14-1786 (L)

14-1830 (Con), 14-2130 (Con), 14-2248 (Con)

United States Court of Appeals
for the
Second Circuit

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and PEOPLE OF THE STATE OF NEW YORK, CENTRAL HUDSON GAS & ELECTRIC CORP., NEW YORK POWER AUTHORITY, NEW YORK STATE ELECTRIC & GAS CORP., ROCHESTER GAS AND ELECTRIC CORP.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ENTERGY NUCLEAR POWER MARKETING, LLC, INDEPENDENT POWER PRODUCERS OF NEW YORK, INC. (IPPNY),
Intervenors.

INITIAL BRIEF OF PETITIONERS
PEOPLE OF THE STATE OF NEW YORK AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

Of Counsel

Jonathan D. Feinberg
Solicitor
John C. Graham
Assistant Counsel
Nelli Doroshkin,
Assistant Counsel
(518) 474-7687

Kimberly A. Harriman
General Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Dated: Albany, New York
June 27, 2014

CORPORATE DISCLOSURE STATEMENT

As State entities, the People of the State of New York and the Public Service Commission of the State of New York are not required to file a disclosure statement under Rule 26.1 of the Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

FEDERAL STATUTES

FEDERAL ADMINISTRATIVE CASES

STATE STATUTES

STATE ADMINISTRATIVE CASES

NYPSC Case 14-E-0117:

MISCELLANEOUS

JURISDICTIONAL STATEMENT

The People of the State of New York and the Public Service Commission of the State of New York (NYPSC) seek review of four final orders that Respondent Federal Energy Regulatory Commission (FERC) issued August 13, 2013, January 28, 2014, and May 27, 2014. Order Accepting Proposed Tariff Revisions and establishing a Technical Conference, *New York Independent System Operator, Inc.*, 144 FERC ¶ 61,126, Docket No. ER13-1380-000 (Aug. 13, 2013); hereafter referred to as Zone Order; Order Accepting Tariff Filing Subject to Condition and Denying Waiver, *New York Independent System Operator, Inc.*, 146 FERC ¶ 61,043, Docket No. ER14-500-000 (Jan. 28, 2014); hereafter referred to as Demand Curve Order; Order on Rehearing, *New York Independent System Operator, Inc.*, 147 FERC ¶ 61,152, Docket No. ER13-1380-003 (May 27, 2014); hereafter referred to as Zone Rehearing Order; Order Denying Clarification and Rehearing, *New York Independent System Operator, Inc.*, 147 FERC ¶ 61,148, Docket No. ER14-500-001 (May 27, 2014); hereafter referred to as Demand Curve Rehearing Order. These orders contravene the Federal Power Act (FPA), insofar as the rates resulting from those orders are not "just and reasonable." The orders also violate the Administrative Procedure Act (APA) inasmuch as they arbitrarily and capriciously rely on extra-record evidence. This Court has jurisdiction

pursuant to 16 U.S.C. § 825*l*(b). The NYPSC Petition for Review was timely filed on June 2, 2014, which was within 60 days after FERC denied rehearing. *Id.*

STATEMENT OF ISSUES

1. Whether increased prices intended to provide incentives for provision of electric generating capacity in the Lower Hudson Valley (LHV) are unjust and unreasonable, when FERC has barely acknowledged the consumer harm from such rates and failed to recognize the speculative nature of the consumer benefits it relies upon?

2. Whether FERC's rejection of the New York Independent System Operator, Inc.'s ("NYISO") proposal to phase-in the price increases caused by the formation of the new capacity zone, so as to align the timing of the intended incentive for electric generating capacity with actual construction of generation, causes unjust and unreasonable capacity prices?

3. Whether FERC arbitrarily and capriciously failed to require tariff provisions for eliminating the new capacity zone and its concomitant higher generation capacity prices after the transmission constraint that assertedly gave rise to the need for the zone is relieved?

4. Whether FERC unreasonably dismissed the effects of transmission system upgrades that will relieve the constraint and thereby reduce the expected

price incentive for new generation and delay the timing of new entry into the capacity market?

5. Whether FERC arbitrarily and capriciously relied on extra-record evidence of the need for new generating capacity to preserve electric reliability, particularly when it relied on the wrong estimates and confused total state numbers with those for the Lower Hudson Valley?

STATEMENT OF THE CASE

Introduction

The People of the State of New York and the Public Service Commission of the State of New York (NYPSC) respectfully petition this Court for review of four final FERC orders.[1] Through these orders, FERC has imposed substantial electricity price increases upon residential, commercial and industrial consumers in the Lower Hudson Valley region of the State of New York. It has done so by creating a new geographic zone for the sale and procurement of wholesale electric generation capacity (capacity). That zone includes the Lower Hudson Valley as part of a larger zone including New York City and Long Island, and severs the Lower Hudson Valley from the remainder of the State north and west of New York

[1] NYPSC Counsel appears for the NYPSC and the People of the State of New York in matters affecting the rates, charges and services of local electric distribution utilities. N.Y. Pub. Serv. L. § 12 (McKinney 2011).

City. The new capacity zone (NCZ), with immediate effect on the prices consumers in that region pay for capacity, was implemented in May 2014. In this Court, the NYPSC estimated the region-wide consumer impact of FERC's action to be $280 million annually.[2] Electric utility parties have estimated the consumer impact to be in excess of $500 million over an initial three year period. Demand Curve Order P 113 (JA 2818).

FERC has failed to comply with Section 205 of the Federal Power Act (FPA) (16 U.S.C. § 824d) inasmuch as capacity pricing in the new zone does not result in just and reasonable electric rates. FERC claims to have balanced consumer impacts and benefits, but its orders make only scant reference to financial impacts on retail ratepayers. FERC claims only that consumers will benefit at some point in the future from new capacity and that future rates will correspondingly drop. But it can offer no assurances that its incentives, based on theories, to encourage new generation will actually cause any generation capacity ever to be built, and it dismisses the ongoing State transmission proceedings that undermine its rationale for creating the new zone. At best, FERC points to two potential short-term solutions. One solution is the reentry of a mothballed unit that is going forward with efforts to enter the market, but it remains speculative as to

[2] Affidavit of Adam Evans in Support of Petition of the People of the State of New York and the NYPSC for Writ of Mandamus and Emergency Motion for Stay, Docket No. 14-1482 (filed May 12, 2014) (Evans Aff.).

whether that generator will succeed. The other solution is demand response efforts by customers, but FERC has given customers no time to implement such response. Moreover, the short-term response on which FERC relies will not materialize in time to ameliorate rate impacts on customers of an estimated $158 million during summer 2014 alone (Evans Aff. ¶ 18). Thus, FERC's new capacity zone will, in the short term, only benefit existing incumbent generators by creating windfall profits.

Though the impetus for the establishment of the NCZ is a transmission constraint identified by the NYISO, FERC arbitrarily and capriciously rejected the NYPSC's arguments that the NCZ is unnecessary in light of State-initiated transmission upgrades that will address the same identified constraint. Having rejected using a reliability criterion for the establishment of new capacity zones in an earlier proceeding, FERC changed its position on rehearing and grounded its rationale for an immediate need for the new capacity zone in a purported reliability need. FERC failed, however, to make a factual finding of any such reliability need. It relied upon extra-record evidence of capacity need which, when read properly, does not support its claims that there is such a need. Upon rehearing, moreover, FERC does not justify the substantial and unnecessary rate increases resulting from the new capacity zone, given that the planned transmission upgrades will address the transmission constraint. FERC likewise avoids responding to the

NYPSC's argument for delaying or phasing in the effects of the NCZ by illogically claiming that the transmission upgrades would not address a reliability need. At the same time, FERC has required no assurances from generation owners that there will be any generation response to the high prices brought on by the NCZ. Incumbent generators will receive a windfall from the institution of the new capacity zone, while new generators will be dissuaded from entering the zone by the planned transmission upgrades.

Establishment of the New Capacity Zone

FERC's orders establish the NCZ, a new geographic zone in the lower Hudson Valley region for the localized marketing of electric generation capacity, also known as "installed capacity" or "ICAP," and authorize the holding of auctions to trade capacity within the zone. The NCZ incorporates NYISO load zones G, H, I and J. A map showing the NYISO load zone boundaries is annexed hereto as Addendum A.

Installed capacity in the context of electric power marketing is a measure of electric generation capability. It does not represent an actual unit of physical energy, but rather is a regulatory construct that pertains to the "capability to generate or transmit electric power." *New York Indep. Sys. Operator, Inc.*, Order Conditionally Approving Proposal, FERC Docket No. EL07-39-000, 122 FERC ¶

61,211 at P 2 n.1 (Mar. 7, 2008). Capacity is procured separately from electric energy. A payment for capacity ensures that a generator is available to provide energy at times of peak electricity demand. Revenue from ICAP auctions is intended to provide financial incentives toward the construction of new generating facilities, as needed, to ensure sufficient electricity to meet peak demand. *Simon v. Keyspan Corp.*, 785 F. Supp. 2d 120, 124 (S.D.N.Y. 2011).

FERC requires load serving entities ("LSEs") to purchase installed capacity from suppliers. 122 FERC ¶ 61,211, at P 2. Locational ICAP procurement requirements mandate that load serving entities serving customers in certain zones purchase minimum amounts of capacity from electricity suppliers located in those zones; load serving entities in the NCZ must purchase capacity equal to a minimum of 88% of their peak load from generating facilities located in the NCZ. NYISO Installed Capacity Calculations: http://icap.nyiso.com/ucap/public/ldf_view_icap_calc_selection.do.

In order to price its energy and capacity market products, the NYISO has divided the State into eleven geographic load zones, designated by the letters A through K. Until April 2014, the NYISO managed three capacity zones: New York City (Zone J), Long Island (Zone K) and the New York Control Area ("NYCA"), encompassing all zones (Zones A-K). Zone Order at P 2 (JA 969). On April 30, 2013, the NYISO filed proposed revisions to its Services Tariff and Open

Access Transmission Tariff to move certain zones from the NYCA market and merge them with the New York City zone to establish a new capacity zone. *See* Zone Order at P 5 (JA 971). Under this proposal, load serving entities in the Lower Hudson Valley no longer rely on the upstate market for ICAP purchases, but are now grouped with New York City in ICAP auctions. The NCZ was established and implemented for the May 1, 2014 start of the 2014/2015 Capability Year. *See id.* at P 6 (JA 971).

The NYISO proposed the establishment of the NCZ and its associated price signals due to the NYISO's identification of transmission constraints limiting the amount of power that can be transmitted from elsewhere into the region comprising the NCZ. *See* Zone Order at P 6 (JA 971). According to estimates made by the staff of the NYPSC, the establishment of the NCZ will increase capacity prices by approximately $280 million within the next year for customers located in current NYISO load zones G, H and I. Evans Aff. ¶ 6. Between May and October 2014, the increase is estimated to be $158 million. *Id.* ¶ 18.

FERC has opined that higher capacity prices in the NCZ will help encourage the development of new generation capacity to mitigate the transmission constraints. *See* Zone Order at P 24 (JA 977). It takes at least three years, however, to build a new generator from the time that it is first proposed. Evans Aff. ¶ 19. Meanwhile, the NYPSC has been actively addressing the transmission

constraints into the Lower Hudson Valley. The NYISO's 2013 New Capacity Zone Study found that the transmission constraint limits the deliverability of 849.2 megawatts (MW) of power. NYISO April Filing at 6 (JA 128). When issuing its August Order, FERC was aware that NYPSC-directed AC transmission upgrades were being implemented and were expected to create an additional 1000 megawatts of transmission capacity into the NCZ region. *See* Zone Order at P 17 n.21 (JA 975). In November 2013, the NYPSC approved three transmission projects in the NCZ region that will provide additional transmission capacity, in the region.[3] NYPSC Case 12-E-0503, *Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans*, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing, at 47 (issued November 4, 2013).

Given the transmission projects already authorized and the NYPSC siting efforts, the NCZ incentives for generation capacity will not benefit ratepayers. The new generation projects that FERC's incentives are designed to encourage are unlikely to materialize before the transmission upgrades planned by the NYPSC come sufficiently close to fruition to defeat any incentives created by the New

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

Capacity Zone. *See New York Independent Sys. Operator, Inc.*, Notice of Intervention and Protest of the New York State Public Service Commission, FERC Docket No. ER13-1380-000 (May 21, 2013) ("Protest") (JA 637-40).

In the Zone Order, FERC dismissed the NYPSC's showings by stating that the NYISO was limited to the rules in its tariff, which FERC claimed did not allow the NYISO to consider future transmission upgrades in evaluating whether to establish a new capacity zone. *See* Zone Order at PP 21, 23 (JA 976-77). FERC, however, regulates NYISO auctions through its approval of, and modifications to, the NYISO Services Tariff. *Simon*, 785 F. Supp. 2d at 125. FERC, therefore, is not bound by the confines of the NYISO tariff in considering tariff revision proposals. Yet FERC refused to examine thoughtfully the NYISO's proposal in light of State-led transmission projects.

Pricing of Capacity

The NYISO uses demand curves to help price capacity.[4] The NYISO accepts ICAP supply offers and compares them to the pre-set demand curve; the

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

intersection of the supply quantity offered and the demand curve line determines the market-clearing price for all spot market capacity sales.

A separate demand curve is set for each capacity zone, with the curve anchored upon the Net Cost of New Entry ("CONE") into the market. The CONE for each capacity zone is the cost of constructing a new "proxy" generating plant in that zone. Demand Curve Order P 5 (JA 2782); Evans Aff. ¶ 12. For any given amount of demand, the higher the CONE, the higher the ICAP price that is set by the demand curve. Evans Aff. ¶¶ 10, 13.

Proceedings before FERC

On January 4, 2011, in compliance with a prior FERC request, the NYISO submitted proposed criteria that would govern the evaluation and potential creation of new ICAP zones. *New York Indep. Sys. Operator, Inc.; New York Transmission Owners*, Docket No. ER04-449-023, Order on Compliance Filing, 136 FERC ¶ 61, 165 at P 1 (Sept. 8, 2011). FERC accepted criteria based on a "Highway Capacity Deliverability Test," which triggers creation of a new zone "when the total transmission transfer capability … is insufficient to allow all of the capacity resources in a pre-existing zone to be deliverable throughout the pre-existing zone." *Id.* at PP 52, 53. In other words, a new zone is triggered when there is a significant constraint in the transmission network within an existing capacity zone.

FERC, however, rejected proposed criteria that would have examined system reliability, *id.* at PP 59-60, and consumer economic impacts, *id.* at 63. It relied only on the criteria of whether there was a deliverability constraint to establish a new capacity zone. It did not consider whether such a constraint actually created a reliability issue for the deliverability of electricity.[5] It did not create any test whatsoever for the impacts of the creation of a new capacity zone on ratepayers. On November 7, 2011, the NYISO submitted revised criteria in response to FERC's September 8, 2011 order. *New York Indep. Sys. Operator, Inc*, Docket No. ER12-360-000, Order on Compliance, 140 FERC ¶ 61,160 at P 1 (Aug. 30, 2012). FERC accepted the revised criteria, which were based solely on deliverability. *Id.*

On April 30, 2013, the NYISO filed proposed tariff revisions implementing the new zone. Zone Order at P 1(JA 969). The NYPSC, however, protested that the new zone was unnecessary because proposed new transmission upgrades would alleviate the deliverability constraint. *Id.* at P 23 (JA 977). FERC dismissed this point, claiming that the NYISO tariff considers only whether a constraint exists at present. *Id.* FERC also stated that transmission relief would not address a

[5] "Deliverability" is a test that looks to ascertain whether all of the capacity resources located in any given zone are deliverable throughout that zone via the transmission network. *Id.* at P 52.

reliability need for capacity within the NCZ, though it failed to cite to a finding of a reliability need made by the NYISO. *Id.* at P 26 (JA 978).

The NYPSC further showed that unjust and unreasonable rates would result, because consumers would experience a substantial price increase and receive no benefit in return. *Id.* at PP 24-26 (JA 977-78). FERC again dismissed this NYPSC showing, asserting that higher capacity prices would incent new generation and/or transmission development, which in turn would alleviate the constraint. *Id.* Nowhere, however, did FERC either quantify the negative economic impacts to consumers (and the concomitant benefits to generators) that would result from the new capacity zone, or weigh the value of the asserted benefits to ratepayers against the substantial economic costs to ratepayers.[6]

Utilities serving customers within the new zone requested a phase-in of the price impacts. *Id.* at P 28 (JA 978). FERC rejected this request, asserting that it would merely delay the incentive. *Id.* at P 31 (JA 980).

On November 29, 2013, the NYISO filed further tariff revisions defining the demand curves for the new zone. Demand Curve Order at P 1 (JA 2780). This time, however, it proposed a phase-in adjustment to the curve parameters, so as to

[6] FERC claims that the NYISO examined and considered the economic consequences of its proposal. *Id.* at P 6 (JA 971). That analysis, however, concerned economic impacts to market participants, not the rate impacts on consumers.

ameliorate consumer impacts. *Id.* at PP 1, 163 (JA 2780, 2834). FERC again rejected the phase-in because it believed that any delay would discourage "competitive supply" and that short-term responses, *e.g.*, repowering of mothballed facilities, would materialize. *Id.* at P 164 (JA 2835).

On May 27, 2014, FERC issued two separate rehearing orders in the zone creation and demand curve reset proceedings. 147 FERC ¶ 61,152 (May 27, 2014) (Zone Rehearing Order) (JA 2988-3013); Order Denying Clarification and Rehearing, 147 FERC ¶ 61,148 (May 27, 2014) (Demand Curve Rehearing Order) (JA 3014-3042). In the Zone Rehearing Order, FERC denied rehearing of the Zone Order. It dismissed arguments against the NCZ by asserting that long-term system reliability problems that might occur justified the new zone, without making any findings as to a reliability need, and that the resulting short-term rate increases to consumers were therefore appropriate. Zone Rehearing Order at PP 13-20 (JA 2993-99).

In the Demand Curve Rehearing Order, FERC rejected the NYISO's, the NYPSC's and the Transmission Owners' call for a phase-in. FERC again determined that delaying the new zone's price signals would discourage new capacity resources and threaten reliability. Demand Curve Rehearing Order at PP 59-63 (JA 3037-40).

SUMMARY OF ARGUMENT

In creating the NCZ, FERC has violated its statutory responsibility to ensure that electric rates are just and reasonable. In its quest to provide incentives for generation capacity, it ignored the impacts of the resulting capacity price increases upon residential, industrial and commercial consumers, and in any event failed to quantify those impacts. It implies that consumers will receive commensurate benefits through new generation projects, but those projects either will not fully mitigate the increase or are purely speculative. Likewise, it unreasonably dismissed parties' call for a phase-in of the price impacts, which at least could have aligned the timing of the ICAP incentives with any potential market responses.

FERC's creation of the zone was also arbitrary and capricious. Its post hoc reliance, on rehearing, upon reliability need lacks any factual finding of such a reliability need, and, in any event, is devoid of record support. The arbitrariness of FERC's reliance on an alleged reliability need is especially evident inasmuch as FERC previously refused to consider reliability as a criterion for creating the zone. Furthermore, FERC failed to rationally explain the need for a new capacity zone based on a transmission constraint where transmission projects will alleviate the constraint.

STANDARD OF REVIEW

FERC's assessment of just and reasonable rates is subject to the substantial evidence standard of review. 16 U.S.C. § 825*l*(b); *Rochester Gas & Elec. Co. v. FPC*, 344 F.2d 594, 596-97 (2d Cir. 1965); *Sithe/Independence Power Partners v. FERC*, 285 F.3d 1, 5 n.2 (D.C. Cir. 2002). Under that standard, the record must contain "more than a mere scintilla" of evidence in support of FERC's determination, such as would constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951).

Further, the Administrative Procedure Act provides that a reviewing court shall hold unlawful and set aside agency actions found to be arbitrary and capricious. 5 U.S.C. § 706(2). An agency's decision cannot be upheld where it fails to "reveal a 'rational connection between the facts found and the choice made'." *Natural Res. Def. Council, Inc. v. U.S. EPA*, 658 F.3d 200, 215 (2d Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

POINT I.

FERC HAS VIOLATED ITS STATUTORY OBLIGATION TO ENSURE THAT ELECTRIC RATES ARE JUST AND REASONABLE

A. FERC ignored consumer economic impacts.

Under the FPA, electric rates and charges must be just and reasonable. 16 U.S.C. § 824(a). The FPA authorizes FERC to regulate wholesale rates and transactions, and also the sellers who engage in them, because such sales are "for ultimate distribution to the public" and thus are "affected with a public interest." *Id.*

Consonant with its purpose of promoting the public interest, the FPA is first and foremost a consumer protection statute. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) ("primary aim of this legislation was to protect consumers against exploitation").[7] "A major purpose of the whole Act is to protect power consumers against excessive prices." *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). Thus, the FPA requires just and reasonable rates

[7] Although this case concerned the Natural Gas Act of 1938 (52 Stat. 821, 15 U.S.C. § 717 *et seq.*), the FPA and the Natural Gas Act "are in all material respects substantially identical." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956)). Consequently, citations to decisions interpreting either statute are interchangeable. *Id.*

in order to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 388 (1959).

FERC cannot be said to have promoted the public interest in just and reasonable rates when it has disregarded economic impacts of the new zone upon consumers. In its initial orders, FERC barely acknowledged that consumer rates would increase. Zone Order at P 23 (JA 977) ("The price differential that is expected to develop when a new capacity zone is created …"). Indeed, it actually rejected the NYISO's "Consumer Impacts Test" for creating a new zone as "unnecessary and vague." 136 FERC ¶ 61,165 at PP 61, 63. On rehearing, FERC finally agreed, without offering any specifics, that customers would face higher prices. But here the agency shows that it values incentives for developers over "just and reasonable rates" for consumers, inasmuch as it stated that "consumers may pay more but doing so is necessary to provide the appropriate price signals to incent developers to build or restore capacity …" Zone Rehearing Order P 17 (JA 2996). Although FERC claimed that it "has considered the extent to which rates in the Lower Hudson Valley will increase as a result of the implementation of a new ICAP demand curve," Demand Curve Rehearing Order P 59 (JA 3037), it fails to articulate any estimate of the amount of the increase. More fundamentally, it fails to appropriately balance the substantial short-term consumer economic impacts

against the supposed long-term benefits of the zone. It claims, for instance, that consumers have been on notice of the possibility of the creation of a new capacity zone since 2006. Zone Order P 31 (JA 980). FERC does not identify what notice was given, or customer outreach provided to customers by the NYISO of this possibility. It fails, moreover, to explain how customers could have responded to that possibility, if they had notice, or why that possibility justifies immediate imposition of the new capacity zone on customers. FERC provides developers of new generation with a substantial lead time to respond to the prices increases in the new capacity zone. It gave customers, however, no time to avoid those new increases. In particular, it denied customers a phase-in of the new capacity zone, which would have afforded them time to respond.

Despite FERC's refusal to do so, the FPA requires that it quantify and review the extent of the possible price impacts to ensure that they fall within a reasonable range of rates. *Maine PUC v. FERC*, 520 F.3d 464, 472 (D.C. Cir. 2008) "FERC cannot pluck rates out of thin air; it must rely on record evidence to establish a reasonable range of rates." Given the absence of evidence and reasoned analysis of consumer impacts, FERC's determinations cannot result in just and reasonable rates.

B. FERC's alleged consumer benefits are speculative.

Rather than offering any analysis of economic impacts, FERC instead claims that the new zone benefits consumers by incenting new capacity. In the Zone Order, FERC maintained that establishing the zone is immediately necessary to stimulate future investment in generation capacity. Zone Order at PP 24-26 (JA 977-78). In response to arguments that customers would receive no commensurate benefit in return for substantial rate increases, FERC stated that high price signals are needed over the long run, Zone Order at PP 23-24 (JA 977), and that mothballed facilities could be incented to re-tool in the short term, Demand Curve Order at P 164 (JA 2834).

That belief, however, is unsubstantiated. The purported benefits FERC relies upon are purely speculative. On rehearing, FERC asserted that customers would receive benefits in the form of relief from shortages of reserve capacity and, consequently, improved system reliability. Zone Rehearing Order at P 17 (JA 2996); Demand Curve Rehearing Order at P 62 (JA 3038-39). No factual determination was made in these proceedings that a system reliability need existed– as fully demonstrated in Point II herein. There is, moreover, no real indication that these purported benefits will ever materialize, either in the short term or the long term.

FERC's purported short-term benefits will not fully address the immediate price increases arising from FERC's rejection of a phase-in. For its conclusion that the inflated price signals are immediately working to encourage generating capacity, it rests upon repowering of two existing projects – the Danskammer and Bowline generating plants. Demand Curve Rehearing Order P 62 (JA 3038-39). As for Danskammer, the NYPSC has just accepted a proposal for transfer of the plant to a developer that proposes to refurbish the plant, which was damaged by Superstorm Sandy.[8] It is, however, pure speculation that the developer will be able to succeed in refurbishing the plant. The developer must overcome possible court proceedings from other generators in the new capacity zone, who would benefit if Danskammer does not operate.[9] The developer also has to succeed in obtaining a

[8] NYPSC Case 14-E-0117, Order Approving Transfer and Making Other Findings, issued June 27, 2014. http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={69C91C0A-54AA-4889-A85A-AE376A4A683B} - (Danskammer Transfer Order).

[9] In particular, Intervenor Entergy is aggressively opposing Danskammer's application to the NYPSC for authorization to repair the facility and restore it to operation. (Danskammer Transfer Order at 12-14, 35-36). NYPSC Case 14-E-0117, *Helios Power Capital, LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc.* – Petition for Expedited Approval for Lease, Sale and Operation of Danskammer Generating Facility, Initial Response of Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Entergy Entities") (filed April 4, 2014) and Supplemental Comments of the Entergy Entities (filed June 9, 2014).

supply of gas that would allow it to address concerns from environmentalists about the fueling of the plant with coal. (Danskammer Transfer Order at 19-20, 35).

Furthermore, it appears that if Danskammer operates, then Bowline might not. Facility owner NRG Energy, Inc., has indicated to the NYPSC (JA 3039) that if Danskammer were to enter the capacity market, it may hesitate to restore Bowline.[10] In other words, the unreasonably high new capacity zone prices may be insufficient to provide an incentive for Bowline's return, particularly if Danskammer operates. Moreover, FERC does not state that NRG has applied for authorization to resume operation, nor does it appear that NRG has stated any commitment to do so. At best, NRG has stated only that the new zone "greatly improve[s] the prospects" of repowering. Demand Curve Rehearing Order at P 62 n.51 (JA 3039). Thus, FERC's reliance on short-term solutions is not reasonable.

The alleged long-term benefits are merely predictions. All that FERC can offer is its theory that higher payments to developers will incent construction or restoration of generating capacity. Zone Rehearing Order at PP 15-17 (JA 2995-

[10] NYPSC Case 13-E-0012, NRG, Energy, Inc., letter of March 17, 2014 at 2 ("… the final status of the Danskammer facility is a major open question that will determine whether NRG can proceed posthaste to meet its desired implementation date or alternatively must hold up implementation to protect itself against the incurrence of significant investment costs that could be rendered uneconomic pending the outcome of this proceeding.") (cited by FERC at Zone Rehearing Order, P 17 n.31 (JA 2996)).

96). But in determining just and reasonable rates, "mere reliance on economic theory cannot substitute for substantial record evidence and the articulation of a rational basis for [FERC's] decision." *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1514 (D.C. Cir. 1984). Despite evidence undermining the efficiency of incentives associated with the NCZ, FERC hopes that full implementation of the NCZ will send price signals encouraging new capacity development to address a transmission constraint. FERC failed to examine whether the theory of efficient price signals would hold in the Lower Hudson Valley in the following years, and whether a phase-in of the NCZ demand curve parameters could be accomplished without impeding investment. It did not consider the potential impacts upon consumer rates or the actual likelihood of any improvements in electric power deliverability, nor did it evaluate whether the former justifies the latter.

C. FERC's rejection of a phase-in of price impacts results in unjust and unreasonable rates.

In the Demand Curve Order, FERC expressed its agreement with the assertion, made in the filing of Entergy Nuclear Power Marketing LLC, that a phase-in of the demand curve parameters for the NCZ would "discourage competitive supply [of capacity] and could increase the likelihood of regulatory actions to meet capacity needs." Demand Curve Order at P 164 (JA 2835). Even if FERC correctly concluded, in the Zone Order, that the NCZ would encourage

new entry into the capacity market, FERC failed to satisfactorily explain why new entry would be discouraged by the phase-in of price signals.

FERC's stated goal for the NCZ was to provide for long-term price signals. Zone Order at P 25. But generation projects are built over the course of several years. *See* Evans Aff. at ¶ 19 (three years to build a new generator); *see also* Demand Curve Order at P 154 (JA 2832) (reciting Multiple Intervenor claims that it typically takes two years to build generating capacity). A two-year phase-in, as proposed by the NYISO, would not impede new entry, because it would send efficient price signals to potential investors in capacity and would not affect the capacity revenues of any party developing new capacity in the NCZ.

FERC dismisses the contention that a phase-in will not defeat incentives for new entry by stating that "[t]his argument fails to take into account the potential for shorter term supply responses, *i.e.*, demand response and repowering options, to meet capacity needs." Demand Curve Order at P 164 (JA 2835). The impetus of the NCZ's ICAP demand curve, however, is not to provide short-term price hikes for the benefit of demand response providers and repowered power plants, but, as stated in the Zone Order, to encourage new investment in generating and transmitting capacity. Zone Order at P 26 (JA 978) (stating that "the new capacity zone needs its own ICAP Demand Curve, reflecting its higher net cost of new entry, in order to send the necessary price signals over the long run and provide the

higher capacity revenue over the long run needed to encourage new investment"). Thus, there is no reason why the NCZ's expected long-term price signals would be any less effective if implemented gradually, so as to minimize their immediate negative effects while still providing investors with a favorable price signal over their planning horizon.[11]

On rehearing, FERC again relied upon long-term incentives as a basis for the immediate price increase. Demand Curve Rehearing Order PP 59-65 (JA 3037-41). But it also relied upon speculation about the return of Danskammer and Bowline, apparently believing that such speculation justifies the increase in the short term. Thus, FERC failed to show that the higher NCZ prices represent anything other than a windfall to incumbent generators without any commensurate benefit to consumers. FERC's insistence upon providing an incentive, no matter what, fails to ensure that prices are not excessive, and is impermissible. *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1501-02 (D.C. Cir. 1984) (citing *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) and *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968) in support of statement that

[11] In this connection, even demand response initiatives require time to be put into place. FERC provided no time, however, for those measures by providing for a phase-in. Rather, FERC insisted on immediate implementation of the NCZ without giving customers ways of mitigating the rate increases.

FERC may not issue orders resulting in excessive rates); see also *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

D. FERC unreasonably declined to establish criteria for eliminating the new zone in the event the transmission constraint is relieved.

Furthermore, in the interest of maintaining just and reasonable rates in the future, FERC should have directed the NYISO to establish rules for eliminating the new zone when the triggering transmission constraint ceases to exist. It declined to do so, holding that zone elimination was beyond the scope of the proceeding. Zone Rehearing Order P 45 (JA 3011-12). But absent elimination of the zone, even when the transmission constraint is eliminated, capacity prices would never equilibrate with prices on the opposite side of the zone boundary. Because the new zone rules require that 88% of the capacity be purchased from facilities located within the zone, capacity-purchasing entities would still be restrained from participating in the statewide market, even in the absence of any transmission constraint that would prevent statewide capacity from being deliverable to the Lower Hudson Valley. In the event of future capacity shortfalls within the new zone, then, prices would remain elevated irrespective of whether capacity is deliverable from other regions. Such overcharges would not be just and reasonable. *Electric Power Supply Assoc. v. FERC*, 2014 U.S. App. LEXIS 9585, Docket No. 11-1486, slip op. at 15 (D.C. Cir. May 23, 2014).

POINT II.

FERC'S DETERMINATION THAT A NEW CAPACITY ZONE IS NEEDED IS ARBITRARY AND CAPRICIOUS

A. FERC arbitrarily and capriciously asserted an unfounded reliability basis for the establishment and continuation of the new capacity zone.

In dismissing the NYPSC's explanation of the needlessness of a sudden price surge to relieve a transmission constraint that the State is actively addressing, FERC claims that the State-initiated transmission upgrades would fail to address a reliability need for additional capacity to be located in the NCZ. *See* Zone Order at P 26 (JA 978). FERC's rejection of the NYPSC's arguments is arbitrary and capricious because it relies on an implied assertion of a reliability need for the NCZ in dismissing the NYPSC showing, though FERC does not make a factual finding that a reliability need exists in the NCZ. FERC expands its reliance on reliability in the orders on rehearing, relying largely on extra-record material in order to do so. In none of the challenged orders, however, did FERC make a factual determination that a reliability need exists in the NCZ region and that the NYISO proposed the NCZ on the basis of that reliability need.[12] FERC's assertion

[12] The NYISO's April 2013 Filing of proposed tariff revisions states that the establishment of the NCZ is expected to 'enhance' reliability. *See* NYISO Filing at 1 (JA 123). The filing does not, however, identify a reliability need in the NCZ region.

of reliability as the basis for the NCZ and the reason for the dismissal of the NYPSC's arguments is therefore unreasonable.

A reliability need exists where transmission and generation resources fail to meet the total demand for power, "i.e., imports and generation equal less than peak load." 136 FERC ¶ 61,165 at P 59. Because a reliability need exists only where there is a capacity shortage, a system may be reliable despite the existence of a transmission constraint.[13] FERC refers to a possible capacity shortage in footnotes in the orders upon rehearing, pointing to the NYISO's 2014 Summer Capacity Assessment ("Capacity Assessment"). *See* Zone Rehearing Order at n. 29 (JA 2996); Demand Curve Rehearing Order at n. 49 (JA 3038). The Capacity Assessment is dated April 30, 2014, however, so it was not the basis for the implied assertion of a reliability need in the Zone Order. *See* Zone Order at P 26 (JA 978). Nor was the Capacity Assessment filed with FERC by the NYISO in the proceedings before FERC on the establishment of the NCZ and its relevant demand curves; FERC's reference to it in the order on rehearing is the first mention of the document in the proceedings.

In any event, the contents of the Capacity Assessment do not support even a pretextual, post hoc reliability basis for the NCZ. In the Capacity Assessment, the

[13] A transmission constraint limits the amount of power that may be delivered into an area; the amount of power delivered into or located in the area may nevertheless be sufficient to meet the total demand in the area.

NYISO forecasts excess capacity margins under baseline peak weather conditions and reserve requirements under extreme weather conditions. *See New York Independent System Operator 2014 Summer Capacity Assessment* at 2, annexed hereto as Addendum B. The Capacity Assessment found that, under baseline peak weather conditions, there would be 879 MW of excess capacity in all of New York State. *See id.* at 2. Under extreme weather conditions, there would be a 1,431 MW capacity reserve need for all of New York State.[14] *See id.* FERC's reading of the Capacity Assessment, that "there will be a 1,431 MW capacity reserve shortage during the upcoming summer in Southeast New York under extreme weather conditions," therefore, misrepresents the contents of the Capacity Assessment. Demand Curve Rehearing Order at n. 29 (JA 2996). Under extreme weather conditions, the reserve shortage in Southeast New York would be approximately 121 MW. Summer Capacity Assessment at 7.[15]

FERC further fails to recognize that Southeast New York, a NYISO term of art, is a region encompassing Zones H, I, and J of the NCZ and also Zone K, which

[14] The extreme weather estimate predicts a capacity need of 35,976 MW, *id.* at 3, while the record summer peak demand in New York State is 33,956 MW, *id.* at 5. The extreme weather demand estimate for 2014, then, is over 2,000 MW greater than the record demand.

[15] The transmission system into the Southeast New York load area carries approximately 3,000 MW; under extreme weather circumstances, the amount of power that would be need to be delivered to Southeast New York from upstate would be 3,121 MW. *See id.*

is not in the NCZ. *See* 2012 NYISO Reliability Needs Assessment (RNA) at A-9. Therefore, any reserve need identified for Southeast New York does not necessarily identify a reserve need for the NCZ region. In fact, the entire 121 MW reserve need for Southeast New York could be entirely due to needs in Zone K; the Capacity Assessment would grant FERC no grounds to state, or assume, otherwise. Finally, as noted by the NYISO, the reserve need for the entire state under extreme weather conditions can be met – and exceeded, by 458 MW – by using operating procedures. Capacity Assessment at 3, 4. FERC's conclusion that the NCZ is necessary to address a reliability need in the constrained area, Zone Rehearing Order at P 15 (JA 2994), lacks a rational connection to the facts, where the facts cited do not indicate a reliability need.

FERC's selective citation of the Capacity Assessment also belies the actual, long-term reliability conditions in New York State. In none of the challenged orders does FERC cite to the NIYSO's 2012 RNA, a report on projected reliability needs throughout the NYCA used in the NYISO's Comprehensive Reliability Planning Process.[16] The publication of an annual RNA was ordered by FERC in the NYISO's reliability planning process. *See New York Indep. Sys. Operator, Inc.*, Docket Nos. ER04-1144-000 and ER04-1144-001, Order Accepting in Part

[16] *See* NYISO Reliability and Economic Planning Process, presented at the June 9-10, 2010 FERC Technical Conference on Planning Models and Software, *available at* http://www.ferc.gov/CalendarFiles/20100608140527-Chao,%20NYISO%20-%206-9-10.pdf.

and Rejecting in Part Tariff Amendments, 109 FERC ¶ 61,372 at 2 (Dec. 28, 2004). The 2012 RNA does not identify any resource adequacy needs, in any capacity zone in the state, through 2019. 2012 RNA at 35 and A-5. Contrary to FERC's assertion of a long-standing reliability need, Zone Rehearing Order at P 17 (JA 2996), earlier RNAs, issued in 2009 and 2010, also did not identify reliability needs.[17] *Id.* at 6. The preliminary results of the 2014 Reliability Needs Assessment also show no resource adequacy needs anywhere in the NYCA until 2019. Available at http://www.nyiso.com/public/committees/documents.jsp?com=bic_espwg&directory=2014-06-30.

The arbitrary nature of FERC's assertion of a reliability basis is further accentuated by the fact that, in its prior orders that established the process for creating new capacity zones generally, FERC rejected the NYISO's proposal for using a reliability criterion as the basis for the establishment of new zones. 136 FERC ¶ 61,165 at PP 59-60.

FERC chose instead to base the creation of new zones on deliverability needs; that is, the creation of a new zone is triggered when some capacity in an

[17] The 2012 RNA explains the lack of reliability need finding in 2009 and 2010 as being "due to increased generation resources and the reduced load forecast resulting from the economic recession," as well as "[i]ncreased participation in the NYISO's demand response program." *Id.* No RNA was issued in 2011 or 2013.

existing zone cannot be delivered throughout that zone due to a transmission constraint. *See id.* at PP 52, 53 . FERC preferred the deliverability test to the reliability test because "a deliverability constraint can bind under the Attachment S Deliverability Test without there being a corresponding reliability need." *Id.* at P 60. [18] Thus, the existence of a deliverability constraint does not necessarily correspond with a reliability need, and a deliverability constraint may exist where no reliability need exists. Given that reliability was never an issue in the process of establishing a zone, FERC did not build a record on reliability.[19] FERC's claim, then, that the basis of the NCZ is a reliability concern,[20] is both inconsistent with FERC's prior approach to the establishment of new capacity zones and lacks a rational ground.

---

[18] That is, reliability and deliverability are two different concepts. Reliability involves an engineering determination of whether the system can withstand generation and/or transmission losses and continue to function. *Id.* at P 59 & n.35. FERC conflates reliability and deliverability when it contends that a long-term transmission constraint necessarily leads to a reliability need. Zone Rehearing Order at 13 (JA 2994).

[19] Consequently, any of FERC's purported findings of a reliability need are unsupported by substantial evidence, and are therefore invalid. 16 U.S.C. § 825*l*(b); *Rochester Gas & Elec. Co. v. FPC*, 344 F.2d at 596-97; *see Sithe/Independence Power Partners v. FERC*, 285 F.3d at 5 n.2 (holding that assessment of just and reasonable rates is subject to the substantial evidence standard of review).

[20] Demand Curve Rehearing Order at P 61 (JA 3037-38), Zone Rehearing Order at P 16 (JA 2995).

Even if a reliability need did exist, it would be addressed by the NYPSC's planned transmission upgrades. In the Zone Rehearing Order, at P 14 (JA 2994-95), FERC claims that "[a] reliability concern occurs when a binding transmission constraint prevents sufficient capacity from being deliverable where it is needed to satisfy existing reliability requirements." Thus defined, any reliability concern, then, could be addressed through the elimination of the transmission constraint. If the transmission constraint is eliminated, and with it any possible reliability concern, then there is no basis for the existence of the NCZ. Yet, as shown in POINT I, D, *supra*, the NCZ is so designed that, even absent any transmission congestion, capacity prices within the NCZ are expected to exceed those in the Rest of State capacity market. Even were a reliability need to exist, it would not justify the indefinite continuation of the NCZ.

B. FERC failed to rationally consider the effects of transmission projects on new entry.

In the challenged orders, FERC has failed to draw a logical connection between the transmission constraint found and its decision to impose a short-term price surge. FERC's decision to approve the NCZ, therefore, should be rejected as arbitrary and capricious.

The NYISO proposed the establishment of the NCZ after identifying a transmission constraint that limited the amount of power that could be transmitted

into the region comprising the NCZ. *See* Zone Order at P 6 (JA 971). The NYISO found that the congestion was 'bottling,' or limiting the deliverability of, a total of 849.2 MW of upstate generation capacity. *See* NYISO April 2013 Filing at 6 (JA 128). The NYPSC protested the creation of the NCZ before FERC, noting that transmission proceedings before the NYPSC would address the constraint identified by NYISO by implementing approximately 1000 MW of transmission upgrades between 2016 and 2018. NYPSC Zone Protest at 4, 5 (JA 637, 638).

As FERC noted throughout the August Order, the NCZ was created with the expectation that it would encourage new generation to be constructed in the NCZ region, which would alleviate the constraint identified by the NYISO. Zone Order at PP 23-25 (JA 977-78). Not only would new generation be rendered unnecessary to alleviate the constraint where transmission projects would do so before new generation would enter the NCZ market,[21] but FERC's expectation that new generation would enter the NCZ market is irrational in light of the State's transmission proceedings. Elimination of the transmission constraint increases the amount of generation available to the NCZ, so prices would be mitigated when the transmission projects come into service. No new entry into the NCZ capacity

[21] It takes more than three years to build a new generator from the time that it is first proposed. NYPSC December 2013 Notice of Intervention and Comments at 5 (JA 1638). As of June 27, 2014, no applications for the construction of new generation facilities in the Lower Hudson Valley are pending before the NYPSC.

market would come in before 2018, if at all, because of the expectation of price mitigation, the complete scope of which is difficult to predict. In the context of the transmission overhaul, FERC's rationale for the NCZ, "to encourage new resources to be built in the new capacity zone," Zone Order at P 26 (JA 977), is irrational.

Given the irrationality of the NCZ in light of the State-led transmission proceedings, FERC dismissed the NYPSC's argument by first claiming a procedural limitation. FERC states that the NYISO's tariff does not allow the NYISO to take into account future transmission projects in proposing a new capacity zone. *See* Zone Order at PP 21, 23 (JA 976-977).[22] FERC, though, is not bound by any limitations of the NYISO tariff in evaluating the NYISO's tariff revision proposals,[23] and FERC avoids limiting its authority by making such a claim. Nor is it bound by law to approve a tariff that is unjust or unreasonable. *Otter Tail Power Co. v. FERC*, 583 F.2d 399, 406 (8th Cir. 1978). Because FERC

[22] FERC nonetheless, illogically, claims that it can adopt the NCZ to encourage such projects. FERC asserts that "[t]he price differential that is expected to develop when a new capacity zone is created will provide incentives to alleviate this constraint, such as by completing the transmission upgrades." Zone Order at P 23 (JA 977). This statement also is internally illogical, as the State-led transmission upgrades are not dependent upon the price increases brought on by the NCZ; indeed, in the January Order, FERC expresses concern that price *mitigation* "could increase the likelihood of regulatory actions to meet capacity needs." Demand Curve Order at P 164 (JA 2835).

[23] FERC regulates NYISO auctions through its approval of, and modifications to, the NYISO Services Tariff. *See Simon*, 785 F. Supp. 2d at 125.

is not limited by the NYISO tariff from considering the effects of planned transmission projects on the identified deliverability constraint, FERC must rationally consider the circumstances in evaluating the establishment of the NCZ.

In contrast to the Zone Order, in the Orders on Rehearing issued May 27, 2014, FERC no longer claims that transmission upgrades would not effectively address any reliability concerns. Instead, it rejects the NYPSC's arguments by stating that there is "no assurance that any [transmission] facilities would be completed during the 2016-2018 time frame." Demand Curve Rehearing Order at P 63 (JA 3039-40). FERC offers no basis for its new rationale, despite the fact that the NYPSC, in its most recent order addressing the progress of the State's transmission initiative, continues to urge the parties to meet the 2014-2018 construction time frame established in the Governor's Energy Highway Blueprint.[24] FERC's insistence that some assurance more compelling than the NYPSC's formal proceeding to evaluate specific transmission solutions is necessary to justify delaying the NCZ contrasts with its casual reliance on its own unsupported prediction that new generation will enter the market as a result of implementing it. In essence, FERC appears to believe it may impose hundreds of millions of dollars in costs on New York ratepayers on the basis of a generation

[24] Case 12-T-0502, Order Authorizing Modification of the Process to Allow for Consideration of Alternative Proposals, at 4 (issued February 21, 2014); see also Case 12-T-0502, Order Instituting Proceeding, at 2 (November 30, 2012).

owner's self-promoting statement "that the recent approval of a new capacity zone … greatly improves the prospects of [the owner] restoring its Bowline 2 unit,"[25] Demand Curve Rehearing Order at P 62 (JA 3038), but does not believe that the State's public commitment to enhancing the transmission system is a sufficiently credible basis for a different decision. Relying on the unsupported claims of generation suppliers that generation may possibly reenter the market, lacking any assurance whatsoever that new generation will actually enter the market and summarily dismissing evidence to the contrary, FERC reasserts its approval of the NCZ and rejection of the phase-in upon rehearing.

CONCLUSION

For the foregoing reasons, this Court should vacate Respondent FERC's orders challenged herein, to the extent necessary to eliminate the NCZ and to restore the New York capacity market to the status quo ante. The Court should

[25] The folly of relying on such statements as a basis for immediate and substantial rate increases is shown by NRG's indication that it may not bring back Bowline if Danskammer comes online, cited note 11 *supra*. Given the recent approval of Danskammer's return by the NYPSC, as described *supra*, it seems highly unlikely that NRG will commit the investment necessary to bring Bowline back on-line.

further direct FERC to issue refunds of capacity charges assessed beginning May 2014 to the extent this Court finds those charges to have been excessive, and grant such other and further relief as it deems just and reasonable.

Respectfully submitted,

Kimberly A. Harriman
General Counsel

/s/ John C. Graham
John C. Graham
Nelli Doroshkin
Assistant Counsel
Jonathan D. Feinberg, Solicitor
Of Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-7687

Dated: June 27, 2014
Albany, New York

CERTIFICATE OF COMPLIANCE

With Federal Rules of Appellate Procedure 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) stated in #2 below because this brief contains 8,844 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

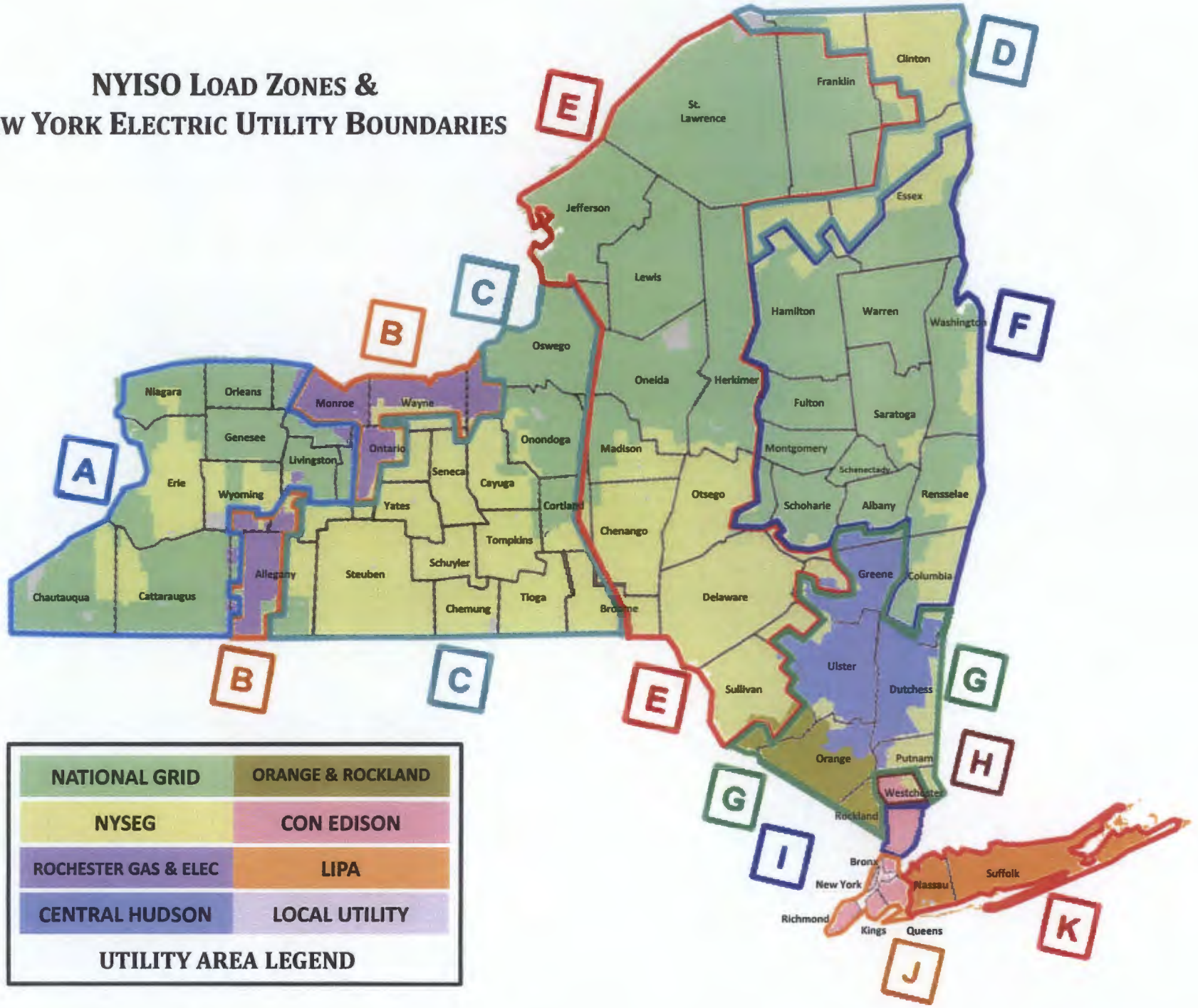
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

/s/ John C. Graham
JOHN C. GRAHAM
Assistant Counsel

Dated: June 27, 2014

ADDENDUM A

NYISO Load Zones & New York Electric Utility Boundaries



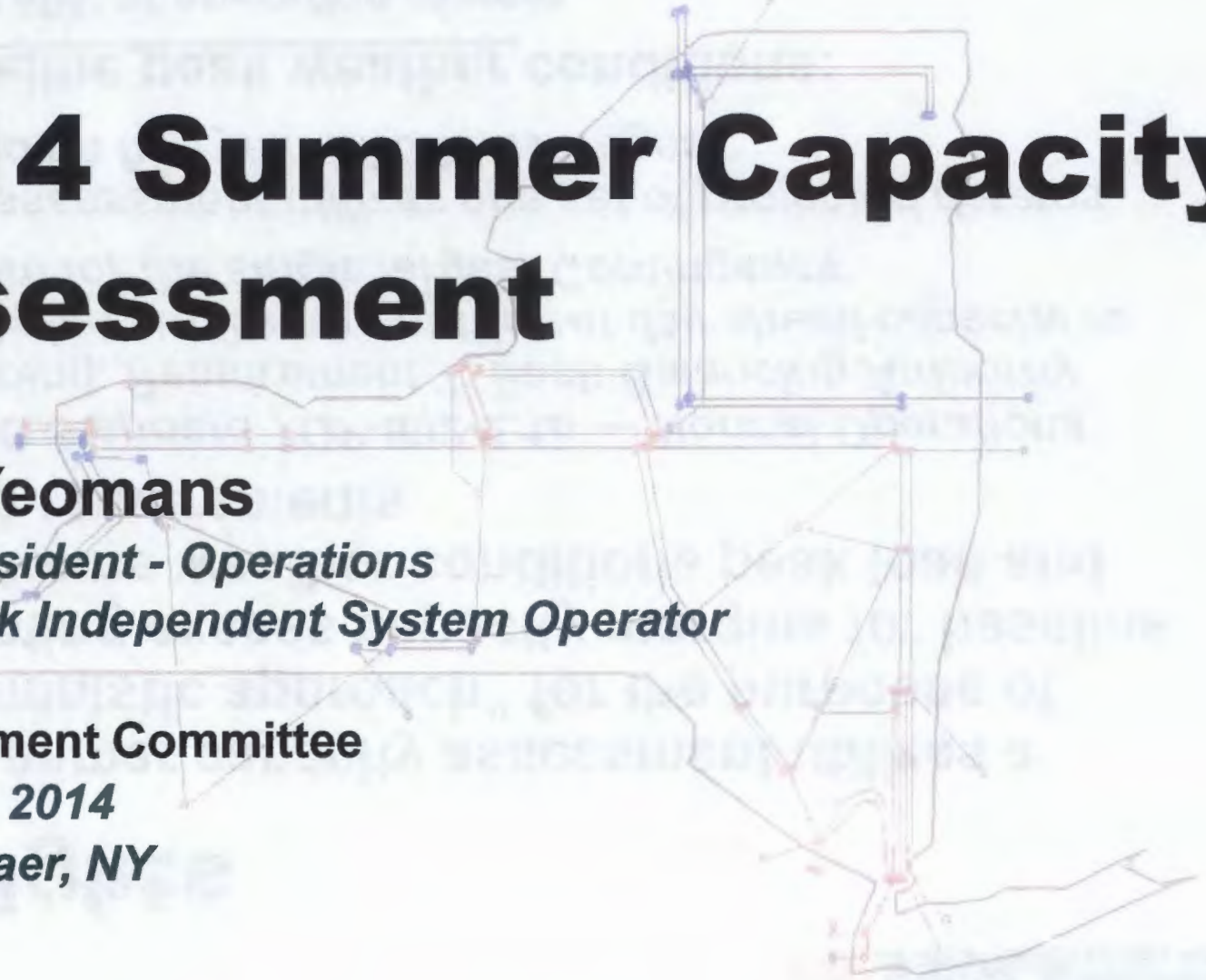
ADDENDUM B

NEW YORK INDEPENDENT SYSTEM OPERATOR

2014 Summer Capacity Assessment

Wes Yeomans
Vice President - Operations
New York Independent System Operator

Management Committee
April 30, 2014
Rensselaer, NY



DRAFT – FOR DISCUSSION PURPOSES ONLY

Highlights

- **This summer capacity assessment utilizes a "deterministic approach" for the purposes of forecasting excess capacity margins for baseline and extreme weather conditions peak load and reserve requirements**
  - ***NERC Standard TOP-002-2.1b — Normal Operations Planning, Requirement 7: Each Balancing Authority shall plan and secure sufficient day ahead capacity to secure for the single largest Contingency***
  - ***The assessment utilizes one set of projected derates based on five year EFoRd averages***
- **At <u>baseline peak weather</u> conditions:**
  - ***+879 MW of operating margin***
- **At <u>extreme weather</u> (90th percentile forecast):**
  - ***-1,431 MW shortage of operating margin***

NEW YORK INDEPENDENT SYSTEM OPERATOR

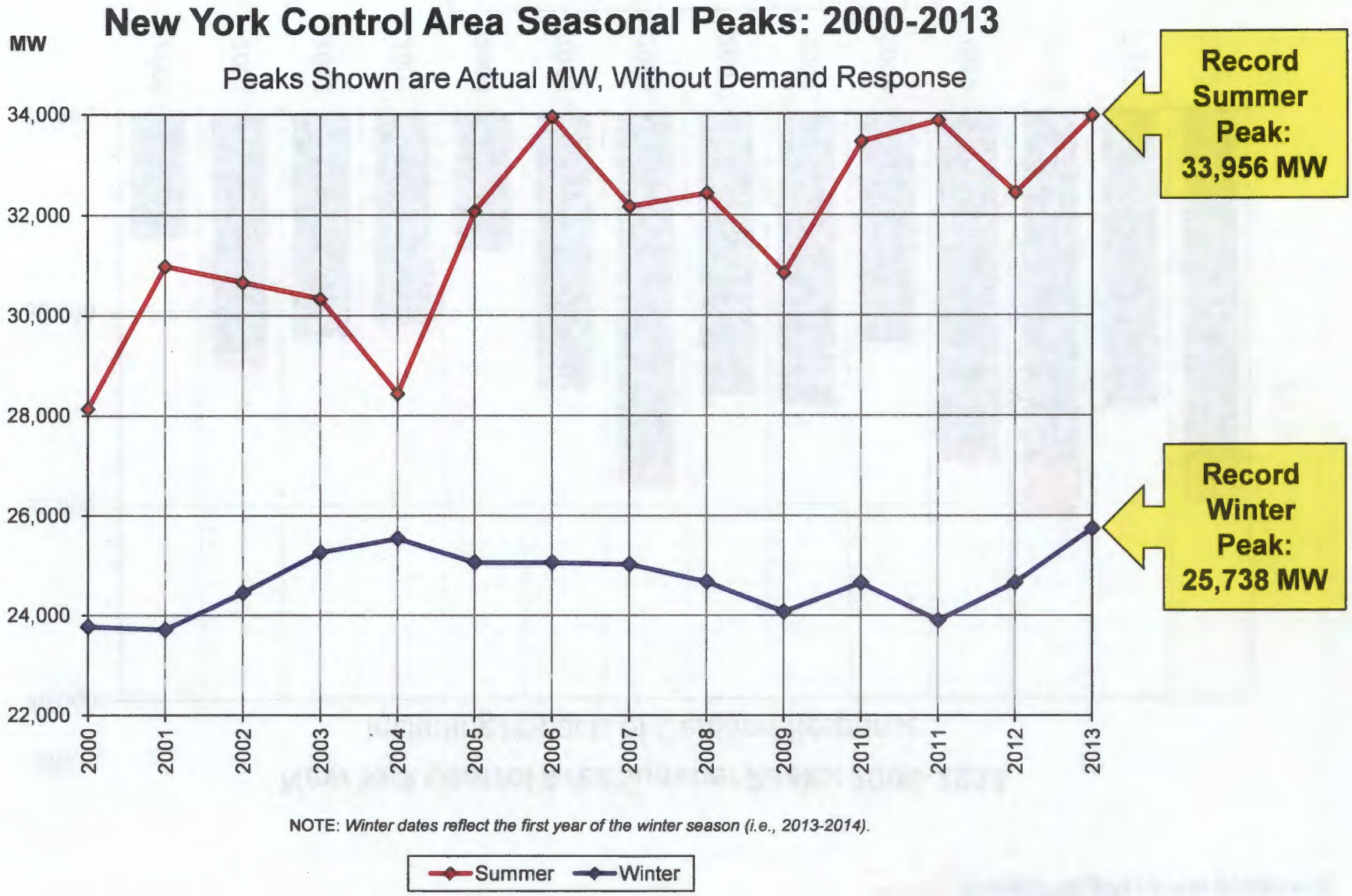
2014 Summer Installed Capacity, Preliminary Assessment - April 9, 2014

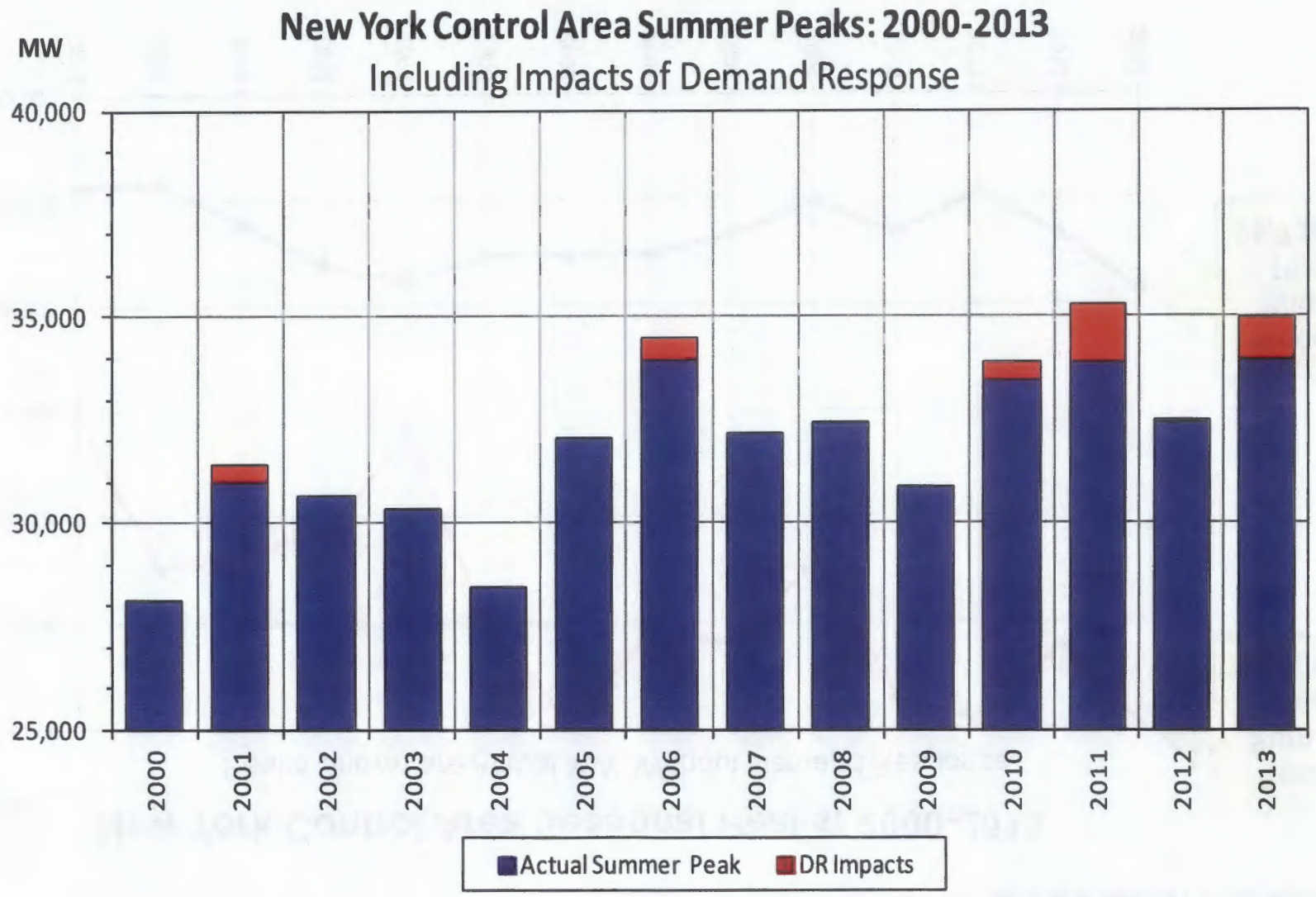
Line	Item	2012 Baseline Forecast	2013 Baseline Forecast	2013 90th Percentile Forecast	Updated for 2014 GB: 2014 Baseline Forecast	Updated for 2014 GB: 2014 90th Percentile Forecast
1a	Installed Capacity Resources - Deliverable	38,405	37,779	37,779	37,797	37,797
1c	SCR - ICAP Values	2,165	1,484	1,484	1,189	1,189
1d	Net ICAP Imports	1,901	1,969	1,969	2,130	2,130
1	**Total Capacity Resources**	**42,471**	**41,232**	**41,232**	**41,116**	**41,116**
2	Assumed Unavailable Capacity (Gen & SCR) [1]	-4,329	-4,800	-4,800	-4,606	-4,606
3 = 1 + 2	**Net Capacity Resources**	**38,142**	**36,432**	**36,432**	**36,510**	**36,510**
4	Peak Load Forecast	33,295	33,279	35,767	33,666	35,976
5	Operating Reserve Requirement	1,965	1,965	1,965	1,965	1,965
6 = 4+5	**Total Operating Requirement**	**35,260**	**35,244**	**37,732**	**35,631**	**37,941**
7 = 3 - 6	**Operating Margin**	**2,882**	**1,188**	**-1,300**	**879**	**-1,431**

1. For 2014, this includes1245 MW for wind, 519 MW for Run-of-River Hydro, 94 MW for Large Hydro, 2578 MW for thermal units, 47 MW for other renewables, and 123 MW for SCR.

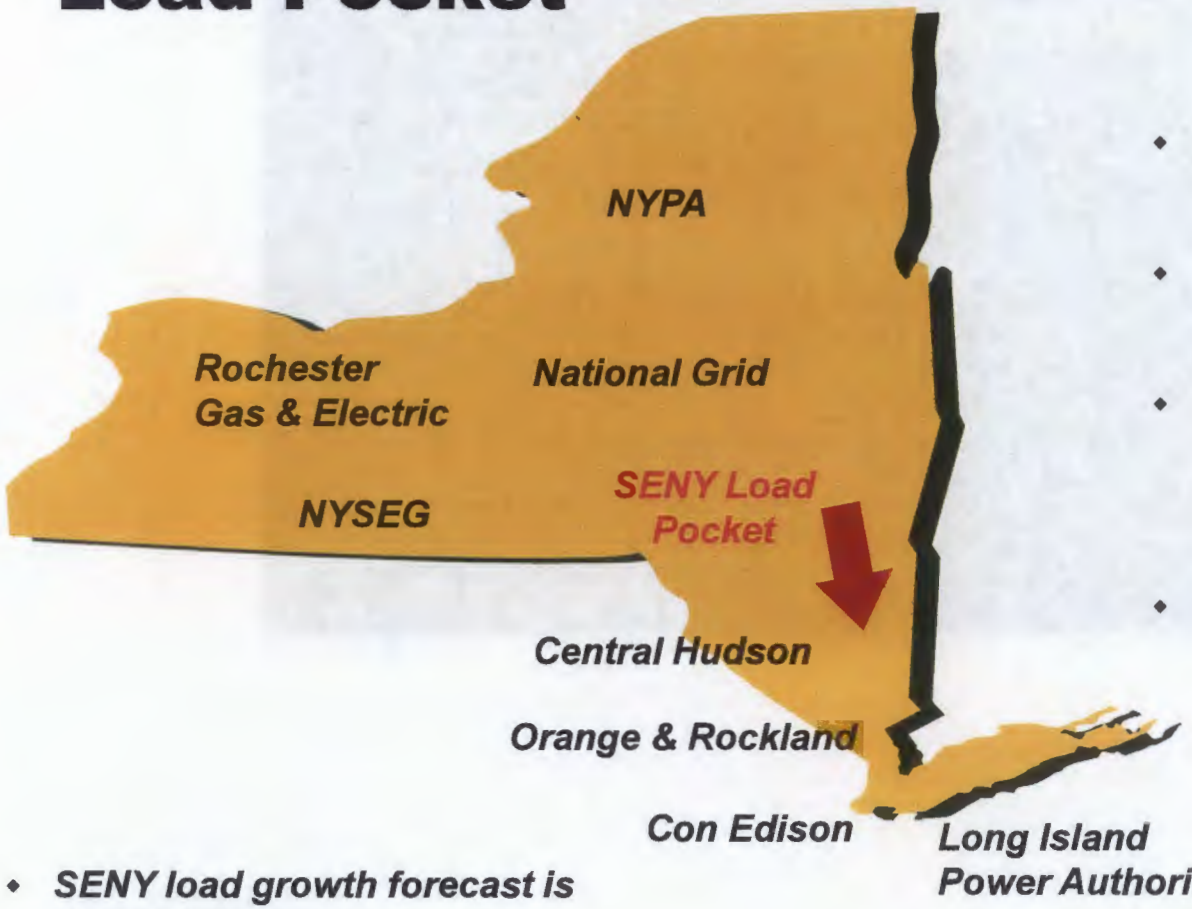
2014 Emergency Operating Procedures

Emergency Operating Procedures		
Procedure	**Effect**	**2014 MW Value**
Emergency Demand Response Programs	Load Impact	13
Voltage Reductions	Load Impact	517
Voluntary Industrial Curtailment	Load Impact	116
General Public Appeals	Load Impact	88
Emergency Purchases (Estimate)	No Load Impact	500
Thirty Minute Reserves to Zero	No Load Impact, but allow Operating Reserve to decrease	655
Total Emergency Operating Procedures		**1,889**





Summer 2014 Southeast NY (SENY) Capacity Procurement for Load Pocket



- 64% of the state's load is in Southeast New York
- There is insufficient local SENY generation and external ICAP to meet peak demand needs so upstate generation is needed to meet load
- The transmission system into the SENY load pocket is limited (approximately 3,000 MW)
- For normal weather – 10.2% of SENY load is met from upstate generation (2,191 MW)*
- For extreme weather – 13.6% of SENY load would need to be met from upstate generation (3,121 MW)* Note: this is greater than the transmission limit
- For Summer 2014, under extreme weather conditions, demand response will be required for transmission security

*Assumes all external ICAP (UDRs) at elected 2014 levels

- SENY load growth forecast is 200-350MW/year

NEW YORK INDEPENDENT SYSTEM OPERATOR

The New York Independent System Operator (NYISO) is a not-for-profit corporation responsible for operating the state's bulk electricity grid, administering New York's competitive wholesale electricity markets, conducting comprehensive long-term planning for the state's electric power system, and advancing the technological infrastructure of the electric system serving the Empire State.

www.nyiso.com