and the Power Generation Advisory Panel, the Commission should act quickly to establish a program to incent the type of zero emitting technologies that will be needed to maintain reliability as progress is made towards the 70 by 30 Target and to meet the 2040 Zero Emission Target. IPPNY, NYSBCTC and AFL request that the Commission initiate a proceeding or establish a new tier under its CES to determine by July 1, 2022, after appropriate notice and comment, the zero emissions energy systems that are likely to be technically capable by 2030 of providing the operating flexibility and dispatchability to provide the necessary reliability services that have historically been provided by fossil-fueled generating resources to

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[22] E3 Report at 45.

[23] Power Generation Advisory Panel, Meeting 11, Climate Action Council (May 3, 2021), at 65, https://climate.ny.gov/-/media/CLCPA/Files/2021-05-03-Power-Generation-Advisory-Panel-Presentation-Slides.pdf.

[24] *Id.*

[25] *Id.* at 66.

meet the 2040 Zero Emission Target. The Commission should establish a competitive program to attract private sector investment in a minimum of 1 GW of such zero emissions energy systems in sufficient time to ensure these resources will commence commercial operation by 2030.

This commitment will help create a market for the kind of technologies that will comprise the up to 30 percent of remaining power generation technology needed to maintain reliability as progress is made toward achieving the 2040 Zero Emission Target. Having these new technologies enter into service by 2030 will allow operational experience to accumulate and provide an opportunity for any needed technology refinements to assure that all necessary resource additions are operating in time to achieve the 2040 Zero Emission Target.

B. THE COMMISSION SHOULD INCLUDE PROVISIONS WITHIN THE ZERO EMISSIONS ENERGY PROGRAM THAT PROMOTE SUCCESSFUL PROJECT DELIVERY AND FACILITATE A JUST TRANSITION FOR THE ENERGY WORKFORCE.

In establishing the competitive zero emissions energy systems program, the Commission should include quality-based contracting and labor provisions that build on the Just Transition policies that were enacted in this year's State Budget for renewable energy systems pursuant to PSL Section 66-r and Section 224-d of the Labor Law, in terms of prevailing wage, PLA, and the Buy American provisions.[26] These policies will help ensure that assisted projects are built in a cost effective manner and meet applicable standards and critical construction and power generation schedules. These policies have been embraced in prior Commission decisions.[27] The Commission should require that the owner of the zero emissions energy system, or a third party

[26] *See* State Education, Labor, Housing and Family Assistance Budget Bill for the 2021-2022 State Fiscal Year, 2021 N.Y. Sess. Laws Ch. 56 (McKinney), Part AA, § 2-a.

[27] *See, e.g.*, Offshore Wind Order (ruling "PLAs may be *particularly valuable* in the context of offshore wind procurements where time is of the essence. A PLA *helps to assure timely compliance with contract terms and deliver of power by the specified COD*" (emphasis added)).

acting on the owner's behalf, as an ongoing condition of any agreement with a public entity that implements the competitive zero emissions energy systems program, comply with the provisions of PSL Section 66-r and Section 224-d of the Labor Law. The Commission should also require that bona fide apprenticeship programs registered with the United States or New York State Department of Labor are utilized for the appropriate type and scope of work. Prevailing wage and apprenticeship training have similar positive project delivery effects as do PLAs. The former helps attract sufficient supplies of skilled craft personnel needed for projects, while the latter provides an effective means for verifying training credentials deployed to affected projects. In addition, all three policies have a long history of success in federal, state and local public works programs in New York State and have provided substantial assistance in building other types of power generation projects. Moreover, these policies are consistent with, and build upon, the Just Transition policies embedded in the CLCPA.

These labor provisions are consistent with the March 23, 2021 recommendations of the Just Transition Working Group to the Climate Action Council.[28] They would create and retain good paying union jobs in New York, spur local manufacturing and further New York's clean economy goals, help encourage the repurposing of existing facilities and incentivize private investment in new, zero carbon emission technologies that strengthen local communities. A Just Transition to clean energy can only occur if workers in the current industry are allowed to participate in the zero emissions energy future.

[28] Just Transition Working Group, Meeting 9, Climate Action Council (Mar. 23, 2021), at 8, https://climate.ny.gov/-/media/CLCPA/Files/2021-03-23-Just-Transition-Working-Group-Presentation.pdf.

IV. CONCLUSION

For the foregoing reasons, IPPNY, NYSBCTC and AFL urge the Commission to evaluate this Petition and grant the relief sought herein expeditiously.

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