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. 5:15-CV-230 (DNH/TWD)

MEMORANDUM OF LAW IN SUPPORT OF THE NYPSC DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(C) OR, IN THE ALTERNATIVE, FOR DISMISSAL UNDER THE DOCTRINE OF PRIMARY JURISDICTION

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INTRODUCTION

Defendants Audrey Zibelman, Patricia L. Acampora, Gregg C. Sayre and Diane X. Burman, together the Public Service Commission of the State of New York ("NYPSC," "New York Commission," or "NYPSC Defendants"), by their attorneys, Kimberly A. Harriman, General Counsel, Jonathan D. Feinberg, Solicitor, Lindsey N. Overton, John C. Graham, and Salomon T. Menyeng, Assistant Counsel, of Counsel, submit this memorandum in support of their motion to dismiss Count I of the Complaint for failure to timely file, and to dismiss Count II for lack of standing. In the alternative, the NYPSC Defendants seek to dismiss portions of Count I of the complaint, without prejudice to recommencement, in light of FERC "primary jurisdiction" over Plaintiffs' "price suppression" claims.

The Complaint is time-barred because Plaintiffs Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Operations, Inc. (together, "Plaintiffs") filed the Complaint on February 27, 2015, more than eight months after the expiration of the applicable four-month statute of limitations borrowed from New York law. After the NYPSC rejected Plaintiffs' "price suppression" and preemption claims in its July 13, 2014 Repowering Order, Plaintiffs sought neither judicial review nor rehearing within the applicable limitations periods. Other parties sought rehearing, however, and the NYPSC denied rehearing on October 27, 2014. Plaintiffs' time to bring this action was not tolled by that petition for rehearing filed by other parties. They nevertheless waited to commence this action at the close of the limitations period for challenging the rehearing order. Their limitations period, however, actually began to run upon the NYPSC's issuance of its June 13, 2014 Repowering Order, not its October 27, 2014 Rehearing Order.

In addition, Plaintiffs' Commerce Clause claim should be dismissed for lack of standing because Plaintiffs' asserted injuries do not result from burdening of their own transactions across state borders. Plaintiffs are New York generators selling the right to buy electricity in New York, and therefore cannot raise claims of out-of-state generators. They assert that the capacity market operated by the New York Independent System Operator, Inc. (NYISO) is interstate, and that out-of-state generators participate in that market. Under the doctrine of prudential standing, however, Plaintiffs may not assert the rights of those out-of-state generators in an effort to remedy their own alleged injuries. Notably, the NYPSC approved Dunkirk repowering in part because it would allow out-of-state electric producers to make sales in New York (Answer Ex. B at 21). Plaintiffs are not similarly situated to such out-of-state producers.

In the alternative, the NYPSC moves to dismiss Plaintiffs' conflict preemption (a portion of Count I) claims without prejudice under the doctrine of primary jurisdiction. The Court should dismiss these claims because the assertion that the repowering approved by the NYPSC will artificially suppress New York capacity prices is being addressed by the Federal Energy Regulatory Commission (FERC). Plaintiffs' "price suppression" claims fall squarely within the field of expertise of that agency, which sets rates for sales of electric energy at wholesale. Plaintiffs assert "price suppression" claims in this action as a basis for preemption, while simultaneously pursuing a remedy before FERC for the same claims. That is, Plaintiffs assert before FERC that the Term Sheet would artificially suppress the prices received by other electric generators in the NYISO capacity auctions. This Court should defer the "price suppression" issue to FERC to avoid a substantial danger of inconsistent rulings. Inasmuch as FERC is simultaneously examining the same issue in its proceedings, its determination would be subject to federal judicial review.

QUESTIONS PRESENTED

1. Whether the Court should dismiss Count I of the Complaint as time-barred when, applying the analogous four-month limitations period for New York Civil Practice Law and Rules (N. Y. CPLR) Article 78 review proceedings in New York State courts, the Complaint was filed several months after the expiration of that period.
2. Whether the Court should dismiss the Plaintiffs' Commerce Clause claim (Count II) for lack of standing, inasmuch as Plaintiffs as intrastate producers can only claim injury from in-state transactions and cannot assert claims by out-of-state producers.
3. Whether, under the primary jurisdiction doctrine, the Court should dismiss Count I of the Complaint, without prejudice, and defer to FERC the issue that Plaintiffs' Count I conflict claims are premised upon, that the Dunkirk Term Sheet agreement will artificially suppress capacity prices, because that issue is currently before FERC, and Plaintiffs are also seeking a remedy there.

STATEMENT OF FACTS

In its "Order Addressing Repowering Issues and Cost Allocation and Recovery," issued June 13, 2014 (Repowering Order) (Complaint Ex. A), the NYPSC approved the February 13, 2014 Term Sheet (Complaint Ex. B) submitted by Intervenor-Defendant Dunkirk Power LLC (Intervenor), the owner and operator of Dunkirk, and electric utility Niagara Mohawk Power Corporation d/b/a National Grid (National Grid). The Term Sheet provides that Intervenor will retrofit coal-fired electric generators at its Dunkirk electric generating facility to run on natural gas, a cleaner and cheaper fuel (i.e., "repower"), and that National Grid will fund the repowering project. The Repowering Order further authorized National Grid to recover from its ratepayers its costs incurred under the Term Sheet. *Id.* In addition, the Repowering Order expressly

rejected Plaintiffs' claim that the Federal Power Act (FPA) precludes the NYPSC from approving the Term Sheet and the recovery of repowering costs from ratepayers (*Id.* at 37-39), and that the alleged suppression of capacity prices was a basis for preemption (*Id.* at 39-40).

By petition filed July 14, 2014, two other parties in the NYPSC proceedings, Earthjustice and Sierra Club, applied for rehearing of the June 13, 2014 Repowering Order on the grounds that the NYPSC violated the State Environmental Quality Review Act (SEQRA), and abused its discretion under state law in approving repowering. (Feinberg Decl. Ex. C.) Earthjustice and Sierra Club's petition for rehearing did not, however, challenge the NYPSC's authority to approve the Term Sheet under federal law or raise capacity "price suppression" issues. *Id.* The NYPSC denied Earthjustice and Sierra Club's petition for rehearing by its Rehearing Order issued October 27, 2014. (NYPSC Answer Ex. B.) The NYPSC rejected claims, *inter alia*, that it was arbitrary and capricious to support the size of the repowering by explaining that the repowering as sized was needed to relieve bulk transmission congestion and permit, among other things, imports of electric energy from out of state.

Plaintiffs, owners, affiliates and operators of nuclear power plants that compete against Dunkirk in NYISO markets, did not seek rehearing before the NYPSC, despite their option of doing so pursuant to New York Public Service Law (PSL) § 22. They filed the Complaint commencing this action on February 27, 2015, exactly four months after the Earthjustice and Sierra Club rehearing order was issued. Plaintiffs seek a declaration that the June 13, 2014 Repowering Order is preempted by federal law and violates the Dormant Commerce Clause, and also seek to enjoin enforcement of that order. (Complaint pp. 35-36.)

The NYPSC asserted defenses of untimeliness, lack of standing and primary jurisdiction in its March 30, 2015 Answer. (NYPSC Answer ¶¶ 96-97, 104-05, 111.)

Plaintiffs' Complaint

Plaintiffs allege that the NYPSC's Repowering Order approving the Term Sheet is field and conflict-preempted by the FPA and invalid under the Dormant Commerce Clause. (Complaint ¶ 1-95.) As to field preemption, Plaintiffs' claim is that the Term Sheet functionally sets wholesale electric rates. (Complaint ¶ 68-71.) The question with respect to conflict preemption is whether the Term Sheet will artificially suppress wholesale electric generating capacity prices. (Complaint at ¶ 72-76.) And, as to the Dormant Commerce Clause claim, the issue is whether the Term Sheet will impermissibly affect interstate commerce by artificially suppressing capacity prices (Complaint ¶ 78-95).

Related Proceeding Before FERC

On May 30, 2013, Plaintiff Entergy Nuclear Power Marketing, LLC (ENPM) moved to intervene in a FERC complaint proceeding commenced by the Independent Power Producers of New York, Inc. (IPPNY). *Independent Power Producers of N.Y., Inc. v. New York Independent System Operator, Inc.*, FERC Docket No. EL13-62-000, Motion to Intervene and Comments of ENPM (filed May 30, 2013) (Feinberg Decl. Ex. A). In that proceeding, IPPNY complained 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. *Id.* at 1-2. ENPM moved to intervene due to the participation of Plaintiff Entergy Nuclear FitzPatrick LLC (FitzPatrick) in the NYCA capacity market. *Id.* at 6.

On April 10, 2014, ENPM filed comments supporting IPPNY's amended complaint. *Independent Power Producers of N.Y., Inc. v. New York Independent System Operator, Inc.*,

FERC Docket No. EL13-62-000 ("*IPPNY*"), Supporting Comments on Amended Complaint of ENPM (filed April 10, 2014) (Feinberg Decl. Ex. B). ENPM specifically pointed to the NYPSC's approval of the Term Sheet as an attempt to show an urgent need for FERC to remedy alleged "price suppression" in the NYCA capacity market. *Id.* at 3-5. Furthermore, it argued for and requested the same relief as IPPNY – including that FERC impose a bid floor on "subsidized" generators such as Dunkirk so as to prevent such generators from bidding below their costs in the NYCA capacity auctions. *Id.* at 6-14.

On March 19, 2015, FERC denied IPPNY's complaint with respect to RSSA contracts addressing reliability needs. *IPPNY*, 150 F.E.R.C ¶ 61,214, at ¶¶ 62-73 (2015) (IPPNY Order). It found that such contracts for reliability services do not suppress capacity prices. FERC found, however, that contracts like those in the Dunkirk Term Sheet could raise potential issues of artificial "price suppression." *Id.* at ¶¶ 69-71. The FERC therefore directed the NYISO to evaluate whether resources under repowering agreements similar to Dunkirk's have the potential to suppress prices in the capacity market. *Id. at* ¶ 71. It further directed the NYISO to submit a report within 90 days, and indicated that it would thereafter determine whether additional actions would need to be taken. *Id.*

On April 20, 2015, ENPM petitioned FERC for clarification and rehearing of the IPPNY Order, contending, among other things, that FERC ignored evidence that the Term Sheet results in long-term artificial "price suppression." *IPPNY*, Request for Clarification and Rehearing of Entergy Nuclear Power Marketing, PP. 13-17 (filed March 30, 2015) (Feinberg Decl. Ex. D). FERC has yet to rule on this petition.

NYISO's Recommendations After The Stakeholder Process

On June 17, 2015, NYISO filed its report with FERC. *IPPNY*, NYISO Compliance Report, Attach. II, at 5 (filed June 17, 2015) (Feinberg Decl. Ex. E). The NYISO Report recommended that FERC should not "address concerns regarding the potential market effects of resources under repowering agreements similar to Dunkirk's at this time." NYISO's Compliance Report in FERC Docket No. EL13-62-00, at 5 (internal quotation marks omitted). NYISO stated that it would propose necessary measures related to repowering projects that address reliability needs in a subsequent compliance filing and, by January 19, 2016, it would issue a further report regarding repowering agreements that are not principally driven by reliability needs. *Id*. at 5.

ARGUMENT

I. STANDARD OF REVIEW

In determining a Rule 12(c) motion, the Court "employ[s] the same . . . standard applicable to dismissals pursuant to [Rule] 12(b)(6)." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011); *Altman v. J.C. Christensen & Assocs.*, 2015 U.S. App. LEXIS 7980, 3-4 (2d Cir. May 14, 2015). It must "accept all factual allegations in the [C]omplaint as true and draw all reasonable inferences in [Plaintiff's] favor." *L-7 Designs, Inc.*, 647 F.3d at 429. "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Johnson v. Rowley*, 569 F.3d 40, 44 (2d Cir. 2009); *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679, quoting Fed. R. Civ. P. 8(a)(2).

While a court deciding a motion to dismiss is restricted to "the allegations contained within the four corners of [the] complaint" *Pani v. Empire Blue Cross Blue Shield*, 152 F. 3d 67, 71 (2d Cir. 1998), "this limitation has been interpreted broadly to include any document attached to the complaint, any statements or documents incorporated in the complaint by reference, any document on which the complaint heavily relies, and anything of which judicial notice may be taken." *Jefferson v. Chicara*, 2015 U.S. Dist. LEXIS 40815, 10-11 (E.D.N.Y. Mar. 26, 2015), citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

II. THE PREEMPTION CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE TIME-BARRED.

A. The Four-Month Statute Of Limitations For Article 78 Proceedings Is Applicable To Entergy's Field And Conflict Preemption Claims.

The field and conflict preemption claims underlying the Plaintiffs' request for declaratory and injunctive relief have no set statute of limitations under Federal law. Under such circumstances, the Court should apply the most closely analogous statute of limitations under state law. *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989); *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 42 (2d Cir. 1983); *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 336 (2d Cir. 1997). Finding the closest analog entails determining the statute of limitations applicable to Petitioners' claims if they had been brought in state court.[1] *Sandberg*, 111 F.3d at 336. The applicable state statute of limitations here is four months. CPLR § 217.

Under New York law, judicial review of administrative agency determinations must be sought through CPLR Article 78 proceedings. CPLR §§ 7801-7806; *Northern Elec. Power Co., L.P. v Hudson River-Black Riv. Regulating Dist.*, 122 A.D.3d 1185, 1188 (3d Dept 2014).

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[1] An identical standard, known as the "next nearest context standard," also applies to declaratory ruling actions under New York law. *Solnick v. Whalen,* 49 N.Y.2d 224, 230 (1980).

Among the questions properly raised in an Article 78 proceeding are "whether a determination was made in violation of lawful procedure [or] was affected by an error of law." CPLR § 7803(3). Thus, constitutional challenges to New York agency determinations are within the purview of CPLR Article 78. *Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194 (2007); *Solnick v. Whalen*, 49 N.Y.2d 224, 229-31 (1980). The statute of limitations applicable to Article 78 proceedings is four months.[2] CPLR § 217(1); *Walton*, 8 N.Y.3d at 194. Consequently, under the federal "most closely analogous" rule, the statute of limitations governing Entergy's constitutional challenges to the Commission's approval of the Term Sheet is the four-month period that applies to CPLR Article 78 proceedings.

Petitioners may argue that the Article 78 statute of limitations is inapplicable because this action is for declaratory and injunctive relief. The statute of limitations, however, does not depend upon how Plaintiffs label their claim; rather, it depends upon the nature of the relief sought and whether the claim could have been brought in another form. *Northern Elec. Power*, 122 A.D.3d at 1188. Here, Plaintiffs' constitutional challenges to a state agency administrative determination are squarely within the purview of an Article 78 proceeding.[3] *Walton*, 8 N.Y.3d

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[2] As the New York Court of Appeals observed, this short statute of limitations is consonant with sound public policy that "the operation of government not be trammeled by stale litigation and stale determinations." *Solnick*, 49 N.Y.2d at 232.

[3] For statute of limitations purposes, a constitutional challenge to *administrative* action is distinguishable from a challenge to *legislation* – i.e., a claim regarding the constitutional validity of a state statute. Challenges to legislation are not cognizable under CPLR Article 78, but instead must be brought as declaratory ruling actions. *New York City Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 201 (1994). Here, Plaintiffs challenge the NYPSC approval of the Term Sheet, rather than the state statute permitting such approval. In addition, quasi-legislative acts of administrative agencies, such as the approval of the Term Sheet, are deemed administrative rather than legislative for the purposes of whether such actions are amenable to Article 78 relief and, consequently, whether the Article 78 statute of limitations applies. *Id.* at 204.

at 194, 197; *Solnick*, 49 N.Y.2d at 231. Because Plaintiffs could have raised those claims in such a proceeding, the four-month Article 78 limitations period (pursuant to CPLR § 217) applies. *Northern Elec. Power*, 122 A.D.3d at 1188.

B. Entergy's Preemption Claims Are Time-Barred Because They Accrued More Than Four Months Prior To The Commencement Of This Action.

Entergy commenced this action exactly four months after the NYPSC's Rehearing Order. The issues that allegedly caused Entergy's claimed injuries, however, were rendered final for the purposes of judicial review in the Repowering Order. Entergy did not seek rehearing on its "price suppression" and preemption issues, and the NYPSC did not revisit those issues on rehearing. The final order as to Entergy's purported injury, then, was the Repowering Order. That order was issued on June 13, 2014, more than eight months prior to Entergy's commencement of this case. Therefore, this case was untimely begun.

1. The Repowering Order Was Final For Judicial Review As To Plaintiffs.

Under New York law, the statute of limitations for judicial review of administrative agency action commences when that action becomes "final;" *i.e.*, when the agency has reached a definitive position on the issue that inflicts an actual, concrete injury upon the complaining party. *Matter of Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomms.*, 5 N.Y.3d 30, 34 (2005); Finality has two requirements: (1) the agency must reach a complete position on the issue that inflicts injury upon the complaining party, and (2) that injury may not be prevented or significantly ameliorated by further administrative action. *Id.*; *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998). As to the second requirement, where further proceedings by the complaining party before the agency will not render the disputed issues moot or academic, the agency's position is deemed definitive and final. *Zagata*, 91 N.Y.2d at 454 [agency letter that no

application had been submitted constituted a definitive position and completion of agency activity]. In this case, both requirements are met.

As to the first requirement, there is no doubt that Plaintiffs' alleged injuries stem entirely from the Repowering Order, not the Rehearing Order. Throughout their Complaint, they refer solely to the Repowering Order as the source of their grievances. Nowhere do they allege that the Rehearing Order caused any of their claimed injuries. In fact, the Complaint all but ignores the Rehearing Order, mentioning it just once, and only to observe that the Commission denied rehearing. (Complaint ¶ 57.) Moreover, the NYPSC specifically reached a definitive position on Entergy's preemption and "price suppression" issues in the Repowering Order by unambiguously rejecting those claims. (Complaint Ex. A, pp. 37-40.) Therefore, the NYPSC reached a complete position on the issues that allegedly injured Plaintiffs on June 13, 2014.

Although the Commission conducted proceedings on rehearing, the parties who sought rehearing did not raise issues of preemption or "price suppression." (Feinberg Decl. Ex. A.) A petition for a rehearing of a NYPSC Order is made "with respect to any matter determined therein. . . ." PSL § 22. Given that no one asked the Commission to revisit whether the Term Sheet would suppress prices, was preempted or otherwise constitutionally invalid, those portions of the Repowering Order were not subject to rehearing and remain the Commission's final word on those issues. *See Zagata*, 91 N.Y.2d at 453 ("a pragmatic evaluation [must be made] of whether the 'decisionmaker has arrived at a definitive position on the *issue* that inflicts an actual, concrete injury'" (emphasis added)).

The second element of the finality test was also met. Plaintiffs claim that the very act of approving the Term Sheet has wrought injury through action preempted by the federal statute or United States Constitution. (Complaint ¶ 1). Consequently, any further proceedings to

ameliorate their claimed injury would have necessitated reconsideration of the Commission's authority to act on the Term Sheet under federal law. *Walton*, 8 N.Y.3d at 196-97 [Petitioners' injuries could no longer be ameliorated by administrative action once the NYPSC approved a rate containing a Department of Corrections commission for telephone calls.] On rehearing, however, the Commission did not revisit that issue, but rather considered whether its action was "arbitrary or capricious" under state law (either the PSL or SEQRA).

Plaintiffs may attempt to argue that the Rehearing Petition of Sierra Club *et al.* ("Rehearing Parties") tolled the statute of limitations for Plaintiffs. This argument, however, overlooks what the Rehearing Parties actually argued and the relief that they sought. The Rehearing Parties, unlike Plaintiffs, did not claim that the Commission was preempted from approving the Term Sheet under federal law. (Rehearing Petition at 25-26.) Nor did they complain of "price suppression." As those parties made unrelated claims that the Repowering Order was arbitrary and capricious because it lacked evidentiary support and failed to comply with New York's environmental impact review procedures*, id*., their petition did not render the Repowering Order non-final as to Plaintiffs. *Stop-The-Barge v. Cahill,* 1 N.Y.3d 218, 223 (2003) [agency action became final with issuance of a conditioned negative declaration under SEQRA].

In particular, the Rehearing Parties did not seek to overturn repowering completely, but argued that the facility was oversized to meet the stated needs. They did not ask the NYPSC to forever desist from approving repowering, but only asked for a cure of alleged errors. *Id.* at 26 ("Each of [the requested] steps is necessary to cure errors of law and fact in the Order and Negative Declaration…"). Thus, even if the Commission had granted the relief sought by the Rehearing Parties, it still would have held further proceedings on the Term Sheet. Therefore,

such action would not have mooted Plaintiffs' claims that the Commission was not empowered to approve the Term Sheet, and thus would not have redressed Plaintiffs' injury by precluding any approval of, and alleged adverse actions from, repowering. *Zagata*, 91 N.Y.2d at 453-54. Consequently, the rehearing request did not render the Repowering Order nonfinal for judicial review as to Plaintiffs.

2. Plaintiffs Are Not Entitled To Rely Upon Sierra Club's Rehearing Petition As Tolling Their Statute Of Limitations

Furthermore, under the applicable New York statute a rehearing makes the agency's initial determination non-final for judicial review only where:

> … the body or officer making the determination is expressly authorized by statute to rehear the matter upon *the petitioner's* application *unless the determination to be reviewed was made upon a rehearing*, or a rehearing has been denied, or the time within which the *petitioner* can procure a rehearing has elapsed.

CPLR § 7801(1) (emphasis added). Plaintiffs have failed each of these statutory criteria. First, inasmuch as non-finality is triggered by "the petitioner's application" for rehearing, non-finality of the Repowering Order as to Plaintiffs could only be premised upon its own application for rehearing, not someone else's application. *Id*. PSL § 22 provides "the right to apply for a rehearing" to "any corporation or person interested therein," but to protect that right, "any such application for rehearing must be made within thirty days after the service of" the NYPSC order. Filing of a timely application on behalf of an interested person does not protect all interested persons. Once Plaintiffs declined to petition for rehearing, the Repowering Order became final for judicial review as to Plaintiffs when the 30-day time period for seeking rehearing under PSL § 22 expired. CPLR § 7801(1).

Likewise, Federal law supports the proposition that Plaintiffs needed to have filed their own petition for rehearing. New York case law governing finality is derived from federal law.

Zagata, 91 N.Y.2d at 453, citing *Chicago & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 113 (1948). Under Federal law, Plaintiffs cannot rely on other parties' rehearing petitions in order to toll the statute of limitations as to itself. Finality is not only based upon the issues determined by the agency, but also upon the identity of the party. As the U. S. Court of Appeals for the District of Columbia Circuit has held, "[i]t is widely accepted that 'finality with respect to agency action is a party-based concept;'" *BellSouth Corp v. F.C.C.*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) (quoting *United Transportation Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989), and "a party's filing a petition for reconsideration before an agency 'render[s] the underlying agency action nonfinal (and hence unreviewable) with respect to that party,'" *Id.* The corollary, of course, is that the agency action is final with respect to any party which has not petitioned for rehearing. Because Plaintiffs did not seek rehearing of the Repowering Order, that order was final for judicial review as to them. And because they did not commence this action within four months of June 13, 2014, their complaint is untimely. CPLR § 217(1).

Moreover, Plaintiffs could have sought rehearing within 30 days after the issuance of the Repowering Order, PSL § 22, but they failed to do so. As is the case regarding a party that has failed to timely seek rehearing, Plaintiffs waived their statutory right to a rehearing and cannot reap the benefits flowing from a right it declined to exercise. *MCI Telcoms. Corp. v. New York State Pub. Serv. Comm'n*, 231 A.D.2d 284, 290 (3d Dep't 1997); *See Gross v. New York State Pub. Serv. Comm'n,* 195 A.D.2d 866, 868 (3d Dep't 1993). Plaintiffs had a choice between seeking rehearing or judicial review, *Matter of Tri-City Tel. Co. v. Kahn*, 49 A.D.2d 126, 130 (N.Y. App. Div. 1975); they chose neither.

Consequently, as to Plaintiffs, the NYPSC's determination that gave rise to their claimed injury became final on June 13, 2014. Plaintiffs were not among the parties that sought

rehearing, and the NYPSC did not revisit the issues which form the basis of their claimed injury. Thus, the Repowering Order "stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding." *Zagata*, 91 N.Y.2d at 454. Plaintiffs commenced this action on February 27, 2015, more than eight months after their claims accrued. Therefore, all of their claims are time-barred.

III. ENTERGY LACKS STANDING TO RAISE ITS COMMERCE CLAUSE CLAIM.

Entergy, in Count II of its complaint, claims that the June 13, 2014 Repowering Order violated the dormant Commerce Clause. It alleges that the Order was facially discriminatory against interstate commerce, Complaint ¶¶79-84, and imposed burdens upon interstate and international commerce that outweigh the local benefits under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* test applies to non-discriminatory regulation that incidentally burdens interstate commerce, *Id.* ¶¶ 85-93. While Plaintiffs assert that the NYISO capacity market is interstate in nature, they are not, however, engaging in any capacity sales transactions that cross state borders. As such, they cannot claim to be victims of any purported interstate commerce discrimination. Given the absence of any such injury to themselves, Plaintiffs lack prudential standing to prosecute their Commerce Clause claim.

A. Plaintiffs' Mere Allegations Of Harm To An Interstate Market Are Insufficient To Confer Standing.

Prudential standing in the Federal courts generally precludes *jus tertii*; that is, a party may not raise rights of non-parties in order to obtain relief from injury to itself. *Warth v. Seldin*, 422 U.S. 490, 509 (1975); *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79, 86 (2d Cir. 2014). Entergy alleges harm to an interstate market, but the subject matter of its complaint does not involve its own cross-border capacity transactions. Rather, Plaintiffs seek to allege harm to out-of-state parties that seek to make sales into the New York electric capacity markets.

Plaintiffs are not, however, such out-of-state parties. Thus, they are not a proper party to raise a Dormant Commerce Clause claim.

B. <u>Plaintiffs Cannot Show Discrimination Against Their Own Cross-Border Transactions</u>.

A "facially discriminatory" Dormant Commerce Clause claim is necessarily premised upon discrimination, which means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 47 (2d Cir. 2007) (quoting *Oregon Waste Syst., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). It logically follows, then, that the plaintiff must be an out-of-state market participant who is being discriminated against in favor of in-state participants. An in-state participant cannot claim such discrimination. *See Selevan v. New York Thruway Authority*, 584 F.3d 82, 95 (2009) ("a state regulation 'discriminates' against interstate commerce only if it 'impose[s] commercial barriers or discriminate[s] against an article of commerce *by reason of its origin or destination out of State*") (emphasis added; quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)).

By their own pleadings, Plaintiffs admit that they are solely in-state market participants. The complaint states that plaintiff FitzPatrick is "a generator located in Scriba, New York." (Complaint ¶ 9.) It further states that plaintiff ENPM "markets and sells the power output from FitzPatrick in the interstate wholesale markets." *Id.* Likewise, plaintiff Entergy Nuclear Operations, Inc. is identified as "the federally licensed operator of FitzPatrick." *Id.* Therefore, the capacity being marketed by Plaintiffs is produced solely within New York, and Plaintiffs are in-state producers for purposes of the Dormant Commerce Clause.

The market which is the subject matter of Plaintiffs' Dormant Commerce Clause claim is the NYISO capacity market. (Complaint ¶¶ 83, 86, 88, 90.) In that market, New York entities

purchase capacity to meet their obligations to have electric supply available within New York. *See Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 98 (2d Cir. 2015) ("While many RTOs and ISOs in the country have authority over areas whose boundaries cross state lines, New York has its own ISO (*i.e.*, NYISO), which is responsible for the reliable operation of New York's high-voltage transmission grid and administers bulk power markets in New York.") As Plaintiffs' Complaint is founded upon sales of a New York-produced commodity in a New York market, they have no basis upon which to assert that they are victims of discrimination against interstate sales for dormant Commerce Clause purposes.[4]

C. Plaintiffs' *Pike* Balancing Test Claim Also Requires Them To Show Harm To Their Own Cross-Border Transactions.

Likewise, under the *Pike* balancing test, a "burden on interstate commerce" contemplates a situation where the state is burdening a cross-border movement of goods. *United Haulers v. Oneida-Herkimer Waste*, 438 F.3d 150, 161 (2d Cir. 2006); *see also Pike*, 397 U.S. at 140-42 (finding the existence of burdens where state regulation impeded shipping of goods across state boundaries either for processing or final sale). Here, Plaintiffs do not allege, for the purposes of this action, that the capacity that they offer is being processed or sold outside New York or that the Term Sheet burdens any of their out-of-state sales. Plaintiffs complain about alleged harms to sale of capacity into New York by out-of-state suppliers, which they do not have standing to assert, as in-state producers.

[4] To the extent Plaintiffs sell capacity to out-of-state entities, the prices for those transactions are not affected by capacity sales on the market controlled by NYISO. Just as the NYISO sets prices for New York buyers of out-of-state capacity resources, the price of New York capacity purchased outside New York is governed by the regional ISO administering the buyer's market. Consequently, Plaintiffs' sales outside New York are beyond the scope of this action.

Plaintiffs' bare assertion that the Commission has interfered with an interstate market in which they participate is insufficient to confer standing for the purpose of the *Pike* test. FERC jurisdiction over those markets attaches only because energy flowing on an interconnected interstate transmission grid is deemed "interstate." *See Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (describing "commingling" of electrons from various generators throughout interconnected transmission systems); *see also Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 529-30 (1945) (describing the scientific basis for why power flowing on interconnected systems may be factually interstate). To the extent any Entergy-generated energy may happen to traverse out-of-state transmission conduits en route to a New York purchaser, it would do so only because of the laws of physics, rather than by virtue of any market action. The *Pike* test, however, applies only where some type of market transaction occurring across state boundaries is involved. *United Haulers,* 438 F.3d at 161; *Pike*, 397 U.S. at 140-42. Capacity is not energy, but merely an option to buy energy. (Complaint ¶ 34.) As such, a capacity purchase is merely a sales transaction whose geographic nature is not affected by the movement of electrons. Plaintiffs' mere participation in the New York capacity market, then, does not excuse them from showing a burden to a cross-border transaction in order to maintain dormant Commerce Clause standing.[5]

Finally, Entergy's claims do not qualify for any of the recognized exceptions from the prudential *jus tertii* standing preclusion. They do not claim that any injured third parties will be unable to sue. *Mahon v. Ticor Title Ins.*, 683 F.3d 59, 66-67 (2d Cir. 2012) (Hall, J., concurring).

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[5] NYISO also manages energy sales to New York purchasers from out-of-state generators. By contrast, then, an injured out-of-state electric generator selling energy in the NYISO market would have dormant Commerce Clause standing.

Nor can they claim that they have a close relationship with injured third parties, *id.*, inasmuch as those third parties would be Plaintiffs' competitors in the energy and capacity markets. Likewise, they do not claim that their prosecution of this action is necessary to protect their out-of-state competitors' rights, as there is no indication that those competitors could not assert their own rights in a proper case. *Warth v. Seldin*, 422 U.S. at 510. In any event, any claim that Plaintiffs can protect the rights of out-of-state producers is suspect. Notably, Plaintiffs fail to mention that through repowering, the NYPSC expressly sought to foster transfers of lower-cost Canadian-produced electricity into New York. (Repowering Order at 29; Rehearing Order at 18-21.) It seems unlikely that Plaintiffs can protect the interests of out-of-state producers as they seek to prevent out-of-state transactions.

IV. THIS COURT SHOULD DISMISS THE PLAINTIFFS' CONFLICT PREEMPTION CLAIMS UNDER COUNT I AND REFER THE "PRICE SUPPRESSION" ISSUE TO FERC UNDER THE PRIMARY JURISDICTION DOCTRINE.

The doctrine of primary jurisdiction affords a basis for dismissing this action with respect to Plaintiffs' conflict preemption claims. Those claims are founded upon a theory that the Term Sheet agreement, through the out-of-market payments it provides to Dunkirk, potentially suppresses capacity prices by enabling Dunkirk to bid below its costs. In this manner, Plaintiffs argue that the Term Sheet conflicts with FERC's market design and burdens interstate commerce. (Complaint ¶¶ 33-37; 62-64; 72-76; 79-94.) Whether a subsidized repowered generator could suppress capacity prices in a manner that disrupts the market, however, is a technical and policy issue squarely within FERC's subject matter expertise. Indeed, that very issue is being examined in a FERC proceeding in which plaintiff ENPM, on behalf of plaintiff FitzPatrick, is actively participating. (Feinberg Decl. Exs. A, B.) ENPM likewise, in that proceeding, seeks a remedy for the same injury that Plaintiffs allege in this action. *Id.*

Courts typically consider four factors in determining whether to refer a question to an agency under the primary jurisdiction doctrine:

> (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.

Schiller v. Tower Semiconductor Ltd., 449 F.3d 286, 295 (2d Cir. 2006) (internal quotation marks omitted). The advantages of the doctrine's application must be weighed against the costs (*e.g.* complications and delays). *See id.* Here, all of these factors weigh in favor of the application of primary jurisdiction and dismissal of the "conflict preemption" claims based on alleged "price suppression" of NYISO electric capacity prices and referral of those claims to FERC.

Regarding the first factor, the issue of "price suppression" in the wholesale electric capacity markets is not within the conventional experience of courts. Rather, it is a technical, policy issue within FERC's jurisdiction and field of expertise, inasmuch as it relates to NYISO's establishment of wholesale electric capacity rates through its market rules (known as "tariffs"). *N.Y. State Elec. & Gas Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 168 F. Supp. 2d 23, 27 (N.D.N.Y 2001); *see Central Hudson*, 783 F.3d at 109 (acknowledging deference to FERC because "issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.")

As to the second factor, the underlying question of whether the Term Sheet, through its out-of-market payments, will artificially suppress capacity prices falls within the FERC's discretion because it has exclusive jurisdiction over sales of electric energy at wholesale in interstate commerce, 16 U.S.C. § 824(b)(1); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733

F.3d 393, 432 (2d Cir. 2013), and it regulates wholesale electric prices in New York through market-based mechanisms administered by the NYISO, *Central Hudson*, 783 F.3d at 99. Resolving Plaintiffs' "price suppression" claim, then, requires FERC's interpretation and a determination of reasonableness of the rates arising from the market operated under NYISO tariffs, subject to FERC jurisdiction. *See N.Y. State Elec. & Gas Corp.,* 168 F. Supp. at 29; *Allegheny Electric Cooperative, Inc. v. Power Authority of N.Y.*, 630 F. Supp. 1271, 1275 (S.D.N.Y. 1986). Thus, the "price suppression" question is fully within FERC's discretion.

With respect to the third factor, a decision by this Court would present a substantial danger of inconsistent rulings because FERC is presently examining the very same issue Plaintiffs raise herein; that is, whether the Term Sheet will artificially suppress prices and thus harm the NYISO-implemented wholesale market design. *Robinson v. Baltimore & O. R. Co.*, 222 U.S. 506, 510-511 (1912); *see* IPPNY Order, 150 F.E.R.C ¶ 61,214, at ¶ 70-71. FERC noted that "[it] still need[s] to develop criteria for evaluating repowered resources," IPPNY Order, 150 F.E.R.C ¶ 61,214, at ¶ 69, and directed NYISO to study the issue and submit a report, *id.* ¶ 71. [6] FERC is also currently reviewing ENPM's and IPPNY's petitions to rehear the IPPNY Order on the grounds that FERC ignored evidence that the Dunkirk Term Sheet causes long-term artificial "price suppression." *See* Order Granting Rehearing for Further Consideration, F.E.R.C Docket No. ER14-543-002 (May 15, 2015); Order Granting Rehearing for Further Consideration, F.E.R.C Docket No. EL15-37-001 (April 21, 2015); *see also IPPNY,* Request for Clarification

[6] In contrast, in the Fourth Circuit case on which Plaintiffs rely in support of claimed "conflict preemption," FERC had completed its review of market design and "explicitly accommodated . . . the participation of subsidized plants in its auction." *PPL Energy Plus v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014). The Fourth Circuit concluded that FERC's mitigation of the effect of the Maryland order in that case "however, tends to confirm rather than refute the existence of a conflict." *Id.* Here, no decision on the presence of a conflict can be reached until FERC has concluded how to address the Dunkirk Term Sheet and the alleged "price suppression."

and Rehearing of IPPNY, PP. 8-16 (filed April 20, 2015); *id.,* Request for Clarification and Rehearing of ENPM, PP. 13-17 (filed March 30, 2015) (Feinberg Decl. Ex. D).

Moreover, there is a substantial risk of conflicting court decisions absent a referral of this case to FERC. If FERC does not grant ENPM the remedy it seeks on rehearing, ENPM could seek judicial review of that determination in a United States Court of Appeals. 16 U.S.C. § 825*l*(b). Hypothetically, then, it is possible that this Court and the Court of Appeals could reach opposite conclusions on the question of "price suppression." Dismissing the conflict preemption claims without prejudice to refile after FERC's decision would avoid that conflict.[7]

Regarding the fourth factor, as shown above, Plaintiffs have a prior application for relief pending at FERC. (Feinberg Decl. Ex. D.) The agency is now considering the "price suppression" issues raised in Entergy's and IPPNY's applications to rehear the IPPNY Order. The current NYISO capacity market tariff has no "criteria for evaluating repowered resources" that would set a bid floor. IPPNY Order, 150 F.E.R.C ¶ 61,214, at ¶ 70. Based on the FERC-mandated stakeholder process, the NYISO indicated that it will "propose rules governing repowering agreements driven by reliability needs, and" file a report regarding repowering not so driven, by January 19, 2016. *IPPNY*, NYISO Compliance Report (Feinberg Decl. Ex. E) at 5; *see also* IPPNY Order, 150 FERC ¶ 61,214, at ¶ 71 (indicating that, after the NYISO stakeholder process, FERC will determine whether additional actions need to be taken).

Plaintiffs state in their proposed amended complaint, note 26, that the NYISO has recently issued a report in which it "asks for additional time to respond to issues raised by the Dunkirk repowering agreement." They nonetheless attempt to contrast this action to the FERC

[7] If Plaintiffs can pursue the "price suppression" issue here, then they can effectively mount a collateral challenge to any FERC Order instead of pursuing federal appellate review.

proceeding, claiming that proceeding "addresses the structure for market rules to be put in place by FERC to deal with retention or repowering of uneconomic generating units." *Id.* Plaintiffs are, however, advocating before FERC for changes in the NYISO capacity market tariffs in order to remedy "price suppression." (Feinberg Decl. Ex. B, pp. 1-14.) The Court and the parties should not be attempting to determine if there is a conflict, until they have the benefit of knowing if and how FERC changes its market rules to deal with the effects of repowering, including any alleged "price suppression."

Based on the foregoing, the resolution of the Plaintiffs' contention that the Term Sheet, through the out-of-market payments it provides to Dunkirk, will artificially suppress capacity prices and, thus, harm the FERC's market design, "is precisely the kind of fact-dependent, policy-based decision best decided in the context of agency review before reaching the judicial arena." *Allegheny Electric Cooperative, Inc.*, 630 F. Supp. at 1275. NYISO's June 17, 2015 report found that further analysis needs to be conducted before drawing conclusions about the market effects of repowering pursuant to agreements similar to Dunkirk's. (*IPPNY,* NYISO Compliance Report at 5.) FERC is still determining whether additional actions need to be taken. *See N.Y. State Elec. & Gas Corp.,* 168 F. Supp. 2d at 30. Dismissal is therefore appropriate.

The advantages of applying the primary jurisdiction doctrine in this case substantially outweigh any costs. Under the primary jurisdiction doctrine, "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, <u>if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice</u>. (emphasis added)" *Reiter v. Cooper*, 507 U.S. 258, 269 (1993). Here, dismissal without prejudice of the conflict preemption claims will not disadvantage Plaintiffs. It is likely that FERC will dispose of the "price suppression" claims in this case, either by providing relief

to Plaintiffs or rejecting their claims. Referral will avoid an unnecessary expenditure of resources by the Court, the parties and non-parties (the NYISO and National Grid), as FERC can issue a definitive decision on "price suppression."

Fundamentally speaking, FERC can decide whether the Term Sheet will conflict with the federal regulatory scheme by artificially suppressing capacity prices and what, if any, remedy should be imposed. Where a state-federal conflict can be reconciled, there is no conflict preemption. *Rice v. Norman Williams Co.,* 458 U.S. 654, 659 (1982). If FERC agrees with Plaintiffs, it could redress their alleged injury and eliminate any purported conflict due to "price suppression" by imposing market rule changes. For example, as requested by IPPNY, the FERC could set the minimum bid that Dunkirk must offer in the capacity market. *See* IPPNY Order, 150 F.E.R.C ¶ 61,214, at ¶ 20. [8]

Inasmuch as FERC, at ENPM's (and IPPNY's) behest, is currently developing criteria for evaluating repowered resources, referral would also simplify the complex fact pattern this case presents. *N.Y. State Elec. & Gas Corp.*, 168 F. Supp. 2d at 30. Referral would not needlessly delay the resolution of the Plaintiffs' conflict preemption and Dormant Commerce Clause claims because it "will be a material aid in ultimately deciding" – or, indeed, may obviate the need to decide – whether the NYPSC's Order is conflict-preempted and whether it impermissibly affects interstate Commerce. *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 305 (1973); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60-61 (2d Cir. 1994).

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[8] It appears a Term Sheet clause setting a bid floor – the remedy ENPM seeks from FERC – would have satisfied Plaintiffs. They could not, however, obtain that relief from the NYPSC, which does not set interstate wholesale electric rates. The FERC proceeding is the appropriate venue to seek that relief and this Court should defer to FERC expertise and authority.

CONCLUSION

For the reasons stated herein, this Court should dismiss with prejudice Count I of this action for untimeliness and should dismiss Count II for lack of standing; or, in the alternative, dismiss without prejudice the "conflict preemption" portions of Counts I and II and refer those claims to the Federal Energy Regulatory Commission, and grant such other and further relief as may be just and reasonable.

Respectfully submitted,

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