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

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| **Independent Power Producers of New York, Inc.,** | ) | |
| **Complainant,** | ) | |
| **v.** | ) | **Docket No. EL13-62-002** |
| **New York Independent System Operator, Inc.,** | ) | |
| **Respondent.** | ) | |

## REQUEST FOR EXPEDITED ACTION

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] the Electric Power Supply Association ("EPSA")[2] respectfully requests expedited action on the compliance filing submitted by the New York Independent System Operator, Inc. (the "NYISO")[3] on June 17, 2015[4] and amended, in response to a Commission request for additional

1 18 C.F.R. § 385.212 (2016).

2 Celebrating its 20th anniversary in 2017, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

3 Capitalized terms not otherwise defined herein have the meaning given them in in the NYISO's Market Administration and Control Area Services Tariff (the "Services Tariff") or, if not defined therein, in its open access transmission tariff.

4 *See* Compliance Report, Docket No. EL13-62-002 (filed June 17, 2016) (unreported) (the "NYISO Compliance Report").

information,[5] on December 16, 2015.[6] In the time that has passed while this matter has been pending before the Commission, the threat from State-approved subsidies for the retention of uneconomic existing resources has not only grown but grown dramatically. In EPSA's view, State-approved subsidies that, by design, interfere with economic signals for entry and exit represent an existential threat to the organized wholesale markets, and it is, therefore, imperative that the Commission act promptly and decisively to address this threat. Specifically, EPSA urges the Commission to order the NYISO to modify the Services Tariff in the manner proposed in the January 19, 2016 protest of the Independent Power Producers of New York, Inc. ("IPPNY")[7] to the NYISO Response.

## I. BACKGROUND

### A. This Proceeding

This proceeding arises out of a complaint filed by IPPNY on May 10, 2013 and amended on March 28, 2014.[8] The Original Complaint focused on artificial suppression of capacity clearing prices in the New York Control Area ("NYCA") resulting from below-cost offers from resources that would have exited the market but for out-of-market revenues under Reliability Support Services Agreements ("RSSAs") and other reliability

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[5] *See New York Indep. Sys. Operator, Inc.*, Docket No. EL13-62-002 (Nov. 16, 2015) (unreported) (the "Letter Order").

[6] *See* Response to Information Request, Docket No. EL13-62-002 (filed Dec. 16, 2015) (the "NYISO Response").

[7] *See* Protest of the Independent Power Producers of New York, Inc., Docket No. EL13-62-002 (filed Jan. 19, 2016) (the "IPPNY Protest").

[8] *See* Complaint Requesting Fast Track Processing of the Independent Power Producers of New York, Inc., Docket No. EL13-62-000 (filed May 10, 2013) (the "Original Complaint"); Motion to Amend, and Amendment to, Complaint of the Independent Power Producers of New York, Inc., Docket No. EL13-62-000 (filed Mar. 25, 2014) (the "Amendment," and together with the Original Complaint, the "Complaint").

must-run mechanisms.[9] IPPNY subsequently amended the Original Complaint to ensure that it covered a proposed agreement (the "Dunkirk Repowering Agreement") that provides for the repowering of Units 2, 3 and 4 at the Dunkirk Generating Station and that would thereby result in the retention of 435 MW of capacity for a 10-year period.[10]

In a March 19, 2015 order, the Commission denied the Complaint, but nonetheless directed NYISO to initiate a stakeholder process with respect to the issue of whether mitigation was required for agreements like the Dunkirk Repowering Agreement and to file a report within 90 days.[11] In so doing, the Commission distinguished between the RSSAs and the Dunkirk Repowering Agreement. Specifically, the Commission agreed with Dr. David Patton, acting as the NYISO's Market Monitoring Unit (the "MMU") that the RSSA units "are economic from the perspective of satisfying the NYISO's reliability requirements," and that "[i]f the reliability needs satisfied by these units were reflected in the capacity market, the units would . . . clear."[12] By contrast, the Commission expressed concern that the Dunkirk Repowering Agreement "raise[s] potential issues of artificial price suppression,"[13] because

> [u]nlike the RSSA contracts . . . that procure adequate capacity to address short-term reliability needs, the Dunkirk [R]epowering [A]greement appears to procure more capacity than is needed for short-term reliability, and for a much

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[9] *See* Original Complaint at 1-5, 20-30.

[10] *See generally* Amendment.

[11] *See Independent Power Producers of N.Y., Inc., v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015) (the "March 2015 Order").

[12] *Id.* at P 66 (citation omitted) (alteration in original).

[13] *Id.* at P 69.

> longer term. We are concerned that if the additional capacity created by the repowering agreement above the amount needed for short-term reliability is allowed to offer into the NYISO capacity market at prices below the cost of repowering, such capacity might deter new entry or displace less-costly existing capacity in NYCA. As a result, capacity market prices could be artificially suppressed.[14]

The Commission therefore directed the NYISO to establish a stakeholder process to examine, among other things, "whether resources under repowering agreements similar to Dunkirk's have the characteristics of new rather than existing resources, triggering a buyer-side market power evaluation because of their potential to suppress prices in the capacity market and what mitigation measures need to be in place to address such concerns."[15] The Commission further directed the NYISO to submit a report on the outcome of its analysis and the stakeholder process within 90 days.[16]

On June 17, 2015, the NYISO submitted the NYISO Compliance Report, stating that it "plan[ned] on conducting further analyses and stakeholder discussions" regarding the application of buyer-side mitigation to resources with repowering agreements.[17] On November 16, 2015, the Commission issued the Letter Order, which required the NYISO to "file its analysis and outcome of the stakeholder discussions regarding repowering pursuant to agreements not principally driven by reliability needs within 30 days of the date of this letter."[18]

In the NYISO Response to the Letter Order, filed on December 16, 2015, the NYISO indicated that it had "conclude[d] that there may be concerns surrounding the

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[14] *Id.*

[15] *Id.* at P 71.

[16] *See id.*

[17] NYISO Compliance Report at 3.

[18] Letter Order at *2, Docket No. EL13-62-002.

ability and incentive to exercise market power through uneconomic retention and repowering."[19] The NYISO further stated that "the MMU supports the NYISO's conclusion . . . that there are concerns surrounding potential issues with artificial price suppression by uneconomically retained or repowered resources under agreements similar to Dunkirk's, and that mitigation measures need to be in place to address the concerns."[20] The NYISO proposed to address such concerns by "screen[ing] and monitor[ing] for suspicious behavior" and then "refer[ring] any suspicious behavior identified to the Commission's Office of Enforcement for further review."[21]

In comments on the NYISO Response, the MMU argued that the NYISO's proposed remedy was inadequate. As the MMU explained, "[i]t would be difficult to ensure that the market will perform competitively and that market power will be deterred effectively without clear rules to mitigate buyer-side market power, which includes uneconomic retention."[22] The MMU further pointed out that "it is generally not possible to go back after the fact and repair the effects of an exercise of market power," and that the Commission's Office of Enforcement might not be able to address uneconomic retention in a timely manner, which would result in uncertainty for market participants.[23] The MMU therefore recommended that "the Commission require the NYISO to propose market power mitigation measures that would impose an offer floor on a generator (at

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19 NYISO Response, Attachment II at 1.

20 *Id.*, Transmittal Letter at 3.

21 *Id.*

22 Comments of the New York ISO's Market Monitoring Unit at 5, Docket No. EL13-62-002 (filed Jan. 11, 2016) (the "MMU Comments").

23 *Id.*

its [going-forward cost ("GFC")] level) if the NYISO determines that the generator would likely have retired but for an above-market contract."[24]

IPPNY raised similar concerns about the NYISO's referral proposal, stating that it is inconsistent with the NYISO's general policy of adopting "measures that immediately address potential improper market behavior by either blocking the behavior or mitigating the harm resulting from the behavior to protect the market,"[25] and that the threat of a referral "is unlikely to have the same deterrent effect as offer floor mitigation due to the lengthy, and often non-public, nature of Office of Enforcement investigations."[26] Accordingly, IPPNY asked the Commission to require that the NYISO adopt an approach under which it will (1) screen for "out-of-market contracts that are expected to provide total compensation to a generator that exceeds the generator's expected near-term market-based revenues by more than 5%"; (2) "direct the generator to sell its capacity in the spot market auctions"; and (3) "impose an offer floor on the generator's [installed capacity ("ICAP")] market bids,"[27] where the offer floor would be "set based on the [generator's] contract payments adjusted for Net [Energy & Ancillary Services ("E&AS")] revenues."[28]

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[24] *Id.* at 6. The MMU also suggested that the NYISO's screening proposal be modified to "include units that are known to have received contracts to remain in operation even if the technology-specific GFC would indicate that the units are likely not economic to retire." *Id.* at 4.

[25] IPPNY Protest at 13 (citation omitted).

[26] *Id.* at 15.

[27] *Id.* at 20. *See also id.*, Affidavit of Mark D. Younger, ¶¶ 46-58 (discussing basis for proposed relief).

[28] IPPNY Protest at 20 (citation omitted).

### B. Subsequent Developments

As discussed below, developments since the filing of the NYISO Response only underscore the need for the prompt implementation of buyer-side mitigation measures to address uneconomic retention.

#### 1. Zero Emission Credits Purchase Requirements

On August 1, 2016, the New York Public Service Commission (the "NYPSC") issued an order requiring the New York State Energy Research and Development Authority ("NYSERDA") to purchase, on behalf of New York's load-serving entities, zero-emissions credits ("ZECs") "from nuclear facilities facing financial difficulty . . . ."[29] Under the NYPSC's ZECs program, NYSERDA will enter into contracts, each with a 12-year term ending March 31, 2029, to purchase ZECs from qualifying nuclear facilities.[30] The contract price is calculated in two-year tranches, adjusted every two years based on the U.S. Interagency Working Group's projected social cost of carbon.[31] The first two-year tranche would be priced at $17.48/MWh,[32] while subsequent tranches would be calculated based on the following formula: "Social Cost of Carbon (average for each Tranche) – Baseline [Regional Green House Gas Initiative] Effect (fixed at $10.41/short

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29 *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard at 119, Case Nos. 15-E-0302, *et al.* (Aug. 1, 2016) (the "NYPSC Order"). A copy of the NYPSC Order is provided in Attachment A, and the order is also available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b44C5D5B8-14C3-4F32-8399-F5487D6D8FE8%7d.

30 *See id.* at 19-20.

31 *See id.* at 130 (describing formula for calculating tranche prices and also stating that the NYPSC reserves the right "to possibly calculate the ZEC price to reflect the difference between upstate and downstate market revenues in order to put downstate facilities on an equal footing with upstate facilities").

32 *Id.* at 20.

ton) – Amount by which sum of [the NYISO] Zone A Forecast Energy Price and [the NYISO Rest of State ("ROS")] Forecast Capacity Price exceeds $39/MWh."[33]

ZECs contracts would be awarded to a nuclear facility "where there exists a public necessity to preserve the zero-emissions environmental attributes of" that facility.[34] In order to determine if a facility satisfies the "public necessity" test, the NYPSC will examine a number of factors, including, among other things, "the degree to which energy, capacity and ancillary services revenues projected to be received by the facility are at a level that is insufficient to provide adequate compensation to preserve the zero-emissions environmental values or attributes historically provided by the facility . . . ."[35] Applying these factors, the NYPSC has determined that "there is a public necessity to provide ZEC payments" for the approximately 837 MW James A. FitzPatrick Nuclear Power Plant (the "FitzPatrick Facility"), the approximately 582 MW R.E. Ginna Nuclear Power Plant (the "Ginna Facility") and the approximately 1,924 MW Nine Mile Point Nuclear Station (the "Nine Mile Facility").[36] In the case of the FitzPatrick Facility, the NYPSC relied on the fact that Entergy Nuclear had already notified the NYPSC of its intent to retire the facility, thereby providing "proof that the owner was

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[33] *Id.* at 51.

[34] *Id.* at 124.

[35] *Id.* In addition, the NYPSC considers (1) "the verifiable historic contribution the facility has made to the clean energy resource mix consumed by retail consumers in New York State regardless of the location of the facility;" (2) "the costs and benefits of such a payment for zero-emissions attributes for the facility in relation to other clean energy alternatives for the benefit of the electric system, its customers and the environment;" (3) "the impacts of such costs on ratepayers;" and (4) "the public interest." *Id.*

[36] *Id.* at 128. The Fitzpatrick Facility is currently owned by Entergy Nuclear FitzPatrick, LLC ("Entergy Nuclear"), but is being sold to Exelon Generation Company, LLC ("Exelon Generation"). *See Entergy Nuclear FitzPatrick, LLC*, 157 FERC ¶ 61,183 (2016). An affiliate of Exelon Generation, Constellation Energy Nuclear Group, LLC ("Constellation Nuclear"), owns the Ginna Facility, an approximately 637 MW unit at the Nine Mile Facility and an 82 percent interest in an approximately 1,287 MW unit at the Nine Mile Facility.

receiving inadequate compensation to ensure that the zero-emissions attributes of the facility will be preserved and that the risk of losing those attributes is a certainty without action by the [NYPSC]."[37] With respect to the Ginna and Nine Mile Facilities, the NYPSC relied on financial data "demonstrat[ing] that the projected revenues fall well short of anticipated costs, which seriously jeopardizes the preservation of the zero-emissions attributes of these facilities."[38]

### 2. The Dunkirk Repowering

As indicated in the IPPNY Protest,[39] the repowering of the Dunkirk Generating Station was temporarily put on hold, because Entergy Nuclear had challenged the legality of the Dunkirk Repowering Agreement in the U.S. District Court for the Northern District of New York.[40] After entering into its agreement to sell the FitzPatrick Facility to Exelon Generation, however, Entergy Nuclear moved to withdraw its lawsuit.[41] As a result, the repowering is now poised to resume.[42]

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[37] NYPSC Order at 125.

[38] *Id.* at 126.

[39] *See* IPPNY Protest at 15 n.54.

[40] *See* Mary Powers, *NRG to close 380-MW Huntley coal-fired plant, puts Dunkirk conversions on hold*, Platt's Energy Trader (Aug. 25, 2015), http://www.platts.com/latest-news/coal/birmingham-alabama/nrg-to-close-380-mw-huntley-coal-fired-plant-21022444.

[41] *See, e.g.*, Sonal Patel, *Long-Stalled New York Repowering Project Is Revived*, Power (Nov. 22, 2016) ("*Long-Stalled Project Revived*"), http://www.powermag.com/long-stalled-new-york-repowering-project-is-revived/; David Robinson, *NRG ready to revive Dunkirk power plant project*, Buffalo News (Nov. 22, 2016) ("*NRG to revive Dunkirk*"), http://buffalonews.com/2016/11/21/nrg-ready-revive-dunkirk-power-plant-project/.

[42] *See Long-Stalled Project Revived* (company representative stating that "now that Entergy [Nuclear] and the other parties to the lawsuit have asked that it be dismissed, development work should be able to proceed again soon"); *NRG to revive Dunkirk* ("As soon as it's practical, we plan to resume our planning and development work on the Dunkirk project.").

## II. MOTION FOR EXPEDITED ACTION

### A. It Is Imperative That The Commission Move Expeditiously And Decisively To Protect The NYISO ICAP Market

The NYPSC Order, like the Dunkirk Repowering Agreement, threatens to artificially suppress prices in the NYISO ICAP market by creating incentives for below-cost offers for certain existing resources. As the Commission recognized in the March 2015 Order, such incentives undermine the level playing field between and among resources, thereby "deter[ring] new entry or displac[ing] less-costly existing capacity in NYCA."[43] In fact, the magnitude of the threat from the ZECs program is potentially much greater than that from the Dunkirk Repowering Agreement inasmuch as the former will result in the long-term retention of over 3,300 MW of generation that would otherwise have exited the market, compared with "just" 435 MW of generation under the Dunkirk Repowering Agreement.[44] As in the case of the Dunkirk Repowering Agreement, there is no sign that either the amount of capacity procured under or the duration of the ZECs contracts corresponds to any legitimate reliability need. To the contrary, the NYPSC had already "accept[ed] Entergy [Nuclear]'s commercial decision" to close the Fitzpatrick Facility, and had "authorized the Ginna [F]acility to retire without further action . . . ."[45] It is thus imperative that the Commission act promptly to address

[43] March 2015 Order, 150 FERC ¶ 61,214 at P 69.

[44] Of course, the potential price suppression impacts of the Dunkirk Repowering Agreement are themselves quite significant. *See* Amendment, Attachment B, Second Supplemental Affidavit of Mark D. Younger at ¶¶ 36-37.

[45] *See* NYPSC Order at 125.

this imminent threat to the ICAP market and restore a more level playing field for all generation.[46]

Where uneconomic entry is concerned, the Commission has long held that "because other resources in the [capacity market] will be affected by such price suppression, the Commission has a duty to ensure just and reasonable rates by requiring that bids in the [capacity auction] represent a resource's true cost . . . , regardless of agreements" the resource owner may have with other parties.[47] That duty is no different where existing resources are involved. In fact, the threat from subsidized existing resources is not limited to the capacity markets where, as in the case of ZECs, the payments are tied to energy production. In such circumstances, the subsidies can create incentives for below-cost offers into the energy markets. While the Complaint relates solely to the ICAP market, the Commission should be aware of this looming issue.[48]

The NYPSC Order provides further evidence that out-of-market subsidies to existing resources are out of control, not just in NYISO but in other organized markets as well. That the problem is not limited to NYISO is illustrated by legislation recently enacted by the State of Illinois (the "ZECs Legislation"),[49] establishing a similar "zero

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[46] To be clear, EPSA believes that the NYPSC Order and the State actions contemplated thereby are preempted by the FPA. Such preemption issues are already being adjudicated before the United States District Court for the Southern District of New York in *Coalition for Competitive Electricity v. Zibelman*, Case No. 1:16-CV-8164. The Commission need not and, indeed, should not, address preemption questions in this proceeding.

[47] *ISO New England Inc.*, 138 FERC ¶ 61,027 at P 20 (2012).

[48] EPSA reserves the right to raise issues about the impact of the ZECs program on the energy markets in future pleadings and proceedings.

[49] Illinois 99th Gen. Assemb., S.B. 2814 (Dec. 7, 2016). The ZECs Legislation is available at http://www.ilga.gov/legislation/99/SB/09900SB2814lv.htm. The Governor of Illinois signed the ZECs Legislation on December 7, 2016. *See* Office of the Governor, Press Release, *Governor Signs*

emission credit" program that is expected to provide annual subsidies of up to $374 million to the approximately 1,871 MW Quad Cities Generating Station located in Cordova, Illinois, within the PJM Interconnection, L.L.C. ("PJM") market, and the approximately 1,069 MW Clinton Power Station in Clinton, Illinois, within the Midcontinent Independent System Operator, Inc. market.[50] Prompt and decisive action in this proceeding is therefore necessary not only to address the very real and growing threat to the ICAP market, but also to send a desperately needed message about the Commission's commitment to protecting the nation's organized markets from the threat of subsidized existing resources. Leaving this threat unaddressed will lead to the further tilting of the playing field and thereby undermine the investor confidence that is essential to a truly competitive wholesale marketplace.

As Dr. Joseph E. Bowring, the Independent Market Monitor for PJM, has explained:

> It is essential that any approach to the . . . markets and the . . . Capacity Market incorporate a consistent view of how the preferred market design is expected to work to provide competitive results in a sustainable market design over the long run. A sustainable market design means a market design that results in appropriate incentives to retire units and to invest in new units over time such that reliability is ensured as a result of the functioning of the market.[51]

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*Legislation to Protect Jobs, Ratepayers and Taxpayers* (Dec. 7, 2016) ("December 7 Press Release"), http://www3.http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=13923 illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=13923.

50 *See* UBS Securities LLC, *IL Legislature Serves Deep Dish Savings* (Dec. 2, 2016), https://neo.ubs.com/shared/d1mvX1WQFQuJU/. *See also* December 7 Press Release (Illinois Governor stating that the ZECs Legislation "ensures the Clinton and Quad Cities power facilities remain open for another 10 years").

51 Comments of the Independent Market Monitor for PJM, Attachment B-1, First Supplemental Testimony of Joseph E. Bowring on Behalf of the Independent Market Monitor for PJM at 5, Docket No. EL16-49-000 (filed Apr. 11, 2016).

Dr. Bowring described two ways to achieve that outcome: (1) the "market paradigm," under which "a full set of markets . . . together ensure that there are adequate revenues to incent new generation when it is needed and to incent retirement of units when appropriate"; and (2) the "quasi-market paradigm," which "includes an energy market . . . but addresses the need for investment incentives via the long-term contract model or the cost of service model."[52] Dr. Bowring stated the former is "the preferred alternative for providing reliable wholesale power at the lowest possible cost,"[53] and further emphasized that, either way, "choices about incentives and regulatory approaches [must] be made with an explicit understanding of the short run and long run implications of these choices for the design of wholesale power markets . . . ."[54] For its part, the Commission has, in the NYISO and other organized markets, similarly favored the market paradigm, recognizing, where subsidized new entry is concerned, that mitigation measures are needed to "maintain[] a role for private investment so that investment risk will not be shifted to captive customers over time."[55] It is vital that the Commission take action consistent with that policy choice and not, through inaction, allow the NYISO market to slide into the quasi-market paradigm.

In EPSA's view, State-approved subsidies that, by design, interfere with economic signals for entry and exit represent an existential threat to the organized wholesale markets that are the centerpiece of the Commission's pro-competitive regulatory approach. As the Commission and the courts have long recognized, the

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52 *Id.*

53 *Id.* at 6.

54 *Id.*

55 *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 at P 91 (2009) ("*PJM*").

purpose of capacity markets is to "ensure both that existing generators are adequately compensated and that prices support new entry when additional capacity is needed."[56] These markets simply "will not be able to produce the needed investment to serve load and reliability if a subset of suppliers is allowed to bid noncompetitively to suppress market clearing prices."[57]

That the State of New York has, deliberately or not, made a different policy choice does not justify, much less compel, a different outcome. To be sure, it is regrettable that the State has opted for the inferior quasi-market paradigm. But the Commission must still act to protect the wholesale markets from the impacts of that choice, consistent with its established policy on State-approved subsidies for uneconomic entry:

> The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction.[58] Our concern, however, is where pursuit of these policy interests allows uneconomic entry of [subsidized] capacity into the capacity market that is subject to our jurisdiction, with the effect of suppressing capacity prices in those markets. We note that our primary concern stems not from the state policies themselves, but from the accompanying price constructs that result in offers into the capacity market from these resources that are not reflective of their actual costs. We agree with arguments contending that [uneconomic] capacity suppresses prices regardless of intent and that the Commission has exclusive jurisdiction on assessing whether

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[56] *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 473 (D.C. Cir. 2008) (internal citation omitted), *rev'd in part not relevant*, *NRG Power Mktg. LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

[57] *PJM*, 128 FERC ¶ 61,157 at P 90. *See also, e.g., New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 103 ("Markets require appropriate price signals to alert investors when increased entry is needed. By allowing net buyers to artificially suppress prices, these necessary price signals may never be seen."), *on reh'g*, 124 FERC ¶ 61,301 (2008), *on reh'g*, 131 FERC ¶ 61,170 (2010), *on reh'g*, 150 FERC ¶ 61,208 (2015).

[58] As noted, whether the State of New York is, in fact, pursuing policy interests within its jurisdiction is another issue for another tribunal and not something the Commission need or should address here. *See supra* note 46.

> wholesale rates are just and reasonable. In fact, the Commission has previously found that uneconomic entry can produce unjust and unreasonable prices by artificially depressing capacity prices, and therefore, the deterrence of uneconomic entry falls within the Commission's jurisdiction. It is these unjust and unreasonable outcomes in a Commission-jurisdiction market that is the focus of our actions here.[59]

While the Commission need not "pass judgment on state policies and objectives,"[60] it can, should, and, indeed, must act to ensure that those policies are not allowed to distort prices in the Commission-jurisdictional wholesale markets.

### B. Requested Relief

As both the MMU and IPPNY have explained, the NYISO's screening and referral proposal is inadequate to deter and provide an effective remedy for uneconomic retention. By contrast, the IPPNY Protest sets forth a detailed proposal that can be used to properly identify and mitigate generators that are likely to be uneconomic and whose continued operation are subsidized by out-of-market contracts.[61] The Commission should therefore order the NYISO to promptly propose modifications to the Services Tariff based on the approach set forth in the IPPNY Protest. Even assuming *arguendo* that the Commission does not agree that IPPNY's proposed relief is just and reasonable, the Commission must still act to address the demonstrably unjust and

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[59] *ISO New England, Inc.*, 135 FERC ¶ 61,029 at P 170 (2011) (footnotes omitted), *on reh'g*, 138 FERC ¶ 61,027 (2012).

[60] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 54 (2013), *on reh'g*, 153 FERC ¶ 61,066 (2013).

[61] IPPNY Protest at 17.

unreasonable distortion of the ICAP market that results from the failure of the Services Tariff to address the effects of offers from subsidized existing resources.[62]

## III. CONCLUSION

**WHEREFORE**, for the foregoing reasons, EPSA requests that the Commission promptly direct the NYISO to file tariff revisions to address artificial price suppression by uneconomic retention as set forth in the IPPNY Protest and discussed herein.

Respectfully submitted,

**ELECTRIC POWER SUPPLY ASSOCIATION**

By: *_/s/ David G. Tewksbury_*
David G. Tewksbury
Stephanie S. Lim
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Nancy Bagot
Senior Vice President
Electric Power Supply Association
1401 New York Ave, NW, Suite 1230
Washington, DC 20005

On behalf of the **Electric Power Supply Association**

Dated: January 9, 2017

62 *See, e.g.*, *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (rejecting the argument that a complainant must demonstrate both that the existing rate is unjust and unreasonable and that its proposed rate is just and reasonable on the basis that "it is only [the Commission] who is required to shoulder the 'dual burden' when it institutes a section 206 proceeding"); *Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (rejecting the notion that "a challenge to rates must propose alternative rates that are just and reasonable" because "[i]t is the Commission's job—not the petitioner's—to find a just and reasonable rate"); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (having found existing rates unjust and unreasonable, "the Commission is required to reach a further determination: the just and reasonable rate to be fixed in place of either an unlawful proposed or existing rate" (emphasis in original)); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,216 at P 94 (2013) ("[W]here the Commission finds that a rate is unreasonable, as it has in this proceeding, we have an obligation to fix the just and reasonable rate under section 206 of the FPA.").