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.

Civil Action No.

15-CV-230
(DNH/TWD)

DUNKIRK POWER LLC'S MEMORANDUM OF LAW IN SUPPORT OF THE PSC DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Dunkirk Power LLC ("Dunkirk Power") submits this brief in support of Defendants Public Service Commissioners' ("PSC Defendants") Motion to Dismiss the Amended Complaint of Plaintiffs Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Power Marketing, LLC, and Entergy Nuclear Operations (collectively "Entergy") pursuant to Rule 12(c), or in the alternative for partial dismissal under the doctrine of primary jurisdiction.

On February 27, 2015, Entergy brought this action for declaratory and injunctive relief, challenging the New York State Public Service Commission's ("PSC" or "Commission") decision to approve the Term Sheet agreement supporting the addition of natural gas-fired capability to the coal-fired Dunkirk electric generating facility (the "Facility") and authorizing Niagara Mohawk Power Corporation d/b/a National Grid ("National Grid") to recover the costs of the fuel addition in rates collected by its ratepayers (cumulatively the "DNG Agreement"). Specifically, Entergy contends that the Commission's June 14, 2014 Order Addressing Repowering Issues and Cost Allocation and Recovery[1] (the "June Order") is preempted under the Federal Power Act ("FPA") and invalid under the dormant Commerce Clause of the United States Constitution. These claims, however, must fail as they are either time-barred, fail for lack of standing or properly vested in the first instance with the Federal Energy Regulation Commission ("FERC").

First, Entergy's claims (Count I and II) are time-barred under the applicable four-month statute of limitations period. Any attempt by Entergy to recharacterize its claims to avoid this conclusion is inapt. Regardless of how Entergy articulates its claims, they are undeniably

[1] *See* Case 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements*, Order Addressing Repowering Issues and Cost Allocation And Recovery (issued and effective on June 13, 2014).

challenges to an administrative determination which is the epitome of an Article 78 proceedings under New York law and thus, subject to a four-month statute of limitations. Second, Entergy failed to preserve its claims in a petition for rehearing of the June Order and cannot rely on the petitions of third parties, which related to entirely different claims, to toll the statute of limitations.

Third, this Court should dismiss Entergy's dormant Commerce Clause claim (Count II) for lack of standing as Entergy is an in-state power producer and cannot assert claims for alleged injuries to out-of-state producers. Entergy's allegation that power produced by Entergy at one of its plants within New York State may travel along transmission conduits outside of New York before reaching a purchaser in New York does not make Entergy an interstate market participant sufficient to confer standing.

Finally, Entergy's conflict preemption claim regarding the alleged suppression of capacity prices is a wholesale market design committed to the primary jurisdiction of FERC by the FPA. As Entergy itself notes, the operation of the New York Independent System Operator's ("NYISO") wholesale markets are controlled by federal law, as administered by FERC. Entergy's efforts to seek redress from this Court would effectively displace the very regulatory authority vested in FERC under the FPA that it purportedly seeks to protect. Entergy's action is also duplicative of a pending regulatory proceeding before FERC wherein Entergy has sought the same remedy it now seeks before this Court. As such, Entergy's claims here are premature and unnecessarily duplicative, and thus, must await the conclusion of the on-going FERC proceeding. To do otherwise and allow Entergy's claims to move forward would effectively eviscerate FERC's role, deny its irrefutable expertise in this area and jeopardize the judicial review required under the FPA.

Accordingly, Dunkirk Power respectfully requests the dismissal of Entergy's claims and such other and further relief as the Court may deem just and proper.

STATEMENT OF FACTS

The Facility, located in Dunkirk, New York, is a coal-fired electric generating power plant owned by Dunkirk Power, a subsidiary of NRG Energy, Inc. ("NRG"). On March 14, 2012, NRG filed a notice of intent to "mothball" all four of its coal-fired units for economic reasons until market conditions improved. Dkt. No. 35-4 (Amended Complaint), ¶ 49. On March 30, 2012, National Grid, the local electric distribution company in the region, advised Department of Public Service Staff that the proposed mothballing of the Dunkirk units would have significant detrimental impacts to the transmission system reliability in western New York. Amended Complaint, ¶ 50.

As a result, on January 18, 2013, the Commission instituted a new proceeding to examine repowering alternatives to utility transmission upgrades, and specifically directed National Grid to evaluate repowering scenarios for the Facility. Amended Complaint, ¶ 51. On March 29, 2013, Chapter 57 of the Laws of 2013, Part Y was enacted, specifically codifying the January 2013 Order. National Grid subsequently solicited bids from NRG for various refueling scenarios, and on December 15, 2013, Governor Cuomo announced that NRG and National Grid had reached an agreement to add natural gas capability to the Facility. Amended Complaint, ¶ 55.

On February 13, 2014, the DNG Agreement, the subject of the instant proceeding, was filed with the Commission. Amended Complaint, ¶ 56. The Commission issued its June 14, 2014 Order, approving the DNG Agreement. Amended Complaint, ¶ 61.

On July 14, 2014, Earthjustice and the Sierra Club submitted a joint petition for rehearing to the Commission.[2] *See* Declaration of Jonathan Feinberg (Dkt. No. 36-1), ¶ 5 & Exh. C. Their

[2] *See* Case 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements*, Joint Petition for Rehearing by Sierra Club and EarthJustice (filed July 14,

petition raised various challenges to the Commission's environmental review of the DNG Agreement as well the Commission's economic analyses and reliability assessment. *See, generally, id.* at Exh. C. Earthjustice and the Sierra Club did not raise any issues concerning preemption under the FPA or the constitutionality of the June Order. Entergy did not file any petition for rehearing with the Commission. *See id.*, ¶ 5. On October 24, 2014, the Commission denied Earthjustice and the Sierra Club's joint Petition for Rehearing, finding no error of fact or law, or any new circumstances that would warrant a different determination ("Rehearing Order"). *See id.*

While the Commission's proceedings were underway, on May 10, 2013, the Independent Power Producers of New York, Inc. ("IPPNY") filed a Complaint (as amended on March 25, 2014) with FERC complaining that out-of-market payments that some generating plants receive under Reliability Services Support Agreements (RSSA contracts), and also under repowering agreements such as Dunkirk's, incent those plants to bid below their costs, thereby artificially suppressing capacity prices in the upstate ("New York Control Area" or "NYCA") capacity market.[3] *See* Hennessey Declaration ¶ 8, and Exh. A.

In that proceeding, on May 30, 2013, Plaintiff Entergy Nuclear Power Marketing, LLC moved to intervene due to the participation of Entergy in the NYCA capacity market. *See* Feinberg Declaration, Exh. A (Dkt. No. 36-2).[4] Thereafter, on April 10, 2014, Entergy filed comments supporting IPPNY's amended complaint before FERC wherein it raised the DNG Agreement as a reason why FERC needed to urgently act to remedy alleged "price suppression" in the NYCA capacity market and requested that FERC impose a bid floor on "subsidized"

2014).

[3] *Independent Power Producers of N.Y., Inc. v. New York Independent System Operator, Inc.*, FERC Docket No. EL13-62-000 ("FERC Proceeding"),

[4] *See* FERC Docket No. EL13-62-000, *Motion to Intervene and Comments of Entergy Nuclear Power Marketing, LLC., filed on* May 30, 2013.

generators such as Dunkirk Power so as to prevent such generators from bidding below their costs in the NYCA capacity auctions. *See* Feinberg Declaration at Exh. B (Dkt. No 36-3).[5] Entergy's claims in the FERC Proceeding exactly mirror their claims in this matter. *See* Hennessey Declaration, ¶ 14.

On March 19, 2015, FERC denied IPPNY's Complaint. In doing so, FERC concluded that:

> The issue before us is whether NYISO's tariff is unjust and unreasonable because it permits existing capacity resources needed for short-term reliability and capacity resources with repowering agreements to offer their capacity at *de minimis* levels. Pursuant to section 206 of the FPA, Complainant bears the burden of making that demonstration. For the reasons discussed below, we find that IPPNY has not met that burden and we, therefore, deny the Complaint.

See Hennessey Declaration, Exhibit B.

Although FERC denied IPPNY's Complaint, it determined that contracts like the DNG Agreement could raise potential issues of artificial "price suppression," and therefore, directed the NYISO", the independent non-for profit organization that monitors the reliability of the New York's power system and coordinates the daily operations to distribute electricity supply, to evaluate whether resources under repowering agreements similar to Dunkirk Power's have the potential to suppress prices in the capacity market. *See* Hennessey Declaration, ¶¶ 17, 18. Entergy thereafter petitioned FERC for clarification and rehearing of the IPPNY Order, contending, among other things, that FERC ignored evidence that the DNG Agreement results in long-term artificial "price suppression." *See* Hennessey Declaration, Exhibit C. FERC has yet to rule on this petition and will issue a decision once NYISO submits its compliance filing. *See* Hennessey Declaration, ¶ 22.

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[5] *See* FERC Docket No. EL13-62-000, *Supporting Comments on Amended Complaint of Entergy Nuclear Power Marketing, LLC.*, filed on April 10, 2014.

ARGUMENT

POINT I

ENTERGY'S CLAIMS ARE UNTIMELY

Entergy claims that the June Order is preempted by the FPA pursuant to the Supremacy Clause, U.S. Const. art. VI, and invalid under the Dormant Commerce Clause, U.S. Const. art. I, § 8. Entergy characterizes its claims in the nature of a request for a declaratory judgment and injunctive relief and, with respect to its Dormant Commerce Clause claim, in the nature of a 42 U.S.C. § 1983 claim ("Section 1983 claim"). Amended Complaint ¶¶ 13, 25. Irrespective of how Entergy characterizes its claims, the most closely analogous statute of limitations period under New York Law is the four-month statute of limitations for an action brought under Article 78 of the Civil Practice Law and Rules ("CPLR"), which applies to challenges of agency actions. *See e.g. New York City Health & Hosps. v. McBarnette*, 84 N.Y.2d 194 (1994).

In the context of an Article 78 action, the Commission's June Order became final and binding on Entergy, and the statute of limitations began to run, when the June Order was issued on June 13, 2014. Entergy, however, waited until February 27, 2015 to commence this action, more than eight months after the Order. Although other parties filed petitions for rehearing of the June Order, this did not toll Entergy's claims, particularly where the claims raised on rehearing are not the claims Entergy now brings before this Court. Accordingly, Entergy's claims are time-barred.

a. The Commission's Issuance of the June Order Was an Administrative Determination Subject to CPLR Article 78 Review, and Its Accompanying Four-Month Statute of Limitations.

While Entergy may argue (*see* Dkt. No. 40, p. 4) that the applicable statute of limitations is six years (or even perhaps three years for Count II), the PSC Defendants correctly point out

that, here, the statute of limitations is actually only four months. PSC Memorandum of Law ("MOL") (Dkt. No. 36-7), at pp. 8-9. This is true for both of Entergy's claims. Indeed, it is no coincidence that Entergy filed this action exactly four months from the date of the Commission's Rehearing Order issued on October 27, 2014.

Where there is no statute of limitations applicable to a plaintiff's request for declaratory and injunctive relief, the Court should apply the most closely analogous limitations period under state law. *See e.g. Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989). CPLR Article 78 applies to challenges of agency actions and is limited by a four-month statute of limitations period. CPLR § 217; *see, e.g., McBarnette*, 84 N.Y.2d 194. Although a six-year statute of limitations applies to a declaratory judgment action for which there is no specific limitations period pursuant to CPLR § 213(1), if a claim brought as a declaratory judgment could have been made in another form, and the limitations period for that form has expired, "the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief." *Id*. at 201, *see also Solnick v. Whalen*, 49 N.Y.2d 224, 230 (1980) (holding that the Article 78 statute of limitations applied to declaratory judgment action).

Entergy's characterization of its claims as a request for declaratory relief is irrelevant considering the temptation to plead the longer six-year statute of limitations period, particularly where its claims are otherwise time-barred. *See Wechsler v. State*, 284 A.D.2d 707, 708 (3d. Dep't 2001) (applying Article 78 despite plaintiff's argument that his claims were "grounded in the constitutionality and legality of" defendant's actions). Rather, New York's Court of Appeals has stated that "it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought in order to resolve which statute of limitations is applicable." *McBarnette*, 84 N.Y.2d at 201 (rejecting Plaintiff's contention that the challenged

agency decision was a legislative act for which Article 78 does not apply) (internal citations omitted).

The Court of Appeals in *McBarnette*, while agreeing that Article 78 is not the proper vehicle for challenging the constitutionality of a legislative act, held that challenges of administrative and quasi-legislative acts of administrative agencies fit "within the language and accompanying gloss of CPLR 7801 and 7803." *Id*. at 204. In applying the more restrictive limitations period, the Court described the policy reason for its decision: "A rule that requires those subject to regulatory decisions . . . to bring their challenges promptly facilitates rational planning by all concerned parties and ensures that the operation of government will not be trammeled by stale litigation and stale determinations." *Id*. at 205-06 (internal citations omitted); *see also Solnick*, 49 N.Y.2d 224 at 232.

Regarding Entergy's Supremacy Clause claim and Dormant Commerce Clause claim (which it purports to characterize as a Section 1983 claim), the analysis is the same. In *McBarnette*, the Court of Appeals confirmed that constitutional claims related to administrative and quasi-legislative acts of administrative agencies are subject to the Article 78 four-month limitations period. PSC MOL p. 9, *see e.g. Walton v. New York State Dept. of Correctional Services*, 8 N.Y.3d 186 (2007); *Solnick*, 49 N.Y.2d 224. The basis for this principle is that where claims based on an alleged constitutional infirmity are in essence claiming that an agency's action was "arbitrary and capricious" and "affected by an error of law," such claims are challenging the action itself, not the underlying constitutionality of the legislation on which it is based. *See, e.g., Thrun v. Cuomo*, 112 A.D.3d 1038, 1040-41 (3d Dep't 2013) (holding that a constitutional challenge of regulations published by the New York State Department of Environmental Conservation and the New York State Energy Research and Development Authority implementing the Regional Greenhouse Gas Initiative, which were quasi-legislative

acts, was time-barred under the Article 78 four-month limitations period.); *see also Peckham Materials Corp. v. Westchester County*, 303 A.D.2d 511 (2d. Dep't 2003) (holding that enactment of County air quality provisions was a quasi-legislative act and that plaintiff's claims that the provisions were an illegal tax, unconstitutional, and inconsistent with state law, were time-barred under the four-month limitations period); *Spinney at Pond View, LLC v. Town Bd. of the Town of Schodack*, 99 A.D.3d 1088 (3d. Dep't 2012) (holding that declaratory judgment action challenging water rates as an unconstitutional tax was subject to Article 78); *Fed'n of Mental Health Ctrs. v. DeBuono*, 275 A.D.2d 557, 560 (3d. Dep't, 2000) (ruling that the enactment of regulations was a quasi-legislative act requiring application of the four-month statute of limitations).

New York courts have also deemed "as-applied" constitutional challenges of agency actions subject to Article 78. In *Matter of Foley v. Masiello*, plaintiffs challenged a wage freeze imposed by the Buffalo Fiscal Stability Authority ("BFSA") as a violation of the U.S. and New York State Constitutions. 38 A.D.2d 1201 (4th Dep't 2007). Although brought as constitutional challenges, the court stated that plaintiffs' claims challenged the constitutionality of the agency's action "as applied to their members, not the constitutionality of the underlying state legislation that created BFSA and authorized it to impose a wage freeze." *Id.* The court added that the wage freeze was an administrative action subject to Article 78. *Id., see also Koeppler v. Wachtler*, 141 A.D.2d 613 (2d. Dep't 1988) (holding that constitutional claims regarding the application of the bar exam requirement to plaintiff pursuant to New York regulation was an "as applied to" challenge subject to Article 78); *DiMiero v. Livingston-Steuben-Wyoming County Bd. of Coop. Educ. Servs.*, 199 A.D.2d 875 (1993) (holding that due process challenge regarding employment benefits did not seek to declare any statute unconstitutional but rather challenged "discrete, ad hoc determinations").

Here, Entergy seeks a declaratory judgment that the Commission's June Order and the DNG Agreement are preempted under the FPA pursuant to the Supremacy Clause of the U.S. Constitution and invalid under the dormant Commerce Clause. Entergy does not challenge the constitutionality of the FPA, the New York Public Service Law ("PSL") or any other particular statute, but rather, the application of the Commission's statutory authority and its exercise of that authority through the issuance of the June Order and approval of the DNG Agreement. The June Order applicable specifically to Dunkirk Power was not a legislative act outside the bounds of an Article 78 challenge. Despite Entergy's attempt to characterize its claims in the nature of a declaratory judgment or a Section 1983 claim, such claims are in essence assertions that the Commission's June Order was "arbitrary and capricious" and "affected by an error of law." CPLR § 7803(3). Entergy's claims, both Count I and II, are therefore in the nature of an Article 78 action, which is subject to a four-month statute of limitations period. This being the case, Entergy's claims are time-barred.

b. The Statute of Limitations Began to Run on Entergy's Claims at the Time the Commission Issued the June Order.

As detailed above, there can be no dispute that Entergy failed to commence this action within four months of the June Order. Any attempt by Entergy to toll the statute of limitations and salvage its claims due to a third party's request for rehearing of the June Order is misguided.

Any party to a Commission proceeding, including in this case Entergy, has a statutory right to petition the Commission to reconsider an order. PSL Section 22 provides that "[a]fter an order has been made . . . any corporation or person . . . shall have the right to apply for a rehearing *in respect to any matter determined therein . . . within thirty days after the service of the order*." (emphasis added). Once brought, a petition for rehearing has the concomitant effect of tolling the statute of limitations for judicial review as to that petitioner's claims. *Gross v.*

State Pub. Serv. Comm'n, 195 A.D.2d 866, 867-68 (3d. Dep't 1993). This benefit, however, is not absolute. After thirty days, the Commission's decision to consider a request for rehearing is wholly discretionary, and the statute of limitations for judicial review is not tolled. *Id.* (finding that the statute of limitations on petitioner's Article 78 action began at the time of the Commission's initial decision, not when it denied an untimely rehearing application; "because the application was late it no longer enjoyed the status 'as of right' but instead was relegated to a discretionary mode and lacked the concomitant effect of tolling the Statute of Limitations for a judicial proceeding."); *MCI Telecoms. Corp. v. PSC*, 231 A.D.2d 284, 288-90 (3d Dep't 1997) (holding that the statute of limitations was not tolled, because the petition for rehearing and letter seeking to join the petition were both untimely).

Here, for purportedly tactical reasons, Entergy elected not to petition the Commission for rehearing following the June Order. By waiving its statutory right, Entergy cannot now argue that it still has the benefit of tolling the statute of limitations on its claims. Instead, Entergy is forced to rely on the position that petitions for rehearing by other parties on different issues tolled the statute of limitations as to Entergy.

However, neither the PSL nor the CPLR support any assertion by Entergy that, because third parties brought a petition for rehearing, the Commission's June Order was non-final as to Entergy for the purpose of determining the statute of limitations. *See* PSC MOL p. 13. PSL Section 22 provides the right to petition for rehearing "in respect to any matter" in the order. Additionally, CPLR Section 7801 states that an agency action is not final for judicial review where there is a rehearing on the matter based "upon the *petitioner's* application." (emphasis added). The language of these statutory provisions indicates that it is the specific issues raised on rehearing, as well as the identity of the petitioner raising those issues, that is determinative with respect to the extent to which the statute of limitations is tolled pending a rehearing

determination by the Commission. This result is also consistent with the policy of requiring prompt challenges to agency actions, which "facilitates rational planning by all concerned parties and ensures that the operation of government will not be trammeled by stale litigation and stale determinations." *McBarnette*, 84 N.Y.2d 194 at 205-06 (internal citations omitted); *see also Solnick*, 49 N.Y.2d at 232.

There can be no doubt that Entergy could have petitioned the Commission for a rehearing of the June Order based on Entergy's claims of preemption and price suppression, all of which Entergy had previously raised before the Commission prior to the June Order. Entergy, however, waived its statutory right, and the accompanying benefit of tolling its claims, by electing not to file a petition for rehearing. Entergy cannot now claim the benefit of a statutory toll by relying on the petitions of third parties, and the subsequent Rehearing Order, which did not revisit the issues that Entergy now raises before this Court.

An agency action is final for the purpose of determining the statute of limitations "when it has an impact upon the petitioner who is thereby aggrieved" and cannot be "prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998) (internal citations omitted), *see also Walton*, 8 N.Y.3d 186 at 194 (stating that agency action is final "when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies"); *Long Island Lighting Co. v. Public Serv. Comm'n*, 80 A.D.2d 977, 978 (1981) (holding that orders were final and binding on petitioner at the time they were received, because petitioner knew at that time that it was aggrieved); *DiMiero*, 199 A.D.2d at 877-78 (holding that limitations period commenced when plaintiffs were notified by letter that their membership would be transferred to a different union).

Here, the statute of limitations on Entergy's claims commenced when the Commission issued the June Order approving the DNG Agreement. On this date, the Commission made its final determination by rejecting claims of federal preemption and price suppression, and thus caused the alleged injury Entergy now raises. Entergy chose not to exercise its statutory right to petition for rehearing on any of the claims it now brings within thirty days of the June Order pursuant to PSL Section 22, and its issues were not revisited in the subsequent third-party petition for rehearing or the Rehearing Order. Entergy's failure to petition for rehearing thus ensured that the issues of federal preemption, price suppression, and alleged impacts on interstate commerce would not be subject to any further administrative review or remedy.

Moreover, there can be no doubt that Entergy was aggrieved, not by the Rehearing Order, but rather by the June Order. Indeed, it is telling that Entergy's Amended Complaint focuses throughout on the June Order (*see, e.g.*, generally Amended Complaint ¶¶ 82 through 103) and wholly fails to mention the Rehearing Order. As such, the Commission's actions to which Entergy now claims it was aggrieved were final for purposes of the statute of limitations.

Accordingly, Entergy was "aggrieved" on June 14, 2014 when the June Order was issued, and Entergy's failure to petition for rehearing ensured that its alleged injury would not be the subject of any further administrative action. Issuance of the June Order was the Commission's final action on Entergy's claims, which are now time-barred.

POINT II

ENTERGY'S DORMANT COMMERCE CLAUSE CLAIM FAILS FOR LACK OF STANDING

The PSC Defendants correctly argue that, as an in-state power generator, Entergy lacks prudential standing to assert its dormant commerce clause claim based on alleged injuries to out-of-state power generators that participate in New York's energy capacity markets.

In addition to the requisite constitutional standing,[6] Entergy also must satisfy a second set of standing requirements, referred to as prudential standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Generally, the three prudential standing doctrines are (1) the prohibition against litigating generalized grievances, (2) the prohibition against litigating the rights of a third party, and (3) the requirement that the plaintiff's interest falls within the zone of interests that the statute was designed to protect. *Id.*

Prudential standing requires a plaintiff to allege a personal stake in the outcome of a case sufficient to justify the exercise of federal court jurisdiction. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 498 (1975). Moreover, the requirement that a plaintiff demonstrate a "personal injury in fact" means that a plaintiff's claims cannot generally rest on the legal rights or interests of third parties. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d. Cir. 2012); *Warth*, 422 U.S. 490 at 499, 509; *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 91 (2d. Cir. 2009) ("Prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights…"). This requirement applies to each claim Entergy asserts. *Mahon*, 683 F.3d 59 at 64.

Here, Entergy claims in Count II of the Amended Complaint that the Commission's June Order violates the dormant Commerce Clause, U.S. Const. art. I, § 8, by discriminating against interstate generators that participate in New York's energy capacity market, or in the alternative, by imposing a burden on interstate commerce that is not outweighed by putative local benefits. Amended Complaint ¶¶ 87-89, 93. In making this claim regarding interstate commerce, Entergy necessarily focuses on alleged harm to generators outside of New York that participate in the New York energy market administered by the NYISO. Amended Complaint ¶¶ 89, 93-95. As the PSC Defendants aptly point out, however, Entergy's own pleadings are founded upon its

[6] Although not argued here, Dunkirk Power does not concede that Entergy has established the requisite constitutional standing for its claims.

status as an in-state market participant. PSC MOL p. 17. In fact, the Amended Complaint fails to even assert that Entergy is an out-of-state generator engaging in capacity sales across state borders in New York. *See, generally*, Amended Complaint.

As an in-state generator, Entergy improperly relies on alleged harm to third parties—out-of-state generators participating in the NYISO market—as the basis for its Commerce Clause claim. Thus, in order to establish standing, Entergy must show a market transaction occurring across state boundaries. The mere fact that power produced by Entergy at one of its plants within New York State may travel along transmission conduits outside of New York before reaching a purchaser in New York, does not make Entergy an interstate market participant. The simple flow of electrons across the states does not create a cross-border transaction. Rather, the capacity sale between Entergy and a New York entity remains wholly as an intrastate transaction. *See* PSC MOL p. 18. Additionally, unlike other ISOs that have jurisdiction in multiple states, the NYISO market encompasses only the geographic area of New York State. *See* PSC MOL p. 17.

Lastly, Entergy's attempt to amend its Complaint fails to cure its standing problem. Entergy's references to alleged impacts on wholesale capacity markets in another NYISO Sub-Region of the New York market where Entergy's Indian Point 2 and 3 plants are located do not alter the fact that Entergy's facilities are all located wholly within New York State. Amended Complaint ¶¶ 12, 70. Accordingly, as an in-state generator, Entergy cannot allege an injury concerning out-of-state sales to maintain standing, because it is not an out-of-state participant in the NYISO capacity market.

POINT III

ENTERGY'S CONFLICT PREEMPTION CLAIMS SHOULD BE DISMISSED AND REFERRED TO FERC UNDER THE PRIMARY JURISDICTION DOCTRINE

Entergy contends that the Commission's June Order invades FERC's exclusive regulatory jurisdiction over the wholesale market prices in New York. Amended Complaint ¶ 79. However, Entergy conveniently fails to recognize that the FPA gives FERC, not the district courts, the power to correct such claimed distortions. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 375 (1988)("[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. . . . The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order.").

Taken at face value, Entergy's preemption claim seeks to have this Court do what it claims the New York Public Service Commission had no authority to do; namely, decide an issue vested in the first instance with FERC. Entergy's "Price Suppression" claim should therefore be dismissed and referred to FERC under the primary jurisdiction doctrine. Otherwise, any ruling by this Court could intrude on the very federal authority Entergy purports to protect and interfere with FERC's regulatory expertise and discretion. This is not to say that judicial review is foreclosed, but rather that it is appropriate only following action by FERC, not now while the issue is pending in a FERC proceeding in which Entergy is participating.

a. The Federal Power Act and FERC's Jurisdiction

For over 70 years, the FPA, 16 U.S.C. §§824 et seq., has authorized FERC to regulate the transmission and sale of wholesale electricity so as to ensure just and reasonable rates. "Congress here has granted exclusive authority over rate regulation to the Commission." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1981). As a result, "[t]he reasonableness of rates and

agreements regulated by FERC may not be collaterally attacked in state or federal courts." *Miss. Power & Light Co.*, 487 U.S. at 375. "The *only* appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.* (emphasis added).

FERC exercises its statutory jurisdiction essentially as an economic regulator, overseeing the market for the sale of electricity in interstate commerce. *See* 16 U.S.C. § 824; *see also Connecticut Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 524 (1945) (observing that purpose of FPA "was primarily to regulate the rates and charges of the interstate energy"). In 2003, Congress expanded FERC's regulatory authority by enacting the Electricity Modernization Act of 2005, Pub. L. No. 109-58, tit. XII, 119 Stat. 594, 941–86 (2005), authorizing FERC to impose reliability standards on facilities that comprise "bulk-power system," defined to include "facilities and control systems necessary for operating an interconnected electric energy transmission network." Indeed, throughout its Amended Complaint, Entergy acknowledges this well-established principle and repeatedly states that under the FPA, FERC has exclusive authority over wholesale electric sales. Amended Complaint ¶¶ 79-83. Entergy is simply disingenuous as any ruling by this Court could intrude on the very federal authority Entergy purports to protect and interfere with FERC's special expertise.

b. Entergy Has Already Sought Relief From FERC And It Cannot Seek The Same Relief Here

Entergy's claims are premised on its argument that the DNG Agreement will artificially suppress prices and, thus, will harm the NYISO-implemented wholesale market design. As discussed above, the remedy for Entergy's claim is fairly straightforward and has been invoked by market participants in the past. Entergy first needs to invoke the NYISO's market rules and, if those rules are insufficient to ensure just and reasonable rates, Entergy must seek relief from FERC. If Entergy is dissatisfied with the FERC Proceeding, it can then seek review in the

United States Court of Appeals under FPA's "specific, complete and exclusive mode for judicial review" of FERC orders. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); 16 U.S.C. §825l(b). Entergy cannot bypass these clearly defined procedural steps and ask this court to intervene.

Tellingly, such procedural steps have already been instituted by IPPNY (of which Entergy is a member). IPPNY brought a claim before FERC to modify NYISO's electric tariff to address impacts of repowering of Dunkirk Facility. *See* FERC Proceeding (FERC Docket No. EL13-62-000). Pertinent here, not only has Entergy filed comments supporting IPPNY's Complaint in the FERC Proceeding, it has filed a Motion to Intervene in that proceeding, seeking the same remedy it is seeking here. *See* Hennessey Declaration, ¶¶ 12, 13. Notably, Entergy has argued to FERC: "Dunkirk RSSA and the Term Sheet will mandate near zero or zero price bidding, and will artificially suppress the NYCA spot market prices, and over time, will provide similar adverse impacts on the competitive markets." Dkt. No. 36-2, pp. 5-6; *see also* Hennessey Declaration, ¶ 13. Thus, irrespective of any effort by Entergy to distance the two, FERC is currently considering in the FERC Proceeding the exact same issue Entergy has raised in this action; namely, whether repowering of the Dunkirk Facility will artificially suppress prices in New York electricity capacity market. Amended Complaint, ¶ 66, fn. 26; Hennessey Declaration, ¶¶ 13, 15.

On March 19, 2015, FERC denied IPPNY's Complaint. *See* Hennessey Declaration, ¶ 13 and Exh. B. Entergy thereafter petitioned FERC for clarification and rehearing of the Order, contending that FERC ignored evidence that the DNG Agreement results in long-term artificial "price suppression." *See* Hennessey Declaration, ¶ 19, and Exh. C. FERC has yet to rule on Entergy's Rehearing Petition. *See* Hennessey Declaration, ¶ 22. Thus, the conflict preemption issues raised before this Court are directly before FERC and currently pending as part of

Entergy's administrative appeal. Likewise, FERC also requested that NYISO address the issues raised by Entergy prospectively. After NYISO files its proposed rules to address impacts of repowering older generation units in October of this year, FERC will likely determine whether additional actions are warranted. Therefore, dismissal of the price suppression claims and referral of such claims to FERC is necessary in order to avoid conflicting rulings by and between this court and FERC, as well as to avoid unnecessary expenditure of limited resources by this court, the parties, and the interested non-parties (National Grid and NYISO).

c. FERC Has Primary Jurisdiction Over the Issue of "Price Suppression."

The doctrine of primary jurisdiction determines whether a court or an agency should act first relative to a specific issue. It applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *See Civil Aeronautics Board v. Aeromatic Travel Corp.*, 341 F. Supp. 1271, 1277-78 (E.D.N.Y. 1971). "In such cases, courts may refer specific questions to the administrative body charged with their resolution." *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 253 (3d Cir. 2007). Primary jurisdiction is intended to "serve as a means of coordinating administrative and judicial machinery and to promote uniformity and take advantage of the agencies' special expertise." *Id.* (quotation marks omitted).

In *Western Pacific*, the Supreme Court explained the doctrine of primary jurisdiction as follows:

> primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.

United States v. Western Pacific 352 U.S. 59, 64 (1956).

Importantly, the doctrine of primary jurisdiction does not seek to take jurisdiction away from the courts. Instead, it intends to avoid uncoordinated and conflicting decisions and allow the agency vested with expertise in a particular area, here FERC, to first decide an issue so that the agency's expertise can later be evaluated by the courts in any subsequent judicial challenge.

According to the Supreme Court:

> The principal reason behind the doctrine of primary jurisdiction is not and never has been the idea that "administrative expertise" requires a transfer of power from courts to agencies, although the idea of administrative expertise does to some extent contribute to the doctrine. The principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts. Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements.

Far East Conference v. United States, 342 U.S. 570, 575 (1952)

The instant case raises issues within FERC's special competence, including the alleged "price suppression" of NYISO electric capacity prices. Price suppression is a complex technical issue which is not within the experience of the district courts, but rather is a policy issue within FERC's jurisdiction and specialized field of expertise. *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014) (FERC shall weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance.). It is FERC who has been charged with responsibility and is well "equipped or informed by experience to deal with a specialized field of knowledge" – especially the science and economics of transmitting electrical power - and that its "findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. NLRB*, 340

U.S. 474, 488 (1951); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2001).

Referral to FERC of Entergy's price suppression claim does not remove the federal court's ability to address the issue. Rather, once FERC has exercised its expertise and evaluated the issue, as discussed above (*see also* Hennessey Declaration, ¶¶ 15-18), if Entergy is dissatisfied with FERC's determinations, it can then seek judicial review in federal court.[7] As a result, and as correctly noted by the PSC Defendants (PSC MOL p. 22), unless Entergy's conflict preemption claim regarding price suppression is dismissed and referred to FERC to permit the pending FERC Proceeding to conclude, a great risk exists of inconsistent decisions on this issue by this Court and the Court of Appeals to which appeals of FERC determinations are made under the FPA.

Moreover, as specifically noted in FPA §313(a)[8], a party cannot take a case to the DC Circuit (or other relevant circuit) until the administrative appeals process is fully exhausted. Entergy has filed a Request for Clarification and Rehearing Petition in the ongoing FERC Proceeding, which means that it is now barred from seeking review from this Court. *See*, Hennessey Declaration Exhibit C. Entergy, therefore must await FERC's decision and cannot be

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[7] Federal Courts have jurisdiction to review FERC's orders under FPA § 313(b), 16 U.S.C. § 825l(b), which provides that, "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. 16 U.S.C. § 825l(b).

[8] FPA § 313(a), specifically states that "No proceeding to review any orders of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act." 16 U.S.C. § 825l(a).

allowed to impermissibly side-step the FPA's detailed review procedures through the instant action.

Accordingly, to the extent Entergy's conflict preemption claim is not time-barred, it should be dismissed and referred to FERC under the primary jurisdiction doctrine.

CONCLUSION

For the reasons discussed above, this Court should dismiss Entergy's Complaint for untimeliness or, in the alternative, dismiss the issue of "price suppression" under the primary jurisdiction doctrine and refer this issue to the Federal Energy Regulatory Commission. This Court should also dismiss Count II for lack of standing, and grant such other and further relief as it may deem just and reasonable.

DATED: September 15, 2015

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