UNITED STATES DISTRICT COURT
FOR THE 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. 5:15-CV-230

(DNH/TWD)

MEMORANDUM OF LAW IN SUPPORT OF THE NYPSC DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF JURISDICTION

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Dated: August 2, 2016
Washington, D.C.

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 12(b)(1), and this Court's June 3, 2016 Uniform Pretrial Scheduling Order,[1] Defendants Audrey Zibelman, Patricia L. Acampora, Gregg C. Sayre, and Diane X. Burman, together the Public Service Commission of the State of New York ("NYPSC" or "NYPSC Defendants"), submit this memorandum in support of their motion to dismiss for lack of Article III jurisdiction the "Amended Complaint for Declaratory and Injunctive Relief" submitted by Plaintiffs' Entergy Nuclear FitzPatrick, LLC ("ENF"), Entergy Nuclear Power Marketing, LLC ("ENPM"), and Entergy Nuclear Operations, Inc. ("ENOI") (collectively, "Entergy").[2]

As demonstrated below, NYPSC's requested relief should be granted for two reasons:

- First, Entergy has already litigated and lost before the Federal Energy Regulatory Commission ("FERC") the same claim that Entergy raises here: that repowering the Dunkirk Steam Generating Station ("Dunkirk") pursuant to the NYPSC Order at issue[3] will injure Entergy because the repowering will result in the artificial suppression of clearing prices in the capacity market operated by the New York State Independent System Operator ("NYISO"). As FERC has already rejected this claim, Entergy is precluded from raising it again here.
- Second, Entergy has suffered no cognizable injury—nor does it face the risk of any such injury in the future—that is traceable to the NYPSC Order, because Entergy resources participating in the NYISO capacity market are entitled to receive nothing other than the FERC-filed auction rate. Entergy can suffer no

[1] NYPSC's 12(b)(1) motion is properly before the Court because the Uniform Pretrial Scheduling Order provides for the filing of such motions by August 2, 2016. Unif. Pretrial Sched. Order, ECF No. 111 ¶ 3 ("ECF No. 111").

[2] Am. Compl. For Decl. & Inj. Relief, ECF No. 51 ("ECF No. 51").

[3] Order Addressing Repowering Issues and Cost Allocation and Recovery, ECF No. 51-1 ("Order").

> legal injury where, as here, Dunkirk's participation in the capacity market is pursuant to a FERC-filed tariff, which establishes the rules and permissions that govern whether—and, if so, how—the repowered Dunkirk facility may bid into the capacity auction. If Dunkirk bids and clears into the NYISO capacity auction in accordance with FERC rules, Entergy is entitled only to the resulting auction clearing price—i.e., the lawful filed rate. The receipt of the FERC-approved auction clearing price—whatever it may be—is not a legally cognizable "injury" for standing purposes, and no district court can find otherwise. The other possibility is that Dunkirk neither can nor does successfully participate in the NYISO capacity auction, in which case the repowering will have no impact on the capacity auction revenues received by Entergy's New York facilities.

In short, having litigated and lost the issue before FERC, Entergy is precluded from raising its alleged injury again here. Further, and in any event, the absence of any cognizable injury to Entergy as a consequence of the NYPSC Order means that: (1) Entergy has no Article III standing, and (2) the Court lacks jurisdiction over Energy's Amended Complaint. For these reasons, the Amended Complaint must be dismissed. *See* Fed. R. Civ. P. 12(h)(3).

ARGUMENT

I. ENTERGY'S AMENDED COMPLAINT SHOULD BE DISMISSED NOW FOR LACK OF JURISDICTION

"Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause [of action] lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). "Article III, § 2, of the Constitution extends the 'judicial [p]ower' of the United States only to 'Cases' and 'Controversies.'" *Steel Co. v. Citizens for a Better Env't*,

523 U.S. 83, 102 (1998). "Standing to sue is part of the common understanding of what it takes to make a justiciable case," *id.*, and is "'perhaps the most important' of the case-or-controversy doctrines placing limits on federal judicial power." *All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). It has three essential elements:

> "A plaintiff must allege[:] [(1)] personal injury [(2)] fairly traceable to the defendant's allegedly unlawful conduct and [(3)] likely to be redressed by the requested relief."

Id. (quoting *Allen*, 468 U.S. at 751). It is "a long-settled principle that standing . . . 'must affirmatively appear in the record.'" *FW/PBS, Inc. v. City of Dall.*, 493 U.S. 215, 232 (1990) (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). A plaintiff must have Article III standing even where only declaratory relief is sought.[4] *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990).[5]

To satisfy the injury requirement, Entergy must demonstrate that it has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted) (quoting *Allen*, 468 U.S. at 756, and *Whitmore*, 495 U.S. at 155). Entergy has failed to make this showing.

The gravamen of Entergy's Amended Complaint is that it will be injured by the NYPSC Order—which does not regulate Entergy—and by the Term Sheet that the NYPSC Order approves—under which Entergy neither pays nor receives anything. Instead, Entergy's alleged injury is that by approving the Term Sheet, the NYPSC has facilitated the proposed repowering

[4] Entergy seeks injunctive and declaratory relief. ECF No. 51 ¶¶ 84, 85, 102, 103.

[5] The submission by the NYPSC Defendants of a Fed. R. Civ. P. 12(b)(1) motion to dismiss is the "proper procedural route" for challenging Entergy's standing because "Article III standing [is] . . . a limitation on the authority of a federal court to exercise jurisdiction." *All. for Envtl. Renewal*, 436 F.3d at 88 n.6.

of the Dunkirk facility which, once completed, will "interfere[] with FERC-approved market processes, by keeping uneconomic supply in the market, [and] will artificially suppress market prices." ECF No. 51 ¶ 1. The referenced FERC-jurisdictional wholesale market is the auction-based market for capacity administered by the NYISO. *See, e.g.*, *id.* ¶ 2 (discussing "[m]ore specifically" the FERC-approved "auction-based market to ensure that adequate capacity is available to meet New York's needs").

Entergy alleges that as a result of this price suppression "generators [such as its] FitzPatrick [facility] will receive lower [capacity] revenues." *Id.* ¶ 69. Entergy further alleges that the repowered Dunkirk plant's bidding in the NYISO capacity auction "under certain market conditions, will also be felt by generators in other NYISO sub-regions (like [Entergy-operated] Indian Point 2 and Indian Point 3)." *Id.* ¶ 70. Entergy's November 2, 2015 Letter Brief confirms the nature of Entergy's alleged injuries in this case, to wit, "[i]mplementation of the Dunkirk Term Sheet will potentially diminish the revenues received from the sale of [Indian Point 2's and Indian Points 3's] capacity, and will thus cause harm to ENOI and ENPM." Entergy Letter Br., ECF No. 84 at 1 ("ECF No. 84"). As regards FitzPatrick, "its [capacity] revenues . . . will suffer from the artificially suppressed prices in [the New York] market if the Term Sheet is implemented" before Entergy's announced closure of FitzPatrick in "early 2017." *Id.* at 1-2.

II. ENTERGY IS PRECLUDED FROM ASSERTING THAT IT WILL BE INJURED BY THE PARTICIPATION OF THE REPOWERED DUNKIRK FACILITY IN THE NYISO CAPACITY MARKETS

The "injury" that Entergy alleges here—that the participation of the repowered Dunkirk facility in the FERC-regulated NYISO capacity auction will artificially suppress the auction clearing price and, in turn, diminish the revenues received by Entergy facilities that clear the auction—was also an essential element of the claim that Entergy litigated and lost in a previous FERC proceeding. Entergy is precluded from re-arguing the issue here, and therefore cannot

allege—let alone demonstrate—the presence of a cognizable injury sufficient to justify standing to bring this lawsuit.

As the Supreme Court recently made clear, "[a]llowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring." *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1298-99 (2015). The Court went on to explain:

> "[T]he determination of a question directly involved in one action is conclusive as to that question in a second suit." *Cromwell v. County of Sac.*, 94 U.S. 351, 354 (1877). The idea is straightforward: Once a court has decided an issue, it is "forever settled between the parties," *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931).

Id. at 1302 (citations omitted). There should be no question that the doctrine of issue preclusion applies here, "where a single issue is before a court and an administrative agency." *Id.* at 1303.

A federal agency's adjudicated finding of fact necessary to its decision is preclusive in district court where the same disputed issue is present in both proceedings, the parties are adverse on the matter, and the losing party had a full and fair opportunity to litigate the issue in the first proceeding.

> [W]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply [preclusion] to enforce repose.

Id. (internal quotations marks omitted) (quoting *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 797-98 (1986)). Federal common law governing the preclusive effect of FERC's federal judgment 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."

Ball v. A.O. Smith Corp., 451 F.3d 66, 69 (2d Cir. 2006) (quoting *Purdy v. Zeldes*, 337 F.3d 253, 258 & n.5 (2d Cir. 2003)). These elements are satisfied here.

On March 25, 2014, the Independent Power Producers of New York, Inc. ("IPPNY") filed an Amended Complaint in FERC Docket No. EL13-62-000 alleging that the Dunkirk repowering would artificially suppress prices in the NYISO auction capacity market. IPPNY asked FERC, *inter alia*, to "exclude the [repowered Dunkirk] capacity from the [NYISO] capacity markets." Motion to Amend and Amendment to Complaint at 12 (Mar. 25, 2014), eLibrary No. 20140325-5110 (included without attachments as Feinberg Decl. Ex. A). Plaintiff ENPM was an intervenor in the proceeding and filed comments both noting that the Dunkirk repowering was "properly . . . before [FERC]" and supporting the Amended Complaint on the same price suppression claim raised here:

> The Amended Complaint properly brings before [FERC] the issue of the Dunkirk repowering, which will result in the retention of 435 MW of uneconomic capacity . . . Unless [FERC] takes action, the Dunkirk Term Sheet will likely be converted into an agreement pursuant to which Dunkirk's uneconomic capacity will continue to artificially suppress capacity market prices until at least September 2025. ENPM supports the Amended Complaint and concurs in IPPNY's request that [FERC] grant leave for IPPNY to amend its original complaint and that [FERC] take action to remedy the harm to the market identified in the Amended Complaint.

Supp. Comments on Am. Compl. Of Entergy Nuclear Power Mktg., LLC, ECF No. 36-3 at 5 ("ECF No. 36-3").[6] NYPSC was also a party to the proceeding and opposed the "asserted harm

[6] IPPNY and Entergy could have argued preemption before FERC. Pursuant to its regulatory powers, FERC can preempt state law, and has done so repeatedly. *See, e.g.*, *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, P 64, *on reh'g*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011) (California Public Utilities Commission's "AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC."); *Pub. Util. Dist. No. 1 of Snohomish Cty.*, 147 FERC ¶ 61,215, P 25, *reh'g denied*, 149 FERC ¶ 61,206 (2014) (FERC "grant[s] the District's petition and declare[s] that the FPA preempts any supplementary or inconsistent state or local requirements under Washington's Shoreline Act") (9th Cir. appeal pending); *New York v. FERC*, 535 U.S. 1, 18

[resulting from] the Dunkirk repowering proposal [as] speculative." *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, P 29 (2015) (rehearing pending) (attached as Feinberg Decl. Ex. C) (referencing Answer of NYPSC in Opposition to IPPNY's Motion to Lodge at 5-6 (July 14, 2014), eLibrary No. 20140714-5205 (attached as Feinberg Decl. Ex. B)).

FERC considered the Amended Complaint, IPPNY's evidence, and other parties' evidence, and denied the complaint—including IPNNY's claims of price suppression resulting from the Dunkirk Term Sheet—finding that "IPNNY has not satisfied its [evidentiary] burden under [FPA] section 206." *Id.* P 71. FERC directed NYISO to conduct a stakeholder process to evaluate going forward "resources under repowering agreements similar to Dunkirk's . . . [and their] potential to suppress prices in the capacity market." *Id.*

Entergy litigated before FERC and lost the issue of whether the Dunkirk repowering would artificially suppress NYISO capacity prices. FERC found, based on the evidence before it, that Dunkirk repowering would not artificially suppress prices, but had only a "potential" to do so. *Id*. PP 69, 71. This finding was essential to FERC's denial of relief. Had FERC found "harm to the market" (ECF No. 36-3 at 5) due to the participation of the repowered Dunkirk facility in the NYISO capacity market, then FERC would have been bound to remedy it. "[I]f FERC sees a violation of [the just and reasonable] standard, it *must* take remedial action." *FERC v. EPSA*, 136 S. Ct. 760, 773-74 (2016) (emphasis added).

(2002) (upholding FERC's preemption of state authority over unbundled retail transmission); *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1079 (D.C. Cir. 2008) (vacating FERC order because FERC failed to recognize that relevant provision of FPA preempted all state assessments at issue). FERC recently rejected provisions in a FERC-jurisdictional settlement agreement because they "potentially infringe[d] upon [FERC's] exclusive jurisdiction over wholesale rates under the FPA" in requiring NYPSC approval of all aspects of the settlement. *R.E. Ginna Nuclear Power Plant, LLC*, 154 FERC ¶ 61,157, P 26 (2016).

Plaintiff ENPM itself recognizes that it lost before FERC the issue of whether the repowered Dunkirk capacity would artificially suppress NYISO capacity market prices. ENPM sought rehearing from FERC's order and argued that "as to the long-term Dunkirk Term Sheet, [FERC] should grant rehearing of its finding that the current record evidence does not support [FERC] imposing a remedy . . . *now* rather than waiting for further factual development by NYISO and other shareholders." Req. for Clarification and Reh'g of Entergy Nuclear Power Mktg., LLC, ECF No. 36-5 at 1-2 ("ECF No. 36-5") (emphasis supplied). "[FERC] erred in ignoring record evidence that the Dunkirk long-term repowering Term Sheet will artificially suppress capacity market prices." *Id.* at 3.

Entergy had full and fair opportunity to litigate the issue before FERC. Entergy expressly relied upon IPPNY's expert evidence—which FERC considered and found wanting. Entergy has argued on rehearing to FERC that the evidence presented there supported a factual finding that the Dunkirk Term Sheet would result in artificial price suppression and market harm and that FERC erred by failing to make such a finding or to establish a hearing to gather more evidence. Finally, FERC's consideration of the Dunkirk price suppression issue was necessary to its finding concerning this aspect of the IPPNY Complaint.

For these reasons, Entergy is precluded from arguing here that the "Dunkirk facility will "interfere[] with FERC-approved market processes, by keeping uneconomic supply in the market, [and] will artificially suppress market prices." ECF No. 51 ¶ 1. FERC found otherwise in denying IPPNY's amended complaint, and that evidentiary finding is not subject to re-litigation in this proceeding. Nor does ENPM's submission of a request for rehearing before FERC prevent a ruling that FERC's finding has preclusive effect here. "Under well-settled federal law, the pendency of an appeal does not diminish the [preclusive] effect of a judgment rendered by a

federal court." *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983). "A judgment otherwise final for purposes of the law of [preclusion] is not deprived of such finality by the fact that time still permits . . . proceedings in the trial court to set aside the judgment." Restatement (Second) of Judgments § 13(f) (Am. Law Inst. 1980). *See also Univ. of Tenn. v. Elliot*, 478 U.S. at 792 (adjudicated finding of un-reviewed agency decision entitled to issue preclusive effect).

In short, Entergy's case is premised on the alleged loss of capacity "revenues . . . [its New York nuclear units] will suffer from the artificially suppressed prices in [the New York] market if the Term Sheet is implemented." ECF No. 84 at 1-2; *see also* ECF No. 51 ¶¶ 69, 70. But FERC rejected that claim on the evidence before it, finding instead that the Dunkirk repowering merely "raise[s] potential issues of artificial price suppression." *Indep. Power Producers of N.Y., Inc.*, 150 FERC ¶ 61,214, P 69 (attached as Feinberg Decl. Ex. C). Even assuming *arguendo* that suppressed capacity prices are a cognizable injury (*see infra* Section III to the contrary) a "potential" injury does not satisfy the strictures of Article III standing because it is "conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. at 560. "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore*, 495 U.S. at 158.

Entergy "deserves no rematch [here] after a defeat fairly suffered." *B&B Hardware, Inc.*, 135 S. Ct. at 1303 (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solomino*, 501 U.S. 104, 107 (1991)). Having lost before FERC, Entergy is precluded from asserting here that the Dunkirk repowering will artificially suppress prices in the NYISO capacity market. As such, Entergy's Amended Complaint must be dismissed for lack of an Article III injury.[7]

[7] In denying NYPSC's Rule 12(c) motion, this Court has held that "the already-filed agency application to FERC seeks to resolve different issues." Decision and Order, ECF No. 96 at 20 ("ECF No. 96"). That is not correct as to Entergy's alleged injuries here and before FERC. The Court's decision denying the NYPSC's Defendants motion to dismiss did not address and consider the argument raised here—that Entergy lacks standing because the injuries alleged in Entergy's Amended Complaint and those litigated before FERC are identical.

III. ENTERGY HAS NOT ALLEGED A JUDICIALLY COGNIZABLE INJURY

Entergy also lacks Article III standing because it has not alleged "an invasion of a legally protected interest." *Lujan v. Defs. Of Wildlife*, 504 U.S. at 560. Entergy contends that the capacity market revenues paid to its resources will be diminished if the repowered Dunkirk unit participates in the NYISO capacity auction. While that may or may not be the case, the possibility that capacity auction prices may be lower is not evidence of a legal injury. Whatever NYISO capacity revenues are paid to Entergy's resources are the just and reasonable rates, and the only lawful rates to which Entergy is entitled. The NYISO capacity auction clearing price, and the dollars paid to Entergy resources that clear the auction, will be determined in accordance with FERC determinations about how the repowered Dunkirk facility may bid into and impact the FERC-regulated markets. Entergy is entitled to nothing else, and is therefore not injured by the NYPSC Order approving the Term Sheet.

Under the filed rate doctrine, plaintiffs can "claim no rate as a legal right that is other than the filed rate, . . . and not even a court can authorize commerce in the commodity on other terms." *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). "[T]he rate . . . duly filed is the only lawful charge." *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (quoting *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)). Every court that has considered the issue has found that FERC-filed tariffs—including regional auction tariffs such as the NYISO tariff governing the conduct of the NYISO capacity market—are entitled to "filed rate" protection. *See, e.g., Simon v. KeySpan Corp.*, 694 F.3d 196, 206-07 (2d Cir. 2012).

The future capacity revenues that Entergy resources receive from the NYISO capacity auction, whether or not Dunkirk participates in the auction, are "per se reasonable and

unassailable in judicial proceedings." *Simon*, 694 F.3d at 204, 206-07 (citation omitted). As explained in *Simon*:

> The rationale behind the filed rate doctrine applies with equal force to [a Market Based Rate ("MBR")] auction system such as NYISO's in which the regulating agency tightly controls the auction process and has exercised its ability to undertake individual review of the MBR to ensure that anti-competitive practices did not undermine the process it created.

Id. at 207. The filed rate doctrine thus bars "all claims—state and federal—that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (citation omitted).

FERC's authority over the rules governing the NYISO capacity market auction is well-established. The FPA gives FERC exclusive authority over sales of electric energy for resale in interstate commerce. *FERC v. EPSA*, 136 S. Ct. at 773; *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). FERC administers exclusively the rates, terms, and conditions of FERC-jurisdictional capacity markets, including the NYISO capacity market. FERC—and not the district courts—determines what resources are permitted to bid into these markets and the terms under which they may bid. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-84 (D.C. Cir. 2009); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3d Cir. 2014); *Simon*, 694 F.3d at 199. "[T]he only 'rights' that [plaintiffs] have in relation to utility rates are those that the legislature . . . provide." *Taffet v. S. Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992).

Entergy has no right under the FPA to a NYISO capacity auction rate that is set excluding the participation of the repowered Dunkirk resource, unless this is what the FERC-regulated tariff provides. Because Entergy "asks for privileges not included in the tariff, its . . . claims are barred." *AT&T*, 524 U.S. at 226. As explained above in Section II, FERC rejected the efforts of

Entergy and others to prohibit Dunkirk's participation. Instead, the FERC-regulated NYISO tariff provides that the Dunkirk facility can bid into the NYISO capacity auction at any level that is in accordance with NYISO's FERC-approved capacity market bidding rules. *See* ECF No. 36-3 at 14 (Entergy comments to FERC complaining that repowered Dunkirk facility "will be offered at zero or near zero bid"); *see also Indep. Power Producers of N.Y., Inc.*, 150 FERC ¶ 61,214, PP 69-71 (attached as Feinberg Decl. Ex. C) (denying complaint seeking, *inter alia*, to exclude the repowered Dunkirk facility from bidding in the NYISO capacity auction market). 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." *Simon*, 694 F.3d at 204 (citation omitted). And if the repowered Dunkirk facility fails to clear the NYISO capacity auction, then the resource will have no impact on Entergy's capacity revenues.

Entergy cannot escape the filed rate bar by seeking injunctive or declaratory relief based on supposed future losses. Employing reasoning applicable here, the Third Circuit in *McCray v. Fidelity National Title Insurance Co.*, 682 F.3d 229, 243 (3d Cir. 2012), found that alleged future losses or damages arising from the continued operation of "current [filed] rates do not constitute a[n] [Article III] injury under the filed rate doctrine." *Id.* at 243 n.15. "Unless and until suspended or set aside, [the filed] rate is made, *for all purposes*, the legal rate." *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922) (emphasis added). The gravamen of Entergy's Amended Complaint is to prevent "interference with FERC-approved market processes [from] uneconomic supply in the market." ECF No. 51 ¶ 1. But Entergy's request for injunctive relief "seeks to enjoin conduct *subject* to the tariffs filed with FERC," i.e., the repowered Dunkirk facility's participation in the market. *In re Cal. Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072,

1078 (S.D. Cal. 2003) (emphasis supplied), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mkgt., Inc.*, 384 F.3d 756 (9th Cir. 2004). "The filed rate doctrine bars this result." *Id.*

The filed rate doctrine's "central underpinning" is "to 'preserv[e] the exclusive role of federal agencies in approving rates . . . by keeping courts out of the rate-making process,'" *Simon*, 694 F.3d at 207 (citation omitted) (alterations in original). Entergy impermissibly asks this Court to substitute its judgment for FERC's and find that participation of the repowered Dunkirk unit in the NYISO capacity market will harm that market. FERC has found otherwise and "it is this judicial determination of a reasonable rate that the filed rate doctrine forbids." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994). "FERC's auction process was plainly designed to result in a reasonable rate," *Simon*, 694 F.3d at 207-08, and the prevailing tariff permits the repowered Dunkirk unit to bid in the NYISO capacity auction and, if successful, contribute to setting that rate. Entergy is entitled to nothing else and, as such, cannot properly contend that the resource's participation in the auction constitutes a cognizable injury.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss the Amended Complaint for lack of Article III jurisdiction.

/s/ Scott H. Strauss

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DATED: August 2, 2016

Attorneys for Defendants 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