In the United States Court of Appeals for the Second Circuit

No. 14-1482

IN RE PEOPLE OF THE STATE OF NEW YORK AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

ON PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION FOR STAY OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

No. 14-1502

IN RE CENTRAL HUDSON GAS & ELECTRIC CORP.

ON PETITION FOR EMERGENCY STAY OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

OPPOSITION OF FEDERAL ENERGY REGULATORY COMMISSION TO EMERGENCY PETITIONS FOR STAY AND WRIT OF MANDAMUS

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INTRODUCTION

Petitioners seek to halt operation of a needed, new electricity capacity market.[1] Although the Federal Energy Regulatory Commission ("FERC" or "Commission") orders have impacted capacity prices, the impacts are the intended result of reforms to send efficient market signals where new generation capacity is needed, to the long-term benefit of consumers and all market participants. The Commission approved the new capacity market changes after carefully balancing impacts to consumers with system reliability needs. The Commission also considered the prospects of future transmission projects on the need for the new capacity zone. Ultimately, this is a policy judgment, of the type quintessentially entrusted to the expert agency's discretion.

Petitioners nonetheless seek to upset the balance struck in the Commission orders. By seeking a stay, Petitioners aim to achieve indirectly exactly what the Commission rejected in its orders – a phase-in of the new capacity zone. FERC reasoned that stakeholders have known for years that reliability would drive the need for a new capacity zone. FERC also found that a phase-in would delay the capacity market's ability to send more efficient investment price signals to attract

[1] The People of the State of New York and the Public Service Commission of the State of New York (herein, "New York") and Central Hudson Gas & Electric Corp. (herein, "Central Hudson") (collectively, Petitioners) filed separate petitions for mandamus and stay. For simplicity, because both petitions raise similar issues, we will address them together.

and maintain sufficient capacity to meet local demand. This Court should defer to FERC's determination that delayed implementation would impact reliability and would not be in the public interest.

Additionally, Petitioners fail to meet this Court's stringent standards for obtaining the extraordinary remedy of a stay. The claimed injury – higher capacity prices in the short-term – is purely economic and entirely redressible. This is reason enough for the Court to deny the petitions. Further, the new capacity zone has been in operation for over a month. Because Petitioners seek to change the status quo, they must show a "clear" or "substantial" likelihood of success on the merits – a very high standard applied to mandatory injunctions. Finally, the public interest weighs against disruption of ongoing market operations, thereby distorting the investment price signals the Commission found necessary to attract and maintain sufficient capacity to meet local demand.

Petitioners' requests for a writ of mandamus directing the agency to issue rehearing orders and act on a recently filed stay motion are now moot. The Commission today issued merits orders denying, in relevant part, Petitioners' requests for rehearing. *See N.Y. Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,152 (2014) ("Zone Reh'g Order," attached hereto); *N.Y. Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,148 (2014) ("Demand Curve Reh'g Order," attached hereto).

BACKGROUND

This case involves the regional energy capacity market[2] administered by the New York Independent System Operator, Inc. ("New York Operator") and overseen by the Commission. Section 201(b) of the Federal Power Act ("FPA") confers upon the Commission jurisdiction over all rates, terms and conditions for electric transmission service by public utilities in interstate commerce and for sales of electric energy at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b); *see generally New York v. FERC*, 535 U.S. 1 (2002). Under section 205 of the FPA, the Commission must assure that jurisdictional rates and services are just and reasonable and not unduly discriminatory. 16 U.S.C. §§ 824d(a)-(b).

In furtherance of its statutory responsibilities, the Commission has encouraged competition and reliability improvements in the wholesale market for electric power through the creation of regional transmission organizations. *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These independent regional entities operate (but do not own) the transmission grid and provide access for all "at rates established in a single,

[2] "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010).

unbundled, grid-wide tariff." *NRG Power Mktg*, 558 U.S. at 168 (explaining responsibilities of an independent system operator).

The New York Operator is an independent, regional, non-profit transmission operator. *Simon v. KeySpan Corp.*, 694 F.3d 196, 199 n.2 (2d Cir. 2012) (describing the New York Operator). The New York Operator is required to ensure that an adequate supply of electric generation capacity is available to meet projected need, taking into account reliability contingencies. The New York Operator determines what capacity is needed throughout its footprint (all of New York State), but also sets location-specific capacity requirements in areas where transmission lines are constrained. Historically, the New York Operator controlled three zones: (1) New York City; (2) Long Island; and (3) the Rest-of-State. *N.Y. Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126, at P 2 (2013) ("Zone Order").[3] At issue here is the New York Operator's creation of a new (fourth) capacity zone in the lower Hudson Valley with an accompanying location-specific capacity requirement.

The decision to create a new capacity zone is based on a specific formula in the New York Operator's FERC-approved tariff. *Id*. P 3 (citing *N.Y. Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,165 (2011) (accepting in part formula governing evaluation and potential creation of new capacity zones), and *N.Y. Indep. Sys.*

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[3] "P" refers to the internal paragraph number within a FERC order.

Operator, Inc., 140 FERC ¶ 61,160 (2012) (accepting tariff revisions implementing formula)). In accordance with the tariff formula, if a new capacity zone study identifies a transmission constrained area, the New York Operator must file tariff revisions to establish the new capacity zone and the supporting study.

As relevant here, a new capacity study determined that creation of the zone at issue here was necessary "to send more efficient price signals, enhance reliability, mitigate potential transmission security issues, and serve the long-term interest of all consumers in New York State." Zone Order P 6. FERC found that the New York Operator properly identified a constrained area and approved the establishment of the new capacity zone. *Id*. PP 1, 20.

In accordance with its tariff, the New York Operator also filed demand curves[4] for the new capacity zone approved in the Zone Order for the 2014/2015, 2015/2016, and 2016/2017 capability years. *N.Y. Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043, at P 1 (2014) ("Demand Curve Order"). The New York Operator proposed to phase-in the new demand curve parameters for the new capacity zone and sought waivers of its tariff in order to do so. *See N.Y. Indep. Sys. Operator, Inc.*, Application at 43, FERC Docket No. ER14-500-000 (Nov. 27, 2013). The Commission accepted the New York Operator's demand curve but rejected its

[4] "Utilizing administratively determined 'demand curves' the [New York Operator] holds monthly auctions to set the price of [] capacity" in each of the New York capacity zones. *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013) (describing the New York Operator's monthly capacity auctions).

request for waiver to phase-in the impacts of the changes. Demand Curve Order PP 162-65.

On May 27, 2014, the Commission denied rehearing, in relevant part, of the Zone Order and Demand Curve Order. *See* Zone Reh'g Order P 1; Demand Curve Reh'g Order P 1. The Commission also denied Central Hudson's April 30, 2014 request for a stay of the capacity auctions for the new capacity zone. Demand Curve Reh'g Order P 5, n.7.

ARGUMENT

I. The Requests For Mandamus Are Moot

Today, the Commission issued orders on rehearing rendering Petitioners' requests for mandamus moot. If Petitioners remain aggrieved by the Commission's recent orders, they can petition for review in the normal course of appellate review. *See* 16 U.S.C. § 825*l* (judicial review under the Federal Power Act).

II. Petitioners Have Not Justified The Extraordinary Remedy Of Stay

An injunction is an extraordinary remedy never awarded as a right. *See UBS Fin. Servs. v. W. Va. Univ. Hosps. Inc.*, 660 F.3d 643 (2d Cir. 2011); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006). *See also Munaf v. Geren,* 553 U.S. 674, 691 (2008) (A stay pending appeal "is an extraordinary and drastic remedy; it is never awarded as of right"). In order to obtain such extraordinary relief, Petitioners must establish: (1) a strong showing that they are likely to succeed on the merits of their appeal; (2) that, without such relief, they will be irreparably injured; (3) the lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *In re World Trade Ctr. Disaster Site Litig. v. City of New York*, 503 F.3d 167, 170 (2d Cir. 2007); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). "The courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008).

Where, as here, the movant seeks to alter the *status quo* instead of preserving it, the already "heavy burden of persuasion . . . becomes even heavier." *Union Cosmetic Castle, Inc. v. Amorepacific Cosmetics USA, Inc.*, 454 F.Supp.2d 62, 68 (E.D.N.Y. 2006) (citing *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004)).

A. The Alleged Economic Harm Is Neither Certain Nor Irreparable

Petitioner must demonstrate "an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of money damages." *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (quoting *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995)). "Irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction.'" *Id*. at 233-34 (quoting *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)). *See also Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (harm must be "both certain and great; it must be actual and not theoretical").

Petitioners' own admissions reveal that their injury is purely economic and not irreparable. New York Mot. at 29 ("FERC will *probably* exercise its *discretion* to refuse to order refunds." (emphasis added)); Central Hudson Mot. at 33 ("Given FERC's discretionary authority to order refunds . . ."). "It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wis. Gas Co.*, 785 F.2d at 674 (rejecting possibility of loss of supply of natural gas, or risk of increased costs of obtaining gas supply, as harm to support stay).

Petitioners argue that a stay is necessary because the Commission has a policy against granting refunds. New York Mot. at 29; Central Hudson Mot. at 21-24. Yet Petitioners also concede that the Commission has remedial discretion here to do so. Petitioners cite to Commission policy against granting refunds where it would require re-running the market. Central Hudson Mot. at 21-22. Although the Commission is reluctant to order refunds where doing so would involve re-running markets, the Commission nevertheless is not barred from ordering refunds and has granted refunds to remedy harm to consumers. *See, e.g., Mirant Americas Energy Mktg., Inc. v. ISO New England, Inc.*, 120 FERC ¶ 61,264 (2007). As FERC has explained, in fashioning a remedy, the Commission balances the "complication and cost of resetting the market and the uncertainty such action could create for market participants against the benefit, if any, to be gained by such endeavor." *Cal. Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,271, at P 24 (2007). Additionally, the Court has "unquestioned power to direct FERC's exercise of such authority in connection with [] disposition of the appeal." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (citing, *e.g.*, *Tenn. Valley Mun. Gas Assoc. v. FPC*, 470 F.2d 446, 453 (D.C. Cir. 1972)).

New York also argues that granting refunds at a later date "would be very difficult" (New York Mot. at 2, 4, 8, 10, 30), a claim undermined by New York's own affidavit calculating alleged harm. New York Mot. at 28 (the new capacity zone "has increased prices in the lower Hudson Valley by approximately $280 million per year"); *see also* Evans Aff. ¶ 16 (estimating the impact to consumers resulting from the new capacity zone as $158 million between May and October 2014). This case is indistinguishable from *Reynolds Metals Co.*, where the court rejected claims of irreparable harm based on the possibility that FERC would not order refunds or that without a stay "the passage of time without a refund obligation . . . may eventually render more difficult the imposition of a refund obligation later." 777 F.2d at 763. There, the court required a showing that the passage of time "will be likely to make refund *impossible*" in order for there to be irreparable harm. *Id*. (emphasis added); *see also Wis. Gas Co.*, 758 F.2d at 674 ("something merely feared as liable to occur at some indefinite time" inadequate basis for stay) (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)). Although it is not an easy process, Petitioners do not claim calculating refunds would be impossible, and the fact that the Commission has ordered refunds under similar circumstances in the past shows that it is not "impossible." *See, e.g., Mirant Americas*, 120 FERC ¶ 61,264.

Petitioners' alleged harm – short-term capacity price increases – reflects their myopic view. By arguing that they get "no benefit" (New York Mot. at 2, 6, 10; *see also* Central Hudson Mot. at 34) from the increased costs, they completely ignore the recent proposals to repower facilities as a direct result of the new capacity zone. *See* Zone Reh'g Order P 20, n.30 & n.31 (observing that as a result of the new capacity zone, repowering proposals have been submitted). Additionally, the Commission noted that, to the extent the new price signals provide the incentive for new generation capacity and new transmission lines and those resources materialize, capacity prices should decrease. *See id*. PP 17, 19.

Where, as here, the movant fails to demonstrate that it will suffer irreparable injury absent a stay, the motion should be denied. *Wis. Gas. Co.*, 758 F.2d at 676. Even if the Court finds an irreparable injury, a stay is not a matter of right; rather, the injury must be balanced against the other stay factors. *See Nken v. Holder*, 556

U.S. 418, 427 (2009) (a stay is an exercise of judicial discretion dependent upon the circumstances of the particular case). Here, the Commission carefully balanced the new capacity zone's significant public benefits (reliability and efficient price signals for development of new capacity) against the potential negative impacts (higher prices in the short-term), and determined that the creation of a new capacity zone was consistent with the tariff and would result in just and reasonable prices.

B. Petitioners Have Not Shown A Substantial Likelihood Of Success On The Merits

The Commission orders reflect a careful balancing of all interests over a series of orders and years. *See* Zone Order PP 3, 31, 33 (explaining procedural history and how stakeholder discussions on the need for a new capacity zone have been ongoing over several years, thereby providing notice to stakeholders). Congress entrusted FERC with the policy decisions at the heart of this dispute (essentially a balance of reliability and competitive solutions to meet electricity demand versus short-term rate impacts to consumers). FERC's balance should not be lightly upset by a reviewing court – certainly not prior to full briefing on the merits. *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. at 532 (reviewing court must "afford great deference to the Commission in its rate decisions").

Courts afford the Commission great deference on ratemaking decisions because of the multiple, and sometimes conflicting, policy considerations inherent in those judgments. *See Cal. Pub. Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("issues of rate design are fairly technical and . . . involve policy judgments that lie at the core of the regulatory mission"). "[T]he F[ederal] P[ower] A[ct] has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity.'" *Consol. Edison Co. of N.Y. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (on review of New York capacity orders) (quoting *Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984)); *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (in ratemaking, Commission expected to "balance . . . the investor and the consumer interests") (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)).

As mentioned *supra* p. 7, Petitioners do not seek to maintain the status quo, but to impose a mandatory injunction on the current operation of the markets pending judicial review. Under these circumstances, Petitioners must demonstrate an even higher likelihood of success on the merits than in cases seeking to preserve the status quo. *See Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (characterizing the standard for mandatory injunction as "the more rigorous standard of 'clear' or 'substantial' likelihood on the merits"). Given the

Commission's careful balancing, Petitioners fail to demonstrate a likelihood, much less a substantial likelihood, of success on the merits.

i. The Commission's Determinations Carefully Balance All Interests And Are Based On Substantial Record Evidence

In assessing justness and reasonableness of rates, "courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capacity markets and the consumer interest in being charged non-exploitative rates." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987) (*en banc*). Here, Petitioners argue that the Commission's orders are arbitrary and capricious because they "fail[] to offer a reasoned explanation" for the "windfall" to existing generators and "corresponding adverse impacts upon consumers." New York Mot. at 21; *see also* Central Hudson Mot. at 34. Petitioners argue that FERC's orders are "conclusory" and based on an "absence of evidence and reasoned explanation." New York Mot. at 22.

That Petitioners are not satisfied with the Commission's ultimate decision, where the Commission struck a balance between lower rates in the short term, and system reliability and efficient market operation in the long-term, hardly means that the Commission was inattentive to the parties' arguments or, generally, its public interest responsibilities. The orders painstakingly explain why immediate price signals are needed (Zone Reh'g Order PP 14-16; Demand Curve Reh'g Order

PP 60-61); why impacts to consumers could be worse under a capacity shortage situation, and that prices should decrease as the market responds to demand (Zone Reh'g Order P 17, 19; Demand Curve Reh'g Order P 62, 64); the reliability risks underlying the need for the new zone (Zone Reh'g Order PP 16-17; Demand Curve Reh'g Order PP 61-62); and the impact of new transmission proposals (Zone Reh'g Order P 18; Demand Curve Reh'g Order P 63).

Under the highly deferential arbitrary and capricious standard, the court will affirm the Commission's orders if FERC has "articulated a 'rational connection between the facts found and the choice made." *TC Ravenswood, LLC*, 741 F.3d at 118 (rejecting challenges to FERC-approved demand curves) (quoting *KeySpan–Ravenswood, LLC v. FERC*, 474 F.3d 804, 809 (D.C. Cir. 2007) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Because substantial evidence is more than a scintilla, but something less than a preponderance of the evidence, the possibility that different conclusions may be drawn from the same evidence does not render the Commission's conclusions unreasonable. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008); *see also Allegheny Elec. Coop. Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990) (FERC's findings of facts, if supported by substantial evidence, are conclusive). Where the evidence might support more than one rational interpretation, "the question [the Court] must answer . . . is not whether record evidence supports [the petitioner's] version of events, but whether it supports FERC's." *Cogeneration Ass'n v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citations omitted). Although Petitioners might have balanced these competing considerations differently, it is the Commission – not Petitioners – that has the responsibility to perform that balancing and make those policy determinations.

ii. The Commission Appropriately Rejected New York Operator's Proposal To Phase-In The New Capacity Zone

Petitioners argue that the Commission erred as a matter of law by rejecting the New York Operator's proposed phase-in without finding that the New York Operator's proposal is not just and reasonable. New York Mot. at 26; Central Hudson Mot. at 29. Petitioners misconstrue the procedural posture of the Commission's actions. The Commission acted within its considerable discretion to reject the New York Operator's request for waiver of its tariff, which would have been required in order to phase-in (or discount) the demand curves. Demand Curve Reh'g Order P 65.

As the Commission explained, "[i]t is the discretion of the Commission to grant a waiver from the directives of the [] Tariff if the Commission finds that waiver is necessary." *Id*. Here, however, the Commission found that a waiver to allow the phase-in "would not appropriately address the long standing problem of artificially suppressed prices in the Lower Hudson Valley" and that "delayed price signals could result in a continuation of the transmission constraint and a lack of incentive for a competitive solution." *Id*. Deference is due to the Commission on its denial of a tariff waiver, which results in holding parties to the terms and conditions of the filed tariff, and the Commission's sound reasoning for such denial is clearly explained in the orders. *See NStar Elec. & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007) (holding review of FERC waiver decisions is "quite limited") (quoting *City of Girard v. FERC*, 790 F.2d 919, 925 (D.C. Cir.1986)).

iii. The Commission Appropriately Denied Central Hudson's Methodology Arguments

Central Hudson questions whether the new capacity zone should have been created in the first instance, focusing its arguments on whether the New York Operator properly calculated "Indicative Locational Capacity Requirements."[5] *See* Central Hudson Mot. at 8-12, 25-28. Notwithstanding that section 5.14.1.2 of the New York Operator's tariff provides that the Indicative Locational Capacity Requirements calculation "is used solely for establishing an ICAP Demand Curve" (Zone Reh'g Order P 27), Central Hudson argues that FERC should have considered the Indicative Locational Capacity Requirement in its analysis of the need for the new zone. Central Hudson argues that the Commission misinterpreted

[5] Section 2.9 of the Transmission Operator's tariff defines "Indicative [New Capacity Zone] Locational Minimum Installed Capacity Requirement" or "Indicative Locational Capacity Requirement" as "[t]he amount of capacity that must be electrically located within a New Capacity Zone, or possess an approved Unforced Capacity Deliverability Right, in order to ensure that sufficient Energy and Capacity are available in that [New Capacity Zone] and that appropriate reliability criteria are met." *See* Zone Order P 4, n.9.

the tariff to exclude it (Central Hudson Mot. at 25), changed its interpretation of the tariff by excluding it (Central Hudson Mot. at 26), or should have rejected the tariff as unjust and unreasonable without considering it (Central Hudson Mot. at 27-28). All of Central Hudson's arguments are an attempt to undermine the creation of a new capacity zone that had been anticipated for years. *See* Zone Order P 31, Zone Reh'g Order P 19. To interpret the plain language of the tariff in a way that would not require the formation of this long-expected (and needed) zone would defy logic. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1077 (D.C. Cir. 1987) (citing *Alabama Power Co. v. FERC*, 685 F.2d 1311, 1316-17 (11th Cir. 1982) (noting that it would be appropriate to reject a statutory interpretation that would lead to "absurd results")).

Further, the Commission found that Central Hudson's arguments are beyond the scope of the proceeding. Zone Order PP 66-67; Zone Reh'g Order P 27. The Commission explained that the New York Operator was not "proposing to change its methodology for calculating Locational Capacity Requirements in this proceeding and that the Indicative Locational Capacity Requirement for the new capacity zone is not used to determine whether a new capacity zone should be created or to establish the new capacity zone boundary." Zone Reh'g Order P 27.

Additionally, the Commission explained that, consistent with precedent, the Commission does not consider price impact a factor in whether to create a new capacity zone. Zone Reh'g Order P 27 (citing *New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,165 at P 63). Accordingly, for purposes of this proceeding, "the Commission does not need to determine whether [the New York Operator's] method for calculating the Indicative Locational Capacity Requirement is appropriate." *Id*.

The Commission's interpretation of what the New York Operator's tariff requires is supported by substantial evidence (consistent with expected outcomes) and due substantial deference. *Idaho Power Co. v. FERC*, 312 F.3d 454, 461 (D.C. Cir. 2002) ("In general, this court "gives substantial deference to [FERC's] interpretation of filed tariffs, 'even where the issue simply involves the proper construction of language.'" (quoting *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (citations omitted)).

C. The Public Interest Does Not Favor A Stay And Would Cause Irreparable Harm To Other Parties

The Federal Power Act charges FERC with regulating wholesale energy markets in the public interest. 16 U.SC. § 824(a). Because the Commission is the "presumptive guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a request for stay pending appeal. *N. Atl. Westbound Freight Ass'n v. Fed. Mar. Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968). Although there are public interest considerations on both sides of this complicated issue, this Court should defer to FERC's view on the balance of those interests. *See Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (FERC "must be given the latitude to balance the competing considerations and decide on the best resolution").

The extensive agency record shows the complicated reliability issue at the crux of FERC's policy decision. Contrary to Petitioners' assertions that incumbent generators are receiving a "windfall" and that granting a stay will not affect investment decisions because new generation facilities take years to develop, the orders reveal that at least two facilities have begun to restore generation units to operational status in reliance on the new capacity zone. Zone Reh'g Order P 17; Demand Curve Reh'g Order P 62. A stay could halt the development of these shorter-term supply responses to meet capacity needs. Moreover, in light of possible capacity shortages, a stay could have substantial negative impacts on the public interest. (Zone Reh'g Order P 17; Demand Curve Reh'g Order P 62 (citing NYISO Summer Capacity Assessment anticipating a 1,431 megawatt shortage in summer, 2014, under extreme weather conditions)). As the Commission notes, "[f]ortunately, consumers have not seen a situation in which their energy needs have not been met due to a capacity reserve shortage." Zone Reh'g Order P 17; Demand Curve Reh'g Order P 62. If summer is particularly hot and electricity supply is limited due to unexpected maintenance or transmission outages, the economic loss (or worse, human loss) could far exceed the costs to consumers as a result of creation of the new capacity zone.

Finally, the New York Operator has already implemented the market changes directed in the Commission orders. Petitioners seek to change the status quo from current market operation to that in effect two months ago. As a practical matter, a stay would be needlessly disruptive, especially in light of the Commission's likelihood of success on the merits and the ability to take any remedial action upon appellate review.

CONCLUSION

For the foregoing reasons, the Petitioners' petitions for a writ of mandamus and motions for stay should be denied.

Respectfully submitted,

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