

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

In re People of the State of New York and Public Service  
Commission of the State of New York,

Petitioners.

Docket No. \_\_\_\_.

**PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION  
FOR STAY**

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**PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION  
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The People of the State of New York and the Public Service Commission of the State of New York (“NYPSC”)<sup>1</sup> respectfully petition this Court to issue a writ of mandamus compelling the Federal Energy Regulatory Commission (“FERC”) to issue final orders in response to the NYPSC’s September 2013 and February 2014 requests for rehearing of FERC Orders issued August 13, 2013, and January 28, 2014, respectively.<sup>2</sup> Through these Orders, FERC has imposed dramatic electricity cost increases on the lower Hudson Valley by establishing a new capacity zone (or “NCZ”) in New York electricity capacity markets. By failing to act on the requests

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<sup>1</sup> NYSPC Counsel appears for the Commission 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 2000).

<sup>2</sup> *New York Indep. Sys. Operator, Inc.*, Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference, 144 FERC ¶ 61,126 (2013) (“August Order”), Attachment A hereto; *New York Indep. Sys. Operator, Inc.*, Order Accepting Tariff Filing Subject to Condition and Denying Waiver, 146 FERC ¶ 61,043 (2014) (“January Order”), Attachment B hereto.

for rehearing of the NYPSC and others, FERC is effectively denying any possibility of relief from imposition of charges flowing from the first of the NCZ auctions, held in April 2014. The NYPSC accordingly seeks a writ of mandamus directing FERC to issue its orders responding to requests for rehearing of the orders at issue within **45 days** so that the legality of FERC's decisions can be subjected to judicial scrutiny.

Pending full judicial review of FERC's decision, the NYPSC moves this Court in an emergency motion to stay the FERC orders insofar as they approve the implementation of capacity auctions in the NCZ. FERC accepted the proposed tariff revisions of the New York Independent System Operator, Inc. ("NYISO") establishing the NCZ for the purposes of conducting installed capacity ("ICAP") auctions. By requiring the implementation of the NCZ through the auctions, FERC will have imposed \$158 million dollars in additional and unnecessary capacity costs on electric utility ratepayers in the lower Hudson Valley just for this summer. These price increases, which will increase to \$280 million within the next year, will provide no corresponding benefits to the ratepayers, in violation of the statutory requirement that electric rates be "just and reasonable." Once the auctions are held it is difficult, if not impossible, to undo them and, in any event, FERC will probably decide not to provide refunds. Accordingly, ratepayers in the lower Hudson Valley will be irreparably harmed by continuation of the auctions.

As noted above, the first of the capacity auctions in the NCZ have already been held, and they demonstrate the dramatic price increases that result from the NCZ. The ICAP auctions for June are currently being held, with the June spot market auction scheduled for May 23, 2014. Thereafter, the auctions for July will begin on June 9, 2014. The NYPSC therefore moves this Court to shorten the time granted to file an answer under Federal Rule of Appellate Procedure 27(a)(3)(A) and to require answers to this Petition and Emergency Motion to be filed within **eight (8) calendar days, with (3) days for replies**. Petitioner respectfully requests this Court to issue its order on this Petition and Motion by **June 6, 2014**, in advance of the July market auction cycle that will begin on June 9, 2014.

**THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF  
MANDAMUS**

Under the Federal Power Act, FERC rehearing is a precondition of judicial review. 16 U.S.C. § 825l(b). In response to the NYPSC and other parties' requests for rehearing, FERC has issued tolling orders ostensibly granting rehearing, but has not issued final reviewable orders. On April 30, 2014, Central Hudson Gas & Electric Corporation ("Central Hudson") filed with FERC an emergency motion for expedited rulings or a stay of capacity auctions for the new capacity zone; the NYPSC submitted an answer in support of the motion on May 2, 2014. As of May 11, 2014, FERC has neither stayed the implementation of capacity auctions in the NCZ nor made a final ruling on the rehearing requests.

The implementation of the Orders, the execution of new capacity auctions, began on April 2, 2014 and will continue indefinitely on a biweekly basis. Since it is very difficult to revisit the auction results, irretrievable costs are being imposed on electricity customers in the lower Hudson Valley as the auctions proceed. Absent an order of this Court to FERC, the agency's Orders have been and will continue to be implemented without opportunity for judicial review and with continuing irreparable harm to electricity customers in the lower Hudson Valley.<sup>3</sup>

### **JURISDICTION**

Pursuant to the Federal Power Act, 16 U.S.C. § 825l(b), this Court has jurisdiction to issue the requested writ. *See In re Am Rivers & Idaho Rivers United*, 372 F.3d 413, 417 (D.C. Cir. 2004). This Court has authority to issue the requested writ under the All Writs Act, 28 U.S.C. § 1651, and Federal Rules of Appellate Procedure and Circuit Rules 20 and 21.

### **RELEVANT FACTS**

FERC's two orders together establish a new geographic zone in the lower Hudson Valley for the marketing of electricity generation "capacity" and authorize the commencement of auctions to trade that capacity in the new zone. On April

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<sup>3</sup> The emergency motion for a stay, *infra*, is supported by the Affidavit of Adam Evans in Support of Motion for Stay ("Evans Aff."), Attachment C, which describes the irreparable harm resulting from continuation of the auctions.

30, 2013, the NYISO, which operates New York's electric grid, filed proposed revisions to its Market Administration and Control Area Services Tariff ("Services Tariff") and its Open Access Transmission Tariff ("OATT") to establish the NCZ. August Order at ¶ 1. By order issued August 13, 2013, FERC accepted the NYISO's proposed tariff revisions. *Id.*

On September 12, 2013, the NYPSC submitted a request for rehearing of the August Order. Request for Rehearing and Clarification of the New York State Public Service Commission, FERC Docket ER13-1380-000 (filed Sept. 12, 2013), Attachment D. In a 'tolling order' issued on October 10, 2013, FERC granted rehearing and stated that it would address the rehearing request in a future order. *New York Indep. Sys. Operator, Inc.*, Order Granting Rehearing for Further Consideration, FERC Docket No. ER13-1380-000 (Oct. 10, 2013). No such further order has issued.

On November 29, 2013, the NYISO filed further revisions to its Services Tariff, proposing to establish the first ICAP demand curve for the new capacity zone and proposing a phase-in of the new demand curve parameters for the new capacity zone. January Order at ¶ 1. FERC accepted the proposed ICAP demand curve and rejected the NYISO's proposed phase-in of the ICAP demand curve parameters for the NCZ in January 2014. January Order at ¶ 1. On February 27,

2014, the NYPSC submitted a request for rehearing of the January Order.<sup>4</sup> In a tolling order issued on March 24, 2014, FERC granted rehearing.<sup>5</sup> It has not, however, ruled on the merits of the rehearing request. The first auction in the NCZ was conducted on April 2, 2014.<sup>6</sup>

In its request for rehearing of the January Order, the NYPSC argued that FERC's actions would increase capacity costs for lower Hudson Valley consumers by \$230 million per year, without any tangible benefit in return. Request for Rehearing of the New York State Public Service Commission, FERC Docket ER14-500-000 (filed Feb. 27, 2014) at 2.<sup>7</sup> Now that the capacity auctions have commenced, however, it is apparent that the annual financial impact will be even greater. On April 29, 2014, the NYISO released the results of the May 2014 ICAP

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<sup>4</sup> Request for Rehearing of the New York State Public Service Commission, FERC Docket ER14-500-000 (filed Feb. 27, 2014), Attachment E.

<sup>5</sup> *New York Indep. Sys. Operator, Inc.*, Order Granting Rehearing for Further Consideration, FERC Docket No. ER14-500-000 (Mar. 24, 2014).

<sup>6</sup> NYISO, Installed Capacity Strip Auction Summary, [http://icap.nyiso.com/ucap/public/auc\\_view\\_strip\\_detail.do](http://icap.nyiso.com/ucap/public/auc_view_strip_detail.do) (last visited May 9, 2014).

<sup>7</sup> In the August Order, FERC claimed that it was imposing higher costs to encourage investment in new generation facilities in the lower Hudson Valley because of a constraint on transmission into the Valley. August Order at ¶¶ 23-24. The NYPSC is addressing the constraint; meanwhile, incumbent generators are receiving a windfall.

spot auction.<sup>8</sup> Those results show that the impact on prices will be at least \$280 million annually. Evans Aff. ¶ 6.

Immediately following the ICAP spot auction, on April 30, 2014, Central Hudson submitted an emergency motion for expedited rulings or a stay of capacity auctions for the new capacity zone, requesting that FERC issue final orders in the NCZ and the NCZ demand curve proceedings.<sup>9</sup> The NYPSC submitted an answer in support of Central Hudson's motion for stay and expedited ruling request on May 2, 2014.<sup>10</sup> As of May 11, 2014, FERC has not taken any action in response to Central Hudson's Motion and the NYPSC's Answer.

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<sup>8</sup> NYISO, Installed Capacity Auction Summary, [http://icap.nyiso.com/ucap/public/auc\\_view\\_spot\\_detail.do](http://icap.nyiso.com/ucap/public/auc_view_spot_detail.do) (last visited May 2, 2014).

<sup>9</sup> Emergency Motion of Central Hudson Gas & Electric Corporation for Expeditious Rulings, or, Alternatively, for a Stay of Capacity Auctions for the New Capacity Zone in New York's Lower Hudson Valley and Motion for Shortened Response Time of Three Business Days, FERC Dockets ER13-1380-000 and ER14-500-000 (filed April 30, 2014) ("Central Hudson Motion").

<sup>10</sup> *New York Indep. Sys. Operator, Inc.*, Answer of the New York State Public Service Commission in Support of Motion for a Stay of New Capacity Zone Auctions and for Expedited Ruling on Requests for Rehearing, FERC Dockets ER13-1380-000 and ER14-500-000 (filed May 2, 2014) ("NYPSC Answer"), Attachment F.

## STATEMENT OF REASONS TO ISSUE MANDAMUS

### A. *FERC Has Unreasonably Delayed the Issuance of Orders on Rehearing*

Under the Administrative Procedure Act, a federal agency is obligated to “conclude a matter” presented to it “within a reasonable time.” 5 U.S.C. § 555(b). A reviewing court may “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* at § 706(1). By order issued August 13, 2013, FERC approved the establishment and implementation of the NCZ on May 1, 2014. *See* August Order at ¶ 1. Although the first round of the capacity auctions for the new capacity zone have already been held, FERC has yet to address the merits of the NYPSC’s request for rehearing of the establishment of the NCZ. Thus, FERC has unreasonably delayed issuance of a reviewable order, notwithstanding that its initial orders are legally binding, have been effectuated in ways that are difficult or impossible to reverse, and are imposing significant financial harm upon consumers of electric power.

### B. *FERC’s Issuance of Tolling Orders Should Not Allow It to Evade Timely Judicial Review of Agency Actions*

The Federal Power Act (“FPA”) makes FERC rehearing a prerequisite to judicial review. 16 U.S.C. § 825l(b) (judicial review may be commenced “within sixty days after the order of the Commission upon the application for rehearing”); *Dilaura v. Power Authority of the State of New York*, 982 F.2d 73, 79 (2d Cir.

1992). In order to protect aggrieved parties' access to judicial review of FERC orders, the FPA allows parties the opportunity to apply to FERC for rehearing; in the absence of FERC action within 30 days from the date that a rehearing request is filed, the NYPSC request for rehearing would be deemed denied. 16 U.S.C. § 825l(a).

FERC's order granting rehearing for the "limited purpose of further consideration," *New York Indep. Sys. Operator, Inc.*, Order Granting Rehearing for Further Reconsideration, Docket No. ER13-1380-003 (October 13, 2013) at 1, has rendered the initial orders non-final, while holding off judicial review until after an order on rehearing is issued. Yet the implementation of the initial orders has begun. That implementation is creating a real and significant impact upon the regulated community and the general public.

To remedy the avoidance of judicial review while that impact continues, this Court should direct the agency to issue an order on rehearing. *Cf. Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction").

C. *New York Ratepayers are Irreparably Harmed by the Implementation of the FERC Orders*

In assessing whether agency delay in concluding a matter is unreasonable, courts consider, *inter alia*, “the nature and extent of the interests prejudiced by delay.” *Reddy v. CFTC*, 191 F.3d 109, 120 (2d Cir. 1999) (quoting *Public Citizen Health Research Group v. Comm’r*, 740 F.2d 21, 35 (D.C. Cir. 1984)). Because FERC has not acted prior to the implementation of the NCZ capacity auctions, New York electricity ratepayers face the possibility of paying an additional \$158 million for electricity in the summer of 2014, without realizing a corresponding benefit. If the Court reverses FERC it will be difficult, if not impossible, to rerun the auctions to reflect whatever relief the Court provides. Moreover, the purpose of FERC’s capacity charges is to provide an incentive for the development of new electric generation, but such generation will not benefit from, or be influenced by, the \$158 million increase in capacity charges this summer that will be borne by ratepayers. Electricity customers in the lower Hudson Valley are therefore subject to irreparable harm and a petition for writ of mandamus should be issued.<sup>11</sup>

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<sup>11</sup> Such irreparable harm is also a basis for an emergency stay, as discussed more fully *infra*.

## **AN EMERGENCY MOTION FOR STAY SHOULD BE GRANTED**

In addition, because of the ongoing financial harm to lower Hudson Valley ratepayers being brought about by the FERC Orders at issue herein, the People and the NYPSC request that this Court stay those orders to the extent required to prevent further NCZ capacity auction results from being reflected in the ICAP market and, ultimately, in consumer electric rates.

The Chairman of the NYPSC, by letter submitted to FERC April 24, 2014, requested that FERC stay its Orders implementing the NCZ.<sup>12</sup> Shortly thereafter, on April 29, 2014, the NYISO released the results of the May 2014 ICAP spot auction.<sup>13</sup> The Central Hudson Motion seeking issuance of a decision and a stay was filed on April 30, 2014, and the NYPSC Answer supporting that motion on May 2, 2014. As of May 11, 2014, FERC has not taken any action in response to the Motion and Answer.

Meanwhile, capacity auctions that will result in electric rate increases of at least \$26 million per month have already occurred. FERC approved these increases, purportedly, in order to encourage the construction of new generation.

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<sup>12</sup> Letter to FERC Acting Chair LaFleur, FERC Dockets ER13-1380-000 and ER14-500-000 (filed April 24, 2014).

<sup>13</sup> NYISO, Installed Capacity Spot Auction Summary, [http://icap.nyiso.com/ucap/public/auc\\_view\\_spot\\_detail.do](http://icap.nyiso.com/ucap/public/auc_view_spot_detail.do) (last visited May 9, 2014).

But it takes at least two to three years to site and build new generation; thus, customers will not benefit in the short term. These auctions will continue on a biweekly basis; their results will be difficult, if not impossible to reverse. This stay is necessary to prevent irreparable harm to New York ratepayers, which is already occurring and will compound, absent action of this Court. Accordingly, the Court should direct FERC to order that the capacity auctions must be conducted in accordance with the geographic capacity zones as they existed prior to the agency's orders at issue herein.

## **RELEVANT FACTS**

### *A. The New Capacity Zone*

The New York Independent System Operator, Inc. (“NYISO”) operates the power grid and wholesale electricity markets in New York State. One of the markets administered by the NYISO is the ICAP Market. Installed capacity is a measure of electric generation capability; it does not represent an actual unit of physical energy, but rather is a regulatory construct, created by the NYISO, that measures the “capability to generate or transmit electrical power.” *New York Independent Sys. Operator, Inc.*, Order Conditionally Approving Proposal, FERC Docket No. EL07-39-000, 122 FERC ¶ 61,211, at ¶ 2 n.1 (Mar. 7, 2008). 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

encourage the construction of new generating facilities, as needed, to maintain adequate and reliable sources of electricity. *Simon v. Keyspan Corp.*, 785 F. Supp. 2d 120, 124 (S.D.N.Y. 2011).

FERC requires distributors of electricity, or load serving entities (“LSEs”), to purchase installed capacity from suppliers. *New York Independent Sys. Operator, Inc.*, Order Conditionally Approving Proposal, FERC Docket No. EL07-39-000, 122 FERC ¶ 61,211, at ¶ 2 (Mar. 7, 2008). Capacity is procured separately from electric energy. *Evans Aff.* ¶ 8. Locational ICAP procurement requirements mandate that LSEs serving customers in certain zones purchase minimum amounts of capacity from electricity suppliers located in those zones; LSEs in the NCZ must purchase a minimum of 88% of their ICAP obligation from generating facilities located in the NCZ. *See id.* at ¶ 11.

In order to price its energy and capacity market products, the NYISO has divided the State into eleven geographic 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). *See Evans Aff.* at ¶ 9. On April 30, 2013, the NYISO filed proposed revisions to its Services Tariff and OATT to move certain zones from the NYCA market and merge them with the New York City zone to establish a new capacity zone. *See August Order* at ¶ 5. 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 ¶ 6.

The NYISO proposed the establishment of the NCZ and its associated price signals due to the NYISO's identification of constraints limiting the amount of power that can be transmitted into the region comprising the NCZ. *See August Order* at ¶ 6. 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. *See Evans Aff.* at ¶ 6. Between May and October 2014, the increase is estimated to be \$158 million. *See id.* at ¶ 16.

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 August Order* at ¶ 24. It takes at least three years, however, to build a new generator from the time that it is first proposed. *See Evans Aff.* at ¶ 19. Meanwhile, the NYPSC has been actively addressing the transmission constraints in the lower Hudson Valley. When issuing its August Order, FERC

was aware that NYPSC-directed AC transmission upgrades<sup>14</sup> were being implemented and were expected to create an additional 1000 megawatts of transmission capacity in the NCZ region. *See* August Order at ¶ 17 n.21. In November 2013, the NYPSC approved three transmission projects in the NCZ region that will provide an additional transmission capacity, and therefore additional ICAP, in the region.<sup>15</sup> *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, NYPSC Case 12-E-0503 at 47* (November 4, 2013). NYPSC staff showed that the NCZ price signal will not benefit ratepayers because the generation projects that they are designed to encourage are unlikely to materialize before these transmission upgrades come into operation. *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”).

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<sup>14</sup> *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, NYPSC Case 12-E-0503 at 47* (November 4, 2013).

<sup>15</sup> 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.

In the August 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* August Order at ¶¶ 21, 23. FERC, however, regulates NYISO auctions through its approval of, and modifications to, the NYISO Services Tariff, *Simon*, 785 F. Supp. 2d at 125, and 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 the possibility, and, indeed, likelihood, of future State-led transmission projects.

*B. The Demand Curve Phase-in*

The NYISO uses demand curves to help price capacity.<sup>16</sup> The NYISO accepts ICAP supply offers and compares them to the pre-set demand curve; the intersection of the supply quantity offered and the demand curve line determines the market-clearing price. A separate demand curve is set for each capacity zone based on the Net Cost of New Entry ("CONE") of a new proxy plant located in each capacity zone. *Evans Aff.* at ¶ 12. Because the demand curve is based on the

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<sup>16</sup> 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).

CONE, higher fixed costs of generators in downstate New York generally result in higher ICAP prices than upstate (and, therefore, higher fixed prices than for the entire state, or the NYCA). *See id.* at ¶¶ 10, 13. Thus, the most recently-set reference prices, prior to the establishment of the NCZ, were \$19.62 per kilowatt-month for the New York City capacity zone, compared to \$9.72 per kilowatt-month for the NYCA. *Id.* at ¶ 13.

The NYISO operates three types of ICAP auctions, “strip” (*i.e.*, seasonal), “monthly,” and “spot” auctions. *See Evans Aff.* at ¶ 14. Spot auctions are held shortly before the start of each month; as the final auction in the series, it is the point where all LSEs are required to purchase sufficient capacity to fulfill their obligations. *See id.* Most capacity in the NYISO auctions is traded in the spot market. *Id.* at ¶ 15. The price set by the May spot auction was \$12.38 per kilowatt-month, an increase of over \$2.00 from the strip and monthly auctions. *Id.*

Extrapolating from the results of the May 2014 spot auction, prices are expected to increase, in the affected zones, by over 100% for the six-month Summer period and by over 150% for the six-month Winter period. The effects of the auctions cannot be undone without great difficulty. *Id.* at ¶ 20. Doing so would require the issuance of refunds, which necessitates re-running the capacity auctions without the new capacity zone. *See id.* Because there may be sellers of capacity who cleared the auctions at the NCZ prices but would not have cleared at

the statewide capacity price, the statewide clearing price and quantity would be altered, as would bilateral ICAP contracts settled off of the results of the spot auction. *See id.*

## ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 18, this Court may stay a federal agency order pending judicial review. As noted in the Petition for Writ of Mandamus, *supra*, the FPA normally limits judicial review to final FERC orders on rehearing, 16 U.S.C. § 825l(a); however, “when parties face the prospect of irreparable injury, with no practical means of procuring effective relief after the close of the proceeding ... they [may] be entitled to immediate review of a nonfinal order.”<sup>17</sup> Here, as discussed *infra*, irreparable injury is caused through the NCZ auctions, which began in April 2014, and FERC has not responded to motions for stay submitted to it regarding the NCZ auctions. A stay may be granted when the petitioner establishes likelihood of success on the merits; that irreparable harm will likely result absent a stay; whether a stay will substantially injure other parties; and where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Plaza Health Laboratories v. Perales*, 878 F.2d 577, 580 (2d Cir.

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<sup>17</sup> *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980) (citing *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

1989). Where the opposing party is a government agency, the last two factors merge. *Nken*, 556 U.S. at 435.

*A. The NYPSC Is Likely to Prevail on the Merits of Its Claims*

The NYPSC is likely to succeed in demonstrating that, both in its decision to approve the establishment of the NCZ, and, particularly, in its decision to reject the phase-in of the proposed demand curves, FERC failed to consider whether the resulting rates would be “just and reasonable.” Section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a), requires that proposed demand curves for capacity auctions be “just and reasonable.” *Cf. TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 115 (D.C. Cir. 2013).

Further, FERC’s decision to approve the implementation of capacity auctions in the NCZ is arbitrary and capricious. The Administrative Procedure Act, 5 U.S.C. § 706(A), requires agency actions to be set aside when the agency has failed to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Manufacturers’ Association of the United States, Inc., v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

Moreover, “[a]n agency’s ‘failure to respond meaningfully’ to objections raised by a party renders its decision arbitrary and capricious.” *PPL Wallingford Energy*

*LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

In evaluating the likelihood of success on appeal, the NYPSC “need not establish an absolute certainty of success.” *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). FERC’s decision to approve the NCZ and reject the phase-in was not in accordance with the FPA’s requirement of just and reasonable rates. FERC also failed to consider rationally the impact of the price increases that the NCZ created, and its rejection of the phase-in of the NCZ’s demand curve failed to explain satisfactorily its conclusion that a phase-in would discourage competitive supply.

1. FERC fails to explain how the windfall for incumbent generators is consistent with just and reasonable rates.

FERC insists that establishment of the NCZ is needed now in order to attract new generation investment within the lower Hudson Valley. August 13 Order at ¶¶ 24-26. FERC further claims that electric rates must necessarily increase as a result. *Id.* ¶ 23; January 28 Order at ¶ 163. But the only justifications that FERC can muster are to assert that higher price signals are needed *over the long run*, August 13 Order at ¶¶ 23-24,<sup>18</sup> and that there may be potential for “shorter term

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<sup>18</sup> *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980) (citing *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

supply responses,” January 28 Order at ¶164. As to the first, however, FERC entirely fails to explain why capacity charges must now be dramatically increased to fund resources that do not yet exist and therefore cannot benefit from the increases. To the extent it recognizes (which it must) that those revenues instead represent a windfall to existing resources, it likewise fails to explain why encouraging new resources requires that existing resources obtain a windfall. As to the second, FERC has not justified the immediate increases; a \$158 million increase in capacity charges this summer will not provide equivalent value for ratepayers this summer.

FERC’s failure to offer a reasoned explanation for allowing such a windfall, and the corresponding adverse impacts upon consumers, is arbitrary and capricious. The NYPSC informed FERC that massive electric rate increases, initially estimated at 25 percent, could result from the full implementation of the NCZ. January Order at ¶ 158. FERC brushed this information aside, holding that “stakeholder discussions” about the NCZ provided all the notice that was needed to prevent consumer “rate shock.” *Id.* at ¶ 163. FERC does not explain, however, how those discussions raised public awareness about, and allowed responses to, the rate impacts to which consumers will be subjected.

FERC is obliged to ensure that electric rates are just and reasonable. 16 U.S.C. § 824d(a). 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.” *Electric Consumers Resource Council v. FERC*, 747 F.2d 1511, 1514 (D.C. Cir. 1984). In the face of evidence undermining the efficiency of price signals associated with the NCZ, FERC relied on the full implementation of the NCZ to send price signals to encourage new capacity development in order 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 efficient decision-making would in fact be impeded by a phase-in of the NCZ demand curve parameters. 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. Instead it stated, in conclusory fashion, that “[s]uch price changes promote efficient decisions and are not unreasonable.” August Order at ¶ 24. FERC, however, is required to 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) (stating that “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 explanation, FERC’s determinations cannot result in just and reasonable rates.

2. FERC failed to rationally evaluate New York State's efforts to relieve transmission constraints.

In order to pass muster even under the deferential standard of review accorded administrative agency decisions, the agency still must “articulate a logical basis for [its] decisions, including ‘a rational connection between the facts found and the choices made.’” *Detsel by Detsel v. Sullivan*, 895 F.2d 58, 63 (2d Cir. 1990) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Because FERC has not drawn any logical connection between short-term price increases and long-term deliverability, its conclusions must be rejected as arbitrary and capricious.

In the August Order, FERC rejected the NYPSC's concerns about the price impacts of the NCZ, given state initiatives to address the constraints, by agreeing with the NYISO that the existence of a transmission constraint in the lower Hudson Valley required a new capacity zone. FERC stated that the NYISO “found that a binding transmission constraint exists. Therefore, a new capacity zone must be created under the terms of NYISO's tariff.”<sup>19</sup> FERC's approach to tariff construction fails to achieve just and reasonable rates, because it overlooks that the new prices created by the NCZ are likely only to provide a temporary benefit to generators in light of state initiatives to eliminate the transmission constraint.

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<sup>19</sup> August Order at ¶ 23.

Potential generation investors would be looking to the price-reducing effects of New York State's transmission initiatives in considering long-term generation investments. Therefore, in the context of a state-initiated transmission overhaul, FERC's rationale for the NCZ, "to encourage new resources to be built in the new capacity zone," August Order at ¶ 23, is irrational.<sup>20</sup>

While FERC claims that it need not consider upcoming transmission projects in deciding whether to approve the NCZ,<sup>21</sup> it nonetheless inconsistently claims it can adopt the NCZ to encourage such projects. FERC asserts that "resulting higher capacity prices in the new capacity zone will help to encourage

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<sup>20</sup> The lack of a rational FERC approach to state initiatives to upgrade transmission is further shown by the inconsistent treatment of the possibility of such initiatives between the August and January Orders. FERC did not assert in the August Order that the State-led transmission upgrades are in danger of being left incomplete absent NCZ price incentives. In the January Order, however, FERC expresses concern that ICAP price suppression "could increase the likelihood of regulatory actions to meet capacity needs." January Order at ¶ 164. The NYPSC-led transmission initiatives are regulatory actions which FERC warns could increase as a result of price suppression; they are also the upgrades that FERC refused to consider as a reason to reject the NCZ, but then states will be provided with an incentive by the NCZ price differential. August Order at ¶ 23-25.

<sup>21</sup> FERC stated both that "the criteria specified in NYISO's tariff for creating a new capacity zone "does [*sic*] not consider whether transmission constraints will be alleviated in the future," *id.*, and that the Service Tariff does require consideration of "any upgrades that would be required to be built to make new resources capacity qualified [*sic*]." *Id.* at ¶ 21. That is, under FERC's interpretation of the tariff, certain transmission upgrades (those connecting the new generation to the grid) must be considered in a new capacity zone study, while other transmission upgrades, eliminating the need for new generation, may not be considered at all.

the development of new generation or transmission capacity to help alleviate the constraint.” August Order at ¶ 24. The “long-run” prices FERC imposes might well not be available for developers when completing their projects in light of the State transmission initiatives. FERC’s insistence on providing an incentive, no matter what, fails to ensure prices to consumers are not excessive, and is impermissible. *Cf. 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 FERC may not issue orders resulting in excessive rates); see also *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

Finally, FERC’s cursory dismissal of the NYPSC’s concerns about the reasonableness of rates resulting from the NCZ stands in sharp contrast to FERC reliance on reliability, which is not an explicit new capacity zone trigger under the NYISO Services Tariff. FERC rejected the NYPSC’s protest that higher price signals are unnecessary in light of changes in transmission infrastructure by asserting that the transmission upgrades would not eliminate “the reliability need for some capacity to be located within the new capacity zone.” *Id.* at ¶ 26. Yet the NYISO’s NCZ study was spurred by a transmission congestion, rather than

reliability, finding. August Order at ¶ 23.<sup>22</sup> Despite rejecting the NYPSC’s argument because of its failure to address an ostensible reliability need, throughout the August Order, FERC states that the impetus for the NCZ is the NYISO-identified transmission constraint, rather than a generation-based reliability finding. Therefore, FERC dismissed the NYPSC’s argument against the price impacts of the NCZ by asserting an unfounded, additional reliability basis for the NCZ.

3. FERC irrationally refused to consider a phase-in of the NCZ impacts.

In the January 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.” January Order at ¶ 164. Even if FERC correctly concluded, in the August Order, that the NCZ would encourage new entry into the capacity market, FERC fails to satisfactorily explain why new entry would be discouraged by the phase-in of price signals. The goal of the NCZ was to provide for long-term price signals. August Order at ¶ 25. The NCZ’s expected long-term price signals would be effective through a gradual implementation, which would minimize their

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<sup>22</sup> In the August Order FERC states that the purpose of the NCZ is to ease the transmission constraint in the region: “The price differential that is expected to develop when a new capacity zone is created will provide incentives to alleviate this constraint...” *Id.*

immediate negative effects and provide developers of new capacity with a signal over their planning horizon.

Generation projects are built over the course of several years. *See* Evans Aff. at ¶ 19 (three years to build a new generator); *see also* January Order at ¶ 154 (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 this contention by stating that “this argument fails to take into account the potential for shorter term supply responses, i.e., demand response and repowering options, to meet capacity needs.” January Order at ¶ 164. 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 August Order, to encourage new investment in generating and transmitting capacity. August Order at ¶ 26 (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”). Therefore, FERC failed to state a rational

connection between the need for the NCZ ICAP demand curve and its rejection of the demand curve's phase-in.

*B. Lower Hudson Valley Electric Consumers Will Suffer Irreparable Harm Absent a Stay*

FERC's establishment of the NCZ has increased the capacity prices in the lower Hudson Valley by approximately \$280 million per year. Consumers, who bear the burden of this increase, are receiving absolutely no benefit in return. Rather, the sole beneficiaries of the increase are incumbent electric generators in the NCZ, who are obtaining a windfall without providing added value to consumers or to the robustness of the region's electricity infrastructure. And this price increase is being implemented through auctions, the results of which cannot practically be reversed or refunded. Because the financial harm to consumers is significant and cannot be undone, that harm is irreparable.

The estimated impact to consumers resulting from the NCZ capacity auctions will be \$158 million over the period of May through October 2014, Evans Aff. ¶16, and \$123 million during November 2014 through April 2015, *id.* ¶17. That translates to an immediate impact of approximately \$26 million per month this summer.

Should the NYPSC prevail on the merits, FERC will probably exercise its discretion to refuse to order refunds.<sup>23</sup> In any event, there will be no practical way to refund the excessive capacity revenues that consumers will have paid during the pendency of this case. To determine refunds, it would be necessary to re-run the NYCA auction with the NCZ capacity resources included in the NYCA. *Evans Aff.* ¶ 20. But that is impractical because some capacity has already cleared through the NCZ auctions held in April. *Id.* Moreover, contracts based upon spot market prices set thus far would have to be undone. *Id.*

In a Court of Appeals case involving a FERC-imposed price increase, the District of Columbia Circuit declined to stay FERC's action only because refunds were apparently available. *Reynolds Metals Co. v. FERC*, 777 F.2d 760 (D.C. Cir. 1985). There, the challenger could only state that the action "may eventually render more difficult the imposition of a refund obligation." *Id.* at 763.

Presumably, then, if granting refunds had been nearly impossible, the court would

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<sup>23</sup> For example, in *Ameren Services Company v. Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,121 at ¶ 157 (2009), *reh'g pending*, FERC stated that "In cases involving changes in market design, the Commission generally exercises its discretion and does not order refunds when doing so would require re-running a market." Similarly, in *California Indep. Sys. Operator*, Order Granting In Part and Denying in Part Requests for Clarification and Rehearing, and Denying Motion to Reopen the Record, 120 FERC ¶ 61,271 (2007) at ¶ 25, FERC ruled that re-running the markets to pay refunds to consumers is "the exception, not the rule."

have granted a stay. *Id.* That is precisely the relevant circumstance in the instant case. As demonstrated above, granting refunds would be very difficult.

Because no refund mechanism will likely be available to ameliorate the \$26 million per month harm to lower Hudson Valley consumers, the stay prerequisite of irreparable harm has been met. *Air Line Pilots Assoc. Int'l v. Civil Aeronautics Bd.*, 215 F.2d 122, 125 (2d Cir. 1954) (holding that a stay may be granted where irreparable injury is likely to occur).

### *C. The Public Interest Requires a Stay of the FERC Orders*

A stay halting auctions on June 9, 2014 and thereafter, pending resolution of this matter, will not only preclude irreparable harm, but it will also be in the public interest. Capacity charges are intended to provide an incentive for construction of new generation and/or repowering of existing generation and a penalty for customers that do not obtain peak capacity. Generators have no entitlement to the windfall that will result from implementation of the New Capacity Zone while FERC's orders are being challenged. End-users should not be required to bear the unavoidable penalty arising from immediate implementation of a capacity market.

The strong public interest against imposition of capacity charges while review is pending arises from the unique nature of such charges. Capacity charges do not compensate generators for the investment incurred to sell electricity. *Sithe*

*New England Holdings LLC v. Federal Energy Regulatory Commission*, 308 F.3d 71, 77 (1st Circuit 2002). Rather, capacity charges are “designed to ... give providers an extra incentive to construct new plants.” 308 F. 3d at 77. Here, continuation of capacity charges pending judicial review will simply provide a windfall to existing generators.

FERC’s ostensible goal in establishing the NCZ is to incent development of new electric generation facilities in the lower Hudson Valley. August Order at ¶ 24 . But the capacity price increase is in effect now, before any new facilities are even in the planning stage. Even if an entity were to decide now to build generation, the process of receiving siting approval and constructing new generation typically takes at least three years. *Evans Aff.* ¶ 19. While FERC claims that retired facilities will be given an incentive to resume operation, it only mentions one such facility that has indicated any interest in doing so. January Order at ¶ 161. Moreover, FERC offers no time estimate as to when that facility might re-start.

Thus, for the foreseeable future, the NCZ will benefit only those sellers of capacity who are already in the market. In exchange for collecting additional capacity revenues, those sellers are under no obligation to build new capacity or to create any other enhancements to the region’s electric infrastructure.

Consequently, consumers are receiving no benefit whatsoever in return for the additional \$26 million per month that they are being forced to spend.

In addition to being designed to providing an incentive to new investment, capacity charges “impose a hefty penalty on those buyers who fail to acquire the reserve capacity that FERC has decreed they shall have.” *Sithe New England Holdings LLC v. FERC*, 308 F.3d at 77. Just as incumbent generators should not receive a windfall from capacity charge, because it will take time to yield new capacity, so too buyers should not be penalized for not acquiring reserve capacity that is not yet available. That is, ratepayers in the lower Hudson Valley should not pay an additional \$158 million in capacity charges this summer when they will not see an equivalent increase in capacity.

The NYISO recognized the inequity to buyers and the windfall for sellers of capacity in immediate implementation of the NCZ. It accordingly proposed a phase-in of the New Capacity Zone. January Order at ¶ 1. FERC rejected the phase-in in part because of its desire to give an incentive to the repowering of generation facilities. January Order at ¶ 164. A phase-in would do little to no harm to producers and investors considering restarting units. They will have as much revenue certainty as they need to plan their business strategies and will be able to project their likely revenues. Full implementation of the demand curve parameters, and the resulting windfall to existing generators, conversely, causes

immediate harm to consumers. The Court should thus stay implementation of the new capacity zone pending review.

That the public interest supports a stay is further shown by the evanescent nature of the deliverability constraint on which FERC relies. FERC concluded that the inclusion of the lower Hudson Valley in the new capacity zone was needed because of the difficulties of delivering power to the lower Hudson Valley. *See* August Order at ¶ 23. New York State has, however, begun to address that deliverability constraint by providing for additional transmission capability into the lower Hudson Valley. In November 2013, the NYPSC approved three enhancements to the downstate transmission system (the TOTS projects) that will create additional capacity for the NCZ.<sup>24</sup> The NYPSC's alternative current transmission upgrade proceeding is expected to provide 1,000 megawatts of transmission capability into the lower Hudson Valley.<sup>25</sup>

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<sup>24</sup> *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*, NYPSC Case 12-E-0503 at 47 (November 4, 2013).

<sup>25</sup> *Evans Aff. at ¶ 19; see also Proceeding on Motion of the Commission to Examine Alternating Current Transmission Upgrades, Order Instituting Proceeding*, NYPSC Case 12-T-0502 (Nov. 30, 2012).

## CONCLUSION

Because the FERC Orders at issue have and will continue to be implemented without opportunity for judicial review, and for the other reasons stated above, the NYPSC petitions this Court to issue a writ of mandamus directing FERC to issue final orders within 45 days responding to the NYPSC's September 2013 and February 2014 Request for Rehearing. Further, the People of the State of New York and Public Service Commission of the State of New York respectfully requests that prior to June 9, 2014 the Court immediately stay so much of the FERC orders at issue herein insofar as they implement capacity auctions in the new capacity zone, pending issuance and completion of judicial review of FERC's orders on rehearing.

Respectfully submitted,

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