Response to Reps. Maloney-Gibson Joint Amendment to HR 4923, FY 2015 Energy & Water Appropriations Bill

On July 10, 2014, the U.S. House of Representatives approved the FY 2015 Energy and Water Appropriations Bill (H.R. 4923) that includes funding for the Federal Energy Regulatory Commission (“FERC”). During floor consideration, the House by voice vote adopted a rifle shot amendment offered by New York Representatives Sean Patrick Maloney (D) and Chris Gibson (R) aimed solely at a particular FERC order.

The Maloney-Gibson amendment would bar FERC from using FY 2015 funds with respect to an order unanimously adopted by FERC on a bipartisan basis in August 2013 to ensure reliability in that part of New York State. The FERC order at issue approved a proposal submitted by the New York Independent System Operator (“NYISO”) after years of study to create the Lower Hudson Valley (“LHV”) Capacity Zone to better promote necessary investment to serve New York electricity consumers. The amendment should not be enacted into law for the following reasons:

- The amendment represents unwarranted political interference with an independent regulatory agency’s final adjudicatory decision in a contested proceeding. Congress through the Federal Power Act has wisely tasked FERC with regulating wholesale power markets including those operated by NYISO. The creation of a new geographical zone for purposes of ensuring sufficient generating capacity for electric reliability is precisely the type of technical, fact-intensive undertaking Congress entrusts to independent agencies such as FERC using open public processes and the reasoned decision-making based on record evidence as required by the Administrative Procedure Act.

- Extensive stakeholder discussions among representatives with various points of view commenced as far back as 2008 on the need for a new capacity zone prompted by a warning from NYISO’s Independent Market Monitor that “long-term reliability concerns have arisen in Southeast New York” and other concerns related to depressed prices and the lack of market signals that “may not give suppliers adequate incentives to build there.”¹ NYISO indicated the area basically had no reserve safety margin in 2013.

- The amendment also represents significant political interference with the pending federal judicial review of FERC’s LHV orders which is the customary manner in which federal agency decisions are scrutinized. Petitions for review of the FERC orders establishing the LHV Zone brought by various parties are presently before the United States Court of Appeals for the Second Circuit. Extensive briefs have been filed and a court panel heard oral arguments in September 2014. Thus, a decision from the court of appeals could be issued at any time.

¹ Dr. David B. Patton, President, Potomac Economics, and NYISO Independent Market Monitor State of the Market Report 2008 page(s) 10,14
• As of May 2014, the new LHV capacity zone is in effect as a key part of the market rules in the NYISO on which market participants rely to make investment decisions essential to reliability; thousands of megawatts of capacity have been procured for the fall 2014 to serve consumers and more megawatts will be purchased as NYISO capacity auctions occur regularly in the future, in some cases monthly. The mere pendency of the amendment much less its enactment unnecessarily increases market uncertainty.

• Threatening the new zone as the amendment does puts recently announced investments in new and existing facilities at risk by undercutting the efficient operation of competitive markets and distorting market price signals at a time when the New York region is in need of the least cost resource decisions that capacity auctions provide.

• FERC to its credit held a technical conference in New York City jointly with the New York Public Service Commission on November 5, 2014, to examine capacity market issues including the new LHV zone. The NYISO stated at the technical conference, “It believes that the creation of the new zone was necessary, fully consistent with tariff requirements, and will benefit all New York consumers over time. Needed investments in resources in the lower Hudson Valley are now being made that will bolster long-term reliability and lower capacity prices in the region as they enter service. Publicly announced investments include the return to service of the Danskammer Generating Station and the potential restoration of Bowline Unit 2 to its full capacity. The NYISO estimates that for the 2015/2016 Capability Year, total capacity costs in New York will be approximately $400 million lower due to the increases in supply driven by the creation of the new zone.” No one disputed these NYISO assertions at the technical conference. All told, NYISO indicated over 3,000 MW of additional generation has been proposed for the LHV zone, showing the improved market with the new zone works.

• According to the Independent Power Producers of New York, “Even though this area of the State is where the demand for energy is greatest, 1,700 MW of generation has retired or mothballed since 2011. This trend is due to the simple fact that the market design for years has provided insufficient prices for resources to develop, or even remain in operation, in this part of the State. Through an extensive regulatory process, a new zone was created and that trend was almost immediately reversed. As a result of resources returning to the market, capacity prices paid by consumers will actually decrease next year.”

Dr. David Patton, the Independent Market Monitor for the NYISO, stated at the November 5, 2014, technical conference, “The NYISO market design has been very effective in facilitating investment and maintaining adequacy.”

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4 Dr. David B. Patton, President, Potomac Economics, and NYISO Independent Market Monitor, Joint Technical Conference on New York Markets and Infrastructure, FERC Docket No. AD14-18-000 page 15