UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants,

-and-

DUNKIRK POWER LLC,

Intervenor-Defendant.

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

MEMORANDUM OF LAW IN OPPOSITION TO NYPSC DEFENDANTS' MOTION FOR JUDGMENT UNDER RULE 12(C) OR, IN THE ALTERNATIVE, DISMISSAL OF ONE PORTION OF COUNT I UNDER THE PRIMARY-JURISDICTION DOCTRINE

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Plaintiffs Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Power Marketing, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy") respectfully submit this memorandum of law in opposition to the motion (ECF 36) of Defendants Audrey Zibelman, Patricia L. Acampora, Gregg C. Sayre, and Diane X. Burman (together, "NYPSC Defendants") for judgment under Federal Rule of Civil Procedure 12(c) or, in the alternative, for dismissal of the conflict-preemption portion of Count I of Entergy's complaint under the primary-jurisdiction doctrine. NYPSC Defendants filed their motion while Entergy's motion for leave to file an amended complaint was pending, but the motion nonetheless discussed Entergy's then-proposed amended complaint. *See* NYPSC Defendants' Memorandum Of Law ("Mem."), ECF 36-7 at 22-23.[1] This Court has since granted leave for Entergy to file the amended complaint, ECF 50, and Entergy did so on August 17, 2015, ECF 51. Entergy consents to having NYPSC Defendants' motion applied to the amended complaint, and accordingly cites the amended complaint herein.

INTRODUCTION

"'The [Federal Power Act ('FPA')] long has been recognized as a comprehensive scheme of federal regulation of all wholesales of [energy] in interstate commerce.'" *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 475 (4th Cir. 2014) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1998)) (second set of brackets in original), *petitions for cert. filed*, No. 14-614 (Nov. 25, 2014), No. 14-623 (Nov. 26, 2014). Plaintiffs Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Power Marketing, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy") brought this suit to restrain NYPSC Defendants (the Commissioners of the New York Public Service Commission) from interfering with this area of exclusive federal authority.

[1] All page citations for ECF documents refer to the page number at the bottom of the ECF page, except for ECF 51-2, for which citations refer to the page number at the top of the ECF page.

Specifically, the New York Public Service Commission ("NYPSC") issued an order that authorizes payment of more than $200 million in subsidies over a ten-year period to a Dunkirk electricity generator that would otherwise have been mothballed because it was not earning sufficient revenues to cover its costs. *See* Order Addressing Repowering Issues And Cost Allocation And Recovery, No. 12-E-0577 (NYPSC June 13, 2014), ECF 51-1 ("Order"). With the Dunkirk generator participating as a seller of 435 megawatts in the interstate wholesale capacity market,[2] relative to a mothballed status in which it would not be participating in that market, market prices will be suppressed below what they otherwise would have been. NYPSC acknowledged that the suppression could be substantial, citing an estimated reduction by $841 million in payments from utilities to generators to purchase capacity (and a corresponding reduction in revenues received by generators from utilities for the sale of such capacity). ECF 51-1 at 8 n.9. The Order concedes NYPSC's aim, *inter alia*, to improve "the competitiveness of the electric [capacity] market." *Id.* at 3.

Entergy's principal claim in this case is that NYPSC Defendants are preempted by the FPA from implementing an Order that not only will *result* in artificially suppressed prices in an interstate capacity market, but will do so using *means* that directly affect the functioning of that market: (1) preventing the Dunkirk facility from keeping all of the revenues that it receives from the capacity market's auction, instead requiring that those revenues be shared with the local utility that must fund the vast majority of the subsidies, ECF 51-2 at 5-7; and (2) reducing the subsidies in circumstances where the Dunkirk facility is unable to sell in the capacity market, *id.* at 6-7.

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[2] In the interstate wholesale capacity market, generators sell to utilities "the option to purchase electricity in the future." *Nazarian*, 753 F.3d at 472. By purchasing this option, utilities ensure that there will be an adequate future supply of actual electricity that the utilities can purchase and in turn resell to their business and residential customers.

In closely similar circumstances, the U.S. Courts of Appeals for the Third and Fourth Circuits recently enjoined state actions as preempted by the FPA. *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014), *petitions for cert. filed*, No. 14-634 (Nov. 26, 2014), No. 14-694 (Dec. 10, 2014); *Nazarian*, 753 F.3d at 476. As the Fourth Circuit explained, such a state "scheme … effectively supplants the rate generated by the auction with an alternative rate preferred by the state," *Nazarian*, 753 F.3d at 476, and "has the potential to seriously distort the … auction's price signals," upon which "[m]arket participants necessarily rely … in determining whether to construct new capacity or expand existing resources," *id.* at 478-79.

NYPSC Defendants' Rule 12(c) motion does not contest the merits of Entergy's claims, but instead seeks to dismiss Entergy's case based on supposed procedural defects: untimeliness (asserted only as to the preemption claim, Count I), lack of standing (asserted only as to the Dormant Commerce Clause claim, Count II), and primary jurisdiction (asserted only as to the conflict-preemption, not the field-preemption, portion of Count I). These arguments fail.

First, Count I is timely because Entergy filed its complaint on February 27, 2015, within four months of NYPSC's October 27, 2014 order denying the petition of Sierra Club and Earthjustice for rehearing of NYPSC's June 13, 2014 Order. Numerous authorities recognize that, "[w]hen an application for rehearing is allowed by statute and the statute provides that an application for rehearing tolls the period in which to file a petition for judicial review, *the time period is tolled for all parties and not merely the party that files an application for rehearing*." 2 Am. Jur. 2d Admin. L. § 511 (2015) (emphasis added). That principle was underscored by NYPSC's own "Notice Concerning Petition For Rehearing," which broadly proclaimed—without any limitation to Sierra Club and Earthjustice—that "[t]he statute of limitations controlling the time to seek review by filing an Article 78 proceeding should ordinarily be tolled

by a timely petition for rehearing." Declaration Of Sanford I. Weisburst In Opposition To NYPSC Defendants' Motion For Judgment Under Rule 12(c) Or, In The Alternative, Dismissal Of One Portion Of Count I Under The Primary-Jurisdiction Doctrine ("Weisburst Decl."), Ex. A. Administrative and judicial economy firmly support this approach because, where one party's rehearing petition might result in the agency reversing its order (as NYPSC expressly acknowledged here, *see id.* ("Upon conducting its rehearing evaluation, the Commission may … reverse the [June 13] decision ….")), it would make little sense to require other parties to launch suits seeking judicial review of the agency's order and thus potentially burdening the court and the agency unnecessarily. Because Entergy's Count I was timely filed within four months of the order denying rehearing, this Court need not decide whether a four-month or a six-year limitations period applies. In any event, six years is the appropriate period and Entergy's Count I is timely even if the clock started ticking on the date of NYPSC's initial June 13, 2014 Order.

Second, Entergy has prudential standing to assert its Count II claim under the Dormant Commerce Clause. Relying on case law that involved other sorts of constitutional claims, NYPSC Defendants maintain that Entergy is improperly attempting to assert the rights of others. In fact, ample Dormant Commerce Clause case law makes clear that, where a state law or regulation violates the Clause, any participant in the affected interstate market has prudential standing to sue, regardless whether that participant is located within the offending state.

Third, NYPSC Defendants incorrectly argue that the conflict-preemption portion of Count I should be dismissed, under the narrow doctrine of primary jurisdiction, in favor of a pending Federal Energy Regulatory Commission ("FERC") proceeding. This argument fails because, among other things, the conflict-preemption portion of Count I and the complaint in the FERC proceeding raise different legal issues and seek distinct remedies. The conflict-

preemption portion of Count I seeks to declare invalid NYPSC's Order and to enjoin NYPSC Defendants from implementing it. The FERC proceeding, by contrast, takes NYPSC's Order as a given and asks whether FERC should impose a mitigation remedy on certain generators. As the Fourth Circuit explained in similar circumstances, FERC's granting such a remedy would not establish conflict preemption, but would only "*ten[d]* to confirm … the existence of a conflict," *Nazarian*, 753 F.3d at 479 (emphasis added), and indeed the Fourth Circuit sustained a conflict-preemption claim without relying on the fact that FERC had already granted that remedy, *id*. at 479-80.

STATEMENT OF FACTS

The amended complaint alleges the following underlying facts. In March 2012, the owner of the Dunkirk generating facility announced that "it intended to 'mothball' the Dunkirk facility due to presently unfavorable economic conditions." ECF 51-1 at 3 n.2. Through most of 2013, National Grid, a utility that purchases energy and capacity from generators like Dunkirk on the interstate wholesale market and resells it at retail to homeowners and businesses in western New York, similarly resisted the idea of keeping Dunkirk in operation. ECF 51 ¶ 3. On December 15, 2012, however, New York Governor Andrew M. Cuomo announced that Dunkirk's owner (Intervenor-Defendant Dunkirk Power LLC ("Dunkirk Power")) had reached an agreement with National Grid to keep the Dunkirk facility in the market, "repowered" as a natural gas-fired (rather than coal-fired plant) and heavily subsidized by, *inter alia*, payments from National Grid of $20.4 million per year over a ten-year period and a one-time $15 million payment from a state agency. *Id.* ¶¶ 4-5.

Dunkirk Power's and National Grid's Term Sheet (itself a binding document even though it was expected to be memorialized in a final contract, ECF 51-2 at 28) provides, *inter alia*, that (1) National Grid will make the aforementioned $20.4 million payments to Dunkirk Power;

(2) Dunkirk Power will offer the Dunkirk facility's capacity in the interstate wholesale capacity market; (3) in certain circumstances, Dunkirk Power will share some of its revenues from that market with National Grid; and (4) in periods of extended outage of the Dunkirk facility, the payments from National Grid to Dunkirk Power will be reduced. ECF 51 ¶¶ 56-60. The Term Sheet states that it must be approved by NYPSC, ECF 51-2 at 28, and National Grid accordingly submitted it to NYPSC for review and approval, *id.* at 2.

NYPSC noticed the Term Sheet for public comment, and Entergy, among others, filed comments in opposition. Entergy owns generators located in New York that will be injured if the Dunkirk facility—which under normal market forces would have been mothballed—is instead artificially kept on-line, offering its capacity at a price below its cost and thus suppressing the prices (and hence the revenues) that other generators receive in the interstate wholesale market. ECF 51 ¶¶ 6, 12.

On June 13, 2014, NYPSC issued the Order approving the Term Sheet. ECF 51-1 at 40. The Order invoked, *inter alia*, the goal of "competitiveness of the electric market" to justify the Term Sheet. *Id.* at 3, 27; *see also id.* at 29 ("the Term Sheet reduces costs for consumers"). That "competitiveness" benefit, at least in the short term, had been estimated to be an $841 million reduction in capacity payments by utilities to generators. *Id.* at 8 n.9.[3] When the Order addressed Entergy's federal preemption argument, however, it ignored this price-reduction goal

[3] NYPSC's Order acknowledged and did not contest National Grid's estimate of $841 million in reduced capacity payments in the short term. ECF 51-1 at 8 n.9. In a later portion of the Order, NYPSC suggested that "[t]hose market savings are uncertain and difficult to quantify," *id.* at 36, but still did not dispute National Grid's estimate. NYPSC's expression of uncertainty may concern the later years of the Term Sheet, as to which National Grid recognized that "market response [meaning existing generators exiting the market, or new generators not entering the market, due to the artificially suppressed prices] would likely affect the ability to realize such savings over the term of the agreement." ECF 51-2 at 13; *see also Nazarian*, 753 F.3d at 478-79 (similar).

and instead asserted that the Term Sheet could be justified as needed to ensure safety, adequacy, and reliability of the electric grid, an area that NYPSC asserted is ultimately within its authority. *Id.* at 38.

On July 14, 2014, Sierra Club and Earthjustice jointly filed a petition for rehearing before NYPSC. Declaration of Jonathan D. Feinberg In Support Of NYPSC Defendants' Motion To Dismiss Pursuant To Rule 12(c) Or, In The Alternative, Under The Doctrine Of Primary Jurisdiction ("Feinberg Decl."), Ex. C, ECF 36-4. In response, on July 25, 2014, NYPSC issued a "Notice Concerning Petition For Rehearing," which stated in part:

> The statute of limitations controlling the time to seek review by filing an Article 78 proceeding should ordinarily be tolled by a timely petition for rehearing. CPLR §7801(1). The four-month period in which to seek review under CPLR §217 would not therefore commence until issuance of a Commission decision on rehearing. … Upon conducting its rehearing evaluation, the Commission may reaffirm its initial decision or adhere to it with additional rationale, modify the decision, reverse the decision, or take such other or further action as it deems necessary.

Weisburst Decl. Ex. A. NYPSC issued an order stating that the rehearing petition had been denied effective October 27, 2014. Weisburst Decl. Exs. B & C.

On February 27, 2015, Entergy filed its original complaint in this case. Both originally and as amended, the complaint seeks to declare NYPSC's June 13, 2014 Order invalid and to enjoin NYPSC Defendants from enforcing the Order. ECF 51 at 38. Count I asserts a claim under this Court's powers in equity to enforce the FPA as supreme over NYPSC's Order. Count I has two parts: field preemption and conflict preemption. The field-preemption theory alleges that the Order invades the exclusive federal field of regulation of the wholesale interstate market for the sale of capacity. *Id.* ¶ 76. The conflict-preemption theory alleges that the Order stands as an obstacle to the accomplishment of Congress's purposes in the FPA. *Id.* ¶ 80.

Count II asserts a claim for violation of the Dormant Commerce Clause. The New York wholesale market for capacity is an interstate market because New York's electricity grid is connected with grids in other states, and because both New York and non-New York generators sell in that market. *Id.* ¶ 88. NYPSC's Order discriminates against interstate commerce by choosing to bestow on a single in-state generator millions of dollars in out-of-market subsidy benefits that will harm competing generators in the interstate wholesale capacity market. *Id.* ¶¶ 89-92. Additionally, NYPSC's Order imposes burdens on interstate commerce that vastly exceed the in-state benefits. *Id.* ¶¶ 93-101.

STANDARD OF REVIEW

In a Rule 12(b)(6) or Rule 12(c) setting, this Court should "accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff" for purposes of a statute-of-limitations defense, *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir. 1999) (internal quotation marks omitted), a lack-of-standing defense, *see, e.g.*, *Fair Hous. in Huntington Comm., Inc. v. Town of Huntington, N.Y.*, 316 F.3d 357, 362 (2d Cir. 2003), or an invocation of the primary-jurisdiction doctrine, *e.g.*, *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 67 (2d Cir. 2002). *See generally L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011) (same standard applies on Rule 12(c) motion as on Rule 12(b)(6) motion). NYPSC Defendants' recitation (Mem. 7) of the plausibility standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), is misplaced because NYPSC Defendants' motion does not argue that Entergy's complaint fails to state a claim for relief.

ARGUMENT

I. COUNT I (FEDERAL POWER ACT PREEMPTION) WAS TIMELY FILED

NYPSC Defendants' argument that Count I of Entergy's suit is untimely contravenes both NYPSC's own public statements and basic principles of administrative law. Assuming that

CPLR § 217(1)'s four-month statute of limitations applies, Entergy's action is timely because the clock did not begin to run until NYPSC denied rehearing on October 27, 2014, and Entergy filed this action within four months of that date, on February 27, 2015. Accordingly, this Court need not decide whether the appropriate limitations period is four months under CPLR § 217(1) or six years under CPLR § 213(1). In any event, a six-year period applies, as several district courts in this Circuit have held.

A. Entergy's Count I Was Timely Filed Within Four Months Of NYPSC's October 27, 2014 Order Denying Rehearing

Although NYPSC issued its principal Order on June 13, 2014, a timely petition for rehearing was filed by Earthjustice and Sierra Club (Feinberg Decl. Ex. C), after which NYPSC stated the following in a public notice, which NYPSC Defendants' motion disregards:

> The statute of limitations controlling the time to seek review by filing an Article 78 proceeding should ordinarily be tolled by a timely petition for rehearing. CPLR § 7801(1). *The four-month period in which to seek review under CPLR § 217 would not therefore commence until issuance of a Commission decision on rehearing*.

Weisburst Decl. Ex. A (emphasis added). NYPSC thus told the public that the clock would not start ticking until after its decision on the rehearing petition, and never suggested that this public statement was intended to apply only to Earthjustice and Sierra Club. For example, the notice did not say, "*Rehearing petitioners*' four-month period in which to seek review under CPLR § 217 would not therefore commence until issuance of a Commission decision on rehearing." Rather, NYPSC spoke generally to the public: "The four-month period in which to seek review under CPLR § 217 would not therefore commence until issuance of a Commission decision on rehearing."[4]

[4] NYPSC frequently gives similar notices in other dockets when timely rehearing petitions are filed, never suggesting that the tolling of the limitations period applies only to those parties that filed the petition. *See, e.g.*, Notice Concerning Petition for Rehearing, No. 14-E-0423, Dkt. 37

NYPSC's notice reflects the well-established principle of administrative law that allows one party's filing of a timely rehearing petition to toll the time for seeking judicial review by all parties: "[W]hen an application for rehearing is allowed by statute and the statute provides that an application for rehearing tolls the period in which to file a petition for judicial review, *the time period is tolled for all parties and not merely the party that files an application for rehearing*." 2 Am. Jur. 2d Admin. L. § 511 (emphasis added).[5] This principle is likewise embodied in the rules and practices of federal and state courts. *See, e.g.*, Sup. Ct. R. 13.3 ("[I]f a petition for rehearing is timely filed … by any party, … the time to file the petition for a writ of certiorari *for all parties (whether or not they requested rehearing or joined in the petition for rehearing)* runs from the date of the denial of rehearing or … the subsequent entry of judgment.") (emphasis added); Fed. R. App. P. 4(a)(4)(A) ("If a party timely files in the district court any of the following motions [including to amend factual findings or the judgment], the time to file an appeal runs *for all parties* from the entry of the order disposing of the last such remaining motion.") (emphasis added); *Rhame v. Charleston Cnty. Sch. Dist.*, 772 S.E.2d 159, 162 (S.C. 2015) ("If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion.") (internal quotation marks omitted); *In re J.L.J.*, No. 10-13-00051-CV,

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(NYPSC July 24, 2015); Notice Concerning Petition for Rehearing, No. 13-G-0136, Dkt. 133 (NYPSC May 28, 2015); Notice Concerning Petition for Rehearing, No. 14-C-0248, Dkt. 4 (NYPSC Feb. 18, 2015).

[5] "Tolling" in this context means that the clock for seeking judicial review is not simply paused during the time the rehearing application is pending, but rather does not even begin ticking until disposition of the rehearing application. *See, e.g.*, *Fee v. Employment Appeal Bd.*, 463 N.W.2d 20, 21-22 & n.2 (Iowa 1990) (cited by 2 Am. Jur. 2d Admin. L. § 511 at n.5) (party had full statutorily authorized period in which to seek judicial review following disposition of rehearing application).

2013 WL 3013865, at n.1 (Tex. App. June 13, 2013) ("Any petition for review [to the highest court] must be filed within forty-five days after the date of either this opinion or the last ruling by this Court on all timely-filed motions for rehearing or en banc reconsideration.").

Consistent with this principle, NYPSC's notice nowhere limited the tolling of the time to seek judicial review to the rehearing petitioners. Nor was the notice rendered ambiguous by CPLR § 7801(1), which describes the circumstances in which an agency order is not yet reviewable in court: when the order is "not final or can adequately be reviewed by appeal to a court, or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless … rehearing has been denied …." NYPSC Defendants focus on the words "the petitioner's application" for rehearing (Mem. 13), but those words simply describe who has filed the application, not the effects of that application on other parties.

But even if NYPSC's notice could be characterized as ambiguous, the ambiguity should be resolved by applying tolling of the four-month period to *all* parties given the procedural posture of NYPSC Defendants' motion, *see Harris*, 186 F.3d at 247, and also as a matter of administrative and judicial economy: If one party's rehearing petition can result in the agency's reversal of its order as to *all* parties, it makes little sense to require those other parties to commence court cases, thus burdening both the court and the agency (which has to defend the cases), before the rehearing process has run its course. *See, e.g.*, *United Transp. Union v. I.C.C.*, 871 F.2d 1114, 1118 (D.C. Cir. 1989) (review by "the court and the agency at the same time … *could lead only to a waste of resources on the part of the agency, or the court, or both, without any countervailing benefit*") (emphasis in original) (internal quotation marks omitted).

Here, there can be no doubt that reversal of NYPSC's June 13 Order was a possibility, and that such reversal would have obviated the need for any and all parties adversely affected by that Order (including Entergy) to seek judicial review. NYPSC Defendants seek to portray things differently by focusing on the rehearing petition and incorrectly characterizing it as seeking only limited further proceedings before NYPSC rather than outright reversal; in fact, the rehearing petition requested, *inter alia*, that NYPSC "rescin[d] the [June 13, 2014] Order." Feinberg Decl. Ex. C at 25. In any event, even if the rehearing petition had not sought rescission or reversal of the Order, *NYPSC itself* made clear that reversal was a possibility in the public notice quoted above, stating that, "Upon conducting its rehearing evaluation, the Commission may reaffirm its initial decision or adhere to it with additional rationale, modify the decision, *reverse the [June 13] decision*, or take such other or further action as it deems necessary." Weisburst Decl. Ex. A (emphasis added). Given this admission, the June 13 Order did not have the finality required for *any* party to seek judicial review. *See, e.g.*, *Walton v. N.Y. State Dep't of Corr. Servs.*, 8 N.Y.3d 186, 194 (2007) (a party may seek judicial review of an agency decision only if the following prerequisites are met: "*First*, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and *second*, the injury inflicted may not be … significantly ameliorated by further administrative action or by steps available to the complaining party.") (emphasis added) (internal quotation marks omitted).

Contrary to NYPSC Defendants' argument (Mem. 11), it does not matter that the rehearing petitioners may have been seeking reversal of the June 13 Order on *different grounds* from those advanced by Entergy at NYPSC before the June 13 Order or in this Court now. Even

if the grounds had been entirely distinct,[6] the important point is that the *same relief* that the rehearing petitioners were seeking—reversal, as NYPSC acknowledged in its notice—would, if granted, have obviated the need for Entergy to seek judicial review. In other words:

> [A] determination will not be deemed final [simply] because it stands as the agency's last word on a *discrete legal issue* that arises during an administrative proceeding. … If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete.

Essex Cnty. v. Zagata, 91 N.Y.2d 447, 453-54 (1998) (emphasis added) (citations omitted).[7]

Indeed, that Earthjustice's and Sierra Club's rehearing petition tolled the four-month period for *all* parties is made even more clear by NYPSC's treatment of the petition as triggering a notice-and-comment rulemaking in which any member of the public could comment on the rehearing petition. As NYPSC's notice explained, "A Notice of Proposed Rulemaking will be filed with the Department of State with respect to the Petition. Comments pursuant to the State Administrative Procedure Act ['SAPA'] will be due by September 29, 2014." Weisburst Decl. Ex. A. This notice-and-comment process "afford[ed] the public an opportunity to submit comments on the proposed rule." SAPA § 202(1)(a); *see also* 7 West's Fed. Admin. Prac. § 7309 (2015) ("Rulemaking … [is] a vehicle for broad public participation in government decisions."). In this context, the public (including Entergy) reasonably concluded that NYPSC's

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[6] In fact, contrary to NYPSC Defendants' description, the grounds clearly overlapped. *See, e.g.*, Feinberg Decl. Ex. C at 23 ("A further error that necessitates rehearing is that the [June 13, 2014] Order never addresses the record evidence that a 150MW repowering would be sufficient, even though such evidence was highlighted by both the Moving Parties *and Entergy*.") (emphasis added).

[7] *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003) (cited at Mem. 12), similarly focuses on the agency's ultimate relief, and not on discrete legal issues raised or resolved along the way. There, "the agency reached a definitive position … when … its [State Environmental Quality Review Act ('SEQRA')] review ended[, and it] conducted no further SEQRA investigation, and issued no further SEQRA declaration on the project." *Id*. at 223.

notice's public reference to tolling the period for seeking judicial review applied generally, and not just to Earthjustice and Sierra Club.

Given the clarity of the principle that one party's rehearing petition regarding an agency order tolls *all* parties' time to seek judicial review of that order, it is not surprising that the issue has not frequently been litigated in New York or elsewhere, and NYPSC Defendants identify no such case law in their motion. Notably, the Iowa Supreme Court expressly rejected the argument advanced by NYPSC Defendants in *Fee v. Employment Appeal Bd.*, 463 N.W.2d 20 (Iowa 1990), which involved a statutory provision akin to the provision that authorized rehearing of NYPSC's June 13, 2014 Order here. *Compare id.* at 22 (Iowa provision providing that "any party" may apply for rehearing of agency's order), *with* N.Y. Pub. Serv. L. § 22 ("any corporation or person interested [in a NYPSC Order] shall have the right to apply for a rehearing"). The court held that one party's rehearing petition filed with the agency tolled the time for both parties to seek judicial review, explaining:

> We cannot believe the legislature intended for such a trap as the agency envisions here. We hold [appellant] was entitled to compute her filing requirements on the basis of [the rehearing petitioner's] application for rehearing. The filing was timely and the district court should have entertained the petition for judicial review.

Fee, 463 N.W.2d at 22.[8] *A fortiori* here, where there is not only a broad New York statutory provision but also a broad NYPSC notice, Entergy's filing of its complaint on February 27, 2015, within four months of NYPSC's October 27, 2015 order denying rehearing, is timely.

[8] NYPSC Defendants' cases (Mem. 14) do not address whether one party's rehearing petition tolls the deadline for another party to seek further review. *See, e.g.*, *BellSouth Corp v. F.C.C.*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) (same party sought agency rehearing and judicial review); *United Transp. Union*, 871 F.2d at 1114 (similar); *MCI Telecomms.Corp. v. Pub. Serv. Comm'n of the State of N.Y.*, 231 A.D.2d 284, 289-90 (3d Dep't 1997) (underlying rehearing petition untimely); *Gross v. State Pub. Serv. Comm'n*, 195 A.D.2d 866, 867 (3d Dep't 1993) (similar).

B. In Any Event, A Six-Year Limitations Period Applies

Because Entergy's complaint is timely under the four-month limitations period set forth in CPLR § 217(1), this Court need not decide whether that period rather than the six-year period of CPLR § 213(1) governs a federal preemption case like this one. In any event, the six-year period applies here, and thus, even if the clock began running on the date of NYPSC's principal Order (June 13, 2014), Entergy's February 27, 2015 complaint is timely.

Entergy's Count I, which invokes this Court's equitable powers to enjoin a federally preempted action by state officials, *see Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015), arises under federal law. There is, however, no federal statutory provision prescribing a limitations period for such a cause of action. Accordingly, "the applicable limitations period … is that specified in the most nearly analogous … limitations statute of the forum state." *Muto v. CBS Corp*., 668 F.3d 53, 57 (2d Cir. 2012) (internal quotation marks omitted); *see also Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989).

Applying this analysis, "[c]ourts in this Circuit have held that the applicable statute of limitations for claims brought pursuant to the Supremacy Clause in New York is six years, applying the catch-all provision of the C.P.L.R., section 213(1), for an action for which no limitation is specifically prescribed by law." *Nat'l R.R. Passenger Corp. v. McDonald*, 978 F. Supp. 2d 215, 242 (S.D.N.Y. 2013) (internal quotation marks omitted), *aff'd*, 779 F.3d 97, 101 (2d Cir. 2015); *Kenmore Mercy Hosp. v. Daines*, No. 09-CV-162S, 2011 WL 4368564, at *3 (W.D.N.Y. Sept. 19, 2011) ("Courts in this Circuit have held that the applicable statute of limitations for … an action [asserting federal preemption as to an agency determination] in New York is six years.");[9] *see also* CPLR § 213(1) (an "actio[n] must be commenced within six

[9] These cases, which NYPSC Defendants do not address, involved preemption challenges to state agency action, rather than to a state statute, and they accordingly undermine NYPSC

years" where, *inter alia*, it is "an action for which no limitation is specifically prescribed by law").

This case law, which NYPSC Defendants do not address, contradicts their argument (Mem. 9) that CPLR § 213(1)'s catch-all six-year period does not apply. Specifically, NYPSC Defendants argue that Entergy's Count I is "within the purview of an Article 78 proceeding" and therefore subject to the four-month period set forth in CPLR § 217(1). Mem. 9. But the New York Court of Appeals cases cited by NYPSC Defendants in support of this point (*id*. 8-10) did not involve federal preemption claims. *See Walton*, 8 N.Y.3d at 193 (New York constitutional claims); *Solnick v. Whalen*, 49 N.Y.2d 224, 227 (1980) (same). NYPSC Defendants' lone authority that touched on federal preemption—to be precise, a state-law unjust-enrichment claim that involved a federal preemption issue—was decided by an intermediate appellate court that did not discuss the federal cases cited above. *See N. Elec. Power Co., L.P. v. Hudson Riv.-Black Riv. Regulating Dist.*, 122 A.D.3d 1185, 1188 (3d Dep't 2014). Moreover, it would be unfair to apply this novel decision to Entergy because it issued on November 26, 2014, *after* Entergy's four-month period would have run if measured from June 13, 2014. Before November 26, 2014, Entergy could have taken comfort in the fact that the trial court in *Northern Electric* had held, applying a six-year limitations period, that the claim was timely. *See N. Elec. Power Co., L.P. v. Hudson Riv.-Black Riv. Regulating Dist.*, No. 3510-12, 2013 WL 269113 (Sup. Ct. Albany Cnty. Jan. 17, 2013), *rev'd*, 122 A.D3d 1185.

Even if *Northern Electric* represented the definitive view of the New York courts on what New York statute of limitations should apply to a federal preemption claim, federal courts do not unflinchingly accept a state statute of limitations for a federal cause of action for which federal

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Defendants' argument (Mem. 9 n.3) that only a challenge to a statute is governed by a six-year statute of limitations.

law does not supply a limitations period. *Reed* recognizes an exception, 488 U.S. at 324, allowing a federal court instead to employ an analogous *federal* (rather than state) limitations period when a state limitations period would "frustrate or interfere with the implementation of national policies or be at odds with the purpose or operation of federal substantive law," *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (internal quotation marks and citations omitted), and "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes," *Reed*, 488 U.S. at 324. *See also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 161 (1983) ("State legislatures do not devise their limitations periods with national interests in mind ….").

Here, a four-month statute of limitations would frustrate the FPA because four months is a short period of time to research and to write a complaint addressing complex issues concerning a state public service commission's interference with federally regulated interstate electricity and capacity markets. Accordingly, federal interests are better served by allowing a preemption plaintiff in these circumstances to rely on the catch-all six-year limitations period applicable to a claim under the Administrative Procedure Act, 28 U.S.C. § 2401(a), which incidentally is the same period as the period set forth in CPLR § 213(1). Applying that limitations period, even if the clock started ticking on NYPSC's issuance of the June 13, 2014 Order rather than the October 27, 2014 order denying rehearing, Entergy's February 27, 2015 complaint is timely.

II. ENTERGY HAS PRUDENTIAL STANDING TO PURSUE COUNT II (DORMANT COMMERCE CLAUSE)

NYPSC Defendants incorrectly contend (Mem. 15-19) that Count II should be dismissed for lack of standing. As an initial matter, NYPSC Defendants' motion rests this argument solely on the doctrine of "prudential" standing (*see id.* at 2, 15, 18), effectively conceding (correctly) at this motion stage that Entergy has Article III standing. Specifically, Entergy alleges that it will

suffer a concrete and particularized injury from suppression of the capacity prices it receives through its participation in the interstate wholesale capacity market, that this injury-in-fact will be caused by implementation of the Term Sheet, and that this Court could remedy the injury by invalidating and enjoining NYPSC's Order that approved the Term Sheet. *See* ECF 51 ¶¶ 13, 67-72.

NYPSC Defendants also concede that "Entergy alleges harm to an interstate market" (Mem. 15); for example, the market involves purchases of capacity from generators located in other states and in Canada, ECF 51 ¶ 88. But NYPSC Defendants argue that, because "the subject matter of [Entergy's] complaint does not involve *its own* cross-border capacity transactions," Entergy lacks prudential standing to assert a Dormant Commerce Clause Claim. Mem. 15 (emphasis added). The argument is unpersuasive.

The test for prudential standing is "'not a rigorous one,'" *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 91 (2d Cir. 2009) (quoting *Nat'l Weather Serv. Emps. Org., Branch 1-18 v. Brown*, 18 F.3d 986, 989 (2d Cir. 1994)), and is satisfied so long as "'the interest sought to be protected by [plaintiffs] is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,'" *id.* at 92 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (emphasis and alteration in original). Prudential standing is a particularly relaxed concept in the context of a Dormant Commerce Clause claim. Contrary to NYPSC Defendants' assertion that "the plaintiff must be an out-of-state market participant who is being discriminated against in favor of in-state participants" (Mem. 16), just the opposite is true: "[C]ognizable injury from unconstitutional discrimination against interstate commerce *does not stop at members of the class against whom a State ultimately discriminates*." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997) (emphasis added). Thus,

in *Tracy*, an Ohio-based purchaser of natural gas had standing to assert a Dormant Commerce Clause challenge to an Ohio tax exemption that favored Ohio-based distributors over out-of-state distributors. *Id.* at 286-87; *see also, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (Hawaii liquor wholesalers had standing to assert Dormant Commerce Clause challenge to Hawaii excise tax on imported liquors); *S. Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003) (South Dakota plaintiffs had standing to assert Dormant Commerce Clause challenge to South Dakota ban on corporate farming that burdened foreign corporations); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 181, 183 (1st Cir. 1999) (Maine garbage hauler who did not haul garbage out of state had standing to raise Dormant Commerce Clause challenge to town ordinance prohibiting such activity). This is because the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome" state action. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978).

Thus, "[i]n conducting the discrimination inquiry, a court should focus on discrimination against *interstate commerce*—not merely discrimination against the specific parties before it." *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) (emphasis in original). Similarly, where, as here, the plaintiff relies on the "undue burden" approach of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the inquiry involves balancing putative "local benefits" of the challenged state action against "the burden imposed *on interstate commerce*" by that action—not the burdens on any given party, *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1257 (11th Cir. 2012) (emphasis added).

In *Houlton*, for example, a local trash hauler in Maine had standing to raise a Dormant Commerce Clause challenge to a town ordinance requiring all haulers either to self-haul waste to a specific local repository, or else to allow one designated waste hauler to transport the waste to

any repository. 175 F.3d at 181, 183. As the First Circuit explained, it did not matter that the plaintiff "failed to allege that he hauled garbage out-of-state or planned to do so" (the activity prohibited by the town ordinance) because "cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *Id.* at 183 (citing *Tracy*, 519 U.S. at 286). The plaintiff had "lost the business of his residential customers…; that injury can be traced directly to the … waste management scheme; and the injury would be adequately redressed by equitable relief and/or damages against the Town." *Id.* The plaintiff was "a classic plaintiff asserting his own economic interests under the Commerce Clause—a constitutional provision specifically targeted to protect those interests," and he accordingly "avoid[ed] any concerns relative either to jus tertii or to the zone of interests requirement." *Id.* (citations omitted); *see also, e.g.*, *Selevan*, 584 F.3d at 92 (it was "of no importance" that plaintiffs did not pass directly into another state after paying allegedly unconstitutional toll).

Entergy's Dormant Commerce Clause claim meets this test, as the amended complaint alleges, ECF 51 ¶¶ 13, 67-72, that Entergy will suffer an injury that "can be traced directly to" the Order and the Term Sheet, and that "would be adequately redressed by equitable relief" against NYPSC and Dunkirk Power.

NYPSC Defendants' cases (Mem. 15) are inapposite, for none of them addresses the scope of the "zone of interests" that will support prudential standing under the Dormant Commerce Clause. *See Warth v. Seldin*, 422 U.S. 490, 493, 508-10, 514 (1975) (taxpayers and representative organizations lacked prudential standing to challenge exclusionary zoning practice under First, Ninth, and Fourteenth Amendments); *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79, 80-81, 86 (2d Cir. 2014) (homeowners seeking to challenge banks' assignments of

mortgages to third parties lacked prudential standing, as they were neither parties to nor beneficiaries of the assignment agreements); *see also Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 63-66 (2d Cir. 2012) (cited at Mem. 18) (plaintiff lacked Article III standing to assert others' rights against defendants who had not injured plaintiff herself).[10] Whereas the rights asserted in those cases did not extend to the plaintiffs themselves, Entergy has *its own* cognizable right under the Dormant Commerce Clause as a participant in the interstate market affected by NYPSC's Order.

III. THE CONFLICT-PREEMPTION PORTION OF COUNT I SHOULD NOT BE DISMISSED OR STAYED UNDER THE DOCTRINE OF PRIMARY JURISDICTION

It is important at the outset to recognize the narrow nature of NYPSC Defendants' invocation of primary jurisdiction: They contend that the doctrine "affords a basis for dismissing this action" only "with respect to Entergy's conflict preemption claims" (Mem. 19), *not* the field-preemption portion of Count I or the Dormant Commerce Clause claim set forth in Count II.[11] Even as so limited to the conflict-preemption claim, the primary-jurisdiction doctrine should not be applied here.

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[10] As shown in text, *Selevan* (cited at Mem. 16) supports Entergy's standing here. NYPSC Defendants' remaining cases (Mem. 15-19) do not concern standing to assert a Dormant Commerce Clause claim. *See Pike*, 397 U.S. at 140-42 (addressing substantive Dormant Commerce Clause test without addressing standing); *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 46-52 (2d Cir. 2007) (same); *United Haulers Ass'n Inc. v. Oneida-Herkimer Waste Mgmt. Auth.*, 438 F.3d 150, 156-63 (2d Cir. 2006) (same); *see also Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453 (1972) (not involving Dormant Commerce Clause); *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515 (1945) (same); *Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92 (2d Cir. 2015) (same).

[11] Because the majority of this case will remain pending even if primary jurisdiction were applicable to the conflict-preemption portion of Count I, the proper remedy would be to stay, not to dismiss, the conflict-preemption portion. *See, e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (primary jurisdiction doctrine contemplates a stay rather than a dismissal in certain circumstances). A stay is also appropriate because it avoids the possibility that defendants will be able to assert an untimeliness challenge to a future renewal of the dismissed claim. *See Jewell v. Cnty. of Nassau*, 917 F.2d 738, 740-41 (2d Cir. 1990) (*per curiam*).

The doctrine of primary jurisdiction has a "relatively narrow scope," *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 851 (2d Cir. 1988), allowing "a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight," *Nat'l Commc'ns Ass'n v. AT&T Co.,* 46 F.3d 220, 222-23 (2d Cir. 1995) (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952)). "Referral of an issue to an agency on the grounds of primary jurisdiction is inappropriate when the issue in question is a purely legal one … or turns on a factual matter requiring no technical or policy expertise." *MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 617 (S.D.N.Y. 2001) (internal quotation marks omitted).

Here, the issues presented by this case and by the pending FERC proceeding are not the same, which is a threshold requirement. *See, e.g.*, *Franzon v. Massena Mem'l Hosp.*, 977 F. Supp. 160, 166 (N.D.N.Y. 1997). In this case, Entergy is seeking a declaratory injunction that NYPSC's Order violates the Supremacy and Dormant Commerce Clauses, and an injunction barring NYPSC Defendants from enforcing their Order. ECF 51 at 38. By contrast, in the pending FERC proceeding, FERC is treating NYPSC's Order as a given and considering whether market rules contained in the FERC tariff administered by the New York Independent System Operator, Inc. should be changed on a generic basis. The relief sought in that proceeding would impose a particular remedy on subsidized generators that would *mitigate* the effects of keeping uneconomic generators (like Dunkirk) in service by requiring that such generators bid their capacity at a price no lower than their going-forward costs. *See Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, Order Denying Complaint, 150 FERC ¶ 61,214, at ¶ 1 (FERC Mar. 19, 2015), ECF 18-3 ("[Independent Power Producers of New York, Inc.

('IPPNY')] requests that the Commission direct [the New York Independent System Operator, Inc.] to require that such resources be excluded from the capacity market or be offered at levels no lower than the resources' going-forward costs."); *id.* ¶ 71 ("IPPNY's Amendment raises concerns regarding whether changed circumstances in the rest-of-state may necessitate the prospective adoption of market power mitigation rules for the rest-of-state."). It would turn the law of federal preemption on its head to allow state agencies to take preempted actions in the first instance and force federal agencies to mitigate the state agency's action—rather than to allow private plaintiffs to bring suit to invalidate the action.

Just as the requested remedy in the FERC proceeding is different from that sought on the conflict-preemption claim here, the legal standards are different: FERC will decide what is needed, taking NYPSC's Order as a given, to achieve a "just and reasonable rate … [or] practice," 16 U.S.C. § 824e(a)-(b), while this Court will decide whether NYPSC's Order "'stands as an obstacle'" to FERC's objectives in implementing the FPA, namely, the operation of efficient energy markets, ECF 51 ¶ 80 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

Finally, any suggestion that FERC's decision in the *IPPNY* proceeding will dispose of the conflict-preemption claim in the instant case is incorrect. In *Nazarian*, FERC had already imposed a mitigation remedy by the time the federal preemption case came before the Fourth Circuit, and the Fourth Circuit resolved the conflict-preemption claim without relying on FERC's action, 753 F.3d at 478-79, observing further that FERC's imposition of the remedy only "*tend[ed]* to *confirm* … the existence of a conflict," *id.* at 479 (emphasis added).[12] On the other hand, if FERC decides *not* to impose a mitigation remedy, such decision may rest on

[12] For this reason, NYPSC Defendants' attempted distinction (Mem. 21 n.6) of *Nazarian* as a case where FERC had already imposed a mitigation remedy is unpersuasive.

FERC's desire to avoid so-called "over-mitigation." *See, e.g.*, *N.J. Bd. Of Pub. Utils. v. FERC*, 744 F.3d 74, 109 (3d Cir. 2014) ("Surely FERC is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance."). Indeed, such concerns about over-mitigation demonstrate that the most targeted way to reconcile NYPSC's Order with FPA policies is to invalidate the Order—relief that is again sought only in this case, not in the FERC proceeding.

It largely follows from NYPSC Defendants' failure to satisfy the "same issue" requirement that they cannot satisfy the remaining four factors of primary-jurisdiction analysis: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *See MCI Telecomms. Corp. v. John Mezzalingua Assocs.,* 921 F. Supp. 936, 941 (N.D.N.Y. 1996) (citing *Nat'l Commc'ns Ass'n*, 46 F.3d at 222).

First, the conflict-preemption portion of Entergy's Count I raises the straightforward legal question whether NYPSC's Order stands as an obstacle to FERC's objectives in implementing the FPA, namely, the operation of efficient energy markets. And NYPSC Defendants ignore that NYPSC's Order already acknowledged the underlying fact of price suppression. *See* n.3, *supra*. While the appropriate remedy for this price suppression remains an open issue, the remedies available in this Court and the FERC proceeding are different, as explained above.

Second, the conflict-preemption portion of Count I does not fall within FERC's discretion. While FERC may have discretion to decide whether to impose a mitigation remedy

on subsidized generators to address the problem of artificial price suppression, FERC, unlike this Court, lacks either the discretion or the authority to invalidate NYPSC's Order or to enjoin its enforcement. *Compare Armstrong*, 135 S. Ct. at 1385 (in suits by private plaintiffs, "federal courts of equity" have "power … to enjoin unlawful executive action … subject to express and implied statutory limitations"), *with* 16 U.S.C. § 824e(a)-(b) (authorizing FERC only to fix a "just and reasonable rate … [or] practice" going forward and to require a refund for certain past deviation from that just and reasonable rate or practice, but not to invalidate a state commission's order or to enjoin enforcement of such order).

Third and *fourth*, because as explained above, the conflict-preemption claim in this case seeks a distinct remedy (and involves different underlying legal issues) relative to the claim in the FERC proceeding, there is no cognizable risk of inconsistent decisions and no negative inference to be drawn from the fact that Entergy intervened at FERC to support complainant IPPNY's requested remedy in that forum.

CONCLUSION

NYPSC Defendants' motion for judgment under Rule 12(c), or in the alternative for dismissal under the doctrine of primary jurisdiction, should be denied.

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Respectfully submitted,

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