

153 FERC ¶ 61,191
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Hudson Transmission Partners, LLC

v.

New York Independent System Operator, Inc.

Docket Nos. EL12-98-001
EL12-98-002

ORDER ON REHEARING, CLARIFICATION, AND COMPLIANCE FILING

(Issued November 19, 2015)

1. In a November 21, 2013 order,¹ the Commission granted, in part, and denied, in part, the complaint (Complaint) of Hudson Transmission Partners, LLC (HTP) against the New York Independent System Operator, Inc. (NYISO), which alleged that NYISO improperly implemented its buyer-side market power mitigation exemption test with respect to HTP's 660 MW high voltage, direct current merchant transmission facility (HTP Project), which resulted in the HTP Project being mitigated. The Commission also directed NYISO to make a compliance filing by January 20, 2014,² a directive that was subsequently extended and modified.³ In this order, the Commission denies the request for rehearing of its November 2013 Order, grants clarification to a limited extent, accepts NYISO's compliance filing and directs a further compliance filing to be submitted within 90 days of the date of this order.

¹ *Hudson Transmission Partners, LLC v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156 (2013) (November 2013 Order).

² *Id.* at Ordering Paragraph B.

³ *Hudson Transmission Partners, LLC v. New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,082 (2014) (February 2014 Order).

I. Background

A. NYISO's Market Power Mitigation Measures

2. NYISO administers market power mitigation rules for the New York City (NYC) zone of the installed capacity (ICAP) market by applying an Offer Floor for the purpose of inhibiting new entry of uneconomic capacity into the NYC ICAP market that artificially depresses NYC ICAP market prices to uneconomic levels.⁴ Consistent with those rules, NYISO may exempt a new resource from the Offer Floor if it meets either prong of a two-part exemption test. As relevant here, the calculation of the resource's cost of new entry, net of energy and ancillary services revenues (Unit Net CONE) is central to prong (b) of the exemption test⁵ and to the calculation of the Offer Floor that applies to non-exempt resources.⁶

3. On September 27, 2010, NYISO filed proposed amendments in Docket No. ER10-3043 to "refine and enhance" the buyer-side market power mitigation rules.⁷ Among other things, the amendments made clear that market power mitigation exemption test

⁴ As pertains to new entry, in February 2015 the Commission directed, pursuant to FPA section 206, modifications to NYISO's buyer-side market power mitigation rules to allow for private investors that certify they are a purely merchant investment, with no out-of-market subsidy, and relying solely on market revenues to enter the ICAP market unmitigated. *Consolidated Edison Company of New York, Inc. v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at PP 4, 45, *order on reh'g. & compliance*, 152 FERC ¶ 61,110 (2015) (accepting, subject to a further compliance filing, NYISO's filing of tariff language to implement the competitive entry exemption).

⁵ Prong (b) provides that a resource will be exempt if the average of the ICAP Spot Market Auction prices in the six capability periods starting with the capability period three years after the start of the project's Class Year is projected to be higher than the unit's reasonably anticipated Net CONE.

⁶ Projects that fail both prongs of the exemption test are subject to an Offer Floor equal to the lower of (1) 75 percent of net CONE of the proxy peaking unit used to establish the demand curve which establishes the ICAP market price for that period (Default Net CONE) or (2) Unit Net CONE.

⁷ Proposed Enhancements to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for Waiver of Prior Notice Requirement, Docket No. ER10-3043-000 (filed Sept. 27, 2010) (September 2010 Filing).

determinations were required to be performed for all Examined Facilities⁸ and included transition rules to ensure projects from earlier Class Years, such as the HTP Project, would be tested in an orderly manner.⁹ NYISO also proposed other clarifications and enhancements such as the Three-Year Rule to replace the Reasonably Anticipated Entry Date Rule¹⁰ and a specific definition for “Mitigation Study Period.” The bulk of NYISO’s proposed amendments were accepted by the Commission, effective November 27, 2010.¹¹

4. The proposed amendments also helped to more closely align the mitigation exemption test with NYISO’s project cost allocation for new interconnection facilities. Project cost allocation is a factor in the calculation of the Unit Net CONE and in determining the expected capacity prices used in the mitigation determination. Pursuant to Attachment S of its Open Access Transmission Tariff (OATT),¹² NYISO estimates and allocates cost responsibility among NYISO transmission owners, load-serving entities, and developers of generation and merchant transmission for new interconnection facilities. Under the cost allocation process, NYISO examines the new facilities assigned to a given Class Year to determine what incremental upgrades are necessary to provide deliverability for the interconnection of new projects that want to participate in NYISO’s

⁸ “Examined Facilities” refers to those projects that will be included in the mitigation exemption test analysis, and the term is defined in section 23.4.5.7.3 of NYISO’s Market Administration and Control Area Services Tariff (Services Tariff). For the complete definition of “Examined Facilities,” *see infra* P 15.

⁹ Under what is referred to as the “Pre-Amendment” rules, a proposed new entrant had the option to request a mitigation exemption determination after it had met certain milestones, but NYISO was not obligated to make such a determination, unlike under the “Post-Amendment” rules, which require NYISO to make such a determination.

¹⁰ NYISO’s proposed revisions to section 23.4.5.7.2, accepted effective November 27, 2010, require that, for purposes of the mitigation exemption test, the entry date is assumed to occur three years after the start of the project’s interconnection Class Year. Previously, under Pre-Amendment rules, section 23.4.5.7.2 provided that the actual expected date of entry of the project (Reasonably Anticipated Entry Date Rule) was to be used.

¹¹ *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010), *order on compliance*, 134 FERC ¶ 61,083 (2011) (February 2011 Order), reh’g denied, 136 FERC ¶ 61,077 (2011).

¹² NYISO OATT, § 25 (Attachment S).

ICAP market. Developers that intend to participate in NYISO's ICAP market are responsible for the costs of the System Upgrade Facilities¹³ and System Deliverability Upgrades¹⁴ needed to interconnect their projects in compliance with NYISO's Deliverability Interconnection Standard. As part of the cost allocation process, NYISO performs a number of studies and, upon completion of the study process, provides each developer in a given Class Year with its initial cost allocation. If any developer rejects its cost allocation, NYISO restudies the remaining projects in a subsequent round to re-determine the cost allocations. The process, in other words, is iterative and continues until all developers in the Class Year either accept their respective cost allocations or drop out of the process.

B. The HTP Project

5. The HTP Project is a uni-directional controllable transmission line running between Ridgefield, New Jersey and New York City that entered into service in 2013. The HTP Project was the winner of a New York Power Authority (NYPA) request for proposals process in 2006 and was in the NYISO interconnection Class Year of 2008. HTP applied for and received negotiated rate authority from the Commission in 2011.¹⁵

¹³ NYISO OATT, Attachment S, § 25.1.1.

¹⁴ System Upgrade Facilities are the components of electrical equipment that are used to make the modifications to the existing transmission system that are required to maintain system reliability due to: (i) changes in the system, such as load growth; and (ii) proposed interconnections. System Deliverability Upgrades are components of electrical equipment that can be used to make the modifications or additions that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Deliverability Interconnection Standard at the requested level of Capacity Resource Interconnection Service (CRIS). NYISO OATT, Attachment S, § 25.1.2.

¹⁵ *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011). NYPA, pursuant to an agreement with HTP, will purchase 75 percent of the transmission capacity rights of the line for a term of twenty years for the purpose of importing energy and capacity from PJM Interconnection, LLC (PJM) into the NYC capacity zone. *Id.*

6. The HTP project has been awarded Unforced Capacity Deliverability Rights (UDRs) by NYISO.¹⁶ When Unforced Capacity is located in an External Control Area and is deliverable to the NYCA interface with the UDR transmission facility, UDRs allow that Unforced Capacity to be treated as if it were located in the NYCA Locality, thereby contributing to a load-serving entity's Locational Minimum Installed Capacity (ICAP) Requirement.

7. Merchant transmission lines such as the HTP Project interconnect to the NYISO operating system pursuant to Attachment X of the NYISO OATT in the same manner as generators and, like generators, they enter the interconnection queue. The HTP Project is an ICAP supplier, and, as such, can offer into the NYISO ICAP Market. Like other new entry into the NYC Locality, the HTP project is subject to NYISO's buyer-side market power mitigation measures, unless it is found to be exempt.

8. NYISO provided HTP with its initial Class Year 2008 cost allocation on November 14, 2009, and its final cost allocation on December 28, 2009. HTP accepted its final Class Year 2008 cost allocation on January 4, 2010. In October 2010, HTP filed a limited protest to NYISO's proposed amendments to the buyer-side market power mitigation measures concerning the applicability of the new Three Year Rule. In response, the Commission clarified that this rule would not apply to Class Year 2008 projects like HTP. The Commission therefore directed NYISO to evaluate HTP under the Reasonably Anticipated Entry Date Rule, and assume that the HTP Project would enter service in 2013 (i.e., rather than 2011).¹⁷

9. NYISO evaluated the HTP Project pursuant to the buyer-side market power mitigation rules and the February 2011 Order and, on June 9, 2011, informed the HTP Project of the initial determination that it would be subject to Offer Floor mitigation. On September 9, 2011, and October 5, 2011, NYISO issued updated determinations for the HTP Project based on the Examined Facilities that remained in the Attachment H cost allocation process. A final determination was issued on December 22, 2011. All determinations reached the same conclusion, i.e., that the HTP Project would be subject to an Offer Floor upon entry.

¹⁶ UDRs are rights, as measured in MWs, associated with new incremental controllable transmission projects that provide a transmission interface to a New York Control Area (NYCA) Locality, *i.e.*, an area of the NYCA in which a minimum amount of Installed Capacity (ICAP) must be maintained. NYISO ICAP Manual March 2015, section 4.14.

¹⁷ February 2011 Order, 134 FERC ¶ 61,083 at P 25.

10. On August 3, 2012, HTP filed a complaint against NYISO asserting that NYISO, in applying the mitigation exemption test to the HTP Project, used methods and assumptions that were unjust, unreasonable, and unduly discriminatory, and that were inconsistent with the requirements of NYISO's OATT and Market Administration and Control Area Services Tariff (Services Tariff).¹⁸ HTP asserted that NYISO violated its Tariffs by evaluating the HTP Project as part of Class Year 2010 instead of Class Year 2008, by improperly using an arbitrary 50 percent scaling factor with respect to HTP's projected energy revenues, by its use of three-year forward prices from PJM's Base Residual Auctions in order to project future PJM capacity prices, and by its use of proxy capital costs in the calculation of Unit Net CONE. HTP further asserted that it should be compensated for the reliability benefits it will provide if not exempted from mitigation, or that the Commission should clarify that HTP may file a rate schedule under section 205 of the Federal Power Act (FPA) to receive compensation for the reliability benefits provided by the HTP Project.

11. In the November 2013 Order, the Commission granted, in part, and denied, in part, HTP's Complaint and directed NYISO to make a compliance filing encompassing four directives related to NYISO's calculation of a scaling factor applied to adjust HTP's energy revenues for imperfect coordination between the separate energy markets of NYISO and PJM. A further directive required NYISO to redo its exemption determination for the HTP project using HTP's actual cost of capital instead of the capital cost of the proxy unit.

12. On January 15, 2014, NYISO submitted a motion requesting a 45-day extension of its compliance filing deadline. In its February 2014 Order, the Commission granted NYISO an extension of time to February 21, 2014.¹⁹ The Commission also suspended the fourth directive of the November 2013 Order pending its receipt of a compliance filing for the first three directives and subject to further order.²⁰

¹⁸ NYISO's OATT provides the rules governing Transmission Service. The Services Tariff applies to NYISO services related to its administration of competitive markets for the sale and purchase of Energy and Capacity and for the payments to Suppliers who provide Ancillary Services to its Administered Markets and NYISO's provision of Control Area Services.

¹⁹ February 2014 Order, 146 FERC ¶ 61,082 at P 12.

²⁰ *Id.* P 11. The fourth directive of the November 2013 Order required NYISO to file a proposed tariff provision to incorporate its scaling methodology into its tariff.

II. Summary of the November 2013 Order

13. As relevant here, the November 2013 Order denied HTP's Complaint with respect to Class Year issues and the analysis reference date. The Commission found that NYISO reasonably interpreted section 23.4.5.7.3 of its Services Tariff and appropriately included the 2009 and 2010 Class Years in its mitigation exemption determination and cost allocation for the HTP Project and that NYISO used the appropriate analysis reference date. The Commission also found that NYISO's use of a scaling factor to project HTP's energy revenues was reasonable, but it granted the Complaint to the extent that it required NYISO to (1) provide the specific scaling factor that it applied to HTP, (2) explain in detail how such factor was calculated, (3) support its methodology, and (4) file a proposed tariff provision to incorporate its scaling methodology into its tariff.²¹ The Commission rejected HTP's arguments for an additional cost-based compensation mechanism for reliability benefits. The Commission stated that an Offer Floor does not deprive HTP of its Unforced Capacity Deliverability Rights (UDRs); HTP can still offer into the NYISO capacity market. Further, the Commission agreed with NYISO that HTP had not established that the HTP Project will actually provide substantial and quantifiable benefits beyond those reflected in the capacity market price in the ICAP market.

III. Request for Rehearing

14. On December 23, 2013, HTP filed a request for rehearing and clarification of the November 2013 Order with respect to the Commission's rulings on: (1) the category of Examined Facilities applicable to the HTP Project; (2) the combination of Class Years for exemption determination and cost allocation purposes, (3) the relevant analysis reference date; (4) the use of a scaling factor; and (5) the UDR Holder's ability to retain or sell unused UDRs.

A. Category Determination

15. While HTP and NYISO agreed that the HTP Project was assigned to Class Year 2008,²² they differed on what projects should be examined together. HTP argued that NYISO was required to conduct its evaluation sequentially, by Class Year, and NYISO argued that it was required to examine the HTP Project based on existing capacity and concurrently with other Examined Facilities that shared the same starting capability

²¹ As noted above, in the February 2014 Order, the Commission suspended the fourth directive subject to further order. *Id.*

²² November 2013 Order, 145 FERC ¶ 61,156 at P 46.

period, i.e., summer 2013.²³ Both parties relied on section 23.4.5.7.3 which defines “examined facility” as consisting of three different categories:

(I) each proposed new Generator and proposed new UDR project, and each existing Generator that has [Energy Resource Interconnection Service (“ERIS”)] only and no [Capacity Resource Interconnection Service (“CRIS”)], that is a member of the Class Year that requested CRIS, or that requested an evaluation of the transfer of CRIS rights from another location, in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility Study determination is being made (the Capability Periods of expected entry as further described below in this Section, the “Mitigation Study Period”),

(II) (a) each (i) existing Generator that did not have CRIS rights, and (ii) proposed new Generator and proposed new UDR project, that (a) is an expected recipient of transferred CRIS rights at the same location regarding which the ISO has been notified by the transferor or the transferee of a transfer pursuant to OATT Attachment S Section 23.9.4 that will be effective on a date within the Mitigation Study Period,

(III) each proposed new Generator that (a) is either (i) in the ISO Interconnection Queue, in a Class Year prior to 2009/10, and has not commenced commercial operation or been canceled, and for which the ISO has not made an exemption or Unit Net CONE determination, or (ii) not subject to a deliverability requirement (and therefore, is not in a Class Year) and (b) provides specific written notification to the ISO no later than the date identified by the ISO, that it plans to commence commercial operation and offer UCAP in a month that coincides with a Capability Period of the Mitigation Study Period.²⁴

16. HTP argued that the HTP Project falls under Category (I) of the Examined Facilities definition and NYISO argued that HTP falls under Category (III). HTP further argued that as a Category (I) Class Year 2008 facility, HTP must be examined by itself

²³ Both parties agreed that the Commission had ruled that, for purposes of the mitigation exemption determination for HTP, NYISO should use the Reasonably Anticipated Entry Date Rule instead of the Three-Year Rule, and thus HTP’s entry date for purposes of the mitigation exemption test was 2013. November 2013 Order, 145 FERC ¶ 61,156 at P 47.

²⁴ Services Tariff § 23.4.5.7.3.

because Category (I) Examined Facilities may include projects from only a single Class Year.²⁵ HTP pointed to the use of the singular in Category (I), i.e., each new and existing Generator and new UDR project “that is a member of the Class Year that requested CRIS. . . in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility Study is being made.” Thus, if the Commission were to agree with HTP, the HTP Project would have been evaluated in a Class Year Facilities Study by itself without the presence of the 2009/2010 facilities that were, according to the Post-Amendment mitigation rules, deemed to be entering the market in the same year as the HTP Project. In the November 2013 Order, the Commission concluded that the HTP Project falls under Category (III) Examined Facilities.²⁶

17. The Commission explained that section 23.4.5.7.3 of the Post-Amendment rules identifies three categories of facilities that will be examined together as a group: (I) “typical” projects that have requested CRIS and that fall into the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility Study determination is being made; (II) recipients of transferred CRIS rights or those projects that do not fall into any Class Year; and (III) projects from prior Class Years (those who have already completed the cost allocation process), but have yet to have a mitigation exemption determination made.²⁷ The Commission further explained that, while the definition of Category (III) does not specifically include Controllable Lines, NYISO has previously clarified, and the Commission agreed, that the NYISO tariff’s references to generators are intended to include Controllable Lines.²⁸

18. Further, the Commission stated that the mitigation exemption determination is not based upon the hypothesis that any particular entrant will be the only entrant. Rather, the determination is based upon the most accurate projections of prices and costs during the Mitigation Study Period that can be made at the time the analysis is performed and those projected prices are influenced by the expected additions of capacity that NYISO assumes will enter the market during the forecast period.

²⁵ November 2013 Order, 145 FERC ¶ 61,156 at P 37.

²⁶ *Id.* P 52.

²⁷ *Id.* P 51.

²⁸ *Id.* P 52 (citing *Linden VFT, LLC v. New York Indep. Sys. Operator, Inc.*, 141 FERC ¶ 61,008, at P 29 (2012) (*Linden VFT*)).

1. HTP's Request for Rehearing

19. HTP continues to assert that the HTP Project is a Category (I) Examined Facility. It argues that in finding that the HTP Project was a Category (III) Examined Facility, the Commission disregards the plain meaning of section 23.4.5.7.3 of NYISO's Services Tariff, rewrites the Category (III) definition to cover transmission facilities like the HTP Project, violates all applicable maxims of tariff interpretation, and violates the Filed Rate Doctrine. HTP also contends that consistent application of the Commission's tariff interpretation would create numerous conflicts and/or contradictions with other tariff provisions. In addition, according to HTP, the Commission's determination fails to draw any rational connection between its findings in *Linden VFT*²⁹ and the definition of the term "Generators" and its conclusion that this term also includes merchant transmission facilities such as the HTP Project. Moreover, according to HTP, the Commission erred in combining Class Years for cost allocation and exemption determinations.

20. HTP argues that section 23.4.5.7.3 is not ambiguous regarding the proper classification of the HTP Project. Section (I) states:

(I) each proposed ***new Generator*** and proposed ***new UDR project***, and each ***existing Generator*** that has [Energy Resource Interconnection Service ("ERIS")] only and no [Capacity Resource Interconnection Service ("CRIS")], ***that is a member of the Class Year*** that requested CRIS, or that requested an evaluation of the transfer of CRIS rights from another location, in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility Study determination is being made (the Capability Periods of expected entry as further described below in this Section, the "Mitigation Study Period"), [emphasis added by HTP]

HTP contends that it is undisputed that the HTP Project was a "new UDR project," and that it was not a recipient of transferred CRIS rights. Conversely, according to HTP, the HTP Project could not have been a Category (III) facility because Category (III) is expressly limited to New Generators. HTP contends that the Commission rewrote Category (III) by arbitrarily inserting the new term "Controllable Line," a term that was already used in the Category (I) and Category (II) definitions but not in Category (III).³⁰ HTP states that the Commission did not claim that the tariff, as written, is ambiguous and the only way that the Commission could reach this conclusion was by retroactively, and unlawfully, changing the filed tariff to include a new term.

²⁹ *Linden VFT*, 141 FERC ¶ 61,008 at P 29.

³⁰ HTP December 12, 2013 Request for Rehearing at 22.

21. HTP further argues that even assuming some ambiguity, the Commission's interpretation violates all applicable rules of tariff interpretation and renders the tariff provision nonsensical. HTP adds that it has not found a single case where a court affirmed a Commission order retroactively revising an existing rate, and the Commission has neither found a drafting error nor found that exclusion of this term renders the tariff absurd. Further, according to HTP, finding that the term "Generator," can be read to include "UDR projects" renders the term "UDR project" used in conjunction with the term "Generator" in the Category (I) and (II) definitions superfluous and nonsensical, thus violating the principle that all the terms in a tariff should be given meaning. In addition, HTP contends that the Commission's interpretation runs afoul of the interpretative maxim that the express mention of one thing implies the exclusion of another since Category (I) and (II) expressly include UDR projects while Category (III) does not. HTP also argues that ambiguous contract or tariff provisions are to be construed against the drafter, NYISO.

22. HTP asserts that the Commission's justification for re-writing the tariff rests on false premises. HTP quotes the November 2013 Order, wherein the Commission stated:

While the definition of Category (III) does not specifically include Controllable Lines (referred to here as UDR Projects), NYISO previously clarified, and the Commission agreed, that the NYISO tariff's references to generators are intended to include Controllable Lines. That clarification coupled with the fact that NYISO's tariff defines generator as "any facility capable of supplying Energy, Capacity and/or Ancillary Services that is accessible to the [New York Control Area (NYCA)]" would appear to include HTP's controllable transmission line project.

HTP asserts that neither NYISO nor the Commission has clarified that the term "Generator" includes transmission facilities, and there is no indication that the term "Generator" in the Services Tariff is intended to, or could, include transmission facilities. HTP contends that the Commission relies on statements taken out of context, interpreting revisions made to Attachments S and X of the NYISO OATT but not to the provisions at issue here in Attachment H of the Services Tariff. Further, HTP states that in *Linden VFT*, the Commission did not find that a Controllable Line is a Generator, but instead, only stated that, "in the *Guidance Order*, the Commission made clear that controllable transmission and generators are to be treated in the same manner in the CRIS process."³¹ HTP asserts that this does not mean that the two are the same or that the term

³¹ HTP December 23, 2013 Request for Rehearing at 27-28 (citing *Linden VFT*, 141 FERC ¶ 61,008 at P 29; *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,267 (2008) (*Guidance Order*)).

“Generator” in the NYISO tariff includes “Controllable Lines,” either for the purposes of the specific tariff provisions the Commission was interpreting or for any other tariff provision. HTP adds that the *Guidance Order* and the underlying NYISO filing each explicitly state that, solely for the purposes of that order and filing, the term “generator” was used as a shorthand for referring to both generators and controllable transmission lines.³² HTP asserts that revisions to Attachments S and X proposed by NYISO do not use this shorthand and, in fact, refer to both a Large Generation Facility and Merchant Transmission Facility side by side, indicating NYISO’s intent to use the specific terms in all provisions that were meant to apply to a merchant transmission facility like the HTP Project. Moreover, according to HTP, the specific term “generator” does not even appear in Attachments S and X.³³

23. HTP further asserts that the Commission’s reading of “Generators” to include transmission facilities is contrary to the common and technical usage of the terms, as well as the usage in NYISO’s tariff. HTP argues that the latter half of the definition of “Generator”³⁴ in the Services Tariff demonstrates that the term is used to refer to an electric generation facility. Moreover, according to HTP, the Commission’s contention that the term “Generator” in section 23.4.5.7.3 of the Services Tariff can be read to include UDR projects produces absurd results because generation and transmission are fundamentally different types of facilities and are mutually exclusive under the ordinary and technical meanings of these terms, as well as under the Services Tariff’s definitions of “Generator” and “Controllable Line.”

24. HTP also argues that where the Commission has approved tariff language, i.e., the filed rate, it may not retroactively revise that language either under section 205 or

³² HTP December 23, 2013 Filing at 28 (citing *Guidance Order*, 122 FERC ¶ 61,267 at P 15 n.8; NYISO and New York Transmission Owners, Filing, Docket No. ER04-449-016, Attachment 1, at Page 1 n.2 (filed October 5, 2007)).

³³ HTP notes that where the capitalized term “Generator” does appear, it is part of another defined term such as the “Large Generator Interconnection Agreement.” HTP December 23, 2013 Filing at 29 n.63.

³⁴ Section 2.7 of the Services Tariff defines Generator as:

A facility capable of supplying Energy, Capacity and/or Ancillary Services that is accessible to the NYCA. A Generator comprised of a group of generating units at a single location, which grouped generating units are separately committed and dispatched by the ISO, and for which Energy injections are measured at a single location, and each unit within that group, shall be considered a Generator.

section 206, even if, unlike here, the Commission determines that the provision in question is unjust and unreasonable or otherwise unlawful.³⁵ HTP asserts that, if the Commission wished to change the filed rate, it would have had to institute a proceeding under section 206 of the FPA, find the existing tariff provision unjust and unreasonable, determine a new rate that is just and reasonable, and direct NYISO to revise the tariff on a prospective basis.

2. Commission Determination

25. We deny rehearing with respect to this issue. HTP reiterates its argument that section 23.4.5.7.3 of the Services tariff is clear with respect to the proper classification of the HTP Project, and that, under that provision, the HTP Project was a “new UDR project” as listed in Category (I) and did not fall under Category (III) because Category (III) is expressly limited to New Generators.

26. The Commission addressed HTP’s argument in the November 2013 Order and found that the NYISO tariff’s references to generators are intended to include Controllable Lines. The Commission found the HTP Project was a Class Year 2008 Project that had not yet received a mitigation exemption determination and, as such, it met the Category (III) definition.³⁶ In explaining its reasoning, the Commission found that the term “Generator” in this definition includes “Controllable Line.” HTP interprets this as “rewriting” the tariff and argues that there is no indication that the term “Generator” in the Services Tariff includes transmission facilities. We disagree. As the Commission stated in the November 2013 Order, the Services Tariff defines “Generator” broadly as “any facility capable of supplying Energy, Capacity and/or Ancillary Services that is accessible to the NYCA.”³⁷ Further, the Commission pointed to precedent in which the Commission held that controllable transmission and generating capacity were to be treated the same.³⁸

27. NYISO’s statements in its December 17, 2012 answer in this proceeding indicate that the intent of Category (III) was to address the HTP Project. NYISO states that, at the

³⁵ HTP December 23, 2013 Request for Rehearing at 33 (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Dir. 2002)).

³⁶ November 2013 Order 145 FERC ¶ 61,156 at P 52.

³⁷ November 2013 Order 145 FERC ¶ 61,156 at P 52 (citing NYISO, Services Tariff § 2.7).

³⁸ *Id.* (citing *Linden VFT*, 141 FERC ¶ 61,008 at P 29).

time it filed the buyer-side market power mitigation rules, the HTP Project was “in the ISO Interconnection Queue, in a class year prior to 2009/2010,” that had not yet “commenced commercial operations or been canceled” and NYISO had not previously made “an exemption or Unit Net CONE determination” for it. NYISO adds that the HTP Project was the only project with these attributes, and thus the only project covered by the Category (III)(a)(i) definition.³⁹ In addition, New York Suppliers have indicated that they understood the Category (III) definition to include the HTP Project, and stated that, “in fact, HTP’s interpretation ignores entirely express language in the definition of examined facilities that appears tailor-made for the HTP Project.”⁴⁰

28. Interpreting the tariff to include Controllable Lines in the definition of Category (III) is consistent with a logical reading of the buyer-side market power mitigation rules. If HTP were not considered to fall within Category (III), it would render that portion of the tariff meaningless because the HTP Project is the only project covered by the Category (III)(a)(i) definition. The Commission has previously held that the NYISO buyer-side market power mitigation measures apply to merchant transmission facilities, and it has been clearly understood that controllable transmission and generation capacity “should be subject to the same mitigation” since the issuance of the Commission’s March 2008 order.⁴¹ This was the case even though the Pre-Amendment rules never expressly referenced controllable transmission lines. Therefore, we find that it is reasonable to read the Category (III) definition to include the HTP Projects, and we find that the absence of an express reference to “UDR Projects” in the definition is not a basis to exclude the HTP Project.

29. Accordingly, we deny HTP’s request for rehearing on this issue.

B. Class Year

30. In the November 2013 Order, the Commission pointed out that the new Three-Year Rule dictated that the start date of the mitigation study period for projects in Class Years 2009 and 2010 would be the summer 2013, the same start date as the HTP Project,

³⁹ NYISO December 17, 2012 Answer at 8.

⁴⁰ New York Suppliers November 13, 2012 Protest at 18.

⁴¹ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 121 (2008). (“[B]ecause both transmission and generating capacity are paid based on the same principle of making capacity available in-City, there should be no special exemption. Controllable transmission and generating capacity should be subject to the same mitigation.”).

which was deemed to be entering the market in 2013. That left the question of whether these projects should be studied sequentially or concurrently. The Commission held that the mitigation analysis is based on the applicable Mitigation Study Period and the facilities that enter the market, or are deemed to enter the market, during that period are to be studied concurrently.⁴² The Commission found this approach to be reasonable and stated that the mitigation exemption determination is a factual one, based upon the most accurate projections of prices and costs during the Mitigation Study Period that can be made at the time the analysis is performed. The Commission found nothing in Attachment S that dictated the sequential analysis that HTP advocated,⁴³ and held that NYISO may choose to combine Class Years for the purpose of allocating costs.

1. HTP's Request for Rehearing

31. HTP asserts that the Commission disregarded the plain meaning of the tariff in finding that NYISO may choose to combine Class Years for the purpose of allocating costs under Attachment S and insofar as it found that NYISO may conduct the exemption determination concurrently for Category (I) projects in different Class Years. HTP contends that, contrary to the Commission's ruling, NYISO cannot combine Class Years for purposes of cost allocation and exemption determinations. HTP adds that Attachment S and Attachment H unequivocally require NYISO to evaluate projects one Class Year at a time and preclude NYISO from considering projects in future Class Years. Under Attachment S, HTP asserts, NYISO may not allocate the costs for a given Class Year until the study of the previous Class Year has been completed. HTP states that this is because earlier projects are assigned the costs of the upgrades that they trigger and NYISO identifies and allocates the costs of upgrades triggered by projects in a given Class Year based on the assumption that the upgrades for all of the previous Class Years will have been built and funded by the projects in those previous Class Years that accepted their cost allocations. HTP argues that the Commission is also wrong in claiming that "Attachment S concerns identifying the cost impact of facilities entering the market in the same year,"⁴⁴ in that there is no requirement that all projects in the same Class Year study must also enter service in the same calendar year, or even an expectation that all of these projects will enter the market in the same calendar year.

⁴² November 2013 Order, 145 FERC ¶ 61,156 at P 53.

⁴³ *Id.* P 54.

⁴⁴ HTP December 23, 2013 Request for Rehearing at 33 (citing November 2013 Order, 145 FERC ¶ 61,156 at P 54).

32. HTP also argues that, like Attachment S, the Post-Amendment rules require NYISO to make the Attachment H exemption determinations sequentially and NYISO cannot include Category (I) projects from later Class Years in its exemption determination. HTP notes that NYISO may include Category (II) and Category (III) projects that are in an earlier Class Year than the Category (I) projects (or in no Class Year at all) and that, if the HTP Project were a Category (III) project, it could have been appropriate for NYISO to evaluate it concurrently with the Category (I) projects in a later Class Year.⁴⁵

2. Commission Determination

33. We deny HTP's request for rehearing and affirm our finding that NYISO appropriately included the 2009 and 2010 Class Years in its mitigation exemption determination for the HTP Project. HTP's request and the Commission's ruling that, for purposes of the mitigation exemption determination for the HTP Project, NYISO should use the Reasonably Anticipated Entry Date Rule (i.e. 2013)⁴⁶ had the effect of putting HTP in the market along with the Class Years 2009 and 2010 projects and, thus, those projects should be included in the analysis for the HTP Project. HTP disputes NYISO's assumption that, for purposes of determining exemptions and allocating costs, projects with different class years are participating in the market simultaneously. HTP does not dispute that NYISO may concurrently evaluate projects in different Class Years, or that Category (II) and Category (III) may be in an earlier Class Year than Category (I). That is the case here. As we have found above, the HTP Project is a Category (III) facility and thus, appropriately, is studied in conjunction with 2009 and 2010 projects.⁴⁷

34. HTP argues that neither Attachment S nor Attachment H permits NYISO to include Category (I) projects from different Class Years in the cost allocation and exemption determinations, but rather, requires NYISO to conduct both the cost allocation and exemption determinations on a Class Year-by-Class Year basis. HTP is correct in stating that, pursuant to Attachment S of the OATT, NYISO estimates and allocates cost responsibility among projects in a given Class Year. HTP is correct in stating that the Class Year 2008 cost allocation process was completed nearly two years before the Class Year 2009 and 2010 allocations. However, HTP erroneously concludes that, because the cost allocations were completed at different times, NYISO was required to make the exemption determinations separately. Although HTP's cost allocation determination was

⁴⁵ HTP December 23, 2013 Request for Rehearing at 35, n.84.

⁴⁶ February 2011 Order, 134 FERC ¶ 61,083 at P 25.

⁴⁷ See *supra* P 15 for the definition of Category (III).

performed under the Pre-Amendment rules, HTP did not request and, therefore, did not receive a mitigation exemption determination at that time and thus became subject to the Post-Amendment rules.⁴⁸ Under the Post-Amendment rules, NYISO is required to make mitigation exemption and offer floor determinations for all Examined Facilities whose “capability periods of expected entry” fall within a specific Mitigation Study Period.⁴⁹ HTP’s expected entry date of 2013 put the HTP Project in the same Mitigation Study Period as Class Year 2009 and 2010 projects. Therefore, NYISO did not err when it performed the mitigation exemption and offer floor determinations for the HTP Project concurrently with projects from Class Years 2009 and 2010.

35. With respect to HTP’s claim that Attachment H also requires NYISO to perform its analysis sequentially, HTP relies on its interpretation of the definition of “Examined Facilities” in section 23.4.5.7.3. HTP bases its argument that the Post-Amendment rules require NYISO to make the Attachment H exemption determinations sequentially on its assertion that the HTP Project is a Category (I) project. However, for the reasons explained above, the Commission concludes that the HTP Project was appropriately treated as a Category (III) facility.

C. Analysis Reference Date

36. The Commission has held that the mitigation rules must be interpreted to require that all cost, price, and revenue projections used in the Unit exemption determination be based on the most up-to-date information as of the same time frame as the final cost allocation accepted by the project developer from the Attachment S interconnection cost allocation process (often referred to as the “analysis reference date”).⁵⁰

37. The analysis reference date is significant here because a different set of Demand Curves was available when NYISO performed its exemption determination in 2011, and also because natural gas futures prices used to project energy revenues were significantly lower in 2011. In the November 2013 Order, the Commission found that NYISO appropriately used the data available at the time it made its exemption determination, i.e.,

⁴⁸ HTP was exempted from the Post-Amendment revision that assumed all projects have an expected entry date three years after the Class Year. Instead, HTP was allowed to select its expected entry date, which it chose to be the year 2013.

⁴⁹ Services Tariff § 23.4.5.7.3.

⁵⁰ *Astoria Generating Company L.P. v. New York Indep. Sys. Operator, Inc.* 140 FERC ¶ 61,189, at P 79, (2012) (September 2012 Order), *order on reh’g.*, 151 FERC ¶ 61,044 (2015).

2011. The Commission's determination was controlled by two prior Commission decisions regarding market power mitigation: (1) the September 2012 Order in which the Commission stated that the mitigation exemption analysis must be "based on the most up-to-date information available during the period when NYISO was evaluating" the project;⁵¹ and (2) a Commission order issued on June 22, 2012, in which the Commission stated that NYISO is to use the demand curves that have been accepted by the Commission and made effective as of the time that NYISO performs the mitigation determination.⁵²

1. HTP's Request for Rehearing

38. HTP argues on rehearing that the Commission allowed NYISO to use something other than the most up-to-date information available as of the same time frame as the final cost allocation, which, according to HTP, in this case was no later than January 2010. HTP argues that the Commission erred in permitting NYISO to instead use a date almost two years later in December 2011 when NYISO performed HTP's mitigation exemption determination for the fourth time. HTP also argues that the Commission failed to explain why it was impermissible for NYISO to use data from a different time period from the Attachment S cost allocation for the Astoria II facility,⁵³ but acceptable for NYISO to use what HTP claims is mismatched data for HTP. HTP contends that the proper analysis reference date is when the customer accepts its Class Year interconnection cost allocation under Attachment S and provides the required security. HTP further contends that the Commission confirmed that HTP's interpretation is correct with respect to the Pre-Amendment rules, and there is no indication in the tariff or in the November 2013 Order that NYISO should use a different analysis reference date under the Post-Amendment rules.⁵⁴ HTP asserts that the general rule is that, absent a

⁵¹ *Id.* P 79.

⁵² *Astoria Generating Company L.P. v. New York Indep. Sys. Operator, Inc.* 139 FERC ¶ 61,244, at P 86, (2012) (June 2012 Order), *order on reh'g.*, 151 FERC ¶ 61,043 (2015).

⁵³ HTP December 23, 2013 Request for Rehearing at 43 (citing September 2012 Order, 140 FERC ¶ 61,189 at P 63). The Astoria II facility, a 575 MW generating facility owned by Astoria Energy II, LLC and Bayonne, a 512 MW generating facility being developed by Bayonne Energy Center, LLC were members of the 2009/2010 Class Year and subjects of NYISO mitigation exemption decisions conducted under the Pre-Amendment rules.

⁵⁴ HTP December 23, 2013 Request for Rehearing at 43.

Commission waiver of the requirement, NYISO is to use the most up-to-date data and information as of the same time frame as the final cost allocation.⁵⁵

39. Further, HTP argues that the Commission's holding in the November 2013 Order directs NYISO to perform its sixth mitigation exemption determination for HTP within 60 days of the date of the order and, if NYISO is to use the data available when it performs this analysis, it will be using data from January 2014, more than four years after HTP completed the Attachment S cost allocation and more than six months after the HTP Project entered service. HTP contends that the analysis reference date adopted by the Commission bears no relationship to the tariff's language, or the underlying purpose of these provisions, which, HTP asserts, is to tie the exemption determination to an objective point in time in the interconnection cost allocation process to give the developer information relevant to its decision to proceed with the project. Instead, according to HTP, it is now a freely floating point in time that may be pushed back indefinitely into the future, based on NYISO's delays in completing its exemption determination, NYISO's tariff violations in applying the exemption determination, and Commission-ordered recalculations to remedy the tariff violations. Moreover, HTP adds, as the Commission recognized, using the information available after the project has entered service cannot deter uneconomic entry.⁵⁶

40. HTP contends that NYISO should use data available as of the time frame of HTP's final cost allocation because, according to HTP, this is the date required by the tariff, it is a fixed and objective point that will ensure that a developer has the information required to decide to accept its allocated cost and provide its required security, and use of this date will ensure that the same fixed date is utilized as the analysis reference date for all projects in a given Class Year. HTP asserts that the November 2013 Order is an unjustified and unexplained departure from the September 2012 Order, wherein the Commission granted a one-time waiver to NYISO to permit it to use an earlier date than the date required under the tariff, based on its finding that "[t]o be an effective deterrent to uneconomic entry, the mitigation and Offer Floor determinations should at least be provided before the unit enters the capacity market, not after."⁵⁷

⁵⁵ HTP December 23, 2013 Request for Rehearing at 44-45 (citing September 2012 Order, 140 FERC ¶ 61,189 at P 79).

⁵⁶ HTP adds that the result here is all the more unjust where it is due to NYISO's "inordinate" delay in completing the Class Year Study process. HTP December 23, 2013 Request for Rehearing at 47 (citing September 2012 Order, 140 FERC ¶ 61,189 at P 64).

⁵⁷ HTP December 23, 2013 Request for Rehearing at 48 (citing September 2012 Order, 140 FERC ¶ 61,189 at P 64).

41. HTP also contends that NYISO should not be permitted to use an analysis reference date any later than the October 2010 date used for the Astoria II and Bayonne facilities,⁵⁸ each of which is in a later Class Year than the HTP Project and for which the Commission required an October 2010 analysis reference date. HTP states that as of October 2010 it had already accepted its cost allocation and had provided all of the information NYISO required to calculate its Unit Net CONE and make an exemption determination in response to NYISO's September 28, 2010 data request.⁵⁹ HTP states that, if the Commission denies rehearing, it should exercise its remedial discretion to require NYISO to use HTP's initial June 2011 Offer Floor. HTP asserts that, as a result of NYISO's decision to evaluate HTP concurrently with the Class Year 2009 and 2010 projects, HTP's final mitigation exemption determination was delayed an additional six months, during which time the Commission accepted a new set of ICAP Demand Curves that caused HTP's Offer Floor to increase by over 50 percent. HTP asserts that, even if the Commission concludes that it was proper to evaluate the HTP Project concurrently with the Class Year 2009 and 2010 projects, the HTP Project was not similarly situated with those projects and should be treated differently. HTP states that while Class Years 2009 and 2010 projects still had the option to reject their cost allocations and drop out of the process, HTP had accepted its final cost allocation in January 2010 and had thereby made a binding commitment to fund the upgrades necessary for its interconnection. Consequently, according to HTP, it should have been permitted to accept its initial Offer Floor from June 2011 without being required to wait for NYISO to complete its evaluation (and multiple re-evaluations) of these projects in later Class Years.

2. Commission Determination

42. HTP heavily relies on the September 2012 Order in supporting its arguments here; however, HTP misinterprets the Commission's decision with respect to the mitigation exemption determination for the Astoria II facility⁶⁰ and further, that case is

⁵⁸ See September 2012 Order, 140 FERC ¶ 61,189 at P 63.

⁵⁹ HTP states that the September 28, 2010 Data Request indicated that NYISO intended at that time to make the exemption determination for the HTP Project before it would commence the Attachment S cost allocation process for the Class Year 2009 and 2010 projects. HTP December 23, 2013 Request for Rehearing at 49-50.

⁶⁰ In the case of the Astoria II facility, the date when NYISO evaluated the project aligned with the date of the project's final cost allocation. HTP erroneously construes statements regarding Astoria II's cost allocation to indicate that the Commission's decision on the analysis reference date was based on the date of the final cost allocation,

(continued...)

distinguishable from the circumstances here. The Commission's final holding with respect to Astoria II's exemption determination was that it "should have been based on the information that was available during 2010, when NYISO evaluated the request to exempt Astoria II from Offer Floor mitigation."⁶¹ In the case of HTP, HTP entered the cost allocation process while the Pre-Amendment rules were still in effect. However, HTP never requested a mitigation exemption determination under the Pre-Amendment rules, and was thus subject to the Post-Amendment rules for purposes of its exemption determination. The effect was that HTP had received its final cost allocation, but had not yet been given an exemption determination. One of the purposes of the amended buyer-side market power mitigation rules was to more closely align the cost allocation and mitigation exemption processes. However, because HTP was caught between the Pre and Post-Amendment rules, the process was not aligned and the mitigation exemption determination occurred after HTP accepted its final cost allocation. In this case, we find that NYISO was correct in using the information that was available on the dates on which NYISO conducted the exemption determination and the use of that information was consistent with our finding in the September 2012 Order in that it was "the most up-to-date information available at the time it makes its mitigation exemption determination."⁶² Therefore, we deny rehearing on this issue.

43. Further, we reject HTP's request to use the Offer Floor from HTP's first mitigation exemption determination. Section 23.4.5.7.3.3 of the Services Tariff governs the process regarding how mitigation exemption determinations are made under the Post-Amendment rules, to which HTP is subject. Even though HTP had already accepted a final cost-allocation, it was correctly being analyzed as part of the 2009/2010 Class Year regarding its mitigation exemption because all of these facilities share the same Mitigation Study Period. NYISO followed the Services Tariff in conducting the exemption test for HTP on separate occasions because NYISO issued revised project cost

when, in fact, the determining factor was the date at which NYISO evaluated the request to exempt the project from mitigation. We reiterate that HTP was entitled to request that NYISO conduct the mitigation exemption test for the project at the time of its final cost allocation and obtain a final determination under the Pre-Amendment rules and the previous demand curves, but it did not do so.

⁶¹ September 2012 Order, 140 FERC ¶ 61,189 at P 85. Because of unusual circumstances, the Commission granted a one-time waiver of the tariff requirement and allowed NYISO to make the determination prior to the final project cost allocations applicable to the Astoria and Bayonne projects. *Id.* P 64

⁶² September 2012 Order, 140 FERC ¶ 61,189 at P 79.

allocations associated with the 2009/2010 Class Year cost allocation process and expected capacity prices as well as Unit Net CONE changed as a result. HTP is subject to the Offer Floor associated with the most recent analysis, i.e., the final mitigation exemption determination.

D. Scaling Factor

44. NYISO's Services Tariff requires it to project likely energy revenues in order to calculate net CONE. HTP and NYISO agree that traders do not have perfect foresight of market prices and, thus, would be unable to perfectly arbitrage day-ahead price differences between the PJM and NYISO markets. To account for this imperfect arbitrage, NYISO applied a scaling factor adjustment to the estimate of net energy revenues produced by the National Economic Research Associates (NERA) econometric models. In the November 2013 Order, the Commission agreed with NYISO and the Market Monitoring Unit (MMU) that, because the NERA model-based revenue projections for 2013-2016 reflect perfect arbitrage, an adjustment to the NERA model-based estimate of projected likely energy revenues must be made to comply with the Services Tariff requirement that NYISO account for the "likely" projected energy revenues. The Commission explained that NYISO accounts for imperfect arbitrage by calculating a ratio of (a) historical net energy revenues from the day-ahead and real-time markets to (b) theoretical net energy revenues from the day-ahead market over the same historical time period for Controllable Lines excluding HTP.⁶³ The Commission found that this approach assumed that arbitrage over the HTP Project will be comparable to that experienced historically by other Controllable Lines, and the Commission concluded that this was a reasonable assumption. The Commission rejected HTP's arguments that NYISO should use the NERA model-based estimate of energy revenues that does not account for imperfect arbitrage,⁶⁴ that NYISO's tariff foreclosed the use of a scaling factor,⁶⁵ and that using a scaling factor in the calculation of net energy revenues of transmission lines but not for generators is discriminatory.⁶⁶

⁶³ November 2013 Order, 145 FERC 61,156 at P 84.

⁶⁴ *Id.* P 85.

⁶⁵ *Id.* P 85.

⁶⁶ *Id.* P 86.

1. HTP's Request for Rehearing

45. HTP argues on rehearing that there is no basis in the NYISO OATT, Services Tariff, manuals, or any other NYISO document for the use of any scaling factor, much less the one NYISO used, which the Commission found to be “based on undisclosed assumptions,” “lacking in transparency,” and not “adequately support[ed].”⁶⁷ HTP contends that, in ordering NYISO to file proposed tariff provisions to include a detailed description of the methodology that it intends to use to project energy revenues for future UDR projects, the Commission implicitly acknowledged that there is no basis in the tariff for NYISO’s scaling factor.

46. HTP further argues that the definition of Unit Net CONE in the Services Tariff makes no distinction between the method for calculating Unit Net CONE for a Generator and for a UDR project; nor does it permit NYISO to use any scaling factor, for any type of project. HTP argues that, in the absence of any further detail on how NYISO should project energy revenues, the only reasonable interpretation of this definition is that NYISO may not apply a scaling factor and that the use of the qualifier “likely” suggests only that the projection should be based on reasonable assumptions.⁶⁸

47. HTP claims that the Commission violated the Filed Rate Doctrine and improperly allowed NYISO to retroactively apply the unfiled scaling factor, and that the Commission’s decision implicitly accepts HTP’s argument that the Filed Rate Doctrine and the “rule of reason” require that this scaling factor be on file with this Commission because it is a “practice that affect[s] rates and service significantly.”⁶⁹ In particular, according to HTP, NYISO’s scaling factor significantly affects HTP’s rates because, by arbitrarily cutting the HTP Project’s projected revenues by more than 50 percent, NYISO artificially inflated HTP’s Unit Net CONE by a corresponding amount and thereby significantly increased the likelihood that it would be subject to Offer Floor mitigation and would not be able to earn capacity market revenues. HTP asserts that the Commission’s only proper recourse is to direct NYISO to file revisions to the filed rate under section 205 of the FPA, or to find that the tariff on file is unjust and unreasonable, and then set a new just and reasonable rate pursuant to section 206 of the FPA. In either case, HTP adds, the changes may only be made prospectively, and cannot be applied to HTP on a retroactive basis.

⁶⁷ HTP December 23, 2013 Request for Rehearing at 53 (citing November 2013 Order, 145 FERC ¶ 61,156 at P 89).

⁶⁸ *Id.* (citing Services Tariff § 23.2.1 (Attachment H)).

⁶⁹ *Id.* at 54 (citing *City of Cleveland*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)).

48. HTP also claims that NYISO's tariff provides no basis for it to treat UDR projects differently than generators, and that there is no evidence in the record that could provide a factual basis for NYISO to reduce, by more than 50 percent, its projection of the energy revenues for a UDR project, while applying no scaling factor at all to generators. HTP asserts that the Commission's justification based on "imperfect arbitrage" of prices between NYISO and PJM fails to acknowledge that generators are also subject to substantial uncertainty in that their revenues in NYISO's model are based on capturing the spread, the difference between projected day-ahead energy prices and fuel prices. Moreover, according to HTP, generators' energy revenues are subject to at least as much uncertainty as a merchant transmission line. HTP states that, in particular, generators in New York City are normally required to be dual-fuel capable and are subject to strict environmental permit emissions limits, and therefore must accurately project prices in the markets for oil, natural gas, and emission allowances, in addition to those for energy. Thus, HTP concludes, NYISO has provided no evidentiary basis for its assumption that a trader seeking to arbitrage price spreads between two organized markets on a merchant transmission line would have so much worse foresight of the relevant market prices than a generator would.

49. HTP also argues that there is no record evidence to support the Commission's conclusion that it was reasonable for NYISO to assume HTP's arbitrage would be comparable to that experienced historically by other Controllable Lines. HTP states that NYISO neither provided evidence regarding the historical revenues earned by other merchant transmission lines, nor identified the UDR projects used as the basis for the comparison. More importantly, according to HTP, NYISO has not demonstrated that the historical experience of other merchant transmission lines is relevant to projecting Hudson Transmission's revenues or that these lines have historically been operated with the goal of maximizing energy revenues.⁷⁰

50. HTP asserts that the Commission must clarify that NYISO's compliance filing of the scaling factor used for HTP will be a filing made pursuant to section 205 of the FPA, and not simply an informational filing. HTP states that this will be the first (and only)

⁷⁰ HTP notes that existing UDR projects differ significantly from the HTP Project with respect to location, operational characteristics, and business model that would be expected to significantly impact the ability and incentive to capture day-ahead price spreads over these other merchant lines. For example, HTP adds, all of the transmission rights on the Neptune Regional Transmission System (Neptune) line are controlled by the Long Island Power Authority, which may choose to dispatch Neptune to meet certain reliability needs, rather than to maximize energy market revenues. HTP December 23, 2013 Request for Rehearing at 57, note 136.

opportunity that HTP has had to see NYISO's methodology and assumptions supporting its scaling and to object to the assumptions that NYISO has applied. HTP adds that the Commission should further clarify that NYISO must justify any differences between the methodology applied to the HTP Project and future UDR projects or generators, and that, in the event any portion of NYISO's methodology is not found to be just and reasonable and changes are required, that NYISO must redo the mitigation exemption determination for the HTP Project based on the approved methodology.

51. Finally, HTP asserts that the Commission failed to address HTP's arguments that NYISO's methodology was fundamentally flawed because it assumes that the HTP Project must earn all of its revenues from the day-ahead energy market with little or no contribution from the real-time energy market. HTP states that it presented evidence, supported by the expert testimony of Dr. Pfeifenberger of the Brattle Group, to show that the HTP Project could earn significant revenues in the real-time energy market and that these revenues were more than twice as large as the theoretical maximum revenues available in the day-ahead market. HTP states that no party presented evidence to the contrary.

2. Commission Determination

52. We disagree with HTP's assertion that there is no basis in the NYISO Services Tariff for the use of a scaling factor. As the Commission stated in the November 2013 Order, the Services Tariff requires NYISO to account for the "likely" projected energy revenues⁷¹ and, thus, it is appropriate pursuant to that tariff provision that NYISO adjusts for the likelihood of imperfect arbitrage between the PJM and NYISO markets. Further, it is reasonable for NYISO to look to the experience of other merchant transmission lines in estimating a scaling factor. NYISO uses a ratio of (a) historic net energy revenues from the day-ahead and real-time markets to (b) theoretical net energy revenues from the day-ahead market over the same historical time period for Controllable Lines excluding HTP. This ratio is then applied to the NERA projected revenues to produce an estimate of energy revenues that accounts for imperfect prediction of price consistent with historical experience. Considering that HTP agrees that perfect arbitrage is not possible, deducting 100 percent of NERA's projected revenues would not produce a "likely" figure, as required by the Services Tariff.

53. HTP also asserts that there is no evidence in the record that could provide a factual basis for NYISO to reduce, by more than 50 percent,⁷² its projection of the energy

⁷¹ November 2013 Order, 145 FERC ¶ 61,156 at P 85; *see* Services Tariff § 23.2.1.

⁷² We note that NYISO in its Filing in compliance with the November 2013 Order states that the scaling factor is 32.94 percent. NYISO, February 21, 2014 Compliance

revenues for a UDR project, while applying no scaling factor at all to generators. HTP argues that uncertainties are involved in estimating a generator's energy revenues that require foresight on the part of the generator and NYISO has not adjusted for the generator's lack of perfect foresight. However, HTP's comparison is misplaced in that generator foresight is unrelated to NYISO's estimate of the generator's energy revenues. NERA's model is used to develop the estimate. The estimate reflects the fact that a generator with certain characteristics will be dispatched and its revenues are based on an estimation of prices at the node where the generator will interconnect. The relevant question here is how to create a corresponding measure of the energy revenues for UDR projects that differ from generators in that the UDR project's revenues depend not on the price at a single node but on the ability to arbitrage price difference between two nodes. As HTP agrees,⁷³ perfect arbitrage is not possible. NYISO's tariff requires it to account for "likely" energy revenues, thus, some adjustment is reasonable.

54. We reject HTP's argument that, in order to make such an adjustment, the "rule of reason" required NYISO to make a filing under FPA section 205 to put this practice into the Services Tariff. As an initial matter, we note that in *City of Cleveland* (cited by HTP), the U.S. Court of Appeals for the D.C. Circuit prefaced its opinion with the recognition that it is not possible to set forth in a rate schedule all of the practices affecting rates and services. Regardless, the Commission in this case did require NYISO to make a compliance filing regarding the scaling factor methodology in order to increase transparency of the process. NYISO has made such a filing and it was duly noticed.⁷⁴ NYISO provided the scaling factor and the formula it used to develop that factor. HTP had the opportunity to review NYISO's methodology and filed a protest to the compliance filing, which we address in the compliance section of this order. In its compliance filing, NYISO explains that the specific methodology used for the HTP Project could not practically be applied to other UDR projects and that future scaling factor methodologies should reflect the specific characteristics of future UDR projects and the interactions between the systems with which each project is interconnecting.⁷⁵ In the compliance section of this order, we agree with NYISO's explanation and we direct NYISO to make a further compliance filing to put the general framework for a scaling

Filing at 5.

⁷³ HTP November 30, 2012 Answer at 31; HTP December 23, 2013 Request for Rehearing at 56.

⁷⁴ See *supra* PP 62-63.

⁷⁵ See *supra* P 82.

factor in its tariff. Thus, HTP's argument that it has not had the opportunity to review the scaling factor methodology is moot.

55. Finally, we turn to HTP's argument that NYISO's methodology was fundamentally flawed because it assumes that the HTP Project must earn all of its revenues from the day-ahead energy market with little or no contribution from the real-time energy market. HTP relies on its witness, Dr. Pfeifenberger, whose methodology to account for imperfect arbitrage differs from NYISO's, most notably, in Dr. Pfeifenberger's use of natural gas futures and real-time prices. HTP argues that NYISO's approach was not reasonable because Dr. Pfeifenberger notes that the HTP project could earn significant revenues in the real-time market. However, as the Commission stated in the November 2013 Order, an alternative approach that leads to a different estimate does not automatically render NYISO's approach unjust and unreasonable.⁷⁶ NYISO presented evidence in its answer and in expert testimony in this proceeding that its methodology, including the action of modeling for day-ahead prices rather than real-time, was a reasonable one and was supported by the MMU.⁷⁷ We believe NYISO's approach, while different from HTP's, reasonably captures the likelihood that HTP can successfully arbitrage the varying price spreads by examining what has taken place historically. NYISO looks at historical net revenues and compares them to those theoretically possible (i.e., assuming perfect arbitrage) for the same time period in order to determine what percentage of theoretical net revenues is likely to be realized. NYISO explained that using day-ahead energy prices is more appropriate than real-time prices because there are typically more energy imports in the day-ahead market than in the real-time market.⁷⁸ Modeling of day-ahead prices is also consistent with the methodology utilized to establish the ICAP Demand Curves. Therefore, we affirm the Commission's previous finding that, even if there is merit in Complainant's alternative approach to the calculation of the HTP Project's net energy revenues, the existence of an alternative does not render NYISO's methodology to be unjust and unreasonable. Accordingly, we reject HTP's arguments with respect to the use of a scaling factor.

E. UDR Holders' Ability to Retain or Sell Unused UDRs

56. HTP states that, in its November 30, 2012 answer, it requested clarification that a UDR holder may retain its UDRs, rather than using them to sell UCAP or returning them

⁷⁶ November 2013 Order, 145 FERC ¶ 61,156 at P 83.

⁷⁷ See NYISO November 13, 2012 Answer, Jerke Aff. ¶¶ 43-46; NYISO November 13, 2012 Answer at 19 (citing MMU Report at 7).

⁷⁸ NYISO November 13, 2012 Answer, Jerke Aff. ¶ 44.

to NYISO. HTP states that, in its December 17, 2012 answer, NYISO confirmed that NYISO's tariffs and manuals do not require UDR holders to return their rights if they are not used, but NYISO added that "the only exceptions to this principle apply to resources that are subject to the Pivotal Supplier rule or to other anti-market manipulation related requirements."⁷⁹ HTP states that, in its January 4, 2013 Answer, it requested that the Commission confirm that these exceptions do not swallow the rule because all suppliers are subject to the Commission's prohibition against market manipulation.

57. In the November 2013 Order, the Commission noted that the NYISO ICAP manual states that the holder of External UDRs "may return" such rights to NYISO to be considered as emergency support. The Commission also stated that "the NYISO tariff does not require HTP to 'return' its unused UDRs to NYISO (i.e., lose the right to sell an equivalent amount of ICAP into the NYC ICAP market) simply because the ICAP becomes subject to an Offer Floor that precludes its resale in the NYC ICAP market."⁸⁰

1. HTP's Request for Clarification

58. HTP states that the Commission ignored both HTP's request for clarification that the tariff does not require a UDR holder to return its UDRs and NYISO's apparent agreement with HTP's interpretation of the tariff and the scope of UDR holders' rights. HTP also states that the Commission rejected the January 4, 2013 Answer in which HTP accepted NYISO's clarification and requested further clarification regarding the circumstances in which a UDR holder could be forced to return unused UDRs.

59. HTP states that it understands the Commission's statement that "the NYISO ICAP manual states that the holder of External UDRs 'may return' such rights" to be a confirmation that a UDR holder is not required to return its UDRs to NYISO without compensation under any circumstances. However, according to HTP, the statement is ambiguous and, therefore, HTP requests that the Commission clarify the intent. HTP adds that, if the Commission intended its silence to be read as a rejection of HTP's request for clarification, then the Commission's decisions is arbitrary and capricious because it failed to consider such an important aspect of the problem and because it ignored HTP's request for clarifications and the clarifications given by NYISO.

⁷⁹ HTP December 23, 2013 Request for Rehearing at 60 (citing NYISO December 17, 2012 Answer at 20 n.67).

⁸⁰ November 2013 Order, 145 FERC ¶ 61,156 at P 133.

2. Commission Determination

60. HTP requests clarification with respect to the Commission's statement in the November 2013 Order that the holder of External UDRs "may return" such rights. HTP states, and NYISO agrees,⁸¹ that NYISO's Services Tariff permits a UDR holder to either (1) use its UDRs to offer generation from outside the NYISO footprint into the NYISO ICAP auctions and to satisfy the Minimum Locational Capacity Requirement or (2) elect to return its UDRs to NYISO for a given year. HTP's concern appears to be with NYISO's comment that the only exceptions to this principle apply to resources that are subject to anti-market manipulation related requirements. HTP requests clarification that, if UDR holders do not return unused/uncleared rights to NYISO (thus preventing NYISO from taking them into account when determining its IRM requirement), such action will not be construed as market manipulation.

61. We reiterate that HTP is not required to "return" any UDRs that were offered into the ICAP market and subsequently not able to clear because of an imposed Offer Floor. Moreover, we agree with HTP that retention of such unused rights in this circumstance, i.e., when the offered ICAP does not clear, does not constitute market manipulation without additional showings under the Commission's anti-manipulation rule. As the Commission has set forth in Order No. 670, a violation of the anti-manipulation rule requires a showing of fraud, with scienter, in connection with a jurisdictional transaction.⁸² Accordingly, we grant HTP's request for clarification to the limited extent that we clarify that a UDR rights holder is not required to return its UDRs to NYISO, and that its decision not to do so, in and of itself, would only constitute market manipulation if all three elements were established.

IV. February 21, 2014 Compliance Filing

62. On February 21, 2014, NYISO filed public and privileged versions of its compliance filing. NYISO states that on January 16, 2014, it issued the required redetermination for the HTP Project and concurrently informed stakeholders that the outcome of the HTP mitigation analysis had not changed. NYISO states that HTP is not exempt from Offer Floor mitigation. NYISO adds that it posted the required notice and an updated report from the MMU endorsing its analysis, on its website.

⁸¹ NYISO December 17, 2012 Answer at 20.

⁸² See, e.g., *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P49, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

A. Notice of Filing and Responsive Pleadings

63. Notice of NYISO's February 21, 2014 compliance filing was published in the *Federal Register*, 79 Fed. Reg. 11,779 (2014), with interventions and protests due on or before March 14, 2014. On March 14, 2014, HTP filed a protest. On March 31, 2014, NYISO filed an answer to HTP's protest. On April 15, 2014, HTP filed an answer to NYISO's answer. On April 23, 2014, as corrected on April 24, 2014, NYISO filed public and privileged versions of an answer to HTP's answer.

B. Procedural Compliance Matters

64. Rule 213(a)(2) of the Commission's rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept NYISO's and HTP's answers because they provided information that assisted us in our decision-making process.

C. Substantive Compliance Matters

1. November 2013 Order and NYISO's Compliance Filing

65. In the November 2013 Order, the Commission directed NYISO to (1) provide the Commission with the specific scaling factor used, (2) explain in detail how it was calculated, and (3) support the methodology. The Commission also directed NYISO to file proposed tariff provisions that included a detailed description of the methodology NYISO intends to use to project the likely energy and ancillary services revenues for merchant transmission lines. The Commission suspended this latter directive pending its receipt of a compliance filing for the first three directives and subject to further order.⁸³

66. In its compliance filing, NYISO states that it applied a 32.94 percent scaling factor to estimate the likely net energy revenues of the HTP Project pursuant to the market power mitigation rules and that its analysis was reviewed and endorsed by the MMU Report.⁸⁴ NYISO states that to arrive at this scaling factor, it used data from the Linden VFT merchant transmission facility (Linden VFT) to calculate the difference between the day-ahead market profits based on perfect economic foresight and the day-ahead and real-time economic profits based on realized schedules over Linden VFT. NYISO

⁸³ February 2014 Order, 146 FERC ¶ 61,082 at P 11. NYISO states its scaling factor is only applicable to the determination of the HTP Project's estimated net energy revenues.

⁸⁴ NYISO February 21, 2014 Filing at 5.

explains that it selected data associated with Linden VFT and made corresponding assumptions because Linden VFT has key characteristics in common with the HTP Project that made it reasonable to use the Linden VFT data to calculate the HTP scaling factor. NYISO adds that, prior to the HTP Project, Linden VFT was the only UDR project from PJM into New York City. Further, according to NYISO, the Linden VFT source and sink buses are located physically and electrically close to those of the HTP Project. NYISO concludes that it is therefore reasonable to expect Linden VFT data to approximate the relationship between prices in PJM's PSEG-North Zone (in northern New Jersey), similar to the reasonably expected relationship for scheduled transactions utilizing the HTP Project.

67. NYISO states that it used Linden VFT price and schedule data for an 18-month period (Data Period), from November 1, 2009, the first date of day-ahead market transaction schedules for Linden VFT, to May 16, 2011, the date the scaling factor formula for the HTP Project was specified. NYISO further states that during the Data Period, flows across Linden VFT were uni-directional, exclusively from PJM to New York, just as they presently are across the HTP Project.

68. NYISO states that it would not have been reasonable to select data associated with, or make assumptions with reference to, the other merchant transmission lines interconnecting with the NYCA that participate in the ICAP market as UDR projects. NYISO adds that the Cross-Sound Cable is impacted by different market and inter-regional scheduling rules than the HTP Project, and Neptune sinks into the Long Island Locality, where energy prices exceed those of New York City and result in consistently higher price spreads for UDR projects sinking in Long Island. According to NYISO, such consistent price spreads would be expected to produce easier arbitrage opportunities, and, therefore, a Market Participant would expect to see much more frequent scheduling of UDR projects into Long Island in NYISO's Day-Ahead and Real-Time Energy markets compared to a line into New York City.

69. In support of the scaling factor methodology that it used for the HTP Project, NYISO asserts that the scaling factor was an appropriate, necessary, and effective way to implement the Services Tariff's requirement that it reasonably project the likely net energy and ancillary services revenues of the HTP Project. NYISO states that the scaling factor methodology was developed in consultation with, and with the support of, NERA and the MMU. According to NYISO, the MMU recognized that if a scaling factor was not used, the net energy revenues calculated using the NERA econometric model "would assume perfect arbitrage between PJM and NYISO in the day-ahead market, which is not reasonable."⁸⁵

⁸⁵ NYISO February 21, 2014 Filing at 10 (citing November 13, 2012 Answer,

70. NYISO states that the scaling factor methodology as applied to the HTP Project was specifically designed to work in conjunction with the econometric model utilized by NERA to estimate the theoretical Day-Ahead Market net energy revenues in other determinations under the buyer-side market power mitigation rules that were made at the time of the December 2011 determination for the HTP Project and that the econometric model was likewise used in establishing the relevant ICAP Demand Curves.

71. The fourth compliance directive required NYISO to file proposed tariff provisions that include a detailed description of the methodology NYISO intends to use to project the likely energy and ancillary services revenues for merchant transmission lines. NYISO responds that, while the scaling factor methodology that NYISO applied to the HTP Project was entirely appropriate to that project, it should not, and practically could not, be applied mechanically to other UDR projects in future determinations under the buyer-side market power mitigation rules. As NYISO explains, different UDR projects will have different attributes than the HTP Project, and the scaling factor methodology was developed specifically to complement NERA's estimation of day-ahead market net energy revenues using NERA's econometric model for the HTP determination. NYISO contends that a scaling factor methodology for UDR projects should reflect the unique attributes of each future UDR project and the interactions between the system with which it is interconnecting and NYISO. NYISO adds that future UDR projects may interconnect NYISO not only with PJM but with ISO-New England and Hydro Quebec, each of which is governed by different market rules and structures. Furthermore, according to NYISO, the differences between rules in neighboring systems are likely to change over time; thus, applying the scaling factor methodology developed for the HTP Project could result in a suboptimal or even an unreasonable estimate of net revenues. Further, NYISO asserts that, to the extent future UDR projects have other unique operational challenges that could not be easily captured, the application of a methodology based on a scaling factor appropriate for an earlier buyer-side market power mitigation determination could result in the omission of those operational challenges from anticipated energy and ancillary services revenues. In addition, NYISO states that an opportunity to use a more suitable alternative approach for the later evaluated project could be foreclosed by overly restrictive tariff rules.

72. Thus, NYISO requests that, if the Commission chooses to provide further guidance regarding tariff submissions to determine net energy and ancillary services revenue estimates, it permit NYISO to develop a compliance proposal that is sufficiently broad and flexible to allow for the kinds of variations described above.⁸⁶ NYISO adds

MMU Report at 8).

⁸⁶ NYISO February 21, 2014 Filing at 13.

that prior to the February 2014 Order, it had made substantial progress towards the development of a conceptual basis and general framework for estimating net energy and ancillary services revenues for UDR projects that could accommodate different projects with unique attributes from various neighboring systems, while providing sufficient notice, clarity, and transparency to stakeholders. NYISO states that Commission guidance on the fourth compliance directive that allows NYISO to utilize its analysis and work developed to date could be beneficial to all stakeholders.

73. NYISO states that it reads the February 2014 Order to permit it to use its existing Services Tariff authority to reasonably project likely net energy and ancillary services revenues in order to calculate net CONE for a UDR project in the event that it must make another determination under the buyer-side market power mitigation rules before the Commission has resolved all questions regarding the fourth compliance directive.

2. HTP's Protest

74. HTP reiterates the arguments made in the Complaint that NYISO cannot retroactively apply an unfiled scaling factor that unduly discriminates against merchant transmission facilities. HTP contends that, because the scaling factor significantly affects rates, it must be filed for Commission review and approval under section 205 of the FPA, as the Commission correctly recognized in the November 2013 Order when it directed NYISO to file, within 60 days, a detailed description of the scaling factor methodology. HTP contends that the scaling factor may only be applied after Commission acceptance on a prospective basis to market participants.

75. HTP asserts that NYISO's use of a scaling factor appears to rest on an underlying assumption that generators (and only generators) will be able to capture 100 percent of potential day-ahead energy revenues available to them. HTP argues that generators arbitrage the difference between projected day-ahead energy prices and fuel prices and are subject to at least as much uncertainty as a merchant transmission line.⁸⁷

76. HTP further asserts that NYISO's scaling factor does not account for all revenues that a merchant transmission line may earn. In particular, HTP argues: (1) NYISO does not include any revenues from ancillary services; and (2) NYISO has not attempted to include any of the revenues that a merchant transmission facility may be able to earn

⁸⁷ HTP March 14, 2014 Protest at 12. HTP asserts that generators in New York City are normally required to be dual-fuel capable and are subject to strict emission standards, thus must project prices for oil, natural gas, and emission allowances in addition to those for power, while managing the differences in timing for nomination and dispatch between the "gas day" and the "electric day." *Id.*

from financial hedging arrangements that would enable a customer to capture the NYISO-PJM spread without scheduling or transmitting power over the line. HTP states that there is no evidence that NYISO inquired whether customers on Linden VFT, or any other merchant transmission line, earned any revenues from ancillary services or from financial hedging arrangements, and, thus, NYISO's analysis is incomplete.

77. HTP also contends that NYISO's methodology and selective use of data systematically and arbitrarily underestimates the portion of the NYISO-PJM price spreads that can be captured. HTP argues that NYISO acknowledges that the scaling factor is an increasing function of the relevant NYISO-PJM price spreads and, thus, according to HTP, it follows that, as projected spreads increase, the scaling factor would approach or exceed 1.0, in which case a merchant transmission line would capture at least 100 percent of the spread between the NYISO and PJM day-ahead prices.⁸⁸ HTP adds that, despite NYISO's acknowledgement that the scaling factor is an increasing function of the relevant price spreads, NYISO has chosen to use a single point value for the scaling factor that does not vary with the level of the projected NYISO-PJM spread.

78. HTP further argues that NYISO has chosen to use data from a single facility for a data period during which NYISO-PJM spreads were historically low.⁸⁹ HTP adds that the 2011 price spread between NYISO and PJM was closer to the price spread for Neptune, and is more than three times larger than the \$1.36/MWh price spread for Linden VFT. HTP argues that the historical data calls into question NYISO's decision to use only data from Linden VFT and to exclude data from Neptune and thus, the Commission should require NYISO, in developing the model of the price spread scaling factor, to include all relevant historical data from both facilities. HTP also argues that NYISO's data period is biased because it gives twice the weight to lower-priced winter months than for higher-priced summer months.

79. Finally, HTP states that NYISO's flawed scaling factor compounds the harm resulting from NYISO's choice of an improper analysis reference date and NYISO's decision to treat the HTP Project as a Category (III) examined facility. HTP renews its request that the Commission direct NYISO to correct its project of HTP's earnings and ancillary services offset by calculating potential day-ahead energy revenues using the appropriate analysis reference date and by treating HTP as a Category (I) examined facility.

⁸⁸ HTP March 14, 2014 Protest at 14-15.

⁸⁹ *Id.* at 16-17.

3. NYISO's March 31, 2014 Answer

80. NYISO responds that HTP's protest is procedurally defective in that HTP seeks to relitigate matters that were decided in the November 2013 Order, and that HTP's protest impermissibly raises issues that are beyond the scope of a compliance proceeding. NYISO states that the November 2013 Order accepted NYISO's use of a scaling factor and did not make that acceptance contingent of the Commission's review of the compliance filing.

81. NYISO also contends that HTP's objections to the scaling factor methodology are unsound and erroneous. NYISO reiterates that its scaling factor was developed in consultation with and endorsed by the MMU and is supported by Affidavits of Daniel A. Jerke.⁹⁰ In response to the claim that NYISO failed to account for the HTP Project's non-energy revenues, NYISO states that the scaling factor was applied solely to determine projected net energy revenues so consideration of HTP's assertions regarding other revenue sources is beyond the scope of the compliance filing. Further, according to NYISO, there is no tariff foundation for HTP's assertion that NYISO must account for all sources of non-capacity market revenues that a merchant transmission facility may earn, such as theoretically available hedging revenues. In addition, NYISO states that the kind of hedging revenues that HTP suggests it might earn are highly speculative and do not represent an additional, incremental source of revenue.

82. NYISO states that its use of a single scaling factor value was just and reasonable and argues that the percentage of price spreads that can be realized is not a function of each individual spread, but rather a function of the consistency of the direction of the price spread, i.e., higher or lower than the PJM price.⁹¹ Further, NYISO argues, even if a "variable" scaling factor rule could be a reasonable alternative approach, it would not mean that NYISO's scaling factor was not just and reasonable.

83. With respect to the argument that NYISO wrongly calculated data from only a single facility, and for an inappropriate time period, NYISO reiterates the explanation provided in its February 21, 2014 filing. NYISO adds that the data period ended in the month preceding the date when the Linden VFT began to operate bi-directionally as the HTP Project was not expected to operate bi-directionally, and thus such data would not

⁹⁰ NYISO March 31, 2015 Answer at 5 (citing Daniel A. Jerke November 13, 2012 Aff.; Daniel A. Jerke December 17, 2012 Supplemental Aff.; Daniel A. Jerke February 21, 2014 Aff.).

⁹¹ *Id.* at 9-10.

be representative of the HTP Project.⁹² With respect to using more summer capability periods than winter periods, NYISO claims that HTP's reasoning is fallacious because the scaling factor does not depend on absolute price levels but, rather, relative price levels, and HTP provided no evidence of a persistent difference between summer and winter capability period price spreads.⁹³

4. HTP's April 15, 2014 Answer

84. HTP's answer addresses two of NYISO's statements. HTP states that NYISO's assertion regarding ancillary services in NYISO's confidential Attachment B to its answer is incorrect. HTP urges the Commission not to make any determinations regarding HTP's eligibility to receive compensation for ancillary services. HTP also disagrees with NYISO's statement that the scaling factor is a function of the consistency of the direction of the price spread. HTP points to NYISO's February 21, 2014 compliance filing where NYISO stated that it excluded the data from Neptune from consideration because the spreads between PJM and Long Island were higher during the chosen data period than those between PJM and New York City.⁹⁴ HTP asserts that this statement must be read to mean that the scaling factor is a function of the magnitude of price spreads, rather than the frequency of positive spreads and that NYISO reverses this position in its answer. According to HTP, NYISO subsequently appears to reverse its position again and return to its original position that the scaling factor depends on "relative price levels."⁹⁵ HTP requests that in light of "NYISO's incorrect statements and the incoherence of its positions" the Commission find that NYISO has not justified the use of an HTP-specific scaling factor, which, according to HTP, has never been accepted by the Commission.⁹⁶

5. NYISO's April 23, 2014 Answer

85. NYISO corrects, in confidential attachments to its April 23, 2014 Answer, the error that HTP pointed out in NYISO's March 31, 2014 Answer, and states that the error

⁹² *Id.* at 12-13.

⁹³ *Id.* at 13.

⁹⁴ HTP April 15, 2014 Answer at 2-3 (citing NYISO February 21, 2014 Filing at 7).

⁹⁵ *Id.* at 3-4 (citing NYISO March 31, 2014 Answer at 10, 15).

⁹⁶ *Id.* at 5 (citing NYISO March 31, 2014 Answer at 14).

was only temporal in nature. NYISO states that its error does not lend any support to the HTP Protest's claim that NYISO should have accounted for ancillary services revenues when it applied a scaling factor to the HTP Project, nor in any other aspect of the buyerside market power mitigation determination for the HTP Project. NYISO further states that it has not asked the Commission to make any determination regarding the eligibility of the HTP Project to provide ancillary services.

86. NYISO also responds that the March 31, 2014 Answer did not "reverse" any prior NYISO statements regarding the nature of the scaling factor calculation and that HTP's assertions to the contrary are based on a misinterpretation of NYISO's earlier pleadings. NYISO contends that it was consistent for the March 31, 2014 Answer both (1) to state that HTP's proposed "multi-value" scaling factor function is flawed in that it depends on the magnitude of *individual* price spreads, and (2) to reiterate that the consistency of the direction of price spreads, as illustrated by *average* spreads, is materially different for UDR projects sinking in Long Island as compared to UDR projects sinking in New York City. This latter assertion, NYISO adds, is relevant to the scaling factor calculation.⁹⁷

6. Commission Determination

87. We find that NYISO satisfactorily fulfilled its compliance requirements to provide the specific scaling factor used, to explain in detail how it was calculated, and to support the methodology. We also find that, as applied to HTP, NYISO sufficiently supports its methodologies as just and reasonable.

88. HTP's protests regarding whether the scaling factor should be applied to the HTP Project, whether the application of a scaling factor is discriminatory to merchant transmission facilities, NYISO's choice of analysis reference date, and NYISO's treatment of the HTP Project as a Category (III) examined facility are beyond the scope of the compliance proceeding, where the only issue is whether NYISO's filing complies with the November 2013 Order. In any case, HTP makes the same arguments in its request for rehearing on this matter, which we address and reject in the rehearing section of this order.⁹⁸

89. With respect to the actual methodology of the scaling factor, HTP asserts that: (1) NYISO's scaling factor does not account for all revenues that a merchant transmission line may earn; (2) NYISO improperly treats the scaling factor as a constant value rather than an increasing function of the price-spread that can be captured; and

⁹⁷ NYISO April 23, 2014 Filing at 5.

⁹⁸ See *supra* PP 52-55.

(3) NYISO has been inappropriately selective in its choice of data in that NYISO has chosen to use data from a single facility, during a period in which the NYISO-PJM price spreads were historically low, and, further, NYISO has given more weight to winter months than to summer months.

90. HTP's argument that the scaling factor should account for all revenues that a merchant transmission owner may earn is misplaced because the scaling factor is only applied to energy revenues. Other revenues are irrelevant to the question of whether the energy revenues estimated using the NERA model should be adjusted for imperfect arbitrage and whether NYISO's adjustment is the appropriate one.

91. HTP also objects to NYISO's use of a single, constant value for the scaling factor. HTP would prefer a scaling factor that varied with the change in the price spread based on the assumption that HTP is more likely to realize the spread when it is large than when it is small. We note that HTP provides no support for this assumption, but, regardless, we believe NYISO's approach, while different from HTP's, reasonably captures the likelihood that HTP can successfully arbitrage the varying price spreads by examining what has taken place historically. NYISO looks at historical net revenues and compares them to those theoretically possible (i.e., assuming perfect arbitrage) for the same time period in order to determine what percentage of theoretical net revenues is likely to be realized. NYISO's method, by relying on historical practice, accounts for factors beyond the size of the price spread that might interfere with perfect arbitrage, variables such as scheduling uncertainties.

92. With respect to NYISO's use of data from a single facility, we find that it is reasonable for NYISO to base the scaling factor for the HTP Project on a UDR project with similar source and sink locations to those of the HTP Project. Other UDR projects interconnecting with the New York Control Area sink in Long Island where the energy prices consistently exceed those of New York City. It is reasonable to conclude that one would arbitrage more successfully under such conditions, and, thus, it was reasonable for NYISO to exclude those other projects because their net revenues would not accurately represent those of the HTP Project.

93. In addition, whether or not NYISO has more winter than summer months in the data is irrelevant because the methodology is based on the price *spread* between PJM and New York City, not the price *level*. There is no record evidence that the summer months consistently reflect a different price spread than the winter months. We also find that it was reasonable for NYISO to choose the period it did because it was the period in which there was the most similarity between the HTP Project and Linden VFT. NYISO avoided using data from a period of bi-directional operations because HTP was not expected to operate in a bi-directional manner.

94. With regard to the fourth compliance requirement that NYISO detail the methodology NYISO intends to use to project the likely energy and ancillary services

revenues for merchant transmission lines, we agree with NYISO that the specific methodology used for the HTP Project could not practically be applied to other UDR projects and that future scaling factor methodologies should reflect the specific characteristics of future UDR projects and the interactions between the system with which each project is interconnecting and NYISO.⁹⁹ Accordingly, we direct NYISO to file, within 90 days of the date of this order, a further compliance filing reflecting tariff provisions that provide the conceptual basis and general framework for a scaling factor and that are sufficiently broad and flexible to allow for the kinds of variations that exist with respect to UDR projects.

The Commission orders:

(A) HTP's request for clarification is hereby granted, and its request for rehearing is hereby denied, as discussed in the body of this order.

(B) NYISO's compliance filing is hereby accepted, as discussed in the body of this order.

(C) NYISO is hereby directed to submit a compliance filing within 90 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁹⁹ NYISO February 21, 2014 Filing at 12-13.