**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| **New York Independent System Operator, Inc.** | **)** | **Docket No. ER21-502-000** |

**REQUEST FOR REHEARING OF**
**INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.**

Pursuant to Section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[2] Independent Power Producers of New York, Inc. ("IPPNY") hereby respectfully requests rehearing of a limited aspect of the Commission's April 9, 2021 order in the above-captioned docket.[3] In its April 9 Order, the Commission accepted, in part, subject to one condition, proposed revisions filed by the New York Independent System Operator, Inc. ("NYISO") to its Market Administration and Control Area Services Tariff ("Services Tariff"), which defined the demand curves in the Installed Capacity ("ICAP") Market for the 2021/2022 Capability Year and proposed inputs and parameters for conducting the annual updates to determine the ICAP Demand Curves for the 2022/2023, 2023/2024, and 2024/2025 Capability Years.[4] The Commission rejected the NYISO's proposal, which was supported by its expert independent consultant, the Analysis Group, Inc. ("AG"), to reduce the assumed 20-year economic lifespan of a fossil-fueled peaking unit in accordance with New York's requirement that the power sector be

[1] 16 U.S.C. § 825*l* (2018).

[2] 18 C.F.R. § 385.713 (2020).

[3] *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,012 (2021) ("April 9 Order").

[4] Docket No. ER21-502-000, *N.Y. Indep. Sys. Operator, Inc.*, 2021-2025 ICAP Demand Curve Reset ("DCR") Proposal (Nov. 30, 2020) ("NYISO Filing").

emission free beginning in the year 2040 and ordered the NYISO "to submit a compliance filing reverting to the previously approved 20-year amortization period."[5]

The Commission's ruling that the amortization period should be set at 20 years was arbitrary and capricious, not the product of reasoned decision making, and contrary to law. Specifically, in light of the evidence offered in the NYISO Filing as further supported by evidence that IPPNY offered in its comments demonstrating the reasonableness of NYISO's proposed 17-year amortization, at least relative to any longer amortization period, the Commission erred to accord adequate weight to this evidence and unlawfully substituted its preferred amortization period without making the predicate finding that NYISO's proposal was unjust and unreasonable required by Section 205 of the FPA.[6] The Commission's ruling was also arbitrary and capricious in that it disregarded IPPNY's demonstration that a 15-year amortization period is the reasonable approximation of the time over which a developer can expect to recover its capital costs of a new peaking unit responding to the reference point prices for the 2021-2025 Demand Curves. The Commission should grant rehearing and order the NYISO to set the amortization period used to calculate the demand curves at 15 years or, at most, 17 years as proposed by the NYISO if the Commission does not grant IPPNY's rehearing request for a 15-year period.

For the reasons demonstrated herein, the Commission should act expeditiously to grant rehearing of this aspect of its April 9 Order to ensure a just and reasonable rate is in place for the capacity auctions to be held for as much of the 2021-2022 Capability Year as possible.

[5] April 9 Order at P 161.

[6] 16 U.S.C. § 824d.

## I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[7] IPPNY hereby identifies the issues on which it seeks rehearing of the April 9 Order and provides representative precedent in support of its position on such issues:

1. The Commission erred in arbitrarily and capriciously rejecting the NYISO's reasoned determination that, given the absence of eligibility rules at present to permit a fossil-fired generator to operate as a zero-emission resource beginning in 2040 in compliance with the requirements of New York State's Climate Leadership and Community Protection Act ("Climate Act"), the amortization period should represent a period over which a merchant investor would expect to recover its upfront capital costs to develop a new peaking plant in New York. *See, e.g.*, *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *N.Y. Indep. Sys. Operator, Inc*, 158 FERC ¶ 61,028, at P 61 (2017); *see also N.Y. Indep. Sys. Operator, Inc*, 146 FERC ¶ 61,043, at P 74; *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); *see also City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981).

2. The April 9 Order was contrary to law. The Commission improperly substituted its preferred 20-year amortization period for the 17-year amortization period proposed by the NYISO without finding the NYISO's proposal to be unjust and unreasonable in violation of Section 205 of the FPA,[8] which requires the Commission to accept a rate that is just and reasonable, regardless of the merits of alternative rates. *See, e.g.*, *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ("*Atlantic City*"); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) ("*Oxy*"); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) ("*Bethany*"); *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) ("*Winnfield*").

3. The Commission erred in arbitrarily and capriciously rejecting IPPNY's demonstration that a 15-year amortization period is the appropriate approximation of the amount of time a merchant investor of a new peaking unit responding to the reference point prices for the 2021-2025 Demand Curves can expect to recover its capital costs. Accordingly, a decision to adopt an amortization period longer than 15-years does not reflect reasoned decision-making and is not supported by substantial record evidence. *See, e.g.*, *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 52 (1983) ("*State Farm*"); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004).

[7] 18 C.F.R. § 385.713(c)(2).

[8] 16 U.S.C. § 824d.

4. In requiring the NYISO to adopt a 20-year amortization period, rather than the 17-year amortization period proposed by the NYISO or the 15-year amortization period advocated by IPPNY, the Commission departed, without explanation, from its own precedent, which, as acknowledged in the April 9 Order, requires that the demand curve reset process "take into account currently effective laws and regulations and avoid speculating about laws and regulations in the future," April 9 Order at P 161 & n.254 (citing precedent), by ignoring the clear requirements of the Climate Act and speculating that such requirements "may be modified," *id.* at P 161. The Commission's failure to acknowledge and explain this departure from precedent renders the April 9 Order arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018) ("*NEPGA*"); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("*West Deptford*"); *Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) ("*Panhandle*").

5. The Commission's holding that it was merely "speculative" that the State of New York would enforce its existing law requiring that "all fossil-fueled resources will cease operation in 2040"—while simultaneously making the speculative assumption that New York might "temporarily suspend or modify" its existing laws in the future—renders the April 9 Order unreasonable, arbitrary, or capricious. *See Fox*, 556 U.S. at 515; *NEPGA*, 881 F.3d at 210-11; *West Deptford*, 766 F.3d at 20; *Panhandle*, 196 F.3d at 1275.

6. In requiring NYISO to adopt a 20-year amortization period, rather than the 17-year amortization period proposed by NYISO or the 15-year amortization period advocated by IPPNY, the Commission failed to provide meaningful responses to arguments and issues raised by the NYISO, IPPNY, and others, including dissenting Commissioners Danly and Chatterjee, which renders its order arbitrary and capricious. *See State Farm*, 463 U.S. at 44; *NEPGA*, 881 F.3d at 210; *American Gas Ass'n v. FERC*, 593 F.3d 14, 21 (D.C. Cir. 2010) ("*AGA*"); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("*NorAm*").

7. The Commission's requirement that the NYISO adopt a 20-year amortization, rather than the 17-year amortization period proposed by the NYISO or the 15-year amortization period advocated by IPPNY, was not supported by substantial evidence and was, in fact, contradicted by the substantial evidence in the record. *See* 16 U.S.C. § 825*l*(b) (2018). *See also, e.g.*, *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311 (D.C. Cir. 2018) ("*Genuine Parts*"); *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 352 (D.C. Cir. 2014) ("*FirstEnergy*"); *Tenneco Gas v. FERC*, 969 F2d 1187, 1214 (D.C. Cir. 1992) ("*Tenneco*"); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 586 n.31 (D.C. Cir. 1978) ("*Columbia*").

## II. REQUEST FOR REHEARING

### A. The Commission Wrongly Rejected the NYISO's Proposal to Reduce the Amortization Period Due to New York State Law Mandating the Electric Sector Be Zero Carbon Emitting by 2040 .

In its April 9 Order, the Commission rejected IPPNY's request that the Commission direct the NYISO to adopt a 15-year amortization period,[9] rejected the NYISO's proposed 17-year amortization period,[10] and directed the NYISO to submit a compliance filing adopting a 20-year amortization period.[11] The amortization period is a core element in the calculation of the ICAP reference point price. Pursuant to the Services Tariff, the DCR determines "the current localized levelized embedded cost of a peaking plant" for each ICAP Demand Curve, which requires that the estimated up-front capital investment costs for each peaking plant, including property tax and insurance, be translated into an annualized level.[12] Among other factors, this translation requires defining the term in years over which the developer is assumed to recover its up-front investment costs, *i.e*. the "amortization period."

As established by the NYISO's consultant, AG, the selection of financial assumptions underlying the amortization period "should capture industry expectations of costs, and reflect project-specific risks, including development risks and risks to future cash flows for a merchant developer, based on investor expectations over the life of the project."[13] The amortization period is an attempt to balance risks over the physical life of a plant, and if that balancing leads to a

[9] April 9 Order at P 162.

[10] *Id*. at P 161.

[11] *Id.*

[12] NYISO Services Tariff § 5.14.1.2.2.

[13] NYISO Filing, Attachment III AG Affidavit and Exhibits, Exhibit E: Independent Consultant Study to Establish New York ICAP Demand Curve Parameters for the 2021/2022 through 2024/2025 Capability Years – Final Report ("Consultant's Final Report") at 60.

long-term outlook for revenues that is less than assumed in the current analysis or captured in annual updates, investors would tend to under recover total costs.[14] If investors do not believe they will recover their total investment, they will not invest in generation in New York.

Accordingly, the NYISO proposed a 17-year amortization period in recognition of the mandate in New York's Climate Act that the electric power sector in New York State must be zero carbon emitting by 2040.[15] The NYISO's proposed reduction to the amortization period from 20 years to 17 reflects the risks associated with the merchant development of a peaking plant in the NYISO market context and the return required by investors to compensate for those risks.[16] The NYISO decided on a 17-year amortization period because it represents the average period of years between the beginning of each Capability Year encompassed by the 2021-2025 DCR and the January 1, 2040 zero-emission deadline established in the Climate Act.[17]

The Commission rejected the NYISO's proposed 17-year amortization period because it believed the NYISO's basis supporting it was speculative.[18] Claiming that the ICAP DCR process must consider currently effective laws and regulations and avoid speculating about laws and regulations in the future, the Commission concluded that the NYISO failed to consider that the Climate Act does not require that power generators retire to satisfy the 2040 zero-emission requirements.[19]

[14] *Id.* at 61.

[15] *See* NYISO Filing at 51; *see also* Climate Leadership and Community Protection Act, 2019 N.Y. Sess. Laws Ch. 106 (McKinney).

[16] *Id.*

[17] *Id.*

[18] April 9 Order at P 161.

[19] *Id.*

The Commission's reasoning is unsound and unsupported. First, the NYISO did, in fact, consider the possibility of future changes in law and did not simply assume that all existing fossil fired generation will cease operation as of January 1, 2040,"[20] but concluded that relying on potential changes would require impermissible speculation. In particular, the NYISO appropriately recognized that:

> Given the absence of eligibility rules at present, assuming fuel conversion options, retrofits, or other modifications to permit a fossil-fired generator, such as the peaking plants proposed herein, to operate as a zero-emission resource beginning in 2040 would require the NYISO to speculate what may in the future be defined as compliant with the requirements of the Climate Act. Reliance on such speculation would directly contradict the Commission's prior mandates regarding allowable considerations during each DCR.[21]

Thus, the NYISO considered the possibility of future laws, regulations, and changes to the Climate Act which might allow fossil-fueled generators to continue operation beyond 2040 but appropriately declined to set the amortization period based on such speculative changes.

The Climate Act provides that the Climate Action Council will approve a scoping plan, which, at a minimum, will include "[m]easures to reduce emissions from the electricity sector by displacing fossil-fuel fired electricity with renewable electricity or energy efficiency."[22] Indeed, the Power Generation Advisory Panel of the Climate Action Council plans to recommend a moratorium on new natural gas plants with the full council this May.[23] It is not speculation to conclude that an H class frame gas or dual fuel peaker plant is the exact type of fossil-fuel fired electricity that the Climate Act seeks to displace by 2040. That is the plain upshot of the law, as

[20] NYISO Filing at 52.

[21] *Id.*

[22] N.Y. Env't Conserv. Law § 75-103(13)(b) (McKinny).

[23] *See* Rick Karlin, *Activists say moratorium on new gas project is needed*, Times Union (Apr. 12, 2021), *available at* https://www.timesunion.com/business/article/Activists-say-moratorium-on-new-gas-project-is-16094733.php.

it is expressly written. By contrast, it is pure speculation to base a determination on the proposition that existing law may later *change*.

As set forth in the Administrative Procedure Act,[24] the Commission is required to render all of its decisions in accordance with reasoned decision-making and articulate a satisfactory explanation for its decision, including a "rational connection between the facts found and the choice made."[25] The Commission cannot exercise its powers "based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence."[26] Further, the Courts have found that where an agency departs from established precedent, reasoned decision-making require that it acknowledge and explain such departure.[27]

The Commission's rejection of the NYISO's 17-year amortization period itself rests not on substantial evidence, as reasoned decision-making and the FPA require,[28] but on rank speculation and also represents an unexplained—and unacknowledged— departure from its own precedent. The Commission faulted the NYISO's proposal for failing to recognize that the Climate Act's requirements "may be modified, as necessary, to allow fossil-fueled resources to remain in service beyond 2040 as a means of ensuring system reliability."[29] On one hand, the

[24] 5 U.S.C. § 551, *et seq*.

[25] *State Farm*, 463 U.S. at 52 , citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner.").

[26] *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010). *See also NEPGA*, 881 F.3d at 212 (emphasizing that "FERC's complex mandate doesn't relieve it of the requirements of reasoned decisionmaking" (citation omitted)).

[27] *See Fox*, 556 U.S. at 515 (stating that an agency departing precedent must "display an awareness that it *is* changing position" and "must show that there are good reasons for the new policy"). *See also, e.g., NEPGA*, 881 F.3d at 210-11; *West Deptford*, 766 F.3d at 20; *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Panhandle*, 196 F.3d at 1275.

[28] *See* 16 U.S.C. § 825*l*(b) (2018). *See also, e.g., FirstEnergy*, 758 F.3d at 352 (stating that "[t]he Commission's factual findings will be upheld if supported by substantial evidence"); *Columbia*, 628 F.2d at 586 n.31 (citing the analogous provision of the Natural Gas Act and stating that "the Commission must demonstrate that its finding is supported by substantial evidence").

[29] April 9 Order at P 161 (citing N.Y. Pub. Serv. Law § 66-p).

Commission found the NYISO's assumption that New York will enforce the Climate Act's codified objectives, as written, is speculative. On the other hand, the Commission speculates that the State will fail to meet the Climate Act's objectives, and then further speculates that potential new entrants will make a similar assumption that sometime between now and 18 years and 8 months from now the Climate Act will be modified to allow fossil-fueled resources to remain in service to maintain reliability,[30] despite the now effective law mandating that the generation of electricity be zero-emissions by 2040. Other than its own speculation, the Commission offered no evidence, much less substantial evidence, for its conclusion. Further, the Commission's decision places the untenable risk on investors in a proxy peaking plant developed to meet a reliability need during this DCR period that such facility will continue to be needed for reliability beyond 2040. Even assuming the Climate Act allows fossil-fueled resources to remain operating beyond 2040 for reliability, it is entirely speculative to assume that the proxy peaking plant entering commercial operation in the current DCR period will be deemed needed to maintain reliability beyond 2040.[31]

As the Commission acknowledges immediately before speculating about ways in which the Climate Act "may be modified" between now and January 1, 2040, its precedent requires that

[30] *Id.* (emphasis added).

[31] The Commission's holding does not rely on claims by the NYISO's Market Monitoring Unit ("MMU") that fossil-fueled resources may be retrofitted to continue operating beyond 2040, but does vaguely refer to the MMU's assertions that "the [Climate Act] does not require that power generators retire in order to satisfy the 2040 zero-emission requirement." April 9 Order at P 161. In any event, such claims are, like the assumption that the Climate Act will be modified, entirely speculative. *See, e.g.*, April 9 Order at P 151 (noting NYISO's statement that "New York State has not yet implemented rules or regulations to specifically define . . . retrofitting options eligible for compliance with the 2040 zero-emission requirement"); *id.* at P 160 (noting IPPNY's argument that "it is too uncertain for potential developers to reasonably estimate whether . . . future ICAP Demand Curve Resets will provide enough additional revenues for such technologies to effectively retrofit the peaking facility technology proposed in this proceeding"); *id.*, Danly Dissent at P 4 ("Retrofits are expensive, and it is obviously speculative to assume at this point that an H class frame will be able to extend its life 18 years from now by switching from burning natural gas to burning some zero-emissions fuel at a cost that would permit it to remain in service."). Reliance on such claims would, therefore, have been arbitrary and capricious as, among other things, an unacknowledged and unexplained departure from precedent.

the demand curve reset process "take into account currently effective laws and regulations and avoid speculating about laws and regulations in the future."[32] Specifically, in two orders cited in the April 9 Order, the Commission refused to accept speculation about actions that other regulators might take at some point in the future.[33] In the 2014 DCR Order, protesters to the NYISO's DCR filing argued that the NYISO failed to consider potential upcoming state and federal regulations which would have an impact on the economic viability of a new unit.[34] The Commission rejected the protesters argument on the basis that "[w]hile there is always a risk that regulations will change in the future, we cannot base the finding of viability on speculation that the [Environmental Protection Agency] or New York State regulators will act at some point in the future."[35] Similarly, in the 2017 DCR Order, the Commission rejected the NYISO's conclusion that the representative peaking plant design should include selective catalytic reduction ("SCR") emissions controls because the New York State Board on Electric Generation Siting and the Environment would not likely grant a certificate to a peaking plant without them.[36] The Commission explained that, "the ICAP Demand Curve reset process takes place every four years so that changed circumstances, such as new regulations, can be taken into account."[37] If the Climate Act requirement for a zero-emission energy sector is modified by some yet to be conceived—let alone promulgated and effective—regulation, a future DCR can reflect fossil-fueled generators' ability to operate and recoup their costs beyond 2040.

[32] April 9 Order at P 161 & n.254 (citing precedent).

[33] *N.Y. Indep. Sys. Operator, Inc*, 146 FERC ¶ 61,043, at P 74 ("2014") ("2014 DCR Order"); *see also N.Y. Indep. Sys. Operator, Inc*, 158 FERC ¶ 61,028, at P 61 (2017) ("2017 DCR Order").

[34] 2014 DCR Order at P 65.

[35] *Id*. at 74.

[36] 2017 DCR Order at PP 33–35.

[37] 2017 DCR Order at P 61 (internal quotation marks omitted).

As Commissioner Danly states in his dissent, which Commissioner Chatterjee joined, to the April 9 Order:

> Though no one can predict the future, no one disputes that this is what New York's statute requires. After dismissing the conclusion that New York will enforce its current law as speculative, the majority justifies its rejection of the 17-year amortization period by citing a provision in the same law that permits the New York Public Service Commission to "temporarily" suspend or modify its requirements.[] The majority does not explain why it is speculative to assume that New York will enforce its existing statutes as a basis for setting demand curves today, but it is not speculative to assume that New York will "temporarily suspend or modify" its laws in the future. Regardless, any such "temporary" suspension or modification is not only speculative, but also of indefinite duration and effect and thus not a reasonable basis upon which to reject NYISO's proposal.[38]

The Commission was obligated to respond to Commissioner Danly, but "instead cho[se] to ignore the dissent's concern entirely."[39] More broadly, the Commission failed to grapple with this "important aspect of the problem"[40] or even to acknowledge, much less to explain, this departure from the Commission's own precedent, which renders its decision arbitrary and capricious.[41]

In addition, the Commission based its refusal to reduce the amortization period on the conclusion that it "may result in unnecessarily high" Net Cost of New Entry ("Net CONE")

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[38] April 9 Order, Danly Dissent at P 3.

[39] *AGA*, 593 F.3d at 21.

[40] *State Farm*, 463 U.S. at 44. *See also, e.g., TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) ("It is well established that the Commission must 'respond meaningfully to the arguments raised before it.'" (quoting *Public Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) ("*Kentucky PSC*")); *NorAm*, 148 F.3d at 1165 (reversing order in which the Commission "not only failed to provide an adequate response to petitioner's argument, it failed to take seriously its responsibility to respond at all").

[41] *See, e.g., Fox*, 556 U.S. at 515. *See also, e.g., West Deptford*, 766 F.3d at 20 ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,' . . . and Commission cases are no exception . . . ." (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995))); *Panhandle*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) ("As we have repeatedly reminded FERC, if it wishes to depart from its prior policies, it must explain the reasons for its departure." (citations omitted)).

estimates, which will impact the ICAP Demand Curves.[42] As an initial matter, because ratemaking is "much less a science than an art"[43] and, as Commissioner Danly observed, "no one can predict the future,"[44] the possibility that any particular rate might prove, in hindsight, to have been "unnecessarily" high is present in any rate proceeding, as is the possibility that such rates will prove to have been "unnecessarily" or inappropriately low.[45] But the statutory requirement is that rates be just and reasonable,[46] and the Commission could only lawfully reject NYISO's proposal upon a finding that it was unjust and unreasonable,[47] even if it perceived that proposal to result in rates "unnecessarily" higher than others the Commission thought were more just and reasonable.[48]

Moreover, the Commission does not explain how it reached this conclusion or articulate what facts on which it relied. In fact, as IPPNY demonstrated in this proceeding, compared to the 2020-2021 Demand Curve reference point prices, the NYISO Filing proposes reference point

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[42] April 9 Order at P 161.

[43] *Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

[44] April 9 Order, Danly Dissent at P 3. *See also Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 at P 7 (2021) (Christie, Comm'r, dissenting) (noting Mark Twain's observation that "the art of prophecy is very difficult, especially with respect to the future . . . .").

[45] *See Pennsylvania Office of Consumer Advocate v. FERC*, 131 F.3d 182, 187 (D.C. Cir. 1997) (explaining that rate-setting requires "predictive judgments about the future" and "[t]hat over- or under-collections will occur is an accepted feature of the rate-setting regime" (citing *Associated Gas Distrs. v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (Williams, J., concurring)).

[46] *See* 16 U.S.C. § 824d(a).

[47] *See Atlantic City*, 295 F.3d at 9 (stating that, when the Commission reviews rates under Section 205, "it may reject them only if it finds that the changes proposed by the public utility not 'just and reasonable'"). *See also, e.g., Winnfield v. FERC*, 744 F.2d 871, 876 (explaining that Section 205 of the FPA places the Commission "in an essentially passive and reactive role").

[48] *See Oxy*, 64 F.3d at 692; *Bethany*, 727 F.2d at 1136. Even assuming *arguendo* that it is accurate to characterize NYISO as having proposed a change to the amortization, as the April 9 Order implies in directing that NYISO "revert[] to the previously approved 20-year amortization period," April 9 Order at P 161, the Commission was still bound to accept NYISO's proposed 17-year amortization period unless it was unjust and unreasonable (and to the extent it was, it was because 17 years was too lengthy, not too short, an amortization period). Under Section 205, NYISO was only required to demonstrate that its proposal was just and reasonable, not the existing rate was unjust and unreasonable. *See, e.g., Cities of Campbell v. FERC*, 770 F.2d 1180, 1184-85 (D.C. Cir. 1985) (discussing the differences between Sections 205 and 206 of the FPA).

prices for 2021-2022 that are as much as 20% lower in certain load zones.[49] As recognized in Commissioner Danly's dissent to the April 9 Order, the majority engages in "cherry-picking of one assumption out of the dozens, or hundreds, or thousands, of assumptions built into the NYISO section 205 filing to reset demand curves, many of which reduce the costs used for the Net CONE calculation" and that it "does not address record evidence raised in a protest that focused on the overall rate impact of the proposed demand curves, which is to significantly reduce capacity prices in critical zones."[50] Simply declaring contrary arguments "speculative," particularly where the only justification offered for the Commission's alternative is itself entirely speculative, does not satisfy the requirements of reasoned decision-making, because it is well established that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such evidence without adequate explanation."[51]

Accordingly, the Commission's rationale for rejecting the NYISO's proposal to reduce the amortization period discredits currently effective laws and embraces speculation about modification of laws and regulations in the future. As discussed *supra*, the Commission cannot exercise its powers "based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence."[52] Thus, for the foregoing reasons, the Commission

[49] Docket No. ER21-502-000, *supra*, Protest and Supporting Comments of Independent Power Producers of New York, Inc. (Dec. 21, 2020) ("IPPNY Protest"), at 6.

[50] April 9 Order, Danly Dissent at P 5.

[51] *Genuine Parts*, 890 F.3d at 312. *See also Tenneco*, 969 F.2d at 1214 ("[A] FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence."); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) (holding that the agency may not rely on a "clipped view of the record" to support its conclusion); *International Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986) (setting aside an order where the agency "confined its attention to evidence that supported its conclusion and to have ignored any contrary evidence—an ostrich's approach which administrative agencies are not authorized to follow").

[52] *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010).

should grant rehearing and order the NYISO to adopt an amortization period that appropriately reflects the Climate Act's mandate that the proxy peaking plant must cease operating by 2040.

### B. The Commission Wrongly Declined to Require an Amortization Period Reflecting a Period Where a Developer Could Recover Its Costs.

The April 9 Order also errs by arbitrarily and capriciously rejecting IPPNY's demonstration that a 15-year amortization period is the appropriate approximation of the time over which a developer can expect to recover its capital costs of a new peaking unit responding to the reference point prices for the 2021-2025 Demand Curves. As demonstrated in the IPPNY Protest, the NYISO properly recognized that the Climate Act required a shorter amortization period than the 20-year period used in past demand curves but failed to shorten the amortization period sufficiently.[53] While NYISO moved in the proper direction, its proposed 17-year amortization period was still too lengthy, and the Commission should have conditioned acceptance on the use of a shorter, 15-year amortization period. As discussed *supra*, and in the IPPNY Protest,[54] since the Climate Act has a direct impact on the useful operating life of the reference unit, it is reasonable to assume that the useful operating life of the selected proxy peaking unit will end in 2040. Thus, the NYISO proposed a 17-year amortization period because it represents the average period of years between the beginning of each Capability Year in the 2021-2025 DCR and the Climate Act's January 1, 2040, zero-emission deadline.[55]

The basis for the Commission's rejection of a 15-year amortization period was that the arguments in favor—which in the Commission's view, were based on existing projects in the NYISO's current interconnection queue and suggestions that the amortization period should only

[53] IPPNY Protest at 9.

[54] *Id.*

[55] NYISO Filing at 51.

reflect commercial operation for the 2024-2025 Capability Year—were unpersuasive.[56] The Commission claimed that "IPPNY's proposal ignores that a peaking facility—as a hypothetical facility—could achieve commercial operation in any of the four Capability Years during the 2021-2025 [Demand Curve Reset ("DCR")] period" and that "IPPNY's argument also relies on speculative assumptions about whether and when existing projects in the queue would be built."[57]

The Commission's rationale that a new peaking facility could achieve commercial operation in any of the Capability Years is arbitrary and capricious, and not the result of reasoned decision making, because it incorrectly and unreasonably ignores IPPNY's arguments and the relevant evidence regarding the reality of constructing new peaking facilities in New York.[58] The April 9 Order fails to provide a "rational connection between the facts found and the choice made."[59] IPPNY presented several facts addressing the ability, or lack thereof, of a peaking facility to achieve commercial operation in the four capability years. Currently, there are no new fossil peaking plants similar to the proxy unit under construction at this time.[60] Further, under currently effective laws and regulation, no proxy unit could enter the NYISO's interconnection queue upon approval of the new Demand Curves and reach commercial operation before the second half of the DCR period (2023-2025).[61] IPPNY explained that there are three fossil-fuel based projects in Class Year 2019 ("CY19") which have estimated

[56] April 9 Order at P 162.

[57] *Id.*

[58] *See, e.g.*, *State Farm*, 463 U.S. at 44; *NorAm*, 148 F.3d at 1165; *Kentucky PSC*, 397 F.3d at 1008.

[59] *Id.*, 463 U.S. at 52 (1983), citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner.").

[60] IPPNY Protest at 10.

[61] *Id.*

Commercial Operation Dates ("CODs") of March 2023, February 2024, and February 2022.[62] These dates are almost certainly optimistic. Notably, the developer of the project with a COD of February 2022 rejected its cost allocation and has dropped out of CY19, making its February 2022 COD unachievable.[63] Each Class Year study since 2008 has taken, on average, at least two years for the various study components to be completed, and therefore it is likely that the upcoming Class Year commencing in 2021 will not conclude before sometime in 2022 or 2023.[64]

Assuming, *arguendo*, that the two remaining gas-fired facilities in CY19 achieve their current COD estimates, under what are likely the best-case scenarios and consistent with the NYISO's methodology of proposing a static operating life across the entire four-year DCR period (calculated as the average of the facility's remaining operating life in each year), the average operating life of the two facilities in CY19 is only 16 years.[65] Importantly, this 16-year period also presumes estimated CODs will hold in the face of siting, permitting, construction and other delays that are common for all electric generating projects in New York, but especially fossil fuel plants. For example, the project with an operating date of March 2023 has not received its Certificate of Environmental Compatibility and Public Need pursuant to Article 10 of the New York Public Service Law[66] and is facing opposition from certain local and environmental groups.[67] Moreover, any developer of a fossil-fueled project subsequently

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[62] *Id.*

[63] *Id.* at 10–11.

[64] *Id.* at 11; *see also Class Year Study: Lessons Learned and Discussion Regarding Potential Process Improvements/Redesign*, NYISO (March 6, 2019), available at https://www.nyiso.com/documents/20142/5326027/07_Class%20Year%20Lessons%20Learned_030619%20TPAS_Final.pdf/6ed30de4-4717-a9de-e80c-0710be5c653f.

[65] IPPNY Protest at 11.

[66] *Id.* at 11; *see also* New York Public Service Commission Case 18-F-0325, *Application of Danskammer Energy, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10*.

[67] IPPNY Protest at 11; *see also* Leonard Sparks, *State: Power Plant Project Needs Juice*, The Highlands Current (Sept. 26, 2020), https://highlandscurrent.org/2020/09/26/state-power-plant-project-needs-juice/.

entering a future CY in response to the new reference prices established in this DCR will be required to complete the next Class Year and likely will have a COD no earlier than 2023 and very likely closer to 2025, making the NYISO's recommended 17-year amortization period—not to mention the Commission's 20-year amortization period—even less tenable for investors seeking to recoup their costs before 2040.

The Commission's conclusion that a hypothetical peaking facility could achieve commercial operation in any of the Capability Years neither addresses nor explains its rejection of any of these facts. Apparently, the Commission believes it is *not* bound to consider real-life facts because the peaking facilities are "hypothetical." But, while the NYISO's Service Tariff does contemplate development of demand curves based on hypothetical marginal facilities, it does not allow for the demand curves to be based on, in Commissioner Glick's words, "the cost attributes of a mythical power plant."[68] Rather, it requires the DCR process to assess "the current localized levelized embedded cost of a peaking plant in each NYCA Locality to meet minimum capacity requirements" or, in other words the "peaking plant gross cost."[69] As previously stated, if merchant generator investors do not believe they will recover their total investment, they will not invest in generation in New York State. Moreover, use of hypothetical facilities does not relieve the Commission of its duties to engage in reasoned decision-making and to support its rulings with substantial evidence.[70]

In addition to its unsupported conclusion that a peaking facility could achieve commercial operation in any of the Capability Years, the Commission concluded that IPPNY's

[68] April 9 Order, Chairman Glick Dissent at P. 2.

[69] Services Tariff at § 5.14.1.2.2.

[70] *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1378 (D.C. Cir. 2017) ("Though we see nothing arbitrary or capricious in FERC's choice to use a hypothetical capital structure in rate-setting, substantial evidence must support the capital structure FERC ultimately uses in the rate calculation, hypothetical or not.").

argument "relies on speculative assumptions about whether and when existing projects in the queue would be built."[71] The Commission misconstrues IPPNY's argument. IPPNY was not speculating about what projects in the queue will or will not be built; it was simply making the point that NYISO's 17-year amortization period unrealistically assumed that projects corresponding to the hypothetical peaking facilities were already under construction, when none is. While the COD date of fossil-fueled plants in the interconnection queue are difficult to accurately estimate, IPPNY does not speculate, but instead factually asserts, that each Class Year study since 2008 has taken, on average, at least two years for the various study components to be completed. And there is nothing "speculative" about assuming that, given that there is no project corresponding to the hypothetical peaking facility already under construction, no such project could, as the 17-year amortization period assumes, "achieve commercial operation in any of the four Capability Years during the 2021-2025 DCR period."[72] Thus, it is not speculation that under current laws, regulations, and NYISO processes, that the upcoming Class Year commencing in 2021 will not conclude before sometime in 2022 or 2023. By presenting regulatory delays of projects currently in the interconnection queue, IPPNY demonstrated that the historical trend of multi-year long development timelines remains true today.

Accordingly, a 15-year amortization period is the appropriate approximation of the amount of time the developer of a new peaking unit responding to the reference point prices for the 2021-2025 Demand Curves can expect to recover its capital costs and the Commission acted arbitrarily and capriciously in rejecting it. For the foregoing reasons, the Commission should grant rehearing and order the NYISO to adopt a 15-year amortization period.

[71] April 9 Order at P. 162.

[72] *Id.*

## III. CONCLUSION

For the foregoing reasons, IPPNY respectfully requests that the Commission grant its request for rehearing of this limited aspect of the April 9 Order. IPPNY further requests that, given the fundamental importance of accurately setting Demand Curves in enabling the efficient functioning of New York's markets, the Commission act expeditiously to grant rehearing to allow the revised Demand Curves to be implemented for as many of the 2021-2022 Capability Year ICAP auctions as possible.

Respectfully submitted,


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Dated: May 10, 2021

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Request for Rehearing of Independent Power Producers of New York, Inc. has been served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Albany, New York, this 10th day of May, 2021.

*David B. Johnson*
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