

emissions controls in the peaking plant design for the Rest of State (“ROS”) proxy peaking unit which is used to set the New York Control Area (“NYCA”) ICAP Demand Curve and ordered the NYISO to revise and resubmit the reference point price for the NYCA ICAP Demand Curve accordingly.

The Commission’s ruling that the ROS proxy peaking plant design should not include SCR emissions controls was arbitrary and capricious and not the product of reasoned decision making. Specifically, in light of the evidence that the NYISO offered in its Filing as further supported by evidence that IPPNY offered in its comments demonstrating the reasonableness of including SCR emissions controls in the ROS peaking plant design, the Commission erred by failing to accord adequate weight to this evidence. The Commission should grant rehearing and order the NYISO to revise the reference point price for the NYCA Demand Curve to include SCR emissions controls in the ROS peaking plant design.

The Commission’s ruling was also arbitrary and capricious to the extent that it disregarded IPPNY’s demonstration that, even assuming *arguendo* developers could consistently obtain Article 10 certificates without installing SCR equipment by accepting an operating hour limit—which itself is highly unlikely—they face significant risk that increasingly stringent emissions caps will require them to retrofit these facilities with SCR equipment later at a cost significantly higher than the cost would have been to install it initially. Unless addressed now, the developers will have no way to recoup these significant costs at that time. Thus, if the Commission does not order the NYISO to revise its Services Tariff to calculate the NYCA Demand Curve based on the assumption that the ROS proxy peaking plant includes SCR equipment on rehearing, it should order the NYISO to either shorten the amortization period for

the ROS peaking plant or increase the required return of the ROS peaking plant to adequately account for this additional risk.

For the reasons demonstrated herein, the Commission should act expeditiously to grant rehearing of this aspect of its January 17 Order to ensure a just and reasonable rate is in place for the capacity auctions to be held for the 2017-2018 Capability Year which begins May 1, 2017.

I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,⁵ IPPNY hereby lists the limited aspect of the January 17 Order on which it seeks rehearing and provides representative precedent in support of its position on these issues:

1. The Commission erred in rejecting the independent Consultants', the MMU's and the NYISO's reasoned determination that the proxy peaking plant design for the ROS proxy unit which is used to set the NYCA ICAP Demand Curve should include SCR emissions controls. The Commission's decision was arbitrary and capricious, and not the result of reasoned decision making, because it unreasonably rejected the NYISO's and IPPNY's demonstration that: (i) developers would be very unlikely to be willing to construct an F class frame unit that was not equipped with SCR technology in the ROS region due to siting, permitting, and future market risks; (ii) the Board on Electric Generation Siting and the Environment ("Siting Board") would very likely condition its approval of peaking plants in the ROS region under Article 10 of the New York Public Service Law ("PSL") on the installation of the best technology available, which is likely to be determined to be SCR emissions controls; and (iii) a federally enforceable annual operating hours limit to maintain nitrogen oxides ("NOx") emissions below the threshold for "major source" designation under the New Source Review requirements is not a viable option for an ROS proxy peaking plant. *See, e.g., Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); *see also City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981).
2. The Commission erred in ignoring IPPNY's argument that, if the Commission does not accept the NYISO's proposal that the ROS peaking plant used to set the NYCA Demand Curve must include SCR equipment, the substantial development risks and the potential for significant additional future SCR retrofitting costs that developers face must be captured in the calculation of the NYCA Demand Curve, either in the form of a significantly shorter amortization period for the ROS proxy unit than the 20-year period in the NYISO Filing or an increased required return for the ROS peaking plant if it is not

⁵ 18 C.F.R. § 385.713(c)(2).

assumed to have SCR equipment. The Commission's decision was arbitrary and capricious, and not the result of reasoned decision making, because it failed to adequately account for the substantial degree of regulatory and development risks in constructing peaking plants without SCR equipment in the ROS region. The Commission failed to order the NYISO to shorten the amortization period for the ROS proxy unit or increase the rate of return for the ROS peaking plant to adequately address the level of risks faced by ROS suppliers. *See, e.g., Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

II. REQUEST FOR REHEARING

A. **The Commission's Determination to Reject the NYISO's Proposal That the ROS Proxy Peaking Plant Design Used to Set the NYCA Demand Curve Must Include SCR Equipment Was Arbitrary and Capricious, and Not the Product of Reasoned Decision Making, Because the Commission Unreasonably Rejected the Evidence Provided by the NYISO, Its Consultants and IPPNY Demonstrating That the F-Class Frame Unit in the ROS Region Is Not Likely Economically Viable without SCR Equipment.**

In its January 17 Order, the Commission ruled that the NYISO's proposal that the peaking plant design for the ROS proxy unit used to set the NYCA ICAP Demand Curve include SCR equipment is "unsupported."⁶ The Commission disagreed with the NYISO's and IPPNY's demonstrated evidence that current and future market and regulatory risks and requirements prevent developers from constructing F class frame units without SCR equipment in the ROS region in New York.⁷ The Commission found the NYISO's and IPPNY's demonstration of the substantial risk that the Siting Board would condition its approval of a peaking plant design in the ROS region under PSL Article 10 on the inclusion of SCR equipment to be "speculative."⁸ The Commission determined that nothing had changed since the 2013 Demand Curve Reset when the NYISO proposed, and the Commission accepted, a peaking plant design without SCR equipment for the ROS proxy unit used to set the NYCA ICAP Demand Curve because SCR

⁶ January 17 Order ¶ 58.

⁷ *Id.* ¶ 60.

⁸ *Id.* ¶ 61.

equipment could be avoided with an operating hour limit.⁹ The Commission stated “it is unclear why the new authority of the NY Siting Board did not require the inclusion of SCR emissions controls in the NYCA peaking plant design for the 2013 ICAP Demand Curve reset, but requires their inclusion now.”¹⁰ The Commission agreed with protestors’ arguments implying that developers would be even more likely to accept an operating hour limit under the 2016 Demand Curves than under the 2013 Demand Curves because the hourly limit would be approximately 1,500 hours higher than the level applied to ROS peaking plant in the 2013 ICAP Demand Curve Reset.¹¹

Courts have held that Commission orders are arbitrary and capricious if the Commission’s determinations do not rely on its technical expertise or the Commission fails to substantiate the application of its policy.¹² The Commission’s determination rejecting the NYISO’s reasoned judgment that the ROS proxy unit should include SCR equipment is arbitrary and capricious because it relies on its own speculation regarding an issue on which it has no special technical expertise, *i.e.*, whether the Siting Board would require peaking units to include SCR equipment, and disregards the expertise of the NYISO and its Demand Curve Reset Consultants, which conducted an independent and comprehensive analysis of this issue in response to extensive stakeholder feedback over the course of the year-long Demand Curve Reset exercise.

Importantly, rejecting the position incorrectly advanced by certain load entities that the ROS peaking plant design choice need only account for the potential development of a single

⁹ *Id.* ¶ 62.

¹⁰ *Id.*

¹¹ *Id.* ¶ 63.

¹² *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 45 (5th Cir. 1989).

peaking plant, the Commission held, “[t]he peaking plant represents the hypothetical marginal unit, and, therefore, must be able to be replicated.”¹³ Thus, the key consideration to be addressed is whether developers could repeatedly bring projects into commercial operation utilizing the ROS proxy unit design without SCR equipment. The answer is indisputably no. As the Consultants and the NYISO demonstrated, there have been significant changes in the regulatory and market landscape that now make an operating hour limit infeasible for developers in the ROS market thereby driving the need to include SCR equipment in the plant design for the ROS proxy unit for these projects to come to fruition.

The Commission accepted protestors’ argument that the ROS proxy unit would be able to operate for more hours under the current operating limit than the facility could have operated under the operating limit applicable for the 2013 Demand Curve Reset to support its decision that developers in the ROS region could obtain an Article 10 certificate for peaking plants without SCR equipment.¹⁴ However, the fact that the ROS proxy unit could operate more hours under an operating limit under the rules currently in effect is the very reason why the Siting Board would likely reject a certificate unless these plants included SCR equipment. The Commission wholly ignored the Consultants’ demonstrated evidence that annual NOx emissions from a unit that relies on an operating hour limit is 2.5 times greater than the NOx emissions of a unit with SCR equipment.¹⁵ As part of the 2013 Demand Curve Reset, it was determined the ROS proxy unit would produce *less* NOx emissions under the operating limit than if the plant design included SCR equipment.¹⁶ This is an important distinction because it demonstrates the

¹³ January 17 Order ¶ 65.

¹⁴ January 17 Order ¶ 63.

¹⁵ See NYISO Filing, Att. III, Exh. D (“Consultants’ Final Report”), at 27.

¹⁶ See *id.*

significant increase in risk an operating hour limit imposes on ROS developers under the 2016 Demand Curves versus the 2013 Demand Curves. As IPPNY demonstrated in its comments in this proceeding, under Article 10, the Siting Board may not grant a certificate for a new generating facility unless it determines that the applicant has minimized or avoided adverse environmental impacts to the maximum extent practicable.¹⁷ The Commission erred by ignoring the Consultants' evidence that, in contrast to the 2013 Demand Curve Reset, an F class frame unit with SCR would have a *lower* potential to emit NO_x than a gas-only plant with an operating limit.¹⁸

Both the NYISO and IPPNY demonstrated that a proposed project without SCR equipment would not likely meet the Article 10 requirement to minimize adverse environmental impacts because the Siting Board would face extreme pressure from intervenors to approve only projects that are as clean as possible.¹⁹ The Siting Board is authorized to impose conditions that are more stringent than federal or State regulatory requirements.²⁰ Given that the Article 10 siting process provides for a mandatory public involvement process, which is funded by the developer to ensure parties that wish to raise issues can do so,²¹ it is almost certain that parties engaged in environmental issues would oppose any proposed projects that did not include the best available control technology in their design.

Parties opposing new fossil generation will likely place extreme pressure on the Siting Board to, at a minimum, condition issuance of a siting certificate on the developer making its

¹⁷ N.Y. Pub. Serv. Law § 168(3)(c) (McKinney 2017).

¹⁸ NYISO Filing, Att. III, Exh. D (“Consultants’ Final Report”), at 27.

¹⁹ NYISO Filing at 12–13; Docket No. ER17-386-000, *New York Indep. Sys. Operator, Inc.*, Limited Protest and Comments of IPPNY (Dec. 9, 2016) (“IPPNY Protest”), Exhibit I (“E&E Position Paper”), at 9.

²⁰ E&E Position Paper at 9.

²¹ *See id.*

plant as clean as possible. The Commission erred in disregarding IPPNY’s evidence that there has been a dramatic change in attitude with respect to fossil fuel generation—including clean natural gas generation—in New York since the last Demand Curve Reset process. Opposition has grown substantially as compared to only a few years ago as demonstrated by New York’s ban of hydraulic fracturing for natural gas,²² New York’s rejection of an application for a water quality permit for the proposed Constitution natural gas pipeline in New York,²³ and New York’s adoption of a Clean Energy Standard mandate that seeks to achieve a 40% reduction in carbon dioxide emissions statewide by requiring that 50% of the electricity consumed in the state by 2030 will be produced by renewable facilities.²⁴ With a renewed focus on clean energy resources, it is likely that developers of new gas-fired generation in New York will face significantly more opposition than they have ever faced in the past. Thus, it is highly likely that, due to the extreme pressure from environmental groups opposed to the siting of natural gas facilities, the Siting Board will, at a minimum, condition approval of a peaking plant on the installation of the best technology available, which is likely to be determined to be SCR equipment.

The Commission’s reliance on statements from the New York State Department of Environmental Conservation (“NYSDEC”) that the Siting Board “has historically relied upon [NYSDEC’s] expertise in assessing environmental impacts and determining the appropriate air

²² See Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. Times (Dec. 17, 2014), <http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html>.

²³ See Erin Ailworth, *New York Environmental Regulators Deny Permit for Constitution Pipeline*, Wall St. J. (Apr. 22, 2016, 7:12 PM), <http://www.wsj.com/articles/new-york-environmental-regulators-deny-permit-for-constitution-pipeline-1461366759>.

²⁴ NYPSC Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Order Adopting a Clean Energy Standard (Aug. 1, 2016) (“NYPSC CES Order”).

pollution control technology” and protestors’ arguments that New York has issued air permits and Article 10 certificates for electric generators without SCR equipment in recent years²⁵ fails to recognize that the Siting Board’s historical reliance on NYSDEC expertise and generators’ historical receipt of certificates occurred under the old, expired Article X statute, not the new Article 10 legislation. The Commission disregarded the NYISO’s and IPPNY’s demonstration that the new Article 10 states that the issuance of permits by NYSDEC “shall in no way interfere with the required review by the board of the anticipated environmental and health impacts relating to the construction and operation of the facility as proposed, or its authority to deny an application for certification . . . and, in the event of such a denial, any such permits shall be deemed null and void.”²⁶ This provision gives the Siting Board authority to perform its own environmental review of NOx emissions and determine that a project should not be built because it does not minimize NOx emissions to the maximum extent practicable. This provision is a new source of authority that was not granted to the Siting Board under the old Article X siting statute (under which the generators referenced by the Commission received certificates).

Thus, “the new authority of the NY Siting Board did not require the inclusion of SCR emissions controls in the NYCA peaking plant design for the 2013 ICAP Demand Curve Reset, but requires their inclusion now”²⁷ because the operating hours limit under the 2017 Demand Curves would cause the ROS proxy unit to emit *greater* NOx emissions than if the plant included SCR equipment—a complete reversal of the factual circumstances in the 2013 Demand Curve Reset, a critical fact that the Commission erred in failing to adequately take into account.²⁸ The

²⁵ January 17 Order ¶ 62.

²⁶ N.Y. Pub. Serv. Law § 172(1).

²⁷ January 17 Order ¶ 62.

²⁸ See Consultants’ Final Report at 27.

NYISO properly concluded that the failure to include SCR equipment in the design of the ROS proxy unit would reduce the NYCA Demand Curve below a level necessary to induce new entry into the ROS market when needed to maintain reliability.²⁹ For the foregoing reasons, the Commission should grant rehearing and order the NYISO to recalculate the reference point price for the NYCA Demand Curve so that it includes SCR emissions controls in the design of the ROS proxy unit.

B. The Commission Erred in Disregarding IPPNY’s Argument That, If the Commission Does Not Accept the NYISO’s Proposal That the ROS Peaking Plant Design Used to Set the NYCA Demand Curve Must Include SCR Equipment, the Substantial Development Risks and the Potential for Significant Additional Future SCR Retrofitting Costs That Developers Face Must Be Captured in the Calculation of the NYCA Demand Curve.

The Commission also erred in rejecting IPPNY’s demonstration of the substantial risk developers face that increasingly stringent emissions caps will require them to retrofit these facilities with SCR equipment later at a cost significantly higher than the cost would have been to install it initially, even if the developers could obtain an Article 10 Certificate without installing SCR equipment by accepting an operating hour limit.³⁰ The Consultants found that “the decision to construct a facility anywhere in New York State without SCR technology introduces development risks and the potential for significant additional future SCR retrofitting cost (relative to the cost of an SCR included in the original plant design).”³¹ Even assuming that Article 10 and environmental laws do not currently require SCR equipment to be included in the design for the ROS proxy unit, the risks that these peaking plants will be required to install SCR

²⁹ NYISO Filing at 15.

³⁰ IPPNY Protest at 21.

³¹ Consultants’ Final Report at 28.

equipment in the future are substantial in light of New York’s well–documented agenda to move to a “clean” electricity economy.

The Commission erred in disregarding IPPNY’s request that these additional risks be captured in the calculation of the NYCA Demand Curve either in the form of a significantly shorter amortization period than the NYISO’s proposed 20-year period or an increased required return if the ROS proxy peaking plant does not include SCR equipment. If the Commission does not order the NYISO to revise its Services Tariff to calculate the NYCA Demand Curve based on the assumption that the ROS peaking plant includes SCR equipment on rehearing, it should order the NYISO to either shorten the amortization period for the ROS peaking plant or increase the required return of the ROS peaking plant.

III. CONCLUSION

For the foregoing reasons, IPPNY respectfully requests that the Commission grant its request for rehearing of this limited aspects of the January 17 Order. IPPNY further requests that, given the fundamental importance of accurately setting Demand Curves in enabling the efficient functioning of New York’s markets, the Commission act expeditiously to grant rehearing to allow the revised NYCA Demand Curve to be implemented for as many of the 2017-2018 Capability Year auctions as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Albany, New York, this 16th day of February, 2017.

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