UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Demand Response Supporters,	)	
	)	
Complainants,	)	
	)	
v.	)	**Docket No. EL13-74-001**
	)	
New York Independent System Operator, Inc.,	)	
	)	
Respondent.	)	

JOINT REQUEST FOR REHEARING OF
THE ELECTRIC POWER SUPPLY ASSOCIATION AND
THE INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[2] the Electric Power Supply Association ("EPSA")[3] and the Independent Power Producers of New York, Inc. ("IPPNY")[4] respectfully request rehearing of

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1 16 U.S.C. § 825*l*(a) (2006).

2 18 C.F.R. § 385.713 (2013).

3 EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

4 IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York. This pleading represents the position of IPPNY as a trade association and may not represent the position, in every respect, of each of IPPNY's individual members.

the Commission's November 22, 2013 order in the above-captioned proceeding.[5] As discussed below, the Commission erred in granting the complaint[6] filed by the Demand Response Supporters (the "DR Supporters")[7] and, more specifically, in finding that the failure of the New York Independent System Operator, Inc. (the "NYISO") to allow behind-the-meter generation to participate in its Day-Ahead Demand Response Program (the "DADRP") is unduly discriminatory.[8] The November 22 Order erroneously equates an ***increase in production*** by behind-the-meter generation with demand response, which the Commission's own regulations define as a "***reduction in consumption***,"[9] and, in the name of eliminating discrimination against behind-the-meter generation, mandates undue discrimination against other generation resources. For these and other reasons set forth herein, the Commission should grant rehearing of the November 22 Order.

I. STATEMENT OF ISSUES AND ERRORS

In accordance with Rule 713(c) of the Commission's Rules of Practice and Procedure,[10] EPSA and IPPNY hereby list each error and each issue on which they seek rehearing of the November 22 Order and provide representative precedent in support of their positions on these issues:

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5 *Demand Response Supporters v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,162 (2013) (the "November 22 Order").

6 Joint Complaint of Demand Response Supporters, Docket No. EL13-74-000 (filed June 17, 2013) (the "Complaint").

7 The "DR Supporters" are: EnerNOC, Inc., Viridity, Inc., Wal-Mart Stores, Inc., Comverge, Inc. and EnergyConnect, a Johnson Controls Company.

8 *See* November 22 Order, 145 FERC ¶ 61,162 at PP 31-32.

9 18 C.F.R. § 35.28(b)(4) (2013) (emphasis added).

10 18 C.F.R. § 385.713(c) (2013).

1. The November 22 Order is contrary to law, because it fails to reconcile the treatment of behind-the-meter generation resources as demand response with the definition of "demand response" set forth in the Commission's own regulations. *See* 18 C.F.R. § 35.28(b)(4) (2013); *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("*Panhandle*").

2. The November 22 Order is arbitrary and capricious, lacks a rational basis, and is not the product of reasoned decisionmaking, because the Commission failed to address the serious and legitimate objections of EPSA, IPPNY and others. *See, e.g., Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("*CAPP*").

3. The November 22 Order is arbitrary and capricious, lacks a rational basis, and is not the product of reasoned decisionmaking, because it is an unexplained departure from Commission precedent on which market participants have placed substantial reliance. *See e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("*Fox*"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("*Greater Boston*"); *PJM Indus. Customer Coalition v. PJM Interconnection, L.L.C.*, 121 FERC ¶ 61,315 (2007) ("*PJM ICC*").

4. The November 22 Order is contrary to law, because the Commission has failed to establish that the existing DADRP rules are unjust and unreasonable or unduly discriminatory or preferential, and that modifying those rules to allow for participation of behind-the-meter generation resources is just and reasonable and not unduly discriminatory or preferential. *See, e.g.,* 16 U.S.C. § 824e (2006); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("*Atlantic City*").

5. The November 22 Order is arbitrary and capricious, lacks a rational basis, and is not the product of reasoned decisionmaking, because it is not supported by substantial evidence insofar as it is premised on numerous unsupported, unstated, and/or erroneous factual determinations and policy judgments regarding what constitutes "demand response" and what resources can be considered similarly situated with each other. *See, e.g., Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979) ("*Columbia Gas*"); *Missouri Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000) ("*Missouri PSC*").

6. The November 22 Order is contrary to law, because it will mandate unduly preferential treatment of behind-the-meter generation resources acting as demand response and unduly discriminatory treatment of other generation resources. *See, e.g.,* 16 U.S.C. §§ 824d, 824e (2006); *Electricity Consumers Res. Council v. FERC*, 747 F.2d 1511, 1515-16 (D.C. Cir. 1984) ("*ELCON*").

7. The November 22 Order is arbitrary and capricious and contrary to law, because the Commission has provided unduly preferential subsidies to a favored industry group, namely, behind-the-meter generation-facilitated demand response providers, at the expense of generators and other market participants. *See, e.g., Woods Petroleum Corp. v. Dept. of Interior*, 18 F.3d 854, 859-60 (10th Cir. 1994) ("*Woods Petroleum*").

II. BACKGROUND

In the Complaint, the DR Supporters urged the Commission to require the NYISO to allow behind-the-meter generation to be treated as demand response resources eligible to participate in the DADRP and to be paid the full locational marginal price ("LMP") for providing demand response. They claimed that Order Nos. 745 and 745-A[11] required such treatment and that excluding behind-the-meter generation from the DADRP is unduly discriminatory and preferential.

In the November 22 Order, the Commission properly rejected the DR Supporters' contention that Order Nos. 745 and 745-A mandated the result that they sought, explaining: "Order Nos. 745 and 745-A do not require that NYISO permit participation in its DADRP by demand response facilitated by behind-the-meter generation. Likewise, Order Nos. 745 and 745-A do not preclude such participation."[12] Nonetheless, the Commission granted the Complaint, in part, on the grounds that the "NYISO's failure to revise its tariff to allow such providers of demand response to participate in the NYISO DADRP constitutes undue discrimination."[13]

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11 *Demand Response Compensation in Organized Wholesale Energy Mkts.*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 ("Order No. 745"), *on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011) ("Order No. 745-A"), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *appeal docketed sub nom. Electric Power Supply Ass'n v. FERC*, Nos. 11-1486, *et al.* (D.C. Cir. Dec. 23, 2011).

12 November 22 Order, 145 FERC ¶ 61,162 at P 33.

13 *Id.*

III. REQUEST FOR REHEARING

A. The November 22 Order Found – And Also Ignored – Undue Discrimination Based On A False Assumption That Reduced Retail Purchases Facilitated By Behind-the-Meter Generation Qualifies As Demand Response

The November 22 Order erroneously found that excluding behind-the-meter generation from the DADRP is unduly discriminatory and ignored the undue discrimination against other generation that results from allowing behind-the-meter generation to participate in the DADRP. Both these errors follow from a single baseless assumption underlying the November 22 Order: that running behind-the-meter generation reduces consumption. Based on this fundamental error, the Commission misperceived undue discrimination against behind-the-meter generation *vis-à-vis* demand response resources allowed to participate in the DADRP and failed to recognize the discrimination against other generation resources that occurs when behind-the-meter generation is allowed to masquerade as demand response.

1. Reducing Retail Purchases By Running Behind-the-Meter Generation Is Not Demand Response

In the November 22 Order, the Commission did not address the threshold question of whether behind-the-meter generation (or reduced retail purchases facilitated by behind-the-meter generation) is really demand response. Instead, it simply assumed that "demand response facilitated by behind-the-meter generation" is "similarly-situated" with demand response provided by reducing consumption.[14] This was a false assumption.

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[14] *Id.* at P 31.

As one would expect from the name, "demand response" is defined in the Commission's regulations as "[a] ***reduction in the consumption*** of electric energy ***by customers*** from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."[15] The operation of behind-the-meter generation, however, involves an ***increase in the production*** of electric energy ***by a generator***, and no reduction in consumption by any customer. The Commission fails to explain how its treatment of behind-the-meter generation in this case is consistent with its regulation.

The common meaning of "consumption," the operative word in the Commission's own definition of "demand response," involves ***end use***.[16] The Commission is bound to apply that common meaning in this instance under fundamental canons of construction, as it is axiomatic that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[17] Had the Commission meant something other than "consumption," it would have used a different word in the definition set forth in its regulations and presumably would not have used that exact word three times in that definition. Having adopted this definition, the Commission is not free to ignore it. It is well-established that an "agency is bound by its own regulations," and "[t]he fact that

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15 18 C.F.R. § 35.28(b)(4) (2013) (emphasis added).

16 *See, e.g., Merriam Webster's Collegiate Dictionary* 249 (10th Ed. 1995) (defining "consumption" as "the utilization of economic goods in the satisfaction of wants or in the process of production resulting chiefly in their destruction, deterioration, or transformation").

17 *Perrin v. United States*, 444 U.S. 37, 42 (1979). *See also Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (describing "the axiom that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary").

a regulation as written does not provide [the Commission] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'"[18]

Not surprisingly, the November 22 Order is unable to pinpoint any change in "consumption" that occurs when behind-the-meter generation is used to supposedly provide "demand response." To be sure, if the behind-the-meter generation is being substituted for purchases by a customer that is selling demand response, the effect of that increase in production "[f]rom the perspective of the grid" will be a "load reduction," in the sense of a reduction in retail purchases off the grid.[19] But there is no "reduction in consumption" and thus no "demand response."[20] The customer is still consuming exactly the same amount of electric energy; that electric energy is just being supplied from generation on the other side of the meter. Accordingly, by treating behind-the-meter generation (or reduced retail purchases facilitated by behind-the-meter generation) as demand response, eligible to participate in the DADRP, the Commission arbitrarily and capriciously disregarded the definition of "demand response" in its own regulations.[21]

EPSA and IPPNY raised this issue in their joint protest to the Complaint, explaining that the DR Supporters failed to establish that the use of behind-the-meter

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18 *Panhandle*, 613 F.2d at 1135 (footnotes omitted). *See also, e.g., Action on Smoking & Health v. Dep't of Labor*, 107 F.3d 901, 902 (D.C. Cir. 1997) (explaining that "agency regulations have the force of law and an agency is not free to disregard its regulations at will"); *Transactive Corp. v. United States*, 91 F.3d 232, 238 (D.C. Cir. 1996) (holding than an agency cannot "ignore its own regulation").

19 Order No. 745-A, 137 FERC ¶ 61,215 at P 66.

20 18 C.F.R. § 35.28(b)(4) (2013).

21 *See Panhandle*, 613 F.2d at 1135 (explaining that the Commission is "bound by its own regulations" and does not "have authority to play fast and loose with its own regulations").

generation can be equated to demand response.[22] The Commission failed to engage EPSA's and IPPNY's serious and legitimate objections to its approach,[23] which, alone, renders the November 22 Order arbitrary and capricious.[24] Moreover, the November 22 Order failed to recognize, much less provide a reasonable explanation supporting, the Commission's departure from its own regulation.[25]

2. The Commission Erroneously Found That The Existing DADRP Rules Are Unduly Discriminatory

Having erroneously assumed that behind-the-meter generation (or reduced retail purchases facilitated by behind-the-meter generation) is "demand response," the Commission not surprisingly came to the similarly erroneous conclusion that its exclusion from the DADRP was unduly discriminatory.[26] But as explained above, the underlying assumption was unsupported and false. Beyond the label affixed to it in the November 22 Order, there is no evidence to support the proposition that behind-the-meter generation (or reduced retail purchases facilitated by behind-the-meter

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22 *See* Joint Protest of the Electric Power Supply Association and the Independent Power Producers of New York, Inc. at 9-11, Docket No. EL13-74-000 (filed July 8, 2013) (the "EPSA/IPPNY Protest").

23 *See id.* at 9-11.

24 *See CAPP*, 254 F.3d at 299 ("[u]nless the Commission answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned."); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (vacating and remanding orders for Commission's failure to respond to "answer objections that on their face seem legitimate") (citation omitted).

25 *See, e.g.*, *Williams Gas Processing Gulf Coast Co. v. FERC*, 475 F.3d 319, 322 (D.C. Cir. 2006) (vacating Commission orders because the Commission "neither explained its action as consistent with precedent nor justified it as a reasoned and permissible shift in policy."); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) ("[i]f an agency decides to change course, however, we require it to supply a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'") (internal citations omitted). *See also, e.g.*, *Fox*, 556 U.S. at 515-16; *Greater Boston*, 444 F.2d at 852.

26 *See* November 22 Order, 145 FERC ¶ 61,162 at P 31.

generation) can reasonably be characterized as similarly situated for purposes of participation in a demand response program, such as the DADRP. And of course, there is no undue discrimination where resources are not similarly situated.[27] Moreover, the Commission did not even attempt to square its determination in the November 22 Order that excluding behind-the-meter generation from the DADRP is unduly discriminatory with its prior acceptance of the DADRP rules, which necessarily entailed a finding that those rules were ***not*** unduly discriminatory.

The November 22 Order is arbitrary and capricious, lacks a rational basis, and is not the product of reasoned decisionmaking by virtue of being unsupported by substantial evidence and instead resting on an unsupported, unstated and manifestly erroneous assumption of fact as to what constitutes "demand response."[28] Accordingly, the Commission failed to satisfy its burden under Section 206 of the FPA to provide a rational basis for determining the existing DADRP rules to be unjust, unreasonable, or unduly discriminatory.[29] It is also arbitrary and capricious as an unexplained Commission's departure from its prior orders accepting the DADRP rules,

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27 *See, e.g.*, *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 167 (2013) ("according different treatment to different resource-types does not amount to undue discrimination under the FPA when these resource classes are not similarly situated"); *Hess Corp. v. PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,040 at P 35 (2013) ("Discrimination is undue when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor." (footnote omitted)); *California Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,148 at P 40 (2010) ("The Commission has determined that discrimination is undue when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor."), *on reh'g*, 134 FERC ¶ 61,106 (2011). *Cf. Integration of Variable Energy Res.*, Order No. 764, FERC Stats. & Regs. ¶ 31,331 at P 47 (explaining that "[i]n Order No. 890, the Commission recognized that the mix of generation resources on the system was changing and that not all generation resources were similarly situated"), *on reh'g*, Order No. 764-A, 141 FERC ¶ 61,232 (2012), *on reh'g*, Order No. 764-B, 144 FERC ¶ 61,222 (2013).

28 *See, e.g., Columbia Gas*, 628 F.2d at 593; *Missouri PSC*, 234 F.3d at 41.

29 *See* 16 U.S.C. § 824e(a) (2006).

notwithstanding the fact that suppliers in the NYISO region have made investments based on the understanding that they would not be at a competitive disadvantage *vis-à-vis* behind-the-meter generation.[30]

3. The Commission Erroneously Ignored The Undue Discrimination Against Other Generation That Results From Its November 22 Order

The false assumption that behind-the-meter generation (or reduced retail purchases facilitated by behind-the-meter generation) is demand response likewise led to the Commission's failure to recognize that behind-the-meter generation is similarly situated with generation that sits "in front of the meter." This, in turn, resulted in a failure to recognize the undue discrimination against "in-front-of-the-meter" generation that occurs when behind-the-meter generation is allowed to participate in the wholesale markets as (or as a facilitator of) demand response and thereby to avoid the obligations that would be imposed if it were to participate in the wholesale market as what it is: generation.

To be clear, the obligations that behind-the-meter generation avoids by masquerading as demand response and the corresponding discriminatory impact on other generators are far from trivial and run the gamut from interconnection requirements, including the obligation to provide voltage support, and other performance obligations to regulatory oversight by the Commission. For example, a generator selling into the NYISO market would be a "public utility" under Section 201(e) of the FPA,[31] and would, among other things, need to obtain market-based rate authorization and make the electric quarterly report, change in status and updated

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30 *See* cases cited *supra* n.25.

31 16 U.S.C. § 824(e) (2006).

market power filings associated with being a market-based rate seller.[32] In contrast, with the Commission having held that an entity "only engaged in the provision of demand response" is not a "public utility that is required to have a rate on file with the Commission,"[33] behind-the-meter generators participating as "demand response" can avoid these burdens, as well as the attendant Commission oversight, even as they combine resources to build what one of the DR Supporters touts as "the world's largest virtual power plant."[34]

The November 22 Order's failure to recognize this undue discrimination was contrary to law, arbitrary and capricious, lacking in a rational basis, and not the product of reasoned decisionmaking in several respects. As an initial matter, the Commission failed to engage EPSA's and IPPNY's serious objections on this issue,[35] which, alone, renders its order arbitrary and capricious.[36] In addition, the undue discrimination against "in-front-of-the-meter" generation and undue preference for behind-the-meter generation violates the FPA.[37] Finally, such treatment and the resulting holdings are arbitrary and capricious, lack a rational basis, and are not the product of reasoned decisionmaking by virtue of being unsupported by substantial evidence and instead resting on an unsupported, unstated and manifestly erroneous assumption of fact as to

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32 *See* 18 C.F.R. §§ 35.36-35.42 (2013).

33 *EnergyConnect, Inc.*, 130 FERC ¶ 61,031 at P 30 (2010) ("*EnergyConnect*").

34 EnerNOC, *Our Impact*, *available at* http://www.enernoc.com/about/our-impact.

35 *See* EPSA/IPPNY Protest at 11-12.

36 *See* cases cited *supra* n.24.

37 *See* 16 U.S.C. § 824c(b) (2006); 16 U.S.C. § 824d(a) (2006). *See also Woods Petroleum*, 18 F.3d at 859-60.

what constitutes "demand response."[38] As a result, in violation of Section 206 of the FPA, the Commission not only failed to demonstrate that the existing DADRP rules are unjust, unreasonable, or unduly discriminatory; it also required that the NYISO modify those rules in a manner that ***is*** unduly discriminatory and preferential.[39]

B. The Commission Ignored The Damaging Effects Of Allowing Behind-the-Meter Generation To Masquerade As Demand Response

In granting the relief sought in the Complaint, the November 22 Order also erred by ignoring entirely arguments, supported by evidence, as to the damaging effects on the market's ability to produce just and reasonable rates that result from allowing behind-the-meter generation to participate in the market as demand response, rather than on a comparable footing to other generation.

The EPSA/IPPNY Protest discussed and attached a policy paper prepared by economist Professor William W. Hogan (the "Hogan Paper")[40] and an *amicus curiae* brief submitted by a group of leading economists in connection with the appeal of Order No. 745 (the "*Amicus* Brief")[41] that demonstrate why allowing behind-the-meter generation to participate in the markets on this basis is harmful to the markets. In the former, Professor Hogan explained that the overcompensation problem under Order No. 745 is especially acute where behind-the-meter generation is deemed to be facilitating demand response, as it means that "consumers who have inefficient backup generators would have an incentive to run such equipment to burn diesel oil or natural gas at much

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38 *See, e.g., Columbia Gas*, 628 F.2d at 593; *Missouri PSC*, 234 F.3d at 41.

39 *See* 16 U.S.C. § 824e(a) (2006).

40 *See* EPSA/IPPNY Protest at 12-14 & Attachment A.

41 *See id.* at 14-15 & Attachment B.

higher heat rates and substitute for measured electricity load."[42] Indeed, "[a]s long as the inefficient generator costs less than the LMP plus the retail rate, the imputed demand response program would create an incentive for these inefficient generators to run."[43] Accordingly, treating behind-the-meter generation as capable of providing demand response would not only mean that certain generators would effectively be paid more if they sit "behind" the meter, as opposed to "in front" of the meter, but could also mean that more efficient generators will be displaced by behind-the-meter generation.

Dr. Hogan further explained that paying the full LMP to behind-the-meter generation would result in "perverse incentives,"[44] including incentives to move generation behind the meter to directly serve load. Such a movement of generation behind the meter, "where it is not visible to the" independent system operator ("ISO")/regional transmission organization ("RTO") would, "[f]rom a social perspective," be "wasteful, as it does nothing to promote increased efficiency."[45] Instead, moving generation behind the meter would only increase the burden on those consumers who continue to rely on the ISO-/RTO-administered markets, as they will be forced to pay not only for the "electricity generated for their own use, but [also] to cover the costs of the imputed demand response program (which are really the value of electricity

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42 Hogan Paper at 13.

43 *Id.* at 10.

44 *Id.*

45 *Id.* at 7-8.

consumed by other consumers)."[46] This, in turn, would "provid[e] an accelerating incentive for even more consumers to desert the [ISO-/]RTO-administered market."[47]

The Amicus Brief echoed these concerns, with the economist signatories warning that full LMP payment "would not merely provide excessive incentives for the purchaser to reduce demand from the interstate grid by producing electricity for its own use" through behind-the-meter generation, but it "would also reward such electricity generation more richly if the purchaser keeps the electricity solely for its own use rather than selling the same electricity into the grid."[48] They further explained that "[i]n an efficient market, [a widget-maker] would self-supply only when it costs less than purchasing electricity," but that paying the full LMP for demand response provided by behind-the-meter generation will cause the widget-maker to self-supply "even though the economic cost of self-generating electricity is higher" than the LMP.[49] The economists observed:

> The absurdity of that result is made especially clear by comparing what would happen if the widget-maker were to offer the output of his generator into the market. If we assume that self-generation costs are 60 cents per widget and LMP is 60 cents per widget, he makes no money selling the electricity he generates into the grid: It costs him 60 cents per widget to generate the electricity, he gets paid 60 cents per widget to generate it, and he still pays for any electricity he uses from the grid (at his preset retail rate of 30 cents). But if he moves the generator behind the meter and keeps it for his own use, he does better. He gets paid 60 cents per widget for not using electricity from the grid (instead generating himself), and he saves the 30 cents per

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46 *Id.* at 8.

47 *Id.* at 9.

48 *Amicus* Brief at 6.

49 *Id.* at 20-21.

> widget he would otherwise have paid for the electricity he now generates for himself – even though he is self-generating and total consumption remains the same.[50]

Paying behind-the-meter generation the full LMP therefore "arbitrarily compensates large users more for generating electricity solely for their own behind-the-meter use than for putting it into the grid,"[51] even though it makes little sense for "electricity [to] be more valuable if kept for self-consumption rather than being sold into the markets."[52] As explained in the EPSA/IPPNY Protest, such a result is not just and reasonable and is unduly discriminatory, and the November 22 Order's failure to address these serious objections and evidence was arbitrary and capricious and not consistent with the requirements of reasoned decisionmaking.[53]

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50 *Id.* at 21-22.

51 *Id.* at 20.

52 *Id.* at 6.

53 *See CAPP*, 254 F.3d at 299.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA and IPPNY respectfully request that the Commission grant rehearing of the November 22 Order.

Respectfully submitted,

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Dated: December 23, 2013

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 23rd day of December, 2013.

/s/
Stephanie S. Lim