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March 2, 2017

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. ER17-386-002 – New York Independent System Operator, Inc.

Dear Secretary Bose:

For filing, please find the Motion and Answer of the New York State Public Service Commission and the New York State Energy Research and Development Authority in the above-entitled proceeding. The parties have also been provided a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 402-1537.

Very truly yours,

/s/ S. Jay Goodman
S. Jay Goodman
Assistant Counsel

Attachment
cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.	**)**	**Docket No. ER17-386-002**

MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION AND NEW YORK STATE ENERGY RESEARCH AND DEVELOMENT AUTHORITY

INTRODUCTION AND EXECUTIVE SUMMARY

On February 16, 2017, the Independent Power Producers of New York, Inc. (IPPNY) filed a Request for Rehearing (Petition) on the Federal Energy Regulatory Commission's (Commission) "Order Accepting Tariff Filing Subject to Condition," which established applicable Installed Capacity (ICAP) Demand Curve Reset parameters (DCR Order).[1] In the DCR Order, the Commission accepted the Market Administration and Control Area Services Tariff (Services Tariff) amendments that the New York Independent System Operator, Inc. (NYISO) proposed to define the ICAP Demand Curves in the market for upcoming Capability Years. The Commission, however, rejected the NYISO's proposal to include Selective Catalytic Reduction (SCR) emissions control technology in the hypothetical peaking plant

[1] New York Independent System Operator, Inc., 158 FERC ¶61,028 (issued January 17, 2017) (DCR Order).

design for the New York Rest-of-State (ROS) ICAP Demand Curve.[2] The Commission explained that this proposal preserved the status quo with respect to this design parameter for the peaking plant, and that the NYISO and IPPNY failed to justify that including the SCR costs would yield just and reasonable wholesale capacity rates.[3]

In its Petition, IPPNY claims that the Commission erred in rejecting the inclusion of SCR technology. First, IPPNY alleges that the decision to exclude SCR from the ROS peaking plant design was arbitrary and capricious because the Commission rejected IPPNY arguments that current and future market and regulatory risks would lead a developer to voluntarily assume significant capital costs that are optional in ROS. Alternatively, IPPNY asserts that the Commission erred by declining to shorten the project amortization period, or increase the return on equity (ROE), embedded in the NYCA Demand Curve to account for the increased market and regulatory risks purportedly associated with the exclusion of SCR from the hypothetical ROS proxy peaking unit.

IPPNY's Petition is based on the same speculative arguments that the Commission already rejected in the DCR Order.

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[2] DCR Order at ¶ 60.

[3] Id.

Thus, IPPNY fails to articulate any Commission decision that is erroneous, arbitrary and capricious, and/or not the result of reasoned decision making. For the reasons detailed below, the New York State Public Service Commission (NYPSC) and New York State Energy Research and Development Authority (NYSERDA) (collectively, the "State Entities") respectfully urge the Commission to deny the Petition.[4]

MOTION FOR LEAVE TO ANSWER

The State Entities request, pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.212 and 385.213) that the Commission grant this Motion and include the information contained herein in the record because it will assist the Commission in its decision making by clarifying and correcting certain matters alleged by IPPNY. Although unauthorized answers are generally discouraged,

[4] Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

the Commission has accepted answers for similar reasons to those provided here by the State Entities.[5]

ANSWER

I. THE COMMISSION RELIED ON SUBSTANTIAL EVIDENCE AND ACTED REASONABLY IN FINDING THAT SCR SHOULD BE EXCLUDED FROM THE ROS PEAKING UNIT DESIGN

IPPNY claims that the Commission's decision to exclude SCR from the proxy peaking unit located in ROS is arbitrary and capricious, and not the result of reasoned decision making, because it rejected arguments advanced by IPPNY, the NYISO, and their consultants, which made assumptions about the possibility of certain future events. IPPNY specifically claims that the Commission erred by declining to make the following findings: (i) that developers would be unlikely to build the ROS peaking unit without SCR technology due to perceived siting, permitting, and future market risks; (ii) the State Board on Electric Generating Siting and the Environment (Siting Board) would be unlikely to approve construction and operation of an ROS peaking plant under New York Public Service Law (PSL) Article 10 unless

[5] See, e.g., Entergy Louisiana, LLC, 156 FERC ¶ 61,146 (issued August 31, 2016) at P5, 15 (accepting an Answer to a Motion for Leave to Answer because it provides information that assisted the Commission in its decision-making process); see also Michigan Electric Transmission Company, 156 FERC ¶ 61,025 (issued July 8, 2016) at P6, 14; Midcontinent Independent System Operator, Inc., 155 FERC ¶ 61,130 (issued May 3, 2016) at ¶ 7, 25.

the "best technology available" to control emissions (i.e., SCR) will be installed; and (iii) a federally-enforceable annual operating hours limit would not be a feasible emissions compliance option for the ROS peaking unit.[6]

IPPNY supports these claims with only a summary of prior arguments that the Commission considered in the DCR Order and already rejected as speculative and inadequately supported. IPPNY thus articulates its disagreement with the DCR Order without specifying any error, arbitrary and capricious decision, or lack of reasoned decision making that might warrant rehearing. Moreover, although the claimed errors entail findings that rejected IPPNY's arguments as speculative, the Petition repeats those arguments without providing any additional specificity that might transform the discredited claims into statements of tangible outcomes that are reasonably certain to occur. Consequently, the Commission should reject these arguments again, and deny the Petition in its entirety.

A. THE COMMISSION REASONABLY CONCLUDED THAT THE SITING BOARD MAY APPROVE A PEAKING PLANT WITHOUT SCR

IPPNY argues again that the Siting Board would require SCR in the ROS peaking unit because: (i) Article 10 requires that adverse environmental impacts be mitigated to the maximum

[6] Petition at 3.

extent practicable; and (ii) "extreme" public opposition to any proposed peaking unit would force the Siting Board to make the plant "as clean as possible."[7] IPPNY further claims that the Siting Board would abandon its historic practice of relying on the environmental review conducted by the New York State Department of Environmental Conservation (NYSDEC) and engage in its own, incremental review of potential impacts. Moreover, IPPNY alleges that the Siting Board can impose emissions standards stricter than those embedded in a NYSDEC-issued air permit.

IPPNY alleges that the Commission erred by relying on its "own speculation" regarding an issue outside the scope of its "special technical expertise" – i.e., whether the Siting Board would require SCR. The Commission, however, did not rely on its "own speculation." It relied on statements proffered by NYSDEC, the sole State agency charged with implementing the federal Clean Air Act and a statutory Siting Board member, as well as Siting Board precedent.[8] The NYSDEC Comments and Siting

[7] Petition at 7-8.

[8] The Siting Board consists of the following individuals: the New York State Department of Public Service (DPS) Chair, who also serves as the NYPSC Chair; the Commissioner of NYSDEC; the Chair of NYSERDA; the Commissioner, President & CEO of New York State empire State Development; the Commissioner of the New York State Department of Health; and two ad hoc members of the public. The DPS/NYPSC Chair also serves as Chair of the Siting Board.

Board precedent explain that the Siting Board has historically relied on, and deferred to, NYDSEC on air permitting issues.[9] In the Athens Certificate Order, for instance, the Siting Board explained that it "must give deference to the findings and conclusions of the [NYS]DEC Commissioner regarding environmental permitting, and our consideration of various environmental issues must assume that the proposed facility conforms to DEC's permits and minimizes adverse environmental impacts."[10] The Commission detailed its reasoning that the NYSDEC statements and Siting Board precedent, as well as the fact that generation units have been permitted, constructed, and operated without SCR, proved "more compelling" than the speculative counterpoints offered by IPPNY.[11]

Further, given that the language of former PSL Articles X and 10 are substantially similar, there is no reason to believe this deference will change under Article 10. The Commission notably dismissed similar IPPNY arguments as

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[9] See Docket No. ER17-386-000, New York Independent System Operator, Inc., Notice of Intervention and Protest of the New York State Public Service Commission and New York State Energy Research and Development Authority, Att. B ("NYSDEC Comments") at 2; Case 97-F-1563, Athens Generating Company, L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000) at 13 (Athens Certificate Order).

[10] Athens Certificate Order at 13.

[11] DCR Order at ¶ 62.

"speculative" in the 2014 DCR Order.[12] Therefore, IPPNY fails to demonstrate why the Commission's decisions should be considered arbitrary and capricious or not the result of reasoned decision making.

B. CONSISTENT WITH ITS PRECEDENT, THE COMMISSION REASONABLY CONCLUDED THAT THE ICAP DEMAND CURVES SHOULD NOT BE BASED ON SPECULATION ABOUT FUTURE SITING BOARD DECISIONS

IPPNY challenges the Commission's findings that: (i) a peaking unit may be permitted, constructed, and operated in ROS without SCR; and (ii) contrary arguments advanced by IPPNY amount to idle conjecture that forms an inappropriate basis for the ICAP Demand Curves. In its Petition, however, IPPNY again champions speculation over an objective consideration of existing regulatory requirements. These arguments suffer from the same two fatal flaws that were determinative for the Commission in the DCR Order – namely that the ROS proxy peaking unit can satisfy applicable emissions regulations without SCR, and that arguments as to how the Siting Board may act in the future are speculative.

The Commission recognized the "undisputed" fact that peaking plants located in Zones C and F in NYCA can satisfy

[12] New York Independent System Operator, Inc., 146 FERC ¶ 61,043 at ¶ 75 (agreeing with the NYISO that Article 10 "is a new law so the manner in which it would apply to the F class frame unit without SCR is purely speculative…") (2014 DCR Order).

applicable emissions standards without SCR.[13] Referencing the NYSDEC Comments, the Commission noted that air permit reviews are fact-specific and SCR "may not be required or appropriate in every case, such as where other control measures are available or where a facility accepts federally-enforceable permit conditions to limit emissions below the applicable thresholds."[14] These findings provided the Commission with an objective basis for determining that, based on current circumstances, the ROS proxy peaking unit may be constructed without SCR.

IPPNY's claim that the Siting Board may impose an emissions control requirement not compelled by NYSDEC is mere speculation about a future regulatory outcome. Moreover, IPPNY fails to provide a compelling legal argument detailing the source of the Siting Board's purported authority to modify an air permit issued by the sole State agency responsible for evaluating compliance with the federal Clean Air Act. The Commission's decision to rely on current regulatory requirements rather than IPPNY's conjecture is consistent with long-standing Commission precedent that the ICAP Demand Curves are reset periodically to account for changed circumstances, and they should not be predicated on speculation that regulators "will

[13] DCR Order at ¶ 60-61.

[14] Id. at ¶ 62 (citing NYSDEC Comments at 2).

act at some point in the future…"[15] The Commission, therefore, reasonably concluded that arguments pinning the potential need for SCR on the PSL Article 10 permitting and certification process are "speculative."[16]

IPPNY further alleges that the Commission erred by rejecting its assumptions about future Siting Board action without properly accounting for a purported "dramatic change in attitude with respect to fossil fuel generation" in New York since the most recent DCR.[17] Although IPPNY detailed its opinion that the public would vehemently oppose any new gas-fired peaking unit, the Commission explained that IPPNY's opinion amounts to "speculation about future public involvement in Article 10 certification proceedings" and, therefore, is less persuasive than "NYSDEC's comments and NY Siting Board precedent."[18] This finding, therefore, is based on substantial evidence in the record, and is also consistent with Commission precedent that the ICAP Demand Curves should not be predicated on conjecture about future regulatory action.[19]

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[15] DCR Order at ¶ 61 (citing 2014 DCR Order at ¶ 74).

[16] Id. at ¶ 60-61.

[17] Petition at 8.

[18] DCR Order at ¶ 62.

[19] Id. at ¶ 61 (citing 2014 DCR Order at ¶ 74).

IPPNY further argues that the Siting Board would condition its approval on the addition of SCR because PSL Article 10 requires the Siting Board to find that adverse environmental impacts associated with the project would be minimized or avoided to the greatest extent practicable. IPPNY argues that the F Frame unit without SCR has a higher potential to emit NO_x than the unit with SCR and, therefore, the Siting Board could not find that the unit without SCR minimizes or avoids an environmental impact to the maximum extent practicable.

The Commission reasonably rejected this argument in finding that a peaking unit operating under a federally-enforceable annual operating hours limit without SCR would satisfy all applicable emissions regulations, and could be constructed and operated in ROS. The NYISO demonstrated that the F Frame unit without SCR, located in ROS, would be subject to a federally-enforceable annual operating hour limit that is greater than the projected run-time hours for the unit.[20] The State Entities explained that IPPNY's argument misinterprets PSL Article 10 and ignores contrary Siting Board precedent.[21] Article 10 of the PSL does not require project developers to

[20] State Entities Protest at 26.

[21] See id. at 30-32.

achieve the lowest possible environmental impact. The Siting Board has explained that "reasonable minimization of adverse environmental impacts is what is required by [the siting statute] and that the costs of mitigation options in comparison with their benefits can be properly considered in evaluating what is reasonable."[22] In so ruling, the Siting Board explicitly rejected the argument that the word "minimize" as used in the siting statute "requires the best technology available" and stated that such interpretation would be "inconsistent with the balancing we must perform under" the siting statute.[23] Nevertheless, IPPNY claims that the Commission acted in an arbitrary and capricious manner by implicitly according greater weight to the Siting Board's interpretation of its enabling statute than to IPPNY's contrary interpretation.

Finally, IPPNY alleges that the Commission erred by rejecting arguments that the enactment of PSL Article 10

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[22] Case 99-F-1164, Mirant Bowline, L.L.C., Opinion and Order Granting a Certificate of Environmental Compatibility and Public Need Subject to Conditions (issued March 26, 2002) at 48-49 (Bowline Certificate Order).

[23] Bowline Certificate Order at 52. IPPNY argues that the peaking unit would have to install emissions control measures sufficient to satisfy the "best technology available" standard. (Petition at 3.) The State Entities demonstrated that this claim is incorrect, however, because the peaking unit without SCR can avoid designation as a "major source" of NO_x emissions, thereby qualifying for a less burdensome regulatory standard. (State Entities Protest at 24-27).

provided the Siting Board with new authority to reject and/or modify air permits issued by NYSDEC. Specifically, IPPNY claims that, in contrast to former PSL Article X, PSL Article 10 provides the Siting Board with "new" authority "to perform its own environmental review of NO_x emissions and determine that a project should not be built because it does not minimize NOx emissions to the maximum extent practicable."[24]

The Commission's decision not to accord significant weight to this argument is reasonable. New York City and Multiple Intervenors explained that former PSL Article X did authorize the Siting Board to deny an application for certification based on its review of environmental and public health and safety impacts.[25] Indeed, a contrary interpretation would mean that PSL Article X obligated the Siting Board to approve a permit application if it merely included all necessary information and permits. The generation siting statutes were never intended to be ministerial in nature, and IPPNY presents no evidence demonstrating that PSL Article X was interpreted in this manner. The new statutory language that IPPNY clings to

[24] Petition at 9.

[25] New York Independent System Operator, Inc., Motion for Leave to Answer and Answer of the City of New York and Multiple Intervenors (dated December 23, 2016) at 7-8 (discussing Article X, PSL § 168(2) (expired and repealed January 1, 2003) and Article 10, PSL § 172 (2016)).

did not expand the Siting Board's authority as claimed by IPPNY; rather, it merely clarified one aspect of the Siting Board's authority. Consequently, the Commission's decision not to accord much weight to the purported "new authority" provided by PSL Article 10 is not erroneous, arbitrary and capricious, or based on faulty decision making as IPPNY claims.

For all the foregoing reasons, the Commission reasonably relied on the NYSDEC's expertise regarding air permitting issues, Siting Board precedent, and other record evidence in finding that the ROS proxy peaking unit may be constructed and operated without SCR. This decision comports with the Services Tariff, which defines the peaking unit as having the "lowest fixed costs and highest variable costs among all other units' technology that are economically viable."[26] Including the optional cost of SCR in the ROS peaking unit would violate this tariff requirement. The Commission, therefore, reasonably dismissed as speculative IPPNY's claims that the Siting Board might impose emissions standards stricter than those embedded in a NYSDEC-approved air permit by requiring SCR technology to limit potential NO_x emissions.

[26] Services Tariff §5.14.1.2.

B. THE COMMISSION REASONABLY CONCLUDED THAT A FEDERALLY-ENFORCEABLE ANNUAL OPERATING HOURS LIMIT IS A VIABLE ALTERNATIVE TO SCR

IPPNY claims that the Commission was arbitrary and capricious in finding that the federally-enforceable annual limit on operating hours is a reasonable alternative to SCR because the Commission disregarded future market risks as well as the present regulatory risks described above. Specifically, IPPNY alleges that a future regulatory change could require the proxy unit to be retrofit with SCR at great expense. The Commission, IPPNY continues, should have concluded that a developer would voluntarily assume the incremental up-front development cost of including SCR in the proxy peaking unit so as to avoid a potentially larger retrofit cost in the future. IPPNY argues that the Commission's decision to reject these arguments as speculative and unpersuasive is arbitrary and capricious.

The Commission, however, reasonably found that IPPNY and the NYISO failed to demonstrate that future regulatory changes would require an SCR retrofit after the facility is operational.[27] This finding is based, in part, on the NYSDEC's Comments, which explain that any future rulemaking process would be lengthy, and would include consideration of compliance

[27] DCR Order at ¶ 67.

options for existing facilities.[28] In contrast, the record pertaining to the potential likelihood and cost of a future SCR retrofit consists of only vague speculation proffered by IPPNY, the NYISO, and their consultants. When this speculation is weighed against the expert opinion of NYSDEC, the State agency vested with the federally-delegated authority to promulgate emissions rules under the Clean Air Act and a statutory member of the Siting Board, it is clear that the Commission acted reasonably by according greater weight to NYSDEC's statements.

The Commission's finding is also consistent with its precedent that the ICAP Demand Curves should not be predicated on speculation about future regulatory outcomes. Indeed, it would have been arbitrary and capricious for the Commission to contradict this precedent or reject NYSDEC's expert opinion based on IPPNY's unsupported claim that a future regulatory change will mandate an SCR retrofit.

II. THE COMMISSION REASONABLY DECLINED TO MODIFY SELECT FINANCIAL PARAMETERS UNDERLYING THE NYCA DEMAND CURVES

IPPNY argues that, if the Commission continues to exclude SCR from the ROS proxy peaking unit, it should shorten the project amortization period or increase the assumed ROE to mitigate the alleged increased risks. The claimed development

[28] NYSDEC Comments at 3.

and future regulatory risks that IPPNY asserts warrant increased capacity revenues are the same speculative risks described above and already rejected by the Commission.

In any event, IPPNY does not specify the alternative amortization period or ROE that it believes should replace the parameters embedded in the Demand Curves and approved in the DCR Order. The financial parameters were the subject of extensive debate throughout the NYISO stakeholder process and in stakeholder pleadings filed with the Commission. It would be highly inappropriate for the NYISO to ignore the product of its consultants' analysis and instead arbitrarily select a new and different amortization period or ROE, as IPPNY requests.

Regardless, the Commission's decision to approve the amortization period and ROE proposed by the NYISO was reasonable, consistent with precedent, and supported by substantial evidence in the record. The 20-year amortization period is the "same value the Commission approved for the same peaking plant technology in the last ICAP Demand Curve reset."[29] Given that the Commission approved the same peaking plant technology without SCR for the NYCA Demand Curve in both the DCR Order and 2014 DCR Order, there was no compelling reason for the Commission to consider adjusting the amortization period.

[29] DCR Order at ¶ 171.

The NYCA Demand Curves already reflect an adder to account for various market risks. The Commission noted that the NYISO's proposed ROE "exceeds the calculated average ROE for the sampled independent power producing companies," although it remained "within a zone of reasonableness because it appropriately accounts for investor risks in the New York market by considering the higher ROEs for stand-alone project finance approaches to generation development found to be in the range of 15-20 percent."[30] The Commission concluded that the "NYISO adequately supports its [proposed ROE] with substantial evidence."[31] An incremental adder to account for the speculative risk claimed by IPPNY is unjustified and unnecessary.

Accordingly, the Commission's decision not to arbitrarily modify the proposed amortization period or ROE is supported by substantial evidence in the record, and is the product of reasoned decision making. The State Entities, therefore, respectfully urge the Commission to deny this alternative plea for relief.

[30] DCR Order at ¶ 180.

[31] Id. at ¶ 179.

CONCLUSION

As discussed herein, the Commission should reject the arguments presented by IPPNY, and deny its request for rehearing on the DCR Order.

Respectfully submitted,

/s/ Paul Agresta

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: Albany, New York
March 2, 2017

/s/ S. Jay Goodman

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