**UNITED STATES DISTRICT COURT**
**FOR THE 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)

REPLY OF THE NYPSC DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF JURISDICTION

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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" or "NYPSC Defendants"), reply to the August 23, 2016, opposition of Plaintiffs' Entergy Nuclear FitzPatrick, LLC ("ENF"), Entergy Nuclear Power Marketing, LLC ("ENPM"), and Entergy Nuclear Operations, Inc. ("ENOI") (collectively, "Entergy") to NYPSC's motion to dismiss Entergy's Amended Complaint for lack of Article III jurisdiction. ECF 51.

## I. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY HERE

NYPSC has shown that Entergy lacks Article III standing because the Federal Energy Regulatory Commission ("FERC") previously denied Entergy's claim that the Dunkirk repowering would artificially suppress New York Independent System Operator ("NYISO") capacity prices. Entergy errs in responding that the Court rejected this contention in ruling on NYPSC's first motion to dismiss. ECF 126 at 6. The "doctrine of the law of the case comes into play only with respect to issues previously determined," *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979), but, as even Entergy admits, the Court's March 7, 2016 Decision and Order (ECF 96, "March Order") did not address whether Entergy had litigated and lost before FERC the injury alleged here.

Entergy concedes that the March Order "did not explicitly address NYPSC Defendants' argument that FERC *had already decided* that there is no price suppression and hence no injury to Entergy," ECF 126 at 7 n.3, and is reduced instead to arguing that the Court did so "implicitly" by rejecting NYPSC's primary-jurisdiction argument. *Id.* Entergy fails to explain why this is so and, based upon a plain reading of the March Order, whether Entergy is estopped from re-litigating its alleged injury did not factor into the Court's decision. Entergy opposed the earlier motion on grounds that, although the cases have common factual issues (namely,

allegations of improper price suppression), they "raise[] different legal issues and seek[] [distinct] remedies." *Id.* at 17. The Court denied the primary jurisdiction motion on that basis, finding that FERC "cannot reach the underlying validity" of the NYPSC Order at issue. March Order at 20. That finding has nothing to do with FERC's resolution of the price suppression allegations that underlie Entergy's claims in both fora. *Id.* at 19-20.[1] As the March Order neither ruled upon Entergy's alleged injury nor made any express or implied finding as to whether FERC had ruled on Entergy's alleged injury, Entergy's law of the case argument is a red herring.

## II. ENTERGY LACKS STANDING BECAUSE IT LOST BEFORE FERC AND CANNOT RELITIGATE HERE ITS ALLEGED CLAIM OF INJURY

Entergy does not dispute that if NYPSC is correct in its reading of *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214, P 29 (2015) (rehearing pending), then Entergy's alleged claim of injury here is precluded and this Court "must dismiss the action." Fed. R. Civ. P. 12(h)(3). While Entergy attempts to demonstrate that FERC's ruling lacks preclusive effect, its claims are meritless.

### *A. FERC Considered and Rejected the Contention that the Dunkirk Repowering Would Artificially Suppress NYISO Capacity Prices*

As NYPSC showed, the Independent Power Producers of New York, Inc. ("IPPNY") complained to FERC that the Dunkirk repowering would artificially suppress prices in the NYISO auction capacity market and asked FERC, *inter alia*, to "exclude the [repowered Dunkirk] capacity from the [NYISO] capacity markets." ECF 124-1 at 6 (quoting ECF 124-3 at

[1] In fact, and contrary to Entergy's prior contention, FERC need not "assume the lawfulness of the Commission's Order approving the Term Sheet." March Order at 19. FERC can and has preempted state law intrusive of FERC's jurisdiction. *See* ECF 124-1 at 6-7 n.6 (and cases cited therein). And FERC can seek injunctive relief to enforce compliance with its orders. 16 U.S.C. § 825m. If this Court dismisses Entergy's complaint on standing grounds, nothing prevents Entergy from raising its preemption claims before FERC, which is fully empowered to address whether the NYPSC's Term Sheet is preempted under the Federal Power Act, and, if not, whether the NYISO tariff should be modified to address the impact of the Dunkirk repowering on the capacity market.

12). Plaintiff ENPM intervened and supported the complaint, raising the same price suppression claim raised here. *Id.* IPPNY bore the burden of showing that the NYISO tariff was unjust and unreasonable because it lacked provisions either excluding the repowered Dunkirk capacity from the NYISO capacity markets or mitigating the impact of any bidding by Dunkirk.

FERC denied the complaint (150 FERC ¶ 61,214, PP 70, 73), finding that "IPPNY has not satisfied its burden" (*id.* P 71). Plaintiff ENPM sought rehearing of FERC's determination. In reply, Entergy attempts to downplay the import of both FERC's ruling and ENPM's rehearing request as "concern[ing] only whether FERC should grant an immediate remedy, not whether FERC had found that Entergy and other generators will not be injured by NYPSC Order and Dunkirk being kept in operation." ECF 126 at 10 n.6. But Entergy's characterization here cannot be squared with its rehearing request, which makes plain what Entergy thought FERC had decided. Entergy sought rehearing of FERC's "finding" that complainants failed to "show, based on the current evidentiary record, that the NYISO rest-of-state capacity rates are unjust and unreasonable due to price suppression from the long-term Dunkirk repowering Term Sheet." ECF 36-5 at 13; *see also id.* at 3 (contending that "[FERC] erred in ignoring record evidence that the Dunkirk long-term repowering Term Sheet will artificially suppress capacity market prices."). The facts are clear: Entergy (and IPPNY) litigated and lost Dunkirk price suppression claims before FERC, and has asked FERC to reconsider its ruling. Entergy cannot establish an Article III injury by seeking to re-litigate here the factual issue it lost before FERC.

Entergy seeks to avoid preclusion on grounds that "FERC found that a conclusion of injury was just as likely [as not] and therefore set the issue for further study." ECF 126 at 8. That misconstrues what happened. FERC did not set the complaint for hearing; it denied the complaint, finding that the complainants failed to carry their burden of proof. Entergy and the

complainants failed to show *that it was more likely than not that the Dunkirk repowering would artificially suppress market prices.* A prior agency decision turning on a failure to satisfy the burden of proof can trigger issue preclusion and bar re-litigation of the same factual claims. *See Univ. of Tenn. v. Elliott*, 478 U.S. 798 (1986) (administrative decision precluded federal claim of discrimination where plaintiff failed to establish discrimination as affirmative defense to agency action). While FERC acknowledged the "potential" for price suppression associated with the repowering, that potential was insufficient even to support granting an administrative complaint seeking mitigation, much less does it establish Article III injury here. Potential means "having possibility"[2] and mere "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). What FERC may find and what it may do on its own motion, incident to its further study of the Dunkirk repowering, is unknown. What is certain is that FERC denied IPPNY's and Entergy's claim of artificial price suppression, and they may not re-litigate it here.

### *B. FERC's Order Is Final for Purposes of Issue Preclusion*

There is likewise no merit in Entergy's claims that FERC has "not yet issued anything akin to a final judgment" because FERC "set the question of price suppression for further investigation." ECF 126 at 11. For purposes of issue preclusion "[t]he test of finality . . . is whether the conclusion in question is procedurally definite." Restatement (Second) of Judgments § 13(g) (Am. Law Inst. 1980). That standard is satisfied here. FERC's order is "procedurally definite" in that FERC denied IPPNY's complaint for failure to satisfy its evidentiary burden, and rejected the claim that the NYISO tariff must be modified in order to prevent artificial price suppression due to the Dunkirk repowering.

[2] *Potential*, American Heritage Dictionary at 1374 (4th ed. 2006).

And Entergy knows that is the case. Underscoring the finality of FERC's decision, plaintiff ENPM requested "rehearing of [FERC's] March 19, 2015 Order denying the relief requested in [IPPNY's] Complaint against . . . [NYISO]." ECF 36-5 at 1 (footnote omitted). ENPM seeks rehearing pursuant to FERC "Rule 713." *Id.* at 2. In so doing, ENPM has necessarily taken the position that FERC's order is "final," because Rule 713 applies only "to any request for rehearing of a *final* Commission decision or other final order." 18 C.F.R. § 385.713(a) (emphasis added). And, while such requests are statutorily prerequisite to judicial review, 16 U.S.C. § 825*l*, their submission does not stay finality. 18 C.F.R. § 385.713(e). Similarly, the possibility that FERC may take action later does not render its order denying IPPNY's complaint non-final.

In sum, Entergy does not dispute and therefore concedes that it litigated before FERC the exact claim of injury it seeks to raise here and that it had fair opportunity to do so. "It is well understood . . . that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *Cunningham v. Tenn. Cancer Specialists, PLLC***,** 957 F. Supp. 2d 899, 921 (E.D. Tenn. 2013) (alteration in original) (quoting *Rouse v. Caruso*, No. 06-cv-10961-DT, 2011 WL 918327, at *18 (E.D. Mich. 2011)). FERC expressly considered and rejected Entergy's claim of alleged injury, finding it at best a potentiality. And FERC did so with finality by expressly denying the complaint before it. *See Old Dominion Elec. Coop. v. Pub. Serv. Elec. & Gas Co.*, Order Denying Rehearing, 108 FERC ¶ 61,055 (2004) (refusing to reopen denied complaint absent request for rehearing for reasons of finality). Having litigated and lost before FERC, Entergy is precluded from a second bite at the apple here. *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293 (2015).

## III. ENTERGY HAS NOT ALLEGED A JUDICIALLY COGNIZABLE INJURY

### *A. NYPSC's Filed Rate Argument Is Properly Raised as a Challenge to Entergy's Standing*

Relying upon district court authority, Entergy contends that NYPSC's filed rate argument is not properly brought under Fed. R. Civ. P. 12(b)(1). But Entergy's position and cited cases are contrary to the pronouncements of the Supreme Court. Article III requires that Entergy demonstrate that it has "suffered an injury in fact—an invasion of a legally-protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Entergy fails to allege an invasion of a legally protected interest.

Entergy's alleged injury is that participation by the repowered Dunkirk unit in the NYISO capacity auction will reduce auction prices. But that is not a judicially cognizable injury because the NYISO tariff permits Dunkirk to bid the repowered capacity into the NYISO capacity auction. And, as discussed *supra*, FERC has so held. 150 FERC ¶ 61,214. The Supreme Court has found repeatedly that a plaintiff suffers no legally cognizable injury where—as here—it claims the right to a rate other than the filed rate. "Injury implies violation of a legal right. The legal rights . . . are measured by the . . . tariff. Unless and until suspended or set aside, [the filed] rate is made, for all purposes, the legal rate." *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922). Plaintiffs can "claim no rate as a legal right that is other than the filed rate, . . . and not even a court can authorize commerce in the commodity on other terms." *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). "[T]he rate . . . duly filed is the only lawful charge." *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998) (quoting *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)). *See also Taffet v. S. Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) ("appellants suffered no legally cognizable injury by virtue of paying the filed rate").

Indeed, in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), now recognized as one of the earliest filed rate decisions,[3] the Supreme Court makes plain that a claim for damages contrary to the filed tariff is beyond the district court's jurisdiction:

> As presented below and pressed at bar, the question takes a seemingly two-fold aspect, the jurisdiction of the court below as affected by the act to regulate commerce and the right to relief sought consistently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act . . . upon the right of a shipper to maintain an action at law . . . because of . . . an alleged unreasonable rate.

*Id.* at 435-36. The Supreme Court found no "power in the court," *id.* at 441, to entertain such a claim as an original matter because unreasonable rate claims could only be "redress[ed] through the Interstate Commerce Commission." *Id.* at 448.

The authority that Entergy seeks to rely upon acknowledges that a filed rate defense "'argue[s] that the claims are . . . not legally cognizable.'" ECF 126 at 12 (quoting *Hoover v. HSBC Mortg. Corp.*, 9 F. Supp. 3d 223, 237 (N.D.N.Y. 2014). The particular issue here is that Entergy's claimed *injury* is not legally cognizable. As such, Entergy has no Article III standing and that challenge is properly brought pursuant to Fed. R. Civ. P. 12(b)(1). *See McCray v. Fidelity Nat'l Title Ins. Co.*, 682 F.3d 229, 243 n.15 (3d Cir. 2012) (no Article III standing for claimed future injury associated with continued operation of currently filed rates).

### *B. NYPSC's Filed Rate Defense Is Properly Before the Court*

NYPSC properly raised and preserved its filed rate defense in its answer to Entergy's Amended Complaint as its second affirmative defense. ECF 57, ¶ 106.[4] Consistent with the

[3] *Taffet*, 967 F.2d at 1488 ("[t]he origin of the filed rate doctrine can be traced back to *Texas & Pacific Railway*").

[4] "Rule 12(h)(2) permits . . . a claim defense to be asserted in the answer." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1385 at 485 (3d ed. 2004).

pronouncements of the Supreme Court and Third and Fourth Circuits,[5] NYPSC reasonably believes that its filed rate defense is correctly brought as an Article III jurisdictional challenge pursuant to Fed. R. Civ. P. 12(b)(1). But, even if the Court finds otherwise, NYPSC's filed rate defense is properly before the Court pursuant to Fed. R. Civ. P. 12(g)(1) which provides that "[a] motion under this rule [which includes a 12(b)(1) motion] may be joined with any other motion allowed by this rule [such as a 12(b)(6) motion]."[6] Fundamentally, because Entergy has no justiciable injury it is in the interest of justice to decide the issue now—regardless of whether the issue is addressed pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6). Fed. R. Civ. P. 1.

### *C. Entergy Seeks Relief Contrary to the Filed Rate*

Entergy contends that the filed rate does not bar its suit because "[it] seeks a declaration that NYPSC's Order is invalid because it establishes an out-of-market mechanism that interferes with the wholesale market." ECF 126 at 14. But that allegation focuses on the merits of Entergy's preemption claim, and fails to come to grips with whether Entergy has alleged a judicially cognizable injury.[7] The very next sentence in Entergy's response gives away the game. Entergy states that if the NYPSC Order is declared unlawful, "NYISO's tariff (and auction mechanism) will remain the same; it will simply yield a different result without . . . Dunkirk's resulting bidding." *Id.* But Entergy has no lawful right to an auction result without Dunkirk's bidding. *That is precisely the change to the filed rate that IPPNY and Entergy sought at FERC, and which it did not provide*. And an order from this Court excluding the repowered Dunkirk

[5] *See McCray*, *supra*, and *infra* n.8 (discussing the *Nazarian* decision in the Fourth Circuit).

[6] Entergy concedes that NYPSC's "collateral estoppel/lack of Article III injury argument . . . is properly brought under Rule 12(b)(1)." ECF 126 at 5.

[7] Indeed, Entergy elsewhere (*id.* at 3) chides NYPSC for failing to address the merits of Entergy's case. Of course, a motion challenging Entergy's standing is not the appropriate place to address merits-based arguments.

unit from bidding into the capacity market would be a paradigmatic example of the sort of judicial ratemaking barred by the filed rate doctrine:

> For a federal court to intrude into FERC's carefully constructed system [concerning an auction system such as NYISO's] would directly undermine the rationale of the filed rate doctrine. It would permit courts "to grant . . . greater relief than [plaintiffs] could obtain from the Commission itself."

*Simon v. KeySpan Corp.*, 694 F.3d 196, 207 (2d Cir. 2012) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 579 (1981)). The rules governing eligibility to bid into NYISO's auction are part of the FERC-jurisdictional tariff, and Entergy's attempt to end-run those rules through this district court action should not be entertained.

Entergy's reliance upon the Fourth Circuit's decision in *PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467, 474 n.1 (4th Cir. 2014) is unavailing because Entergy assumes an entitlement to a rate "'other than the rate adopted by the federal agency in question.'" ECF 126 at 13 (quoting *Nazarian*, 754 F.3d at 474 n.1).[8] Entergy claims it is injured by the repowered Dunkirk unit's bidding in the market. FERC, which possesses exclusive jurisdiction over the NYISO tariff, has already held to the contrary. What Entergy (and *Nazarian*) nowhere address is how a FERC-jurisdictional seller of capacity is entitled to an auction clearing price developed by excluding another eligible bidder's participation. No such right exists. Any such "special advantage . . . 'is illegal, when not provided for in the tariff.'" *AT&T Co.*, 524 U.S. at 224 (quoting *Davis v. Cornwell*, 264 U.S. 560, 562 (1924). Entergy's legal rights are defined by NYISO's FERC-regulated tariff, which permits the bidding of the repowered Dunkirk unit's capacity in the NYISO auction. And FERC rejected providing contrary relief.

[8] Moreover, the *Nazarian* court entertained Maryland's filed rate defense first raised on appeal as a jurisdictional challenge. *Nazarian*, 754 F.3d at 474 n.1. While Entergy is correct that the Supreme Court affirmed the judgment in *Nazarian* in *Hughes v. Talen Energy Mktg. LLC*, 136 S. Ct. 1288 (2016), the *Hughes* decision did not address the filed rate issue, or standing/injury questions.

A simple thought exercise demonstrates that Entergy has no cognizable injury. If the repowered Dunkirk unit were in operation today, it could bid into the NYISO capacity market. If that bid were successful, Dunkirk would contribute to setting the auction clearing price. In those circumstances, Entergy would have no basis on which to claim it had suffered a legal injury. The resulting NYISO capacity auction rate is "per se reasonable and unassailable in judicial proceedings." *Simon*, 694 F.3d at 204. Entergy could not seek damages in court on the theory that it was entitled to a different auction result not reflecting Dunkirk's capacity bid. "The filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (citation omitted). As Entergy cannot seek compensation for allegedly reduced auction revenues, it is plainly not "injured" by receiving that to which it is entitled: compensation measured in accordance with the FERC-approved tariff. *See Simon*, 694 F.3d at 204, 206-07.

## CONCLUSION

For all of the foregoing reasons set forth here and in its Memorandum (ECF 124-1), the Court should dismiss the Amended Complaint for lack of Article III jurisdiction.

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*Attorneys for Defendants 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*

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of August, 2016, electronically filed the foregoing Reply of the NYPSC Defendants in Support of Their Motion to Dismiss Plaintiffs' Amended Complaint for Lack of Jurisdiction with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to counsel of record in this proceeding.

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