UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. ER16-120-000

MOTION FOR LEAVE TO ANSWER AND ANSWER OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC. AND ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213, Independent Power Producers of New York, Inc. ("IPPNY") and Electric Power Supply Association ("EPSA") (collectively, "IPPNY/EPSA") hereby move for leave to file the following answer to certain arguments made by the New York State Public Service Commission ("NYPSC")[1] and the Sierra Club[2] in their comments filed on November 30, 2015, in the above-captioned docket. The NYPSC and the Sierra Club commented on the New York Independent System Operator, Inc.'s ("NYISO") filing[3] made on October 19, 2015, which proposes revisions to the NYISO's Open Access Transmission Tariff ("OATT") and its Market Administration and Control Area Services Tariff ("Services Tariff") to comply with the Commission's February 19, 2015, order[4] directing the

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[1] *New York Indep. Sys. Operator, Inc.*, Docket No. ER16-120-000, Motion of Intervention and Comments of the New York State Public Service Commission (Nov. 30, 2015) ("NYPSC Comments"). IPPNY/EPSA's silence with respect to any other positions or arguments made by the NYPSC, Sierra Club, or any other party should not be construed as IPPNY/EPSA's acquiescence to those positions or arguments.

[2] *New York Indep. Sys. Operator, Inc.*, Docket No. ER16-120-000, Comments of the Sierra Club (Nov. 30, 2015) ("Sierra Club Comments").

[3] *New York Indep. Sys. Operator, Inc.*, Docket No. ER16-120-000, Compliance Filing (Oct. 19, 2015) ("RMR Filing").

[4] *New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) ("RMR Order").

NYISO to establish provisions governing the retention of and compensation to Generators[5] that wish to mothball or retire (deactivate)[6] but are found by the NYISO to be required to provide service, commonly referred to as "reliability must run" ("RMR") service, to satisfy an identified Reliability Need on the New York electric system.

Specifically, the NYPSC argues that the NYISO should only be authorized to select the Initiating Generator as an RMR Generator if there is no other alternative. According to the NYPSC, if more than one Generator is available, the NYISO should simply "identify all other alternative resources" and the NYPSC, not the NYISO, must be the entity to select among Generators to satisfy a Reliability Need.[7] The NYPSC also argues that paying an RMR Generator its respective full cost of service ("COS") is excessive, unjust, unreasonable, and contrary to court precedent. The Sierra Club argues that the NYISO's proposed 365-day Generator Deactivation Notice period is too short and that the notice period should be similar to the three and one-half year notice period required by ISO New England ("ISO-NE").

As discussed below, the Commission must dismiss the NYPSC's arguments because they are untimely requests for rehearing and collateral attacks of the RMR Order, which required the NYISO to (i) evaluate alternative solutions, designate and compensate Generators to provide RMR service and (ii) pay RMR Generators their full COS when they are required to provide RMR service. To the extent the Commission considers the NYPSC's arguments in this docket, they should be rejected because the Commission has exclusive jurisdiction under the Federal Power Act

[5] Capitalized terms that are not otherwise defined herein shall have the meaning specified in the NYISO OATT and Services Tariff, including in the proposed revisions to those tariffs included in the RMR Filing.

[6] The Commission defined "deactivation" in its RMR Order to "encompass generator retirements, mothballing, or any other long-term outages or suspension of service." RMR Order at P 1 n.2.

[7] *See* NYPSC Comments at 4–5.

("FPA") to designate, and set just and reasonable rates for compensation to, Generators to satisfy Reliability Needs and to ensure the proper and efficient operation of the NYISO's markets. The Commission also correctly determined that RMR Generators that are required to provide service must be paid their full COS because "even though it may be uneconomic for the generator to do so, a generator would effectively be denied the opportunity to recover its fixed costs if it were only permitted to recover going forward costs."[8]

The Commission should also reject the Sierra Club's arguments because the retirement notice provisions in ISO-NE are inapplicable to the NYISO. The ISO-NE's forward capacity market gives generators three years' advance notice of whether their continued operation will be economic while the NYISO's capacity market gives generators, at most, only six months' notice whether their continued operation will be economic. Given this significant difference in the underlying capacity market structure, there is no basis to extract this one provision from the ISO-NE market design and super-impose it in the New York market.

I. MOTION FOR LEAVE TO ANSWER

Although Rule 213(a)(2) generally prohibits certain types of answers, including answers in response to comments, the Commission has discretion to waive that prohibition for good cause shown. The basis for such waiver has included whether the answer leads to a more accurate and complete record, helps the Commission understand the issues, clarifies matters in dispute or errors, responds to new issues raised, or provides information that will assist the Commission in its

[8] *AmerenEnergy Resources Generating Company v. Midcontinent Independent System Operator, Inc*., 153 FERC ¶ 61,062 at P 35 (2015).

decision-making process.[9] The NYPSC collaterally attacks, and takes positions that are contrary to, the RMR Order. The Sierra Club misconstrues ISO-NE's forward capacity market and generator retirement provisions. To ensure a complete and accurate record and assist the Commission in reaching its decision, the Commission should accept IPPNY/EPSA's answer.

II. ANSWER

A. The Commission Should Reject the NYPSC's Argument That the NYPSC Must Be the Entity to Select among Generators to Satisfy an Identified Reliability Need.

The NYPSC opposes the NYISO's proposal that the NYISO select the lowest cost Generator from available Generator alternatives. Without providing any citation to the RMR Order to support its argument, the NYPSC summarily establishes that it "views" the RMR Order "as pertaining solely to the NYISO's designation of an Initiating Generator as an RMR unit where there is no other alternative."[10] The NYPSC asserts that its position is consistent with its responsibilities under the New York Public Service Law ("NYPSL") to ensure safe and adequate service and the FPA's reservation of authority over generation resource adequacy to the states. The NYPSC argues that the selection of an RMR Generator from alternative Generator solutions is a generation resource adequacy determination and, if alternative Generators are available, "jurisdiction must be shared with the States as the FPA envisions."[11] Based on its interpretation of the NYPSL and the FPA, the NYPSC then concludes, "FERC should therefore recognize the NYPSC's authority to regulate generation facilities and to make resource adequacy determinations,

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[9] *See, e.g.*, *Mirant Energy Trading, et al. v. PJM Interconnection, LLC*, 122 FERC ¶ 61,007 at P 33 (2008); *BP West Coast Products LLC, et al. v. SFPP, L.P., et al*., 121 FERC ¶ 61,239 at P 34 (2007); *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,254 at P 13 (2005); *Pinnacle West Energy Corp. v. Nevada Power Co., et al.*, 105 FERC ¶ 61,053 at P 34 (2003); *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,309 at P 18 (2003).

[10] NYPSC Comments at 8.

[11] *Id*. at 10.

by directing the NYISO to modify its tariff to provide for the NYPSC to select among generation resources, if more than one is available, as the alternative to meet a reliability need."[12]

The Commission should reject the NYPSC's argument because it is flawed for several reasons. First, the NYPSC misconstrues the RMR Order. Nowhere in the RMR Order did the Commission limit the NYISO's authority to select the Initiating Generator as the RMR Generator only if the Initiating Generator was the sole option. To the contrary, the RMR Order held that the "NYISO is uniquely positioned to assess the need for RMR service and the appropriate entity to assess *the potential impacts RMR agreements may have on its markets in New York*."[13] Thus, the RMR Order required that the NYISO "be the entity that administers RMR service in New York" and "makes the determination whether a specific generator is needed to ensure reliable transmission service and thus whether the facility is designated an RMR unit."[14] The Commission directed the NYISO to "explain its process for identifying RMR alternatives in detail, including how the process will ensure a thorough consideration of all types of RMR alternatives in an open and transparent manner."[15] The Commission stated that a transparent RMR selection process would "help ensure that there is no undue discrimination or preference in the handling of RMR service and agreements pursuant to the NYISO Tariff."[16] The Commission pointed to the Midcontinent Independent System Operator, Inc.'s RMR process as an example of an open and transparent process that considered alternative solutions, including "generator alternatives."[17]

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[12] *Id.*

[13] RMR Order at P 3 (emphasis added).

[14] *Id.* at PP 9, 14.

[15] *Id.* at P 16.

[16] *Id.* at P 13.

[17] *Id.* at P 16.

Second, the NYPSC's argument that the Commission should "recognize the NYPSC's authority to regulate generation facilities and to make resource adequacy decisions" is nothing but an untimely and impermissible attempt to supplement its request for rehearing of the RMR Order. In its rehearing request, the NYPSC previously raised this same argument that jurisdiction over generation resource adequacy is reserved to the states under the FPA.[18] The Commission does not permit parties to raise requests for rehearing through a protest to a compliance filing, and its policy is to reject a protest that is an untimely request for rehearing because "in a compliance filing, what is before the Commission is whether the public utility has complied with the Commission's order, not the merits of that order."[19]

Third, if the Commission decides to consider the NYPSC's jurisdictional argument on the merits in this docket, the Commission must still reject it. The Commission has exclusive jurisdiction to order the NYISO to designate and compensate RMR Generators because such service under these contracts constitutes wholesale sales and otherwise affects or relates to wholesale rates and transmission service in New York.[20] The FPA grants the Commission the authority and responsibility to correct any "practice . . . affecting" transmission and wholesale electricity rates that the Commission determines to be "unjust" or "unreasonable."[21] The NYPSC

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[18] *New York Indep. Sys. Operator, Inc*., Docket No. EL15-37-000, Request for Rehearing of the New York State Public Service Commission (Mar. 23, 2015), at 6–14.

[19] *See Ameren Services Co.*, 120 FERC ¶ 61,051 (2007); *Virginia Electric and Power Co*., 20 FERC ¶ 61,210 (1982); *North American Electric Reliability Council*, 88 FERC ¶ 61,046 (1999); *see also Southwest Power Pool, Inc*., 117 FERC ¶ 61,110 at P 19 and n.31 (2006); *see also Northwestern Corp*., 113 FERC ¶ 61,215 at P 9 (2005).

[20] *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481–82 (D.C. Cir. 2009) (holding that the Commission could regulate the installed capacity market under its affecting jurisdiction because the Commission did not engage in direct regulation of an area subject to exclusive state control).

[21] *See* 16 U.S.C. § 824e(a); *see also* 16 U.S.C. § 824d(a).

does not address this fact, much less explain how such exclusive jurisdiction over these issues can be "shared."

The NYISO's rules governing how a Generator may be selected to provide RMR service to ensure reliable transmission service in its wholesale market, including the associated compensation terms, are "practices affecting" the wholesale market's rates for electricity and transmission service. Establishing its jurisdiction over RMR service, the Commission initiated the RMR proceeding under FPA Section 206, finding the NYISO's tariffs are unjust and unreasonable because they do "not contain provisions governing the retention of and compensation to generating units needed for reliability."[22] The Commission ruled that the rates, terms, and conditions of RMR service are necessary "to ensure the proper and efficient operation of NYISO's markets."[23] The Commission stated:

> Without such provisions, there is no assurance that generation resources will be treated on a not unduly discriminatory basis and have the opportunity to collect compensatory rates without a protracted proceeding. The uncertainty created for resources by the lack of clear tariff provisions has the potential to exacerbate the very concerns an RMR service is meant to address – ensuring the continued reliable and efficient operation of the grid, and of NYISO's markets. NYISO is uniquely positioned to assess the need for RMR service and the appropriate entity to assess the potential impacts RMR agreements may have on its markets in New York. Thus, NYISO should be the entity that administers RMR service in New York, and should do so pursuant to the provisions of its Commission-jurisdictional Tariff required by this order to be filed with the Commission.[24]

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[22] RMR Order at PP 1–2; 4.

[23] *Id.* at P 9.

[24] *Id.* at P 3.

The Commission also explained that such provisions were important to ensure that RMR agreements be of a limited duration "so as to not perpetuate out-of-market solutions that have the potential, if not undertaken in an open and transparent manner, to undermine price formation."[25]

Contrary to the NYPSC's claim that the NYISO's selection of an RMR Generator interferes with the NYPSC's jurisdiction over generation resource adequacy, the NYISO's proposed default process to select and compensate a Generator to provide RMR service in instances where the market design has failed to address a reliability need is no different in concept than the NYISO's competitive wholesale electricity markets rules, which dispatch Generators based on lowest cost to meet system needs. The NYISO's proposed RMR selection process does not—indeed, could not—impact the NYPSC's authority over the siting of generation as the NYISO may only select Generators that are Viable and Sufficient, *i.e.*, Generators that are available and capable of meeting the Reliability Need. As the NYISO has no authority over the NYPSC, it would be impossible for the NYISO to meet its obligation to ensure that there would not be any undue discrimination or preference in the handling of RMR service and to limit the duration of RMR Agreements to avoid the potential artificial suppression of prices if it could not evaluate and decide in a transparent manner the generator(s) with which it will enter into an RMR Agreement. The NYISO's RMR Filing complies with this obligation by providing that the NYISO will review the costs of the Viable and Sufficient Generator solutions, including the Initiating Generator, to ensure that the Generator selected will provide the RMR service at the lowest cost.

[25] *Id.* at P 2.

B. The Commission Should Reject the NYPSC's Argument That RMR Generators Must Be Paid Less than Their Full COS.

In its RMR Order, the Commission ruled that compensation to an RMR Generator that voluntarily chooses to provide RMR service "must at a minimum allow for the recovery of the generator's going-forward costs, with the parties having the flexibility to negotiate a cost-based rated up to the generator's full cost of service."[26] The Commission decided that a Generator that is required to provide RMR service must be paid its full COS because, as the Commission has previously determined, any other approach would deny the Generator "the opportunity to recover its fixed costs of existing plant."[27] The NYPSC argues that "the NYISO's Compliance Filing suffers from the same flaw as the RMR Order by authorizing generation owners to develop their own rates that may encompass full COS recovery, including return on investment."[28] As was true concerning the NYPSC's position on selection of RMR Generators, the Commission must reject the NYPSC's argument because it is an impermissible collateral attack on the RMR Order and it is an improper supplement to its rehearing request.

To the extent the Commission nevertheless considers the NYPSC's argument on its merits despite its procedural infirmities in this docket, the Commission must reject it because, as the Commission previously has ruled, a generator that is required to provide RMR service is providing "utility" service.[29] Because RMR service by its very nature constitutes utility service, the

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[26] *Id.* at P 17.

[27] *AmerenEnergy Resources Generating Co. v. Midcontinent Independent System Operator, Inc.*, 148 FERC ¶ 61,057 at P 85 (2014).

[28] NYPSC Comments at 12.

[29] *Midcontinent Indep. Sys. Operator, Inc*., 153 FERC ¶ 61,062 at P 37 (emphasis added) ("During this delay [prior to deactivation], an [RMR] Unit owner is providing utility service, and as the Commission decided in the Ameren Complaint Order, *when a generator is required to provide utility service, it should be permitted to recover costs beyond going-forward costs*.").

Commission's policy is to provide full COS to RMR generators that are required to operate to satisfy the constitutional requirement for just compensation.[30]

The NYPSC argues that the U.S. Constitution does not require a utility whose operations have become uneconomic because of market forces to be provided a profit, and recovery of its full COS is unjust and unreasonable.[31] To support its position, the NYPSC quotes *Market Street Railway* for the proposition "that the due process clause cannot 'be applied to insure values or to restore values that have been lost by the operation of uneconomic forces.'"[32]

Market Street Railway is inapposite because it pertained to a utility that was no longer able to vie with competition from other entities and, due to market forces, would lose customers and revenues if its rates were raised in an attempt to provide it a profit. In *Market Street Railway*, the U.S. Supreme Court determined that a rate which would not return a profit to the utility but would permit a return on the worth of the utility's property valued at the price at which utility had offered to sell its property was not confiscatory. The Court stated:

> most of our cases deal with utilities which had earning opportunities, and public regulation curtailed earnings otherwise possible. But if there were no public regulation at all, this appellant [Market Street] would be a particularly ailing unit of a generally sick industry. The problem of reconciling the patrons' needs and the investors' rights in an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces, and whose earning possibilities are already invaded by competition from other forms of transportation, is quite a different problem.[33]

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[30] *See* Policy Statement on Matters Related to Bulk Power Sys. Reliability, 107 FERC ¶ 61,052 at P 27 (2004) (confirming that the Commission will approve applications to recover prudently incurred costs necessary to ensure bulk electric system reliability), *clarified*, 108 FERC ¶ 61,288 (2004); *FPC v. Hope Natural Gas Co*., 320 U.S. 591 (1944).

[31] NYPSC Comments at 14 (*citing Market Street Railway Co. v. Railroad Commission California*, 324 U.S. 548, 566 (1945).

[32] *Id.*

[33] *Market Street Railway*, 324 U.S. at 554.

. . .

> This company obviously is up against a sort of law of diminishing returns; the greater amount it collects per ride, the less amount it collects per car mile.[34]

The Court distinguished its holding in *Federal Power Commission v. Hope Natural Gas Co.* that rates are confiscatory if they do not ensure the utility a return "'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital' and to 'enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.'"[35] The Court stated that these considerations were inapplicable.

> [They] concerned a company which had advantage of an economic position which promised to yield what was held to be an excessive return on its investment and on its securities. They obviously are inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in.[36]

Applying the same reasoning of the Court in *Market Street Railway*, the United States Court of Appeals for the District of Columbia Circuit in *Democratic National Committee* remanded to the regulatory commission for further consideration a fare increase for a transit company because, among other reasons, "an examination of [the company's] economic health could have revealed that it was incapable of maintaining profitable operations under any reasonable rate of return allowed."[37]

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[34] *Id.* at 565.

[35] *Id.* at 566 (*quoting Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591, 603, 605 (1945)).

[36] *Id.*

[37] *Democratic Central Committee of the Dist. of Columbia v. Washington Metropolitan Area Transit Comm'n*, 485 F.2d 886, 913 (D.C. Cir. 1973).

The facts underlying the *Market Street Railway* and *Democratic National Committee* cases render their holdings inapplicable to RMR Generators that are forced to continue operating to meet a Reliability Need. In stark contrast to the regulated entities in the *Market Street Railway* and *Democratic National Committee* cases, an RMR Generator is not "up against a sort of law of diminishing returns" where the higher its rate is set, the less amount of revenues it can earn per unit of energy sold. Indeed, the Commission has determined that the revenues received under RMR Agreements "reflect the value of the services provided by these resources to customers."[38] RMR Generators are not "already invaded by competition from other forms of transportation" because they are the lowest cost, or sole, resource available to meet a Reliability Need.

As the Commission recognized, imperfections in the current market design, not more efficient competition, create circumstances that ultimately require service to be procured under an RMR Agreement. The Commission found that RMR Agreements may be necessary to resolve Reliability Needs because the market may not model transmission constraints appropriately. The Commission stated:

> We agree that capacity markets should recognize transmission constraints as much as possible, so as to minimize the need for RMR contracts. But where it is not feasible or practical to model all constraints, some RMR agreements may be necessary, since market

[38] *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc*., 150 FERC ¶ 61,214 at P 66 (2015) ("IPPNY Complaint Order"). In its IPPNY Complaint Order, the Commission denied IPPNY's request that RMR Generators be excluded from the capacity market based on its finding that it is efficient for RMR Generators to clear in the capacity market because they "are economic from the perspective of satisfying the NYISO's reliability requirements." *Id.* at P 66. As discussed in IPPNY's pending request for clarification and rehearing of the IPPNY Complaint Order, IPPNY/EPSA does not agree with the Commission's finding that RMR Generators are economic because "whether an existing generating unit is economic cannot be assessed by reference to a hypothetical market structure or hypothesized capacity zones that have not actually been established." Request for Clarification and Rehearing of the Independent Power Producers of New York, Inc., Docket No. EL13-62-001 (Apr. 20, 2015) at 18. However, if the Commission finds that RMR Generators are economic for purposes of determining that they should not be subject to buyer-side market power mitigation measures, it must also find them to be economic for purposes of determining just and reasonable compensation for providing RMR service.

> prices in these instances may be insufficient to retain enough capacity in these locations to reliably serve load in these locations.[39]

To ensure that such service is limited and of a last resort nature as mandated by the RMR Order, the RMR Agreement must reflect the RMR Generator's full COS when the Generator is required to provide service. The Commission should therefore reject the NYPSC's argument that RMR Generators that are required to provide RMR service should not receive full COS rate recovery under such circumstances.[40]

C. The Sierra Club's Request for a Longer Retirement Notice Period Should Be Rejected.

The Sierra Club argues that several years' advance notice of retirement is needed to protect ratepayers from out-of-market payments that are required before a permanent solution can be built to meet the Reliability Need. It states that other regional transmission organizations such as ISO-NE impose significantly longer notice periods than the NYISO's proposed 365-day period. It proposes that a notice period similar to the three and one-half years' notice period that is effected under the ISO-NE's forward capacity market would enable the implementation of reliability solutions other than RMR Generators.

The Commission should reject the Sierra Club's argument on a number of grounds. First, it would be much more burdensome to Generators than the NYISO's proposed 365-day Generator Deactivation Notice. IPPNY/EPSA demonstrated in its Protest that RMR Generators should begin to receive RMR payments upon the identification of the associated reliability need because the NYISO's proposed 365-day period would otherwise unduly burden uneconomic Generators

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[39] *Id.* at P 68.

[40] The NYPSC's argument that full COS rates for RMR Generators "overcompensate generators by shifting *all* fixed costs to ratepayers" must be rejected because such recovery is fully consistent with the rate recovery provided to fully rate regulated public utilities. NYPSC Comments at 16.

needing to deactivate by forcing them to continue to provide service for an extended period of time without any opportunity to obtain adequate compensation.[41] The Sierra Club's proposal would only serve to further exacerbate that shortcoming in the NYISO's proposal by requiring Generators that wish to retire to operate more than three times longer than under the NYISO's proposal. Second, as the Commission previously has held, the fact that a rule is in place in one market does not provide an adequate basis to simply adopt it wholesale in another market.[42] This approach is particularly warranted here given the significant differences in the capacity market structure in these two regions.

Third, Sierra Club has misconstrued the operation of ISO-NE's forward capacity market, which provides that Generators may offer or delist their capacity three years in advance in a forward capacity auction. Under ISO-NE's forward capacity market, Generators know their capacity revenue for the months leading up to the delivery year in question three years in the future. This provides Generators with three years' advance notice of whether their continued operation three years in the future will likely be economic. In contrast, the NYISO's capacity market requires generators to offer capacity one month in advance with the option, twice annually, to voluntarily participate in strip auctions to sell capacity six months forward. This gives Generators, at most, only six months' notice whether their continued operation will be economic. Under the Sierra Club's proposal, Generators would be required to operate for years without any knowledge of the capacity revenue streams that they will be receiving and whether the capacity

[41] *See New York Indep. Sys. Operator, Inc.*, Docket No. ER16-120-000, Protest of IPPNY/EPSA (Nov. 30, 2015), at 10.

[42] *N.Y. Pub. Serv. Comm'n et al. v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 at P 38 (2015).

revenues along with energy and ancillary market revenues would be adequate to support continued operation.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the NYPSC's and Sierra Club's arguments.

Dated: December 17, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Albany, NY, December 17, 2015.

By: *David B. Johnson*
David B. Johnson