UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ENTERGY NUCLEAR FITZPATRICK, LLC, ENTERGY NUCLEAR POWER MARKETING, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.,

Plaintiffs,

-against-

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, and PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners of the New York Public Service Commission,

Defendants,

-and-

DUNKIRK POWER LLC,

Intervenor-Defendant.

Docket No. 15-cv-230 (DNH/TWD)

MEMORANDUM OF LAW OF PLAINTIFFS ENTERGY NUCLEAR FITZPATRICK, LLC, ENTERGY NUCLEAR POWER MARKETING, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. IN OPPOSITION TO NYPSC DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Scott A. Barbour
MCNAMEE, LOCHNER, TITUS
& WILLIAMS, P.C.
677 Broadway
Albany, NY 12207
Telephone: (518) 447-3213

Sanford I. Weisburst
Yelena Konanova
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100
sandyweisburst@quinnemanuel.com

Attorneys for Plaintiffs (additional Attorneys for Plaintiffs listed on following page)

Gregory W. Camet
ENTERGY SERVICES, INC.
101 Constitution Ave., N.W., Suite 200E
Washington, DC 20001
Telephone: (202) 530-7322

William B. Glew, Jr.
ENTERGY SERVICES, INC.
440 Hamilton Avenue
White Plains, NY 10601
Telephone: (914) 272-3360

Douglas Green
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 429-3000

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Plaintiffs Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Power Marketing, LLC ("ENPM"), and Entergy Nuclear Operations, Inc. (together, "Entergy") respectfully submit this memorandum of law in opposition to the second motion (ECF 124) of Defendants Audrey Zibelman, Patricia L. Acampora, Gregg C. Sayre, and Diane X. Burman (together, "NYPSC Defendants") to dismiss Entergy's Amended Complaint.

INTRODUCTION

This is NYPSC Defendants' *second* motion to dismiss based upon the same March 19, 2015 order of the Federal Energy Regulatory Commission ("FERC"). The first time, NYPSC Defendants argued that "FERC has already rejected [Entergy's] claim" that "Dunkirk unit's participation in the markets will cause Entergy to suffer a concrete and particularized injury," and that the FERC proceeding required dismissal of this case under the primary-jurisdiction doctrine. ECF 69 at 2 (internal quotation marks omitted). This Court rejected the argument. ECF 96 at 19-20.

Now, months later, NYPSC Defendants make the identical argument: "Entergy litigated before FERC and lost the issue of whether the Dunkirk repowering would artificially suppress NYISO[1] capacity prices." ECF 124-1 at 7.

This Court's prior holding is law of the case, and NYPSC Defendants cannot evade the law-of-the-case doctrine by renaming their argument "collateral estoppel" rather than "primary jurisdiction." *See* Point I.A, *infra*. Even if this Court's prior holding and the law-of-the-case doctrine could be ignored, NYPSC Defendants' argument should still be rejected because they cannot satisfy the elements of collateral estoppel. Most notably, they cannot establish that FERC

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1 "NYISO" is the New York Independent System Operator, Inc., the regional transmission organization that oversees the relevant wholesale capacity market subject to FERC's authority. ECF 51 ¶ 38.

actually decided that Entergy will not be injured by the Dunkirk facility being kept in operation. FERC's order did not find, as NYPSC Defendants suggest (ECF 124-1 at 7), "that Dunkirk repowering would not artificially suppress prices." To the contrary, the order found that artificial price suppression was a concern that required further study:

> *We are concerned* that if the additional capacity created by the [Dunkirk] 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*. …
>
> We will require NYISO to submit a report to [FERC] within 90 days of the date of this order regarding NYISO's analysis of these issues and the outcome of … stakeholder discussion. The Commission will review the report to determine whether additional actions need to be taken.

ECF 124-5 at ¶¶ 69, 71 (emphasis added) (footnote omitted). This is hardly a finding that capacity prices will *not* be artificially suppressed. To be sure, FERC denied an immediate remedy for such harm and set the matter for further proceedings. But that does not aid NYPSC Defendants' argument; it only confirms that FERC has not yet issued a final determination, which is another essential element of collateral estoppel. *See* Point I.B, *infra*.

NYPSC Defendants do advance one new argument, *i.e.*, that Entergy's case is barred by the filed rate doctrine. But that argument was available when NYPSC Defendants filed their first motion to dismiss and hence was waived by NYPSC Defendants' failure to include it in that motion. *See* Fed. R. Civ. P. 12(g)(2). The exception to Rule 12(g)(2)'s waiver rule for jurisdictional arguments does not apply because "the filed rate doctrine is not a subject matter jurisdiction issue, but is rather a defense on the merits." *Hoover v. HSBC Mortg. Corp.*, 9 F. Supp. 3d 223, 237 (N.D.N.Y. 2014). In any event, in a decision NYPSC Defendants ignore, the same filed rate doctrine argument was rejected by the Fourth Circuit as "meritless," *PPL*

EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 474 n.1 (4th Cir. 2014), and the Supreme Court implicitly agreed, since it went on to rule in the plaintiffs' favor on their federal preemption challenge to the Maryland Public Service Commission's order, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). *See* Point II, *infra*.

* * * * *

As in their first motion to dismiss, NYPSC Defendants do not argue the merits of Entergy's case. Entergy's case has been strengthened by the Supreme Court's decision in *Hughes*, which held that a similar state commission-ordered subsidy was preempted by the Federal Power Act ("FPA"), reasoning that the state scheme "guarantees [a generator] a rate distinct from the clearing price for its interstate capacity to PJM.[2] By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf." 136 S. Ct. at 1297; *see, e.g.*, ECF 51 ¶ 59 ("graph depict[ing] the difference for the first five-year period of the [Dunkirk] Term Sheet between, on the one hand, the wholesale market revenue that Dunkirk nominally receives from the wholesale auction and, one the other hand, the amount that Dunkirk is allowed by the Term Sheet to keep").

The central issue in this case is whether the NYISO interstate market is entitled to the same protection from State intrusion to which the PJM interstate market was entitled in *Hughes*. If NYPSC Defendants think this case can be distinguished from *Hughes*, they should develop that merits argument. But the law-of-the-case doctrine and Rule 12(g)(2) prevent them from throwing up a series of procedural roadblocks on *seriatim* motions to dismiss seeking to avoid the merits. NYPSC Defendants' motion should be denied.

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[2] PJM, like NYISO, is a regional transmission organization; it covers "13 mid-Atlantic and Midwestern States and the District of Columbia." *Hughes*, 136 S. Ct. at 1293.

STATEMENT OF FACTS

Although this Court is familiar with the facts from proceedings on NYPSC Defendants' first motion to dismiss, Entergy summarizes them here for the Court's convenience. Entergy challenges a June 13, 2014 order ("Order") of the New York Public Service Commission ("NYPSC") approving a Term Sheet that artificially keeps the uneconomic Dunkirk, New York electricity generator in operation, subsidized by payments from National Grid, a local utility, of $20.4 million per year (for ten years) and a one-time $15 million payment from a state agency. ECF 51 ¶¶ 1, 4-5. Entergy owns generators located in New York that will be injured if the Dunkirk facility—which under normal market forces would have been mothballed—is instead artificially kept in operation, offering its capacity at a price below its cost and thus suppressing the prices (and hence the revenues) that other generators receive in the interstate wholesale market. *Id.* ¶¶ 6, 12.

Entergy seeks to declare NYPSC's Order invalid and to enjoin NYPSC Defendants from enforcing the Order. *Id.* at 38. Count I asserts an FPA preemption claim in two parts. Entergy first alleges, under the doctrine of field preemption, that the Order invades the exclusive federal field of regulation of the wholesale interstate market for the sale of capacity by setting the wholesale rates Dunkirk will receive from sales of its capacity. *Id.* ¶ 76. Entergy second alleges, under the doctrine of conflict preemption, that the Order stands as an obstacle to the accomplishment of Congress's purposes in the FPA by, *inter alia*, artificially suppressing wholesale prices. *Id.* ¶ 80. Count II asserts a claim for violation of the Dormant Commerce Clause. *Id.* ¶¶ 87-101.

On July 24, 2015, NYPSC Defendants filed their first motion to dismiss, under Rule 12(c). ECF 36. The motion attacked Entergy's complaint not on the merits, but on procedural grounds: untimeliness, lack of standing, and primary jurisdiction.

As particularly relevant here, NYPSC Defendants argued, as an essential element of their primary-jurisdiction argument, that "Entergy has already unsuccessfully raised at FERC" "[t]he purported injury that brought Entergy to federal court—the contention that it is the victim of unlawful 'price suppression' in the NYISO capacity markets because of the repowered Dunkirk unit." ECF 69 at 1 (emphasis omitted); *see also id.* at 2 ("Entergy says it has been injured because the Dunkirk unit's participation markets will cause 'Entergy to suffer a concrete and particularized injury …' [b]ut FERC has already rejected this claim ….") (alterations and citation omitted). This Court rejected the primary-jurisdiction argument. ECF 96 at 19-20.

In the meantime, the FERC proceeding has continued. NYISO submitted a report to FERC on December 16, 2015, and interested parties have submitted comments. FERC has not yet issued a final order regarding whether generators such as those owned by Entergy are injured by Dunkirk being kept in operation.

STANDARD OF REVIEW

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court must accept as true all material allegations of the complaint and construe the complaint in favor of the plaintiff. *See Thompson v. Cnty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994). If necessary, "[a] court may consider affidavits and other material beyond the pleadings to resolve jurisdictional questions." *Osorio v. Hasenmeyer*, 2005 WL 408048, at *1 (E.D.N.Y. Feb. 16, 2005).

Only NYPSC Defendants' collateral estoppel/lack of Article III injury argument (*see* ECF 124-1, Points I-II), is properly brought under Rule 12(b)(1). Their filed rate doctrine

argument does not concern this Court's subject matter jurisdiction. Because it was not included in the first motion to dismiss, it is waived pursuant to Rule 12(g)(2), and does not qualify for Rule 12(h)(3)'s exception to that waiver rule for subject matter jurisdiction arguments. *See* Point II, *infra*.

ARGUMENT

I. ENTERGY IS NOT COLLATERALLY ESTOPPED BY FERC'S MARCH 19, 2015 ORDER FROM ALLEGING INJURY

A. Law Of The Case Bars NYPSC Defendants' Collateral Estoppel Argument

NYPSC Defendants argue that Entergy cannot allege injury as a result of Dunkirk's participation in the NYISO capacity market because Entergy supposedly "litigated and lost" this issue in a "previous FERC proceeding" (ECF 124-1 at 4). This argument fails at the threshold under the law-of-the-case doctrine because this Court rejected the argument in denying NYPSC Defendants' first motion to dismiss.

Under the law-of-the-case doctrine, "'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case.'" *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 214 F.R.D. 83, 91 (N.D.N.Y. 2003) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002)). The doctrine applies here because NYPSC Defendants already advanced the identical argument on their first motion to dismiss, and this Court rejected it. They cannot escape law of the case simply by relabeling the argument now as "collateral estoppel" instead of "primary jurisdiction."

Specifically, on NYPSC Defendants' first motion to dismiss, they argued, as an essential component of their primary-jurisdiction argument, that "Entergy has already unsuccessfully raised at FERC" "[t]he purported injury that brought Entergy to federal court—the contention that it is the victim of unlawful 'price suppression' in the NYISO capacity markets because of

the repowered Dunkirk unit." ECF 69 at 1 (emphasis omitted); *see also id*. at 2 ("Entergy says it has been injured because the Dunkirk unit's participation markets will cause 'Entergy to suffer a concrete and particularized injury …' [b]ut FERC has already rejected this claim ….") (alterations and citation omitted). This Court rejected the argument, ECF 96 at 19-20, thus implicitly but necessarily rejecting what NYPSC Defendants had portrayed as an essential component of that argument, *i.e.*, that "FERC has already rejected [Entergy's] claim" that "it has been injured," ECF 69 at 2.[3]

NYPSC Defendants cannot avoid law of the case simply by attaching a new label—now "collateral estoppel" (ECF 124-1 at 5) instead of "primary jurisdiction" (ECF 69 at 1)—to the same underlying argument. *See, e.g.*, *FTC v. Metro. Commc'ns Corp.*, 977 F. Supp. 295, 296-97 (S.D.N.Y. 1997) (applying law of the case to bar party's attempt, "more than a year and one half later, … to interpose a claim against the receivership companies, based on the same factual allegations addressed by Judge Keenan but premised on the 'different' theory of quantum meruit (as opposed to its prior contractual theory)"); *Grove v. Secretary*, 2009 WL 179626, at *7 (M.D. Fla. Jan. 26, 2009) (discussing state law) ("By packaging the same legal issue in a different form

[3] To be sure, this Court's prior decision did not explicitly address NYPSC Defendants' argument that FERC *had already decided* that there is no price suppression and hence no injury to Entergy. (This Court described NYPSC Defendants as arguing that "the ongoing FERC proceeding … deals with, and will resolve, the issue of whether the Term Sheet improperly suppresses prices in the NYISO capacity market." ECF 96 at 19.) But, as discussed in text, NYPSC Defendants did explicitly advance the "FERC has already decided" argument on that prior motion, as an essential element of their primary-jurisdiction argument. Accordingly, this Court's rejection of the primary-jurisdiction argument should be viewed as implicitly but necessarily rejecting the "FERC has already decided" argument. For the same reason, the fact that this Court did not use the word "injury" (*see* ECF 124-1 at 9 n.7) is irrelevant because NYPSC Defendants *did* use that word in describing what they viewed as an essential element of their primary-jurisdiction argument. *See* ECF 69 at 1 ("The purported *injury* that brought Entergy to federal court—the contention that it is the victim of unlawful 'price suppression' in the NYISO capacity markets because of the repowered Dunkirk unit— … Entergy has already *unsuccessfully* raised at FERC.") (first emphasis added).

or format, a party or defendant cannot avoid the impact of the law of the case doctrine: the finality of legal issues once pursued on the merits, to their ultimate conclusion."). Similarly, the Supreme Court has held, in the analogous context where a party seeks to raise again an issue on which the party lost in a *prior* proceeding,[4] that a party is "bar[red from] 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' *even if the issue recurs in the context of a different claim*." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)).[5]

B. In Any Event, NYPSC Defendants Cannot Satisfy The Elements Of Collateral Estoppel

Even if, notwithstanding this Court's prior order and the law-of-the-case doctrine, NYPSC Defendants were free to advance their collateral estoppel argument, the argument should be rejected because they fail to satisfy the doctrine's elements. Most notably, FERC never decided the issue on which NYPSC Defendants seek to estop Entergy here. Contrary to NYPSC Defendants' suggestion that FERC found that Entergy is not injured, FERC found that a conclusion of injury was just as likely and therefore set the issue for further study and consideration (ECF 124-5 at 30). While denying an immediate remedy, FERC kept its proceeding open and indeed the proceeding is still pending and has resulted in no final order.

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[4] Law of the case concerns a prior ruling within the *same* proceeding.

[5] NYPSC Defendants contest (ECF 124-1 at 6-7 n.6) this Court's holding (ECF 96 at 20) that the remedies available in this Court are different from those available at FERC. This Court was correct, and NYPSC Defendants' newly-cited authorities are inapposite. In none of those cases did the plaintiffs seek to enjoin a state order, as Entergy seeks in this case; rather, plaintiffs sought at most declaratory relief. *See, e.g.*, *Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 147 FERC ¶ 61,215, at *25-26 (2014) ("Our authority under the FPA is limited to our licensees; we have no regulatory authority over [the Washington State Department of] Ecology or Island County in this case.").

"Collateral estoppel, or issue preclusion, prevents the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding." *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991). It requires that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

Indagro S.A. v. Bauche S.A., 652 F. Supp. 2d 482, 486 (S.D.N.Y. 2009) (internal quotation marks omitted).

NYPSC Defendants' argument fails most obviously on the second element because FERC's order never found that Entergy will not suffer injury from the NYPSC Order keeping Dunkirk in operation. NYPSC Defendants' assertion that FERC made such a finding relies on a selective quotation and paraphrase of FERC's order. According to NYPSC Defendants, "FERC found, based on the evidence before it, that Dunkirk repowering would not artificially suppress prices, but only had a 'potential' to do so." ECF 124-1 at 7 (citing ECF 124-5 at ¶¶ 69, 71). In fact, FERC did not find that generators such as Entergy would not be injured, and instead found that they might well be injured and that the matter requires further study and a further order by FERC:

> 69. However, we find that the new evidence of the Dunkirk repowering agreement and accompanying argument and testimony in IPPNY's March 25, 2014 Amendment raise potential issues of artificial price suppression. Unlike the RSSA contracts discussed in the original Complaint that procure adequate capacity to address short-term reliability needs, the Dunkirk repowering agreement appears to procure more capacity than is needed for short-term reliability, and for a much 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*.
>
> [Paragraph 70 omitted]

> 71. … [W]e direct NYISO to establish a stakeholder process to consider … 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. We will require NYISO to submit a report to the Commission within 90 days of the date of this order regarding NYISO's analysis of these issues and the outcome of such stakeholder discussion. *The Commission will review the report to determine whether additional actions need to be taken*.

ECF 124-5 ¶¶ 69, 71 (emphasis added) (footnote omitted).[6]

NYPSC Defendants take the word "potential" out of context, suggesting that FERC meant that any injury is "'conjectural or hypothetical'" (ECF 124-1 at 9 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). As is evident from the passage block-quoted above, FERC used the word "potential" to mean that the price-suppression/injury issue required further investigation, not that such injury was too speculative or too far in the future to be addressed.

Indeed, Entergy has adequately alleged Article III injury, and NYPSC Defendants provide no response beyond their unpersuasive reliance on the FERC order. Specifically, Entergy alleged that a currently valid NYPSC Order authorizes the repowered Dunkirk facility to return to service and to bid in the auction as soon as September 1, 2015. *See* ECF 51 ¶ 56 (first bullet). Although Dunkirk has to date not started bidding, Entergy has no knowledge when it might do so, and the Term Sheet's September 1, 2015 target date supports a reasonable inference that Dunkirk could commence bidding imminently. That this injury may occur slightly in the

[6] NYPSC Defendants argue that Entergy "itself recognizes that it lost before FERC" because it requested rehearing. ECF 124-1 at 8. In fact, the rehearing request concerned only whether FERC should grant an immediate remedy, not whether FERC had found that Entergy and other generators will not be injured by the NYPSC Order and Dunkirk being kept in operation. *See* ECF 36-5 at 2 (FERC should "impos[e] a remedy … *now* rather than waiting for further factual development") (emphasis in original).

future does not mean that Article III injury is not alleged. To the contrary, "parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors" and need not "wait" until the competitor actually enters the market. *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998); *see also U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (competitors have standing to challenge "regulatory decisions that permit subsidization of some participants in a market"); *Assoc. Gas Distrib. v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) ("[Petitioners] need not wait for specific, allegedly illegal transactions to hurt them competitively."); *see generally Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("Given petitioners' allegation that the amount of available water will be reduced [due to future compliance with the Fish and Wildlife Service's Biological Opinion] and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners *will be injured*.") (emphasis added).[7]

Additionally, NYPSC Defendants cannot meet the fourth element of collateral estoppel because FERC has not yet issued anything akin to a final judgment. *See, e.g.*, *Hi Pockets, Inc. v. Music Conservatory of Westchester, Inc.*, 192 F. Supp. 2d 143, 154 (S.D.N.Y. 2002) ("collateral estoppel appl[ies] to a determination by an administrative agency when the decision is final"). As discussed above, in the March 19, 2015 order, FERC set the question of price suppression for further investigation (including a report from NYISO to FERC). While NYISO has now submitted its report, FERC has not yet issued a final order.

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[7] In contrast, in NYPSC Defendants' authorities, the plaintiffs' claimed injuries were indeed speculative. *See, e.g.*, *Lujan*, 504 U.S. at 563, 566-67 (environmental group lacked injury from funding of activities that threatened endangered species); *Whitmore v. Arkansas*, 495 U.S. 149, 157 (1990) (death row inmate's alleged injury was "too speculative" where it was predicated on the impact of death sentence imposed on another capital defendant); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233 (1990) (plaintiffs lacked injury from ordinance provisions that did not apply to them).

II. NYPSC DEFENDANTS' FILED RATE DOCTRINE ARGUMENT IS WAIVED AND IN ANY EVENT MERITLESS

A. NYPSC Defendants Waived Their Filed Rate Doctrine Argument

Rule 12(g)(2) provides that, "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule [*i.e.*, Rule 12] must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). NYPSC Defendants did not include a filed rate doctrine argument in their first Rule 12 motion. Accordingly, it is waived unless the Rule 12(h)(2) or (3) exception applies.

NYPSC Defendants invoke (ECF 124-1 at 2) only the Rule 12(h)(3) exception, which covers arguments that the Court lacks subject matter jurisdiction. But that exception does not apply because "the filed rate doctrine is not a subject matter jurisdiction issue, but is rather a defense on the merits." *Hoover*, 9 F. Supp. 3d at 237; *see also Lyons v. Litton Loan Servicing LP*, 2016 WL 415165, at *5 (S.D.N.Y. Feb. 2, 2016) ("courts within the Second Circuit have found that filed rate doctrine challenges should not be brought under Rule 12(b)(1)"); *Curtis v. Cenlar FSB*, 2013 WL 5995582, at *2 (S.D.N.Y. Nov. 12, 2013) ("the defendants' [filed rate] argument[is] not properly understood as [a] standing argument[] and this motion will be decided under Rule 12(b)(6)"). These courts persuasively reason that "'standing is fundamentally about the propriety of the individual litigating a claim irrespective of its legal merits, while a Rule 12(b)(6) inquiry is concerned with the legal merits of the claim itself'"; under the filed rate doctrine, "'defendants are not contending that [plaintiff] is the wrong individual to bring these legal claims; they are arguing that the claims are simply not legally cognizable.'" *Hoover*, 9 F. Supp. 3d at 237 (quoting *Curtis*, 2013 WL 5995582, at *2). NYPSC Defendants do not address these authorities.

The Rule 12(h)(2) exception, which NYPSC Defendants do not invoke, is likewise inapplicable. That exception allows, *inter alia*, a party that has already made a Rule 12(b) motion subsequently to make a Rule 12(c) motion arguing that the plaintiff "[f]ail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(h)(2). But NYPSC Defendants' prior motion was a Rule 12(c) motion, not a Rule 12(b) motion. Rule 12(h)(2) does not permit "*ad nauseam* successive Rule 12(c) motions addressed to the same pleading." *Fisher v. Dallas Cnty.*, 2014 WL 4797006, at *8 (N.D. Tex. Sept. 26, 2014).

B. In Any Event, The Filed Rate Doctrine Is Not A Defense To Entergy's Suit

Even if this Court were to consider NYPSC Defendants' filed rate doctrine argument on the merits, it fails. NYPSC Defendants argue that "Entergy suffers no justiciable injury if the repowered Dunkirk facility successfully bids into the NYISO capacity auction in accordance with NYISO's FERC-filed tariff, because the resulting auction rate is 'per se reasonable and unassailable in judicial proceedings.'" ECF 124-1 at 12 (quoting *Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012)).

That argument has been soundly rejected in a decision that NYPSC Defendants fail to address. In the Fourth Circuit's *Nazarian* decision, relied upon by this Court (ECF 96 at 20), and subsequently affirmed *sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016), the Fourth Circuit rejected the argument as "meritless" because "a judgment in plaintiffs' favor would require this court neither 'to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.'" *Nazarian*, 753 F.3d at 474 n.1 (quoting *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004)).

The Fourth Circuit was correct. As NYPSC Defendants themselves concede, "it is th[e] judicial determination of a reasonable rate that the filed rate doctrine forbids" (ECF 124-1 at 13 (quoting *Wegoland Ltd. v. NYNEX Corp.,* 27 F.3d 17, 21 (2d Cir. 1994)). Entergy is not asking

this Court to determine a price for Dunkirk's capacity sales that would be reasonable. Rather, Entergy seeks a declaration that NYPSC's Order is invalid because it establishes an out-of-market mechanism that interferes with the wholesale market. NYISO's tariff (and auction mechanism) will remain the same; it will simply yield a different result without the State's interference (and Dunkirk's resulting bidding) than with the State's interference.

NYPSC Defendants' authorities, which concern challenges to the rates or services provided by a tariff, are inapposite here, where Entergy is challenging a state order that relies on a mechanism outside of the tariff (the Term Sheet) to change the market outcome. *See AT&T Co. v. Centr. Office Tel., Inc.*, 524 U.S. 214, 226 (1998) (breach of contract suit against a provider for services that were in addition to or contrary to what was in the provider's tariff); *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (damages action challenging unreasonable electric utility rates); *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 160-61 (1922) (challenge to rates charged by a carrier pursuant to a tariff); *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (suit by a carrier to recover an undercharge on the sale of interstate railway tickets); *McCray v. Fidelity Nat'l Title Ins. Co.*, 682 F.3d 229, 242 (3d Cir. 2012) (antitrust challenge to "the legal rate" set by tariff); *Simon*, 694 F.3d at 205 (same); *Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc. (In re Cal. Wholesale Elec. Antitrust Litig.)*, 244 F. Supp. 2d 1072, 1075-76 (S.D. Cal. 2003), *aff'd*, 384 F.3d 756 (9th Cir. 2004) (same); *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 850, 853 (9th Cir. 2004) (unfair business practices suit against regulated entities seeking to impose obligations beyond the terms and conditions of the tariff); *Wegoland*, 27 F.3d at 18 (RICO challenge to approved rates); *Taffet v. S. Co.*, 967 F.2d 1483, 1488 (11th Cir. 1992) (same). *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) and *New Jersey Board of Public Utilities*

v. FERC, 744 F.3d 74 (3d Cir. 2014), are inapposite because they do not address the filed rate doctrine.

CONCLUSION

NYPSC Defendants' motion should be denied.

Dated: August 23, 2016

Respectfully submitted,

/s/ Sanford I. Weisburst

Sanford I. Weisburst
Yelena Konanova
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Fax: (212) 849-7100
sandyweisburst@quinnemanuel.com

Scott A. Barbour
MCNAMEE, LOCHNER, TITUS
& WILLIAMS, P.C.
677 Broadway
Albany, NY 12207
Telephone: (518) 447-3213

Douglas Green
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 429-3000

Gregory W. Camet
ENTERGY SERVICES, INC.
101 Constitution Ave., N.W., Suite 200E
Washington, DC 20001
Telephone: (202) 530-7322

William B. Glew, Jr.
ENTERGY SERVICES, INC.
440 Hamilton Avenue
White Plains, NY 10601
Telephone: (914) 272-3360

Attorneys for Plaintiffs