14-1786 (L)

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

United States Court of Appeals

for the

Second Circuit

CENTRAL HUDSON GAS & ELECTRIC CORP.,
PEOPLE OF THE STATE OF NEW YORK, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK POWER AUTHORITY, NEW YORK STATE ELECTRIC AND GAS CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
ENTERGY NUCLEAR POWER MARKETING, LLC,
Intervenor.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

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INITIAL BRIEF OF PETITIONERS CENTRAL HUDSON GAS & ELECTRIC CORPORATION, NEW YORK POWER AUTHORITY, NEW YORK STATE ELECTRIC & GAS CORPORATION, AND ROCHESTER GAS AND ELECTRIC CORPORATION

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CORPORATE DISCLOSURE STATEMENT
OF CENTRAL HUDSON GAS & ELECTRIC CORPORATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Central Hudson Gas & Electric Corporation ("Central Hudson") respectfully submits the following:

Central Hudson is a corporation created and organized under the laws of the State of New York, with its principal offices in Poughkeepsie, New York. Central Hudson is an electric and natural gas utility engaged in, among other things, the businesses of (1) distributing natural gas for residential, commercial, and industrial use, and (2) transmitting and distributing electric power to wholesale and retail customers, and transmitting electric power on behalf of third parties. Central Hudson's transmission of electric power in interstate commerce is regulated by the Federal Energy Regulatory Commission.

Central Hudson is a wholly owned subsidiary of CH Energy Group, Inc. ("CH Energy") and indirect subsidiary of Fortis Inc., a Canadian company located in St. John's, Newfoundland, and publicly traded on the Toronto stock exchange. Other than Central Hudson, none of its United States affiliates or subsidiary companies has issued shares of debt and only Fortis Inc. has issued equity securities to the public.

Respectfully submitted,

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Dated: June 27, 2014

CORPORATE DISCLOSURE STATEMENT
OF NEW YORK POWER AUTHORITY

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the New York Power Authority ("NYPA") respectfully submits the following:

NYPA is a corporate municipal instrumentality and a political subdivision of the State of New York ("State"), organized under the laws of the State, and operating pursuant to Title I of Article 5 of the New York Public Authorities Law. NYPA has no companies, subsidiaries, or affiliates. NYPA generates, transmits, and sells electric power, and principally at wholesale. NYPA's customers include various public corporations located within the metropolitan area of New York City, as well as businesses and municipal and rural electric cooperative customers located throughout the State. NYPA is also a transmission owner member of the NYISO.

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CORPORATE DISCLOSURE STATEMENT
OF NEW YORK STATE ELECTRIC & GAS CORPORATION AND
ROCHESTER GAS AND ELECTRIC CORPORATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation respectfully submit the following:

New York State Electric & Gas Corporation is a wholly owned subsidiary of Iberdrola USA Networks, Inc. ("Iberdrola USA Networks"). Iberdrola USA Networks is a wholly owned subsidiary of Iberdrola USA, Inc., which is wholly owned by Iberdrola S.A., a publicly traded corporation listed on the Madrid Stock Exchange.

Rochester Gas and Electric Corporation is a wholly owned subsidiary of Iberdrola USA Networks. Iberdrola USA Networks is a wholly owned subsidiary of Iberdrola USA, Inc., which is wholly owned by Iberdrola S.A., a publicly traded corporation listed on the Madrid Stock Exchange.

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APA	Administrative Procedure Act
Central Hudson	Central Hudson Gas & Electric Corporation
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
JA	Joint Appendix
NYISO	New York Independent System Operator, Inc.
NYPA	New York Power Authority
NYSEG	New York State Electric & Gas Corporation
RG&E	Rochester Gas and Electric Corporation

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CENTRAL HUDSON GAS & ELECTRIC CORP., PEOPLE OF THE STATE OF NEW YORK, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK POWER AUTHORITY, NEW YORK STATE ELECTRIC & GAS CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, Petitioners, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent, ENTERGY NUCLEAR POWER MARKETING, LLC, Intervenor.	Nos. 14-1786 (L), 14-1830 (Con), 14-2130 (Con), 14-2248 (Con)

INITIAL BRIEF OF PETITIONERS CENTRAL HUDSON GAS & ELECTRIC CORPORATION, NEW YORK POWER AUTHORITY, NEW YORK STATE ELECTRIC & GAS CORPORATION, AND ROCHESTER GAS AND ELECTRIC CORPORATION

Central Hudson, NYPA, NYSEG and RG&E respectfully submit this initial brief in support of their petitions for review of four orders issued by FERC. Those orders accepted the NYISO's proposal to establish a new pricing zone and auction parameters for the sale of electric capacity reserves in the lower Hudson Valley of New York.

JURISDICTIONAL STATEMENT

Central Hudson, NYPA, NYSEG, and RG&E appeal four final orders that FERC issued on August 13, 2013, January 28, 2014, and May 27, 2014. *New York Independent System Operator, Inc.*, 144 FERC ¶ 61,126 (Aug. 13, 2013) ("New Zone Order") (JA969); *New York Independent System Operator, Inc.*, 146 FERC ¶ 61,043 (Jan. 28, 2014) ("Demand Curve Order") (JA2780); *New York Independent System Operator, Inc.*, 147 FERC ¶ 61,152 (May 27, 2014) ("New Zone Rehearing Order") (JA2988); *New York Independent System Operator, Inc.*, 147 FERC ¶ 61,148 (May 27, 2014) ("Demand Curve Rehearing Order") (JA3014). This Court has jurisdiction over petitions to review final FERC orders pursuant to the FPA, 16 U.S.C. § 825*l*, and the APA, 5 U.S.C. § 702. Central Hudson filed a timely petition for review of these FERC orders on May 28, 2014 (JA3043), which was within 60 days after FERC denied rehearing. 16 U.S.C. § 825*l*(b). NYPA's petition for review was also timely filed on June 16, 2014 (JA3048), and NYSEG's and RG&E's petition for review was timely filed on June 20, 2014 (JA3051). On June 26, 2014, the Court consolidated Central Hudson's, NYPA's, NYSEG's, and RG&E's petitions for review.

STATEMENT OF THE ISSUES

1. Whether FERC gave a reasoned explanation, supported by substantial evidence in the record, for why increased prices for electric capacity reserves in the

lower Hudson Valley capacity zone are just and reasonable when FERC (a) acknowledged that properly setting capacity prices depends on an accurate assessment of the need for capacity in the new zone, but (b) inconsistently ruled that it "does not need to determine" whether record evidence showed that NYISO made an accurate assessment?

2. Whether FERC gave a reasoned explanation, supported by substantial evidence in the record, for how the new capacity zone in the lower Hudson Valley will be able to send accurate price signals when FERC admitted that capacity prices in the new capacity zone will remain higher than neighboring zones even after the underlying transmission constraints between the zones are eliminated?

3. Whether, if the price increase effected by the formation of a new capacity zone for the lower Hudson Valley is otherwise valid, FERC's decision to reject NYISO's proposal to phase-in that price increase was arbitrary and capricious when NYISO filed evidence showing that the resulting rates would remain adequate to attract new generation investment?

STATUTES

The APA provides that "[t]he reviewing court shall . . . hold . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" an agency order that is "unsupported by substantial evidence . . . on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2). The FPA requires FERC

to find proposed rate changes to be "just and reasonable," 16 U.S.C. §§ 824d(a) and (e), and provides that FERC's findings of fact, "if supported by substantial evidence, shall be conclusive." 16 U.S.C. § 825*l*(b). Pertinent sections of these statutes are reproduced in the Addendum.

I. INTRODUCTION

Petitioners are New York utilities that collectively serve over 1.5 million customers in New York. Petitioners must buy electric capacity reserves through auctions conducted by the NYISO. Capacity is "the amount of electricity that [a] producer can supply at a given time."[1] In the NYISO capacity auctions, electric suppliers offer to sell the capacity of their resources to electricity retailers like the Petitioners. Prices for capacity are set by the auctions, and Petitioners pass those costs on to their customers. Historically, the capacity market has been divided into the New York City, Long Island, and "Rest of State" regions with separate auctions in each.

Electricity from the selected capacity resources is delivered to the customers through the lines and circuits that make up the New York transmission system. Choke-points exist on the transmission system that physically prevent suppliers in certain areas from being able to deliver enough electric energy to fully serve consumers within the constrained areas. The NYISO has responded to these

[1] *Simon v. KeySpan Corp.*, 694 F.3d 196, 199 (2d Cir. 2012).

choke-points by subdividing its capacity markets and requiring that enough capacity resources are physically located within the constrained area to reliably serve the needs of consumers within that area, given the limits of the transmission system to deliver electricity from outside the constrained area. The expectation is that, in the face of scarcity, capacity should command higher prices and that those higher prices will induce new investments in generating plants that will alleviate the capacity shortage and improve service reliability to electric consumers in the long haul.

This case is about NYISO's decision, in response to such a transmission constraint, to create a new pricing zone for the sale of electric capacity reserves in the lower Hudson Valley. According to FERC's decisions authorizing NYISO to create new capacity pricing zones, those zones (1) should be structured to set prices to attract and retain sufficient capacity to meet the needs of consumers, plus a required reserve margin, but (2) should not encourage capacity excesses by setting prices too high. As FERC put it, the new capacity zones should send "accurate price signals."[2]

Because supply and demand dictate prices, it is essential that FERC get the "demand" side of the equation correct. But, FERC did not do so here. Indeed, departing from its own precedents, FERC expressly ruled that it "does not need to

[2] New Zone Rehearing Order at P 16 (JA2995).

determine" whether NYISO got its demand calculation correct.[3] FERC thus refused both to examine (1) NYISO's evidence on demand conditions in the new capacity zone, and (2) Petitioners' evidence that NYISO miscounted demand by ignoring the fact that some of the demand for capacity is actually attributable to customers in other capacity zones located on the same side of the transmission bottleneck as the lower Hudson Valley capacity zone. As a result, consumers in the lower Hudson Valley have been assigned more than their fair share of the costs that result from the constraint, and thus pay excessive capacity charges in violation of the FPA's mandate that their rates must be "just and reasonable."

FERC committed a similar error when it refused to hear arguments that NYISO failed to account for the mispricing of electric capacity in the new lower Hudson Valley capacity zone that will occur when transmission constraints affecting that zone are eliminated. Earlier, when FERC accepted NYISO's tariff establishing the ground rules for creating new capacity zones, FERC said there was no reason to deal with the issue because prices would automatically equalize once the underlying transmission constraint is relieved, stating: "separate capacity zones do not inherently create unneeded or inefficient price separation, *or any other*

[3] *Id*. at P 27 (JA3001). Note that the "P" refers to FERC's numbered paragraphs in its orders.

inaccurate price signals."[4] But, FERC changed its mind when NYISO filed an actual plan to create the lower Hudson Valley capacity zone when it said "that price separation may well continue after the constraint leading to a new capacity zone disappears."[5] FERC refused to explain the contradiction, nor would it explain how keeping prices elevated in an unconstrained capacity zone is consistent with its requirement that new capacity zones send "accurate price signals." Instead, FERC said "[w]e will not rule on the merits of the arguments presented in this proceeding, as they go beyond the matter of the rules for the establishment of new capacity zones."[6] This answer was unresponsive, however, because FERC already had approved the rules for the establishment of new capacity zones in its 2012 Compliance Order, and the purpose of the case before it was to put those rules into practice by creating a new pricing zone.

The consequence of FERC's errors is substantial, and the costs are growing with each new monthly capacity auction. NYISO initially estimated that creating the lower Hudson Valley capacity zone would cause capacity prices to more than double on a per-unit basis, leading to an aggregate price increase of over $500

[4] *New York Independent System Operator, Inc.*, 140 FERC ¶ 61,160 (2012) ("2012 Compliance Order") at P 51 (emphasis added).

[5] New Zone Order at P 83 (JA999).

[6] New Zone Rehearing Order at P 45 (JA3011).

million during the three-year period covered by its filing.[7] But, actual experience during NYISO's initial auctions that began in May 2014 shows that the costs are likely to be far higher.[8]

FERC also refused to soften the financial burden on the affected customers by easing in the price increase during the first two years of the capacity auctions for the new lower Hudson Valley capacity zone. FERC recognized its legal obligation to "balanc[e] . . . consumer and investor interests,"[9] but then used the need to send "accurate price signals"[10] to reject the phase-in without evaluating whether the phase-in would actually make any proposed generating project uneconomic—in other words, FERC did not evaluate whether the price signals sent by the phase-in would be "accurate." Not only did FERC fail to engage in any meaningful "balancing" of investor interests against the more than $500 million

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[7] *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions to Establish and Recognize a New Capacity Zone and Request for Action on Pending Compliance Filing, Docket No. ER13-1380-000 (filed Apr. 30, 2013), at Att. XII, Affidavit of Mr. Tariq N. Niazi, at PP 21-23, 28, and Table 3 (JA522-JA523, JA527).

[8] *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, Docket Nos. ER13-1380-000, ER14-5000-000 (filed May 2, 2014) at 2-3 (JA2969-JA2970). Information about NYISO's ICAP market, including prices and the auction schedule, is available at: http://www.nyiso.com/public/markets_operations/market_data/icap/index.jsp.

[9] Demand Curve Rehearing Order at P 59 (JA3037).

[10] *Id.*

cost to consumers, FERC also did not explain why it refused to allow a phase-in of capacity price increases here, when it has permitted such phase-ins of capacity price increases by NYISO in the past in similar circumstances.

Finally, it is important to emphasize what this case is not about. It is not about the mechanics of NYISO's capacity auctions. It is not about the intricacies of NYISO's test for setting up new capacity zones. It is not about second-guessing the economic theory behind FERC's regulation of wholesale power markets. Rather, the circumstances of this case are those this Court will quickly recognize: the failure to examine relevant evidence, the failure to follow precedent, and the refusal even to answer arguments raising valid objections. FERC committed all of these errors—legal errors, not technical ones that depend on any specialized expertise—which is why this Court owes no deference to FERC's decisions and should reverse.

II. STATEMENT OF THE CASE

A. Background

1. Parties and Basic Framework for NYISO's Capacity Markets

Petitioners are electricity retailers serving customers who live to the east and southeast of the Hudson River in New York. NYISO is a not-for-profit entity charged with administering New York's electric markets and transmission grid. As such, NYISO is a "public utility" regulated by FERC. Among its duties,

NYISO administers electric energy and electric capacity markets for the state-wide New York Control Area. That area is subdivided into 11 zones for the sale of electricity and—prior to the proceedings below—was subdivided into three zones for the sale of electric capacity.[11] "'Capacity' is not electricity itself but the ability to produce it when necessary."[12]

A separate entity, the New York State Reliability Council, determines the minimum amount of electric capacity that is necessary to maintain service reliability.[13] Electric capacity must be deliverable into a capacity zone before it can count as capacity necessary to maintain service reliability in that zone. Due to physical limitations of the transmission grid to carry electricity, a certain percentage of electric capacity must be physically located within each capacity zone (sometimes referred to in the proceedings below as the locational capacity requirement). Transmission bottlenecks constrain the transportability of electric capacity, and when a transmission constraint arises that prevents consumers in part

[11] *See New York Independent System Operator, Inc.*, 143 FERC ¶ 61,217, at P 2 (2013) (generally describing NYISO's electricity markets and duties).

[12] *Connecticut Dept. of Public Utility Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009); *see Simon*, 694 F.3d at 199 ("installed capacity" is "the amount of electricity that the producer can supply at a given time").

[13] *Id.*

of a zone from being fully served by resources in the rest of the zone, NYISO is required by its tariff to establish a new zone at the constraint point.[14]

2. NYISO's Capacity Auctions

To ensure the reliability of the electric system, NYISO enforces market rules. These rules ensure that electric retailers own, or have contractual rights to, enough capacity to satisfy the maximum needs of their customers, plus a cushion called the installed reserve margin.

The New York State Reliability Council's current minimum capacity requirement, or installed reserve margin, is 117% of peak customer demand. NYISO helps the retailers meet their capacity obligations by conducting regularly held auctions where suppliers offer to sell electric capacity reserves.[15] In theory, capacity prices set in these auctions incentivize new generation resources by establishing a market-based means of recovering their investments.[16] Because these auctions set prices for the sale of electric capacity at wholesale, NYISO is

[14] NYISO Market Administration and Control Area Services Tariff at §§ 5.14.1.2, 5.16.2 (JA202, JA216).

[15] *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 806 (D.C. Cir. 2007).

[16] *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 77 (1st Cir. 2002) ("The ICAP charge . . . is designed to . . . give providers an extra incentive to construct new plants"); *see Simon*, 694 F.3d at 199 (describing NYISO's capacity auctions).

required to obtain FERC's approval for any changes that it makes to the schedules compiled in its tariff that govern them.[17]

Here is how NYISO's capacity auctions work. NYISO creates an administratively determined demand curve showing the amount of capacity that electric retailers require in each capacity zone. This demand curve sets the maximum price that the retailers are required to pay for electric capacity reserves by estimating a hypothetical peaking plant's total cost of construction and operation to produce a kilowatt of electricity less its expected revenues from selling electricity.[18] Capacity sellers bid on the quantity and price at which they are willing to offer their capacity for sale, creating a "supply curve" by stacking the bids from lowest to highest.[19] "The point at which demand is met determines the market price for installed capacity and every producer stacked below that price point can sell its full capacity for the market price."[20] Each capacity zone has its

[17] Demand Curve Rehearing Order at P 63 ("[T]he NYISO tariff required NYISO to make a section 205 filing to propose a new capacity zone with capacity prices to be determined by the application of demand curves that are calculated as required by the tariff.") (JA3039).

[18] *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 115 (D.C. Cir. 2013); *see New York Independent System Operator, Inc.*, 111 FERC ¶ 61,117, at P 16 (2005) (explaining how NYISO establishes administratively determined demand curves for its ICAP auctions).

[19] *Simon*, 694 F.3d at 199; *see also Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1235 (D.C. Cir. 2005).

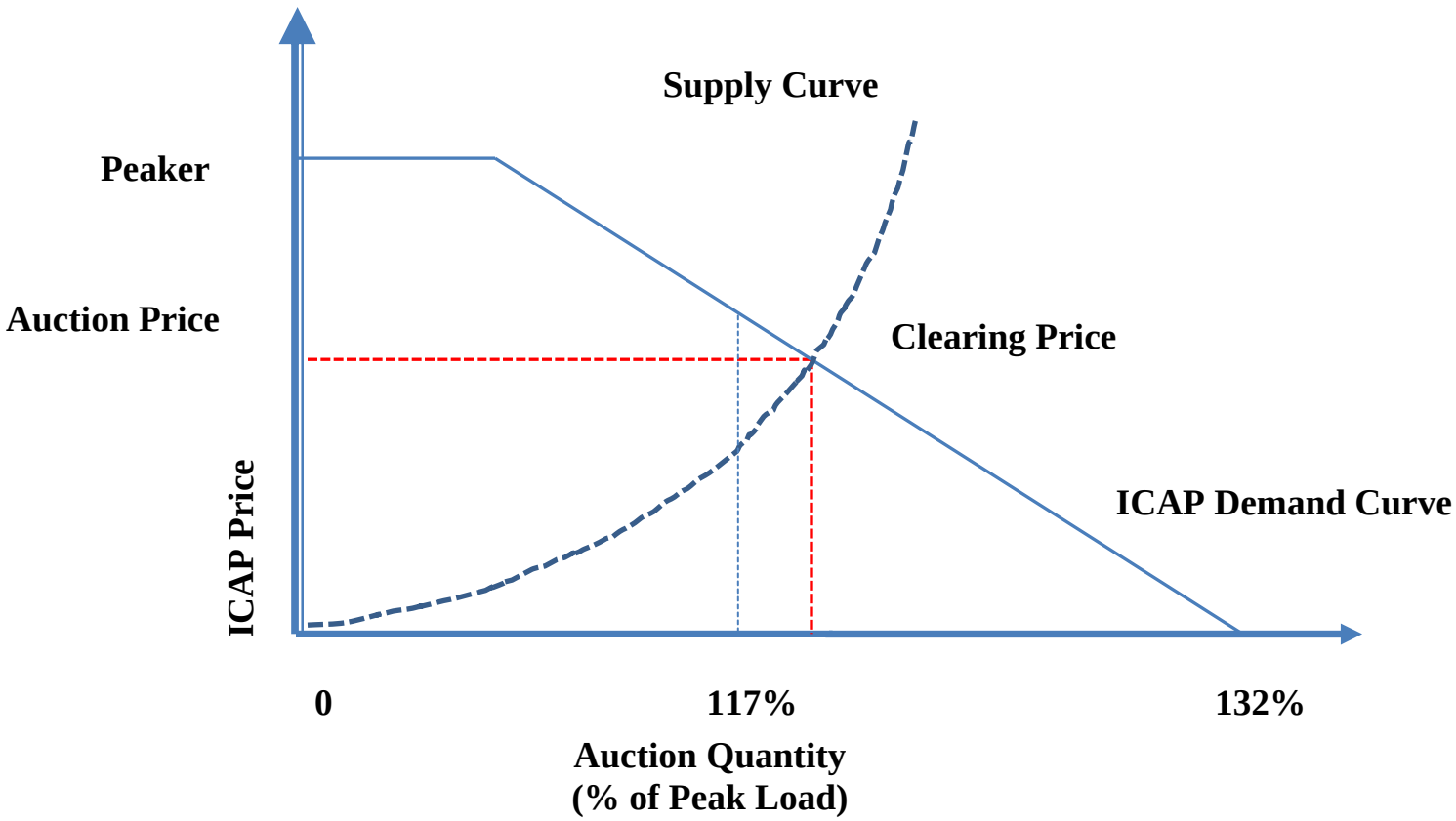
[20] *Simon*, 694 F.3d at 199.

own demand curve and auction to reflect the differences in the cost of constructing generating plants (for example, permitting costs are normally higher in New York City than in Buffalo).

The demand curve takes into account the minimum electric capacity reserves needed to ensure reliable service to electric consumers (i.e., the 117% installed reserve margin), but also accepts additional capacity to the point where the curve intersects with the horizontal axis, called the "zero crossing point."[21] The relationship between supply, demand, and price, as these come together in NYISO's auctions, is illustrated in the following graph:

[21] *New York State Reliability Council*, 118 FERC ¶ 61,179, at PP 3-5 (2007).

Sloped ICAP Demand Curve



Shifting the "zero crossing point" to the right increases the amount of capacity that electric retailers and their customers must buy.[22]

3. NYISO's Tariff For Creating Capacity Pricing Zones

FERC was concerned that transmission constraints within the "Rest of State" capacity zone might lead to underinvestment in generating capacity in

[22] Of course, if there is ample low-cost generation available the per-unit prices will not necessarily increase. *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,117, at P 80 (2005). However, FERC's premise for creating the new zone is that there will be no capacity deficiency, which means that increasing the capacity purchase obligation will also increase the unit cost of capacity.

transmission-constrained, higher cost parts of that zone. Accordingly, FERC directed NYISO to formulate tariff changes to determine how and where the zone should be subdivided.[23]

In 2011, FERC accepted NYISO's "highway deliverability test" which set criteria to decide when transmission limits within a capacity zone are significant enough to justify creating a separate capacity pricing zone.[24] In essence, if transmission lines (the "highway") in a pre-existing zone are inadequate to allow all of the capacity of existing and newly built generators to be transmitted throughout the zone, the zone must be subdivided at the location of the constraint point. FERC's goal was to provide "incentives to attract and retain capacity needed to meet reliability objectives in the constrained area" while "avoiding the encouragement of capacity that is not needed in that area."[25] FERC was not entirely satisfied with NYISO's plan, however, and required it to submit further changes.

FERC followed up in 2012 by reviewing a NYISO compliance filing that delved further into the details of capacity zone formation.[26] One of FERC's

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[23] *New York Independent System Operator, Inc.*, 127 FERC ¶ 61,318, at P 53 (2009).

[24] *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,165 at P 52 (2011) ("2011 Compliance Order").

[25] *Id*. at P 57.

[26] 2012 Compliance Order.

concerns was to identify the electric consumers who should be responsible for paying to add generating capacity required by the constraint. According to FERC, NYISO's revised tariff clarified that "the boundaries of a new capacity zone could include one or more existing constrained load zones on the constrained side of a Highway."[27] Certain capacity sellers, who called themselves the "New York Suppliers," argued that NYISO's proposed line-drawing authority left too many unanswered questions. In particular, they complained that "NYISO provides no details with respect to how the level of the [locational capacity] requirement would be determined" and argued that NYISO's tariff "must be revised to specify how NYISO will calculate this requirement."[28]

FERC decided that NYISO should have flexibility to determine locational capacity needs in part because it believed that, absent additional constraints between capacity zones on the same side of the constraint that required forming the new capacity zone, establishing zone boundaries "would have no effect" on prices.[29] In any event, FERC ruled that stakeholders would have an opportunity to "review and comment on the locational [capacity] requirement for the new capacity zone," making the methodology a detail to be revisited when NYISO

[27] *Id.* at P 39.

[28] *Id.* at P 44. The New York Suppliers included Entergy Nuclear Power Marketing, LLC, an intervenor in this appeal.

[29] *Id.* at P 51.

formed a new zone.[30] Consequently, NYISO's tariff requires NYISO to present its locational capacity requirement analysis for review by FERC in conjunction with a plan to establish a new pricing zone. NYISO did so in the orders at issue here.[31]

B. Proceedings Below

1. NYISO Filing to Establish the New Capacity Zone

In April 2013, NYISO filed its plan to establish a new capacity zone for the lower Hudson Valley. NYISO explained that a transmission constraint at a conjunction of transmission lines southeast of Albany, New York, limited the amount of electricity that could be delivered from electric capacity reserves located in the western parts of the "Rest of State" zone to customers in the eastern and southeastern parts of the State. Therefore, NYISO proposed to subdivide the Rest of State capacity zone by establishing a new boundary line at the constraint point. At the same time, NYISO filed its analysis of the projected locational capacity requirement for electric retailers in the new zone, and its estimate of the resulting

[30] *Id*. at P 50.

[31] NYISO Market Administration and Control Area Services Tariff at § 5.16.4 (JA216-JA217).

price impact on consumers,[32] which NYISO forecast to be more than $500 million over the three-year period covered by its new demand curve filing.[33]

Petitioners objected that NYISO's plan would overcharge consumers in the lower Hudson Valley because NYISO over estimated the capacity needs in the new capacity zone by misidentifying the customers who had deficient capacity due to the constraint.[34] In essence, NYISO required customers in the zone to buy too much capacity, raising its cost.[35] Petitioners showed that NYISO wrongly ignored the capacity purchase requirements of customers in the New York City and Long Island zones—who are on the same side of the constraint point as the lower

[32] *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions to Establish and Recognize a New Capacity Zone and Request for Action on Pending Compliance Filing, Docket No. ER13-1380-000 (filed Apr. 30, 2013), Att. XIV, Affidavit of Henry Chao and John M. Adams (JA546).

[33] *Id.* at Att. XII, Affidavit of Mr. Tariq N. Niazi, at PP 21-23, 28, and Table 3 (JA522-JA523, JA527); *see New York Indep. Sys. Operator, Inc.*, Request for Partial Reconsideration of the New York Independent System Operator, Inc., Docket No. ER13-1380-000 (filed Oct. 28, 2013) at 3 (JA1089).

[34] *New York Indep. Sys. Operator, Inc.*, Protest of Central Hudson Gas & Electric Corp., Docket No. ER13-1380-000 (filed May 21, 2013) at 1, Affidavit of John J. Borchert, at P 12 (JA662).

[35] FERC has recognized that "a greater [Installed Capacity Requirement] (i.e., essentially greater demand) will typically result in a higher price for capacity (i.e., a higher clearing price) and higher charges to customers, while a lesser ICR (i.e., essentially lesser demand) will typically result in a lower price of capacity (i.e., a lower clearing price) and lower charges to customers." *ISO New England Inc.*, 121 FERC ¶ 61,125, at P 26 (2007).

Hudson Valley, and are responsible for replacing capacity from the "Rest of State" capacity zone that cannot be purchased due to the transmission constraint.

Petitioners presented an alternative to NYISO's analysis that measured the proportion of the capacity needs of customers in the lower Hudson Valley, New York City, and Long Island that was affected by the choke point between their service areas and the "Rest of State" zone.[36]

Petitioners also objected that NYISO's proposal did not include a formal plan to relieve high capacity prices in the new capacity zone once the underlying transmission constraint is removed—thereby creating a further barrier to accurate price signals, which are the key to inducing the right amount of generation investment.[37] Petitioners explained that NYISO's plan will keep prices for electric capacity reserves unnecessarily high, even when consumers can import cheaper capacity from outside of the no-longer constrained area.

In fact, NYISO's rules for pricing capacity in constrained capacity zones are designed to "mitigate" the market power of both sellers and buyers on the theory

[36] *New York Indep. Sys. Operator, Inc.*, Protest of Central Hudson Gas & Electric Corp., Docket No. ER13-1380-000 (filed May 21, 2013), Affidavit of John J. Borchert, at P 16 (JA663).

[37] *New York Indep. Sys. Operator, Inc.*, Motion to Intervene and Protest of the Indicated New York Transmission Owners, Docket No. ER13-1380-000 (filed May 21, 2013) at 4-5 (JA673-JA674).

that they may be large enough relative to the size of the sub-divided capacity zone to distort prices.

FERC's theory is that capacity suppliers can distort prices when choke points into a capacity zone limit the supply choices of buyers, and force them to buy at least some of their capacity from sellers with generators located inside of the zone.[38] FERC believes that buyers can also distort capacity prices when they are large enough to require a substantial amount of the capacity in the zone and, by virtue of the size of their demand, can drive down prices if they buy capacity from a new seller who offers capacity at an uneconomically low price.[39]

When these conditions exist, price mitigation in the new capacity zone requires sellers of new capacity to offer their electric capacity at a minimum of 75% of either their cost or the cost of a hypothetical new peaking plant, whichever is lower, and this can also affect the price that buyers must pay because it has the potential to raise the auction clearing price.[40] Once the constraint that gave rise to the new zone is no longer present, however, lower-cost generating plants outside of the zone are precluded from offering their capacity into the auction. If they could, the offers would tend to lower the auction prices. As a result, these pricing rules

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[38] *New York Independent System Operator, Inc.*, 143 FERC ¶ 61,217, at P 38 (2013).

[39] *Id*. at P 39.

[40] *New York Independent System Operator, Inc.*, 143 FERC ¶ 61,217, at P 4 (2013).

for the lower Hudson Valley zone can lead to misdirected generation investment by encouraging the construction of higher-cost generation when the zone is no longer constrained, and by discouraging the development of lower-cost generation outside of the zone because consumers who would otherwise buy electric capacity reserves from outside of their zone are prevented by operation of NYISO's rules from doing so.

2. FERC's Decision on NYISO's Filing to Create the New Zone

The New Zone Order rejected Petitioners' arguments that NYISO had miscalculated the capacity needs in the new zone by failing to attribute some of the capacity to consumers in New York City and Long Island who also contributed to the constraint. According to FERC, the need for capacity in the zone is not "used to determine whether a new capacity zone should be created *or to establish the new capacity zone boundary*," but instead is "*used solely for establishing an ICAP Demand Curve for the new capacity zone*."[41]

FERC did not explain why NYISO was required to file a method for determining the capacity needs in the new zone—a requirement under the 2012 Compliance Order[42]—that FERC would not review. Nor did FERC explain why it gave stakeholders an opportunity to "review and comment" on NYISO's method if

[41] New Zone Order at P 66 (emphasis added) (JA993).

[42] 2012 Compliance Order at PP 2, 50.

FERC did not intend to consider their objections.[43] Further, FERC failed to explain how it could decide whether NYISO's zone proposal satisfied the tariff without examining whether NYISO's zone boundaries would "attract and retain capacity needed to meet the reliability objectives in the constrained area" while "avoiding the encouragement of capacity that is not needed in that area."[44]

Other aspects of FERC's orders also conflict with the 2011 and 2012 orders. FERC found that different capacity zones should have different prices *even if there is no transmission constraint between them*, stating: "price separation may well continue after the constraint leading to a new capacity zone disappears, but . . . such potential distinction between prices is appropriate."[45] By FERC's new reasoning, capacity zones should remain separate even if there is no constraint between them, simply because NYISO can estimate that building a generator in one zone will cost more than building a generator in another zone—regardless of the fact that, in the absence of transmission constraints, electricity from the lower cost generating capacity is transportable into the higher cost capacity zone.[46] FERC did not explain how this result sends accurate price signals for generation investment.

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[43] *Id*. at P 50.

[44] 2011 Compliance Order at P 57.

[45] New Zone Order at P 83 (JA999).

[46] *Id.*

3. FERC's New Zone Rehearing Order

Petitioners timely sought rehearing of the New Zone Order, pointing out the numerous ways in which FERC's new decisions conflicted with its 2011 and 2012 orders. After an eight-month delay, FERC denied these requests for rehearing without answering Petitioners' objections or discussing the underlying evidence. For example, FERC again acknowledged that it was important to create a new capacity zone "that reflects accurate price signals,"[47] but FERC stood by its view that it "does not need to determine" whether NYISO miscalculated the capacity needs of the new capacity zone.[48] Similarly, FERC refused to reconcile its inconsistent theories about whether transmission constraints cause capacity prices to diverge, and also refused to explain how the price mitigation rules will send accurate price signals in an unconstrained zone. Instead, FERC provided a terse response: "we will not rule on the merits of the arguments presented in this proceeding, as they go beyond the matter of the rules for the establishment of new capacity zones and, therefore, are beyond the scope of this proceeding."[49]

[47] New Zone Rehearing Order at PP 14-17 (JA2994-JA2997).

[48] *Id*. at P 27 (JA3001).

[49] *Id*. at P 45 (JA3011-JA3012).

4. NYISO's Demand Curve Filing for the New Capacity Zone

NYISO filed its demand curve for capacity auctions in the new zone on November 29, 2013.[50] The filing used the same method developed and filed in the New Zone Order proceeding to calculate the amount of capacity that consumers in the lower Hudson Valley must buy. However, recognizing that its plan would cause capacity prices in the new zone to more than double, NYISO proposed the same type of phase-in that it previously used (with FERC's approval) when NYISO first began using the sloped demand curve method to set the parameters for its capacity reserves auctions. Had the phase-in been adopted, it would have provided a 24% discount to capacity prices for 2014, a 12% discount in 2015, and no discounts in 2016 or thereafter.[51]

NYISO explained that this phase-in would provide a transition to higher capacity prices, but would have no impact on generation capacity investment in the lower Hudson Valley. Rather, NYISO explained that the phase-in would establish capacity prices that would balance consumer and investor interests as required by

[50] *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions to Implement Revised ICAP Demand Curves and a New ICAP Demand Curve for Capability Years 2014/2015, 2015/2016 and 2016/2017 and Request for Partial Phase-In and for Any Necessary Tariff Waivers, Docket No. ER14-500-000 (filed Nov. 29, 2013) ("Demand Curve Filing") (JA1212).

[51] Demand Curve Filing at 37-38 (JA1255-JA1256).

court precedent interpreting the rate provisions of the FPA.[52] Although Petitioners were otherwise contesting NYISO's method for calculating the capacity purchase obligation and FERC's failure to address price distortions that would occur when the transmission constraints are removed, they supported NYISO's phase-in plan.[53]

5. FERC Rejects NYISO's Proposal for Rate Relief

In the Demand Curve Order, FERC rejected the NYISO's phase-in proposal without addressing the NYISO's explanation that the phase-in would not affect long-term investment incentives. Instead, FERC stated that it was concerned that a subset of capacity market participants who can enter the market in the *short term* might be discouraged from doing so, but FERC did not identify any of these potential sellers.[54]

6. FERC Switches Theories on Rehearing to Deny the Phase-in

Petitioners timely sought rehearing of the Demand Curve Order, explaining that FERC failed to consider NYISO's evidence demonstrating the absence of any harm to generator investments. Petitioners further argued that the Demand Curve Order departed, without explanation, from FERC's precedent granting NYISO's

[52] *Id.*

[53] *New York Indep. Sys. Operator, Inc.*, Motion for Leave to Answer and Answer of the New York Transmission Owners, Docket No. ER14-500-000 (filed Jan. 10, 2014), Exh. A (Cadwalader Affidavit) ¶ 19 and Table 3 (JA2680-JA2681).

[54] Demand Curve Order at P 164 (JA2835).

previous proposal to phase-in a new method for auctioning capacity that also caused a large price increase.[55]

FERC's Demand Curve Rehearing Order did not answer these objections, but instead gave different reasons to reject the phase-in. FERC acknowledged court precedent "that establishing just and reasonable rates involves a balancing of consumer and investor interests."[56] But, FERC's "balancing" consisted of conceding that the new capacity zone will increase prices in the "short run," and claiming that the higher prices are "necessary to provide the appropriate price signals to incent developers to build or restore capacity . . . ."[57] FERC, however, did not compare the anticipated cost impact on consumers to the estimated cost to build a new peaking plant in the lower Hudson Valley and a cost estimate for the two new plants it identified, nor did it explain why a transitory discount to capacity auction prices would make it uneconomic to build those plants.

III. SUMMARY OF ARGUMENT

FERC's orders below rest on its oft-repeated goal "to create a new capacity zone that reflects accurate price signals"[58] by providing incentives "to attract and

[55] *New York Indep. Sys. Operator, Inc.*, Request for Rehearing of the New York Transmission Owners, Docket No. ER14-500-000 (filed Feb. 27, 2014) (JA2895).

[56] Demand Curve Rehearing Order at P 59 (JA3037).

[57] *Id*. at P 62 (JA3038).

[58] New Zone Rehearing Order at P 16 (JA2995); *see also* at P 15 (JA2995).

retain capacity needed to meet reliability objectives in the constrained area" while "avoiding the encouragement of capacity that is not needed in that area."[59] As the Petitioners show, FERC's orders below failed to meet these objectives in three ways that directly violate the FPA and APA, leading to excessive charges to consumers.

First, FERC cannot know whether the new capacity zone is sending "accurate price signals" as FERC expressly ruled that it "does not need to determine" how much capacity the new zone requires.[60] FERC's orders do not address this fundamental difficulty. Moreover, FERC failed to reconcile its ruling with its promise in 2011 that Petitioners would have the opportunity, when NYISO filed its new zone proposal, to "review and comment on" the amount of capacity that consumers must buy.[61] As Petitioners' evidence showed, NYISO's plan forces consumers in the new zone to buy too much capacity, thus driving up prices. FERC has elsewhere recognized this concern.[62] Here, however, FERC provided no explanation that reconciled its refusal to hear evidence on the capacity purchase obligation with its earlier assurance that Petitioners would be able to address that

[59] 2011 Compliance Order at P 57.

[60] New Zone Rehearing Order at P 27 (JA3001).

[61] 2012 Compliance Order at P 50.

[62] *See ISO New England Inc.*, 121 FERC ¶ 61,125, at P 26 (2007) (stating that a higher capacity purchase obligation translates into higher unit costs for capacity).

obligation in conjunction with the creation of a new capacity zone. Given that "FERC may not use unexamined rates as a basis for comparison,"[63] its predictive judgment that high capacity prices will produce long-term benefits to consumers is entitled to no deference from this Court.[64] Accordingly, FERC did not provide any reasoned conclusion that consumers in the new capacity zone will pay "just and reasonable" prices for the capacity they are being required to purchase as required by the FPA.

Second, FERC refused to hear arguments that NYISO's proposal will require consumers in the new capacity zone to continue purchasing too much capacity—at too high a price—long after the underlying problem has been resolved.[65] Building on the economic theory that the price of electric capacity should diverge on either side of a transmission constraint, FERC's rationale for creating the new zone was that transmission bottlenecks in the "Rest of State" capacity zone require a separate sub-divided zone for capacity reserves to send accurate price signals.[66] If there is no separate pricing zone, the reasoning goes,

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[63] *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 472 (D.C. Cir. 2008).

[64] *Elec. Consumers Resource Council v. FERC*, 407 F.3d 1232, 1240 (D.C. Cir. 2005) (deferring to FERC when it developed a record of expected costs and benefits).

[65] New Zone Order at P 83 (JA999).

[66] 2011 Compliance Order at P 58; New Zone Rehearing Order at PP 13-15 (JA2993-JA2995).

capacity prices will be kept artificially low in the constrained capacity zone and the market will under-invest in the infrastructure needed in the zone to maintain reliable service. Conversely, when there is no bottleneck, prices should equalize across capacity zones because capacity becomes freely transferable.

In 2012, FERC claimed that these principles meant that it did not have to deal with the problem of inflated prices once the constraint is solved. Once the constraint is removed, prices would equalize, and the problem would be self-correcting.[67]

Now, however, having accepted NYISO's filing to establish the new zone, FERC has changed its tune, stating: "price separation may well continue after the constraint leading to the new capacity zone disappears" *and* "such potential distinction between prices is appropriate."[68] FERC has not adequately explained why it is "appropriate" for consumers to continue to pay high capacity prices when the lack of a transmission constraint gives them access to lower-priced capacity. FERC deferred without any reasoned explanation to NYISO's assertion that higher prices are justified by higher construction costs in the capacity zone and the prospect that a constraint might return.[69] Once again, FERC's predictive judgment

[67] *New York Independent System Operator, Inc.*, 140 FERC ¶ 61,160, at P 51 (2012).

[68] New Zone Order at P 83 (JA999).

[69] *Id.*

that high current costs will produce long-term benefits is entitled to no deference.[70] And, FERC has offered no answer to Petitioners' showing that FERC's new cost of construction test conflicted with FERC precedent and with the purpose for creating new capacity zones. When Petitioners challenged FERC's reasoning, it refused to answer them.[71]

Finally, confronted with a lack of evidence to support its decision to reject NYISO's proposed phase-in of higher capacity prices in the lower Hudson Valley, FERC has switched theories yet again, claiming that NYISO failed to support a tariff "waiver" and pointing to two possible new generation projects that emerged while rehearing requests were pending.[72] But, even apart from the fact that FERC may not rely on new "evidence" introduced at the rehearing stage—indeed, after rehearing was sought, as in this case—FERC did *not* find that these generators will be built only if FERC allows NYISO to proceed with undiscounted capacity prices during the transition to the new zones.

Moreover, neither generator is in service, and FERC did not find that either generator would enter commercial operation in time to participate in NYISO's capacity auctions in 2014—or even in the 2015 auctions, which will begin in nine

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[70] *Maine Pub. Utils. Comm'n*, 520 F.3d at 472; *Elec. Consumers Resource Council*, 407 F.3d at 1240.

[71] New Zone Rehearing Order at P 45 (JA3011-JA3012).

[72] Demand Curve Rehearing Order at PP 63, 65 (JA3039-JA3041).

months. And, even if these generators manage to come on line in time, by then the one-year discount would be just 12%. FERC did not explain why such a discount would present an economic barrier to the projects. Likewise, FERC failed to reconcile its tariff "waiver" argument with its own precedent approving a previous NYISO proposal to phase in a similar large capacity price increase.[73]

FERC's failure to weigh the evidence, to respond meaningfully to Petitioners' objections, and to reconcile its orders concerning the new capacity zone with FERC precedent compel reversal. The APA prohibits such arbitrary decision-making. Moreover, because NYISO's method charges an excessive portion of the costs of relieving the relevant transmission constraint into the lower Hudson Valley to consumers in that capacity zone—even though customers in other zones on the same side of the constraint contribute to the same capacity shortfall—FERC's orders also violated the FPA's requirement that consumers pay "just and reasonable" rates. Here again, FERC refused to examine the very evidence on the issue that it invited in 2012.[74]

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[73] *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, at P 44 (2003).

[74] *Black Oak Energy, LLC*, 725 F.3d 230, 237 (D.C. Cir. 2013); *see Illinois Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009).

For all of these reasons, FERC's expertise in weighing evidence warrants no deference to the agency here. Instead, the court should reject FERC's orders as arbitrary and unreasoned, and remand the case to FERC to correct its errors.[75]

IV. ARGUMENT

A. FERC's Decisions Approving a New Capacity Zone for the Lower Hudson Valley Are Internally Inconsistent, Contrary to Precedent and, Therefore, Arbitrary and Capricious in Violation of the Administrative Procedure Act and entitled to no deference.

Under black-letter principles of administrative law, FERC's orders may be upheld only if they "examine the relevant data and articulate a . . . rational connection between the facts found and the choice made."[76] In addition, it is well settled that FERC must adhere "to its prior practice and decisions or explain the reason for its departure from such precedent,"[77] and must provide "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[78] Agency decisions that are internally inconsistent or depart

[75] *Keyspan-Ravenswood, LLC*, 474 F.3d at 812 ("[W]e cannot defer when the agency simply has not exercised its expertise.") (citation omitted).

[76] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted).

[77] *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984).

[78] *Greater Boston Int'l Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *see also Republic Airline Inc. v. U.S. Dept. of Transp.*, 669 F.3d 296, 299 (D.C. Cir. 2012) ("One of the core tenets of reasoned decision-making is that an agency [when] changing its course . . . is obligated to supply a reasoned analysis for the change.").

from precedent without a reasoned explanation are entitled to no deference from this Court.[79] Yet, FERC's decisions below violate these fundamental principles; they are internally inconsistent, and they depart from agency precedent without a reasoned explanation.

1. FERC Erred in Refusing to Consider the Evidence It Invited to Determine Whether NYISO's Capacity Purchase Requirement for the Lower Hudson Valley Capacity Zone Will Send "Accurate Price Signals" for Investments in New Generating Capacity.

FERC's New Zone Rehearing Order refused to consider the very evidence FERC acknowledged is critical to ensure proper formation of a new capacity zone. Specifically, FERC acknowledged the need "to create a new capacity zone that reflects accurate price signals," but went on to state that it "does not need to determine whether the NYISO's method for deriving the [locational capacity requirement] is appropriate."[80] And, FERC's refusal to hear evidence addressing the capacity needs in the lower Hudson Valley capacity zone conflicted not only with the reasoning of other parts of the very orders at issue, but also with FERC's statement in 2012 inviting Petitioners to "review and comment on" NYISO's

[79] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference should be withheld "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question'") (citations omitted).

[80] New Zone Rehearing Order at PP 16, 27 (JA2995, JA3001).

method for calculating the capacity requirements for the new capacity zone.[81] This is not reasoned decision-making, and FERC's refusal to consider the evidence precludes any finding that its decision is supported by substantial evidence.

Given its refusal to consider evidence presented by either NYISO or Petitioners in deciding whether NYISO properly determined the capacity needs in the lower Hudson Valley, FERC did not explain how it knows whether the lower Hudson Valley capacity zone will provide "accurate price signals" that will "meet the reliability objectives in the constrained area" while also "avoiding the encouragement of capacity that is not needed in that area."[82] These are the key determinative criteria that FERC itself established for deciding whether to form a new capacity zone. Since FERC has acknowledged that a zone's capacity needs directly affect the auction clearing prices, and the resulting price signals to generation developers,[83] it was unlawful and unreasonable for FERC to ignore the relevant evidence—particularly after inviting Petitioners to comment on this question. Indeed, FERC has admonished the NYISO that its capacity filings must "lay out exactly what considerations led it to reach its conclusion regarding each issue, along with supporting documents backing up each conclusion" because

[81] 2012 Compliance Order at P 50.

[82] 2011 Compliance Order at P 57.

[83] *ISO New England Inc.*, 121 FERC ¶ 61,125, at P 26 (2007) (stating that a higher capacity purchase obligation translates into higher unit costs for capacity).

"[t]he Commission must rely on evidence in the record to approve the applicant's proposals and may not merely rubber stamp NYISO's findings." [84] Yet, FERC ignored its own teachings here.

In short, the Court owes no deference to FERC's decision to "rubber stamp" NYISO's new capacity zone proposal. In deciding whether the new capacity zone will send "accurate price signals," FERC did not consider the relevant evidence or respond to substantial criticisms. Its decisions were arbitrary and capricious and should be remanded.[85]

2. FERC's Contradictions About the Effect on Capacity Prices From Eliminating a Transmission Constraint and Refusal to Require NYISO to Remedy Continuing High Capacity Prices Further Highlights the Unreasonableness of FERC's Decisions.

FERC's rulings as to pricing after the transmission constraint is eliminated likewise compels reversal. Without "engag[ing] the arguments raised before it"[86] an agency cannot satisfy its statutory duty to "conduct a process of *reasoned*

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[84] *New York Independent System Operator, Inc.*, 111 FERC ¶ 61,117, at P 85 (2005).

[85] *Maine Pub. Utils. Comm'n*, 520 F.3d at 472 ("FERC may not use unexamined rates as a basis for comparison"); *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 449 (D.C. Cir. 2005) ("FERC's minimalist explanation does not allow us to defer to its expertise."); *United Distribution Companies v. FERC*, 88 F.3d 1105, 1141 n.45 (D.C. Cir. 1996) ("[W]e will defer to the Commission's expertise if it provides substantial evidence to support its choice and responds to substantial criticisms of that figure.").

[86] *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998).

decisionmaking."[87] Thus, FERC may not "simply talk around the arguments raised before it; reasoned decision-making requires more: a 'direct response,' which FERC failed to provide here."[88]

Here, FERC once again refused to explain its reversal of position in rejecting Petitioners' argument that NYISO's tariff requires a safety valve if prices across zones will not equalize in the absence of transmission constraints between them. FERC recognized this need when it accepted NYISO's tariff setting the criteria for creating new capacity zones. As noted above, FERC's original premise was that transmission constraints cause capacity prices to diverge on either side, but that prices will equalize when the constraint is eliminated.[89] Yet, FERC changed its mind when NYISO sought to create the lower Hudson Valley capacity zone, stating that removing the constraint would *not* necessarily cause prices to equalize *and* that continuing price differences in the absence of a transmission constraint would be "appropriate."[90] According to FERC, different construction costs for generating plants in different regions justify the higher prices. But, this explanation fails to engage the key issue, which is why consumers should be

[87] *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) (emphasis in original).

[88] *Elec. Power Supply Ass'n v. FERC*, No. 11-1486, 2014 WL 2142113, at *6 (D.C. Cir. May 23, 2014).

[89] 2011 Compliance Order at PP 56-57.

[90] New Zone Order at P 83 (JA999).

forced to pay these higher prices when the lack of transmission constraints permits them to be served by less expensive capacity from another region?

Making matters worse, FERC also failed to explain why it is appropriate for NYISO to continue to apply price mitigation rules after transmission constraints in a pricing zone have ceased to exist. The premise for applying price mitigation is that the transmission constraint creates a sub-market that limits the number of buyers and sellers because other competitors are physically incapable of delivering electricity into the constrained zone. FERC deflected Petitioners' objections by stating that it would consider the price mitigation rules in a different proceeding,[91] but Petitioners did not object to price mitigation rules that are properly applied to a constrained sub-market. Rather, Petitioners' issue related directly to the question of proper pricing in the new zone so that it sends "accurate price signals" for generation investment when the constraint no longer exists.[92] By explaining the importance of accurate pricing to incentivize appropriate generation investment, FERC placed that question directly at issue in the 2011 Compliance Order, and it

[91] New Zone Order at P 84 (JA999).

[92] *New York Independent System Operator, Inc.*, Petition for Rehearing of the New York Power Authority, Docket No. ER13-1380-000 (filed Sept. 12, 2013) at 9-10 (JA1010-JA1011).

again recognized this principle in the New Zone Rehearing Order and the Demand Curve Rehearing Order.[93]

But, when Petitioners argued below that FERC's inconsistent positions would lead to mispricing of electric capacity reserves, inaccurate price signals, and excessive charges to consumers, FERC turned mute, stating: "we will not rule on the merits of the arguments presented in this proceeding . . . ."[94]

FERC's silence was especially unreasonable since it created the controversy by changing a core economic assumption that transmission constraints drive the need for creating separate capacity zones. Logically, eliminating the constraints should likewise eliminate the need for those zones—unless the problem is self-correcting as FERC originally assumed. And, continuing to apply price mitigation to a zone is surely unreasonable when consumers have unconstrained access to capacity reserves in the "Rest of State" capacity zone where NYISO does not apply capacity price mitigation rules. Thus, once FERC decided that price separation would not automatically be solved by relieving the constraint, it was incumbent upon FERC to reexamine its premise and require NYISO to address the economic barriers that a separate capacity pricing zone creates in conjunction with the

[93] New Zone Rehearing Order at PP 14-17 (JA2994-JA2997); Demand Curve Rehearing Order at PP 60-62 (JA3037-JA3039).

[94] New Zone Rehearing Order at P 45 (JA3011-JA3012).

formation of the lower Hudson Valley capacity zone. Otherwise, there is no guarantee that the new zone will send "accurate price signals."

The need to address this issue was all the more critical because NYISO establishes pricing for capacity zones in three-year time periods. As the New York Public Service Commission highlighted in its arguments to FERC, New York has an active, aggressive, and well-advanced process in place to encourage new transmission construction. That process is intended in part to alleviate the very same transmission constraints that NYISO and FERC relied upon to establish the lower Hudson Valley capacity zone.[95] Thus, it is reasonable to anticipate that economically significant transmission constraints in the lower Hudson Valley will be alleviated within the three-year time frame when the current capacity pricing method is in place.

Even if it takes longer to alleviate the constraint, the new capacity zone filing that FERC accepted sets a template for perpetuating the zone into the next three-year cycle, which NYISO will begin planning for a year in advance.[96] More fundamentally, FERC failed to recognize that the "market" (meaning generation developers) will plan generation investments on the assumption that prices in the lower Hudson Valley will remain elevated indefinitely due to NYISO's pricing

[95] New Zone Order at P 22 (JA977); New Zone Rehearing Order at P 13 (JA2994).

[96] NYISO Market Administration and Control Area Services Tariff at § 5.14.1.2 (JA202).

rules. If the inaccurate price signals are allowed to stand, these long-lead investment decisions will be misdirected, leading to long-term inefficient grid planning and, ultimately, excessive charges to consumers. But, FERC refused to take these concerns into account by ruling them out of bounds, and thereby saddling consumers with unjustifiably high capacity prices. That was reversible error.

For all of these reasons, FERC's refusal to consider the need to build in a provision to address pricing inaccuracies when the underlying constraint is resolved was arbitrary and capricious. The Court should remand the case to FERC.

3. FERC's Decisions Are Entitled to No Deference Because the Evidence Showed that Consumers in the Lower Hudson Valley Are Being Held Responsible for Purchasing Electric Capacity Reserves that Are Attributable to Others, and They Will Face Excessive Charges Long After the Transmission Constraint Is Solved.

NYISO filed its plan to establish a new capacity zone for the lower Hudson Valley under Section 205 of the FPA, which governs "classifications, practices, and regulations" used to establish electricity rates.[97] In response, Petitioners showed that NYISO over stated the capacity needs of customers in the lower Hudson Valley in relation to their share of the capacity that is "bottled up" by the transmission constraint used to justify the new lower Hudson Valley capacity

[97] 16 U.S.C. § 824d(c).

zone.[98] As Petitioners showed, some of that capacity is attributable to consumers in the New York City and Long Island zones. Thus, attributing all of the capacity shortfall to the lower Hudson Valley violates the FPA's requirement that rates must be "just and reasonable," [99] which the courts have found to require "cost causation" rate-setting.

The cost causation precedents give meaning to the just and reasonable standard. It requires that rates must "reflect to some degree the costs actually caused by the customer who must pay them."[100] This typically requires "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party."[101] FERC must determine which customers are responsible for the costs incurred by the utility (here, NYISO), and FERC may not single out a party for the full cost of a project, or even most of it, when the benefits of the

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[98] *New York Indep. Sys. Operator, Inc.*, Protest of Central Hudson Gas & Electric Corp., Docket No. ER13-1380-000 (filed May 21, 2013) at 1, Affidavit of John J. Borchert (JA657).

[99] 16 U.S.C. § 824d(a).

[100] *Black Oak Energy, LLC v. FERC*, 725 F.3d at 237 (D.C. Cir. 2013) (quoting *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1303 (D.C. Cir. 2007)); *see Illinois Commerce Comm'n*, 576 F.3d at 470.

[101] *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

project are diffuse.[102] The courts remand cases to FERC that fail to properly reflect these principles.[103]

Here, FERC refused even to consider whether lower Hudson Valley consumers are solely, or even primarily, responsible for the costs of relieving the transmission constraint into the new capacity zone, stating: "the Commission does not need to determine whether NYISO's method for deriving the . . . [locational capacity requirement] is appropriate."[104] FERC's refusal to examine the question was unreasonable given that both NYISO and the Petitioners submitted evidence that would have allowed FERC to resolve the issue.[105]

As the appellant in *BNP Paribas* pointed out in an argument that persuaded that court, FERC's cost causation analysis "was inconsistent with its application of cost causation to an analogous case in the electricity sector, namely when integration of a new electricity generator requires upgrades to the transmission network. . . . [because] the Commission does not permit transmission operators to mechanically assign the cost of the upgrade to the generator that precipitated the

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[102] *See Illinois Commerce Comm'n*, 576 F.3d at 476.

[103] *See BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264, 267 (D.C. Cir. 2014) (examining which customer's demands cause the costs incurred by a natural gas pipeline company).

[104] New Zone Rehearing Order at P 27 (JA3001).

[105] *BNP Paribas Energy Trading GP*, 743 F.3d at 269 ("The failings of the Commission's approach here are underscored by its non-response to a specific point that Paribas raised in the administrative proceedings.").

expense, but instead requires consideration of the benefits to all parties on the integrated system."[106]

The same problem exists here. FERC mechanically accepted NYISO's assignment of full-cost responsibility for relieving a transmission constraint to consumers in the lower Hudson Valley. It did not even consider whether NYISO's method for establishing capacity cost responsibility for the lower Hudson Valley capacity zone complies with cost-causation ratemaking. This omission made it impossible to determine whether NYISO's filing complied with the just and reasonable standard as FERC is obligated to do, and requires reversal.[107]

Moreover, as discussed above, it was unreasonable for FERC to refuse to consider whether NYISO's method improperly locks in high capacity costs to the lower Hudson Valley even when transmission constraints no longer block those consumers from accessing lower-cost capacity elsewhere. FERC's method does this by forcing consumers to pay capacity auction prices set by "mitigated" new generators that must offer to sell at 75% of their cost, even though, in an unconstrained market, lower-cost generators could bid and drive down the auction prices. FERC erred by failing to explain why the elimination of the transmission constraint does not entitle lower-cost generators to set the auction clearing prices,

[106] *Id.*

[107] 16 U.S.C. §§ 824d(a) and (e).

and thereby give consumers in the lower Hudson Valley capacity that is available at competitive prices once capacity becomes freely transferable between zones. That too requires reversal.

In sum, it was arbitrary and unreasonable for FERC to accept NYISO's tariff establishing the new capacity zone in the lower Hudson Valley without addressing either Petitioners' cost causation argument or their price mitigation argument. In so doing, FERC failed to satisfy its statutory obligation to ensure that NYISO's tariff for the new capacity zone is just and reasonable.[108] For these additional reasons, the Court should find that FERC's decisions were arbitrary and capricious in violation of the APA and remand the cases to FERC.

B. FERC's rejection of the phase-in was unsupported and inconsistent with its precedent.

Finally, even if FERC's orders were otherwise defensible (and they are not), FERC's rejection of a phase-in was not supported by substantial evidence and was inconsistent with FERC precedent.

NYISO recognized that establishing a new capacity zone in the lower Hudson Valley would cause prices for electric capacity reserves to more than double from a per-unit cost of about $5 per kilowatt per month to more than $10. NYISO predicted that, in the aggregate, this price increase would cost consumers

[108] *Keyspan-Ravenswood, LLC*, 474 F.3d at 812 ("[W]e cannot defer when the agency simply has not exercised its expertise.") (citation omitted).

more than $500 million in extra capacity costs over the three-year period when its proposed demand curve would be in effect.[109] NYISO thus proposed to phase-in the price increase over two years by discounting the cost of capacity by 24% in 2014 and by 12% in 2015—just as NYISO did on a prior occasion without objection from FERC.[110]

NYISO assured FERC that the short phase-in period would *not* discourage new investments in generating plants because generators do not receive capacity payments until they begin commercial operation, and constructing new plants takes several years.[111] NYISO also explained that a phase-in would produce reasonable rates that balanced investor and consumer interests.[112] Capacity prices would be higher than in the unconstrained "Rest of State" capacity zone—which were too low to attract generation investment in the lower Hudson Valley—and the

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[109] *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions to Establish and Recognize a New Capacity Zone and Request for Action on Pending Compliance Filing, Docket No. ER13-1380-000 (filed Apr. 30, 2013), at Att. XII, Affidavit of Mr. Tariq N. Niazi, at PP 21-23, 28, and Table 3 (JA522-JA523, JA527).

[110] *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, at P 44 (2003).

[111] Demand Curve Filing at 42-43 ("Because the construction of new generating resources would take at least two to three years, prospective investment decisions are more likely to be influenced by prices that reflect the full net cost of entry in the third year, than by reduced prices in the two intervening years. Thus . . . 'the phase-in should not affect the market entry decision of most new generating capacity.'") (JA1260-JA1261).

[112] *Id.* at 41 (JA1259).

anticipated maximum capacity prices if consumers were required to bear the full cost of a new peaking plant (i.e., competitive auctions would not clear at capacity prices below the full cost of a new plant).[113]

FERC rejected NYISO's phase-in plan based on worries that it might discourage certain kinds of sellers—those who can quickly retool plants that might otherwise be scrapped and consumers who are allowed to collect capacity payments in exchange for their promise not to consume power that they would otherwise use.[114] But, when Petitioners pointed out FERC's seeming inability to identify any actual capacity sellers who might be harmed, FERC's Demand Curve Rehearing Order turned instead to information made available to it after Petitioners filed their rehearing requests.

Because FERC ordinarily excludes such "moving target" evidentiary submissions at the rehearing stage,[115] introducing new facts conflicts with FERC's practice and raises basic fairness questions. But, even setting that aside, FERC's new information did not help its cause. FERC did not explain why a two-year

[113] *Id.* at 40 (JA1258).

[114] Demand Curve Order at P 164 (JA2835).

[115] *Exxon Corp. v. FERC*, 114 F.3d 1252, 1260 n.12 (D.C. Cir. 1997) (citing *Ocean State Power II*, 69 FERC ¶ 61,146 (1994) ("The Commission generally will not consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target.")); *Philadelphia Electric Co.*, 58 FERC ¶ 61,060 (1992) ("[W]e are reluctant to chase a moving target by considering new evidence presented for the first time at the rehearing stage of Commission proceedings.").

phase-in would imperil the investment plans of these repowering generators (and neither claimed it would).

Nor is there any reason why the phase-in *should* threaten these hypothetical generator investments. Neither of these generators is currently eligible to participate in NYISO's capacity markets in 2014 when the 24% discount would have been in place. Moreover, even if the generators enter service in 2015, FERC did not claim that a 12% reduction to capacity auction clearing prices would keep them out of the market. And, if that were not enough, FERC itself has said that it "does not expect that ICAP revenues received under the proposed Demand Curve will alone result in more financing," meaning developers of new plants take other revenue streams into account in deciding whether to move ahead with their projects.[116] In short, FERC failed to explain *why* NYISO's capacity price discount presented an obstacle to these generators. "FERC may not use unexamined rates as a basis of comparison,"[117] and FERC's prediction that consumers will benefit in the long run from high current prices is entitled to no deference when FERC made no comparison of the costs expected to occur to the anticipated benefits.[118]

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[116] *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, at P 80 (2003).

[117] *Maine Pub. Utils. Comm'n*, 380 F.3d at 472.

[118] *Elec. Consumers Resource Council*, 407 F.3d at 1240.

FERC also raised a new roadblock to NYISO's phase-in plan by claiming that NYISO's tariff does not give it pricing flexibility for capacity auctions. According to FERC, this meant that NYISO required FERC to agree to a tariff waiver, but FERC did not see a good reason to grant one.[119] FERC is mistaken.

The flaw in FERC's new argument is that NYISO's tariff does not include a demand curve for the new capacity zone in the first place, or the capacity purchase requirements that NYISO uses to create the demand curve. That is why FERC's 2011 and 2012 Compliance Orders required NYISO (1) to determine the expected capacity purchase obligation in the new capacity zone, and (2) to calculate a proposed demand curve for submission to FERC in conjunction with the plan to create that new capacity zone.[120] In short, there was no fixed preexisting capacity price in the tariff for FERC to "waive," or at least FERC did not identify one.

FERC's waiver theory also conflicts with FERC's precedent accepting NYISO proposal to phase-in a new capacity demand curve "over three years to ameliorate rate impacts."[121] FERC acknowledged that precedent. But, rather than explain why NYISO's phase-in plan here required a different result, it reprised its general policy to prevent "inefficient outcomes" and its worry that with a phase-in

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[119] Demand Curve Rehearing Order at P 65 (JA3040-JA3041).

[120] 2011 Compliance Order at PP 57-58; 2012 Compliance Order at PP 2, 50.

[121] *New York Independent System Operator, Inc.*, 103 FERC ¶ 61,201, at P 6 (2003).

"[c]apacity in the unconstrained area would displace existing (more expensive) resources in the constrained zone that are deliverable, causing the displaced capacity not to receive capacity payments."[122] FERC said this situation "would not accurately signal the relative reliability needs for and values of capacity in the two areas of the broad zone and may lead to capacity shortages."[123] This reasoning, however, only underscored the deficiency in FERC's refusal to hear evidence about "the relative reliability needs for and values of capacity" without explaining why a modest transitory discount would have the negative effects that FERC feared.

In sum, given that (1) FERC did not identify even one new generator that will be kept out of market by a phase-in, (2) FERC recognized that new generators do not rely *solely* on capacity revenues to support financing for their projects in any event, and (3) FERC has accepted NYISO phase-in proposals for higher capacity prices to ease the burden of sharply higher costs to consumers, FERC's generalized claim that a phase-in will discourage investment was inadequate to satisfy its obligation to respond to the arguments and base its decisions on

[122] Demand Curve Rehearing Order at P 60 (JA3037).

[123] *Id.*

substantial evidence in the record.[124] The reason is that FERC must be able to identify the evidence on which it relies and explain how that evidence supports the conclusions it reaches.[125] The evidence may not be speculative or conjectural.[126] Accordingly, FERC's decision to reject NYISO's phase-in proposal was not based on a reasoned analysis of the record, but instead was based on conjecture in violation of the APA.

V. CONCLUSION

For the foregoing reasons, the Court should find that FERC's orders authorizing NYISO to establish a new capacity zone in the lower Hudson Valley were arbitrary and capricious, failed to examine relevant evidence, departed from FERC's precedent without a reasoned explanation, and were otherwise contrary to law. The Court should, therefore, remand FERC's orders to the agency for further proceedings to address the issues raised by Petitioners. The Court should further direct FERC to provide refunds to electric retailers such as Petitioners to the extent that FERC's proceedings determine that NYISO's tariff for establishing the lower Hudson Valley capacity zone resulted in excessive charges so that Petitioners may provide full relief to their electricity customers.

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[124] As FERC has recognized, generalized claims and unsupported assumptions do not meet the substantial evidence test. *Constellation Power Source, Inc.*, 100 FERC ¶ 61,157, at P 33 (2002).

[125] *City of Charlottesville v. FERC*, 661 F.2d 945, 949-50 (D.C. Cir. 1981).

[126] *Florida Municipal Power Agency v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010).

Dated: June 27, 2014

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Federal Rules of Appellate Procedure Form 6.
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Certificate of Compliance with Type-Volume Limitation,
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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, I electronically filed the foregoing Initial Brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, §10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a

Section 205(a) and (e) of the Federal Power Act, 16 U.S.C. § 824d(a), (e)

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§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*(b)

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ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in