UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Hudson Transmission Partners, LLC	)	
	)	
v.	)	**Docket No. EL12-98-000**
	)	
New York Independent System Operator, Inc.	)	

REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure,[1] the NYISO respectfully submits this request for leave to answer and answer to the *Request for Rehearing and Clarification of Hudson Transmission Partners, LLC* ("HTP Request") in this proceeding.

The Commission's November Order[2] correctly rejected Hudson Transmission Partners, LLC's ("HTP's") challenges to the NYISO's determination under the buyer-side capacity market power mitigation rules ("BSM Rules")[3] that HTP's merchant transmission project ("HTP Project") would be subject to Offer Floor mitigation, and request for a compensation mechanism.[4] The NYISO's BSM Rule determination was based on sound analysis and was consistent with both the requirements of the Market Administration and Control Area Services

[1] 18 C.F.R. § 385.213 (2012).

[2] Hudson Transmission Partners, LLC v. New York Independent System Operator, Inc., 145 FERC ¶ 61,156 (2013) ("November Order").

[3] The BSM Rules are set forth in Section 23.4.5.7 of the Services Tariff. At the time that HTP initiated this proceeding the BSM Rules applied only to new entry into New York City ("In-City"). Subsequently, the BSM Rules were revised to apply to additional Mitigated Capacity Zones. The subsequent changes to Section 23.4.5.7 are not relevant to HTP's complaint, to the HTP Request, or the Commission's consideration of either.

[4] Terms with initial capitalization in this answer have the meaning set forth in the Services Tariff and if not defined in the Services Tariff, have the meaning set forth in the NYISO's Open Access Transmission Tariff.

Tariff ("Services Tariff") and with the design of its capacity market rules.[5] The November Order's near complete rejection of HTP's complaint was based on substantial evidence drawn from a complete record and reasoned decision-making. Contrary to the HTP Request, there is no factual or legal basis for overturning or "clarifying" the November Order on rehearing. Instead, the HTP Request relies on mischaracterizations and misapplications of Commission precedent and past statements by the NYISO. Accordingly, for the reasons discussed in greater detail below, the HTP Request should be rejected.

I. BACKGROUND

The NYISO's BSM Rules are designed to deter uneconomic entry into the In-City Installed Capacity ("ICAP") market that could artificially depress capacity prices. Some form of In-City market power mitigation measures have been in place since the NYISO's inception in 1999. The current capacity mitigation regime, which includes both supplier-side and buyer-side measures, was developed through a series of Commission proceedings starting in 2007 and went into effect in 2008.

Under the BSM Rules, all new entry after March 7, 2008 into the In-City ICAP market is subject to Offer Floor mitigation unless determined to be exempt.[6] The Commission has unequivocally established that the BSM Rules "apply to controllable transmission projects," including specifically the HTP Project, "as well as to generation projects" that are Installed Capacity Suppliers.[7] If a new entrant is found to not be exempt from Offer Floor mitigation, it

[5] The NYISO notes that the Commission's acceptance of the NYISO's determination was subject to the NYISO adopting a different set of financing assumptions for the HTP Project. *See* November Order at P 112.

[6] November Order at P 4.

[7] *Id*. (citing *New York Independent System 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

can only offer its capacity into the ICAP Spot Market Auctions, and its offers must be at or above the seasonal Offer Floor level calculated for the entrant by the NYISO. These restrictions will continue to apply except to the extent that a resource's capacity has cleared in ICAP Spot Market Auctions for any twelve, not necessarily consecutive, months. Ultimately, a Resource will cease to be subject to Offer Floor mitigation entirely once all of its capacity has cleared in the auctions for twelve months.[8]

Beginning in 2011 the NYISO conducted the first of several mitigation determinations for the HTP Project under the BSM Rules.[9] Each determination concluded that the HTP Project should be subject to Offer Floor mitigation. The independent Market Monitoring Unit ("MMU") concurred with each determination.[10]

On August 3, 2012, HTP filed its complaint, the gravamen of which challenges the application of Offer Floor mitigation to the HTP Project. The November Order upheld the NYISO's BSM rule determination for the HTP Project, with one minor exception.

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generating capacity should be subject to the same mitigation.")); and *Linden VFT, LLC v. New York Independent System Operator, Inc*., 141 FERC ¶ 61,008 at P 29 (2012) (with respect to the Capacity Resource Interconnection Service process, controllable transmission and generators are to be treated in the same manner).

[8] *See New York Independent System Operator, Inc.,* 133 FERC ¶ 61,178 at P 49 (2010).

[9] The first final determination was issued on December 22, 2011 in accordance with the timing requirements set forth in the Services Tariff. *See* Services Tariff Section 23.4.5.7.3. The second final determination was issued in November 2012 in response to the Commission's September 2012 Order in another proceeding involving BSM determinations, as discussed later in this answer. The third final determination was issued on January 16, 2014 as directed by the November Order, and is discussed below. Contrary to HTP's representations, *see, e.g.,* HTP Request at 6, the NYISO has not made six final determinations under the BSM Rules for the HTP Project. The NYISO did make a series of initial informational determinations prior to December 2011 but they were not binding. The fact that they were not final and would be revised stated in the notices sent to HTP. (*See, e.g.*, Complaint at Attachment 7, p. 1, NYISO letter to HTP dated June 9, 2011, stating "[t]he NYISO will revise this determination in relation to the timing of the Class Year project cost allocation process.") The number of analyses conducted by the NYISO in no way suggests, as HTP would apparently have the Commission believe, that there were issues, let alone problems with, the NYISO's determinations.

[10] The independent MMU is Potomac Economics, Ltd.

The November Order directed the NYISO to "re-do" the determination for the HTP Project using HTP's actual financing costs.[11] Prior to the November Order, the NYISO had re-done the HTP Project analysis using a generic cost of capital based on its interpretation of the Commission's order in a different proceeding involving the application of the BSM Rules.[12] The November Order did not question the NYISO's understanding of the September 2012 Order but found that certain factual differences in HTP's case justified using the HTP Project's actual cost of capital. The NYISO revised its analysis based on the HTP Project's actual cost of capital, and the re-test again concluded that the HTP Project is subject to Offer Floor mitigation. Consistent with the NYISO's transparent administration of the In-City BSM Rules, the NYISO concurrently posted the result of "not exempt" to its web site, informed stakeholders of the not exempt determination, while separately informing HTP of the outcome and of any additional confidential details. The NYISO also concurrently posted to its website the independent MMU's assessment of the redetermination. The MMU report's addendum confirms that the MMU once again supports the NYISO's determination.[13]

The November Order additionally instructed the NYISO to make a compliance filing to provide "the specific scaling factor used for the mitigation determination for the HTP Project, to

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[11] *See* November Order at P 112. The NYISO's January 16, 2014 redetermination is not the subject of the HTP Request.

[12] *Astoria Generating Company L.P v. New York Indep. Sys. Operator, Inc.,* 140 FERC ¶ 61,189 (2012) ("September 2012 Order"). That proceeding related to NYISO's determinations under the BSM Rules for two other projects. Those determinations were made pursuant to the BSM Rules as they existed prior to their amendment effective November 27, 2010. *See New York Independent System Operator, Inc*., 133 FERC ¶ 61,178 (2010), and *New York Independent System Operator,* 134 FERC ¶ 61,083 at PP 14, 25 (2011) ("February 2011 Order"). Consistent with the Commission's own practice, this answer refers to the BSM Rules as they existed before that date as the "Pre-Amendment Rules," and after that date as the "Post-Amendment Rules."

[13] *See* NYISO notice of not-exempt and MMU reports on the BSM Rule determinations for the HTP Project, available at: <http://www.nyiso.com/public/markets_operations/services/market_monitoring/index.jsp>.

explain in detail how it was calculated, and to support the methodology."[14] The NYISO must also file "proposed tariff revisions to include a detailed description of the methodology that it intends to use in order to project the likely energy and ancillary services revenues for merchant transmission lines [to] be applied to future [UDR][15] projects that are similarly situated."[16] Importantly, the November Order did not make its rejection of HTP's complaint in any way contingent on Commission action on the required compliance filing. In particular, it agreed that NYISO's application of a scaling factor to the HTP Project was both reasonable and firmly grounded in the tariff. The NYISO recently sought an additional forty-five days to make the compliance filing so that it would have more time to engage in stakeholder discussions.[17]

As discussed below, the HTP Request presents no argument or evidence showing that the November Order was not based on reasoned decision-making, let alone "arbitrary and capricious," contrary to law, or inconsistent with the Federal Power Act. Consequently, the HTP Request should be denied in its entirety.

[14] November Order at P 90.

[15] "UDR" is an acronym for "Unforced Capacity Deliverability Rights." Controllable transmission lines must request and be granted UDRs in order to participate in the NYISO's capacity market. HTP was granted UDRs for its MW of Capacity Resource Interconnection Service (CRIS).

[16] November Order at P 90.

[17] *See Motion of New York Independent System Operator, Inc. for Extension of Time to Submit Compliance Filing and Request for Expedited Commission Action by January 21, 2014*, Docket No. EL12-98-000 (Jan. 15, 2014). Contrary to what HTP has suggested elsewhere, the fact that the NYISO sought additional time to develop scaling factor rules to apply to all possible future controllable transmission projects for multiple reasons in no way implies that the scaling factor specifically developed for and applied to the HTP Project was unreasonable. *See Answer of Hudson Transmission Partners, LLC Opposing, in Part, NYISO Motion for Extension*, Docket No. EL12-98-000 at 3 (January 17, 2014).

II. REQUEST FOR LEAVE TO ANSWER

Parties are permitted to answer requests for clarification as of right.[18] The Commission also has discretion[19] to accept answers to requests for rehearing and has done so when they help to clarify complex issues, provide additional information, or are otherwise helpful to its decision-making process.[20] The Commission should accept the NYISO's answer in this instance.[21] The HTP Request makes incomplete, erroneous, and misleading claims and frequently mischaracterizes previous NYISO statements or positions. The Commission's ruling on the HTP Request will have important consequences not only for HTP Project but for future merchant transmission projects that may seek to interconnect to New York City or to other Mitigated Capacity Zones. It could also have major impacts on buyer-side mitigation determinations that have already been made or that will be made in the future. Consequently, the Commission should allow the NYISO to answer in order to ensure that there is a complete and accurate record in this proceeding.

[18] *See* 18 C.F.R. § 385.213(a)(3) *and Mirant Americas Energy Marketing, L.P. v. ISO New England Inc.,* 97 FERC ¶ 61,360 (2001).

[19] *See* 18 C.F.R. § 385.213(a)(2).

[20] *See, e.g., PJM Interconnection, L.L.C.,* 128 FERC ¶ 61,157 at P 10 (2009) (accepting an answer to a request for rehearing because it provided information that assisted the Commission in its decision-making process).

[21] To the extent that the Commission deems Rule 213(d)'s fifteen day deadline to be applicable to this answer, the NYISO respectfully requests a waiver. It was not practicable for the NYISO to complete this answer in fifteen days given the scope of the HTP Request, the fact that the Christmas and New Year's holidays came immediately after the HTP Request was filed, and the NYISO's need to simultaneously prepare other important capacity market-related filings. In addition, as noted above, the NYISO recently completed the re-test of the HTP Project that was required by the November Order and for purposes of establishing a clear record, it was reasonable to submit this answer shortly after the NYISO completed and disclosed the results of the revised evaluation and the independent MMU's assessment of it.

III. ANSWER

A. The November Order Correctly Upheld the NYISO's Treatment of the HTP Project as a "Category III" Examined Facility

The HTP Request argues that the November Order's agreement with the NYISO that the HTP Project was a "Category III" Examined Facility was inconsistent with the Services Tariff and a failure to engage in reasoned decision-making.[22] It also claims that the November Order violated the filed rate doctrine and constituted unlawful retroactive ratemaking by effectively revising the Services Tariff.[23]

HTP's arguments are without merit and should be rejected. The Commission should nevertheless make it very clear on rehearing that it is HTP, not the NYISO, that is effectively proposing to retroactively rewrite the Services Tariff by unilaterally narrowing its definition of "Generator" in a way that would exclude the HTP Project from its coverage. HTP's revision would in turn distort the application of the BSM Rules by preventing the HTP Project from being treated, as was always intended, as a "Category III" Examined Facility. HTP's strategy may not be immediately obvious to readers that are less familiar with the structure of the Services Tariff, the design in 2010 of the BSM Rules revisions *(i.e.*, the Post-Amendment Rules) to specifically identify Category III, or the precedent establishing that Services Tariff references to "Generators" can include references to controllable transmission lines.[24]

There can be no genuine dispute that the Services Tariff defines "Generator" to broadly encompass "any facility capable of supplying Energy, Capacity, and/or Ancillary Services that is accessible to the NYCA." Thus, the November Order's ruling on the use of the term in the BSM

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[22] HTP Request at 19-20.

[23] *Id*. at 3-4, 9-10, 19-34.

[24] November Order at P 52, *citing Linden VFT, LLC v. New York Indep. Sys. Operator, Inc*., 141 FERC ¶ 61,008 at P 29 (2012).

Rules is consistent with the "plain language" of the Services Tariff; not in conflict with it as the HTP request wrongly claims. There is no merit to claims that the November Order impermissibly inserted language into the tariff's description of Category III or "rewrote" any other tariff language.[25] In fact, it is HTP that is seeking to do what it accuses the Commission of doing, *i.e.,* retroactively revising accepted Services Tariff provisions. HTP is also effectively attempting an untimely collateral attack on established precedent affirming that the HTP Project would be subject to the BSM Rules.[26]

The HTP Request attempts to overcome the plain language of the tariff by pointing to traditional rules of contract interpretation.[27] The fatal flaw that undermines all of its arguments is the fact that such interpretative rules are only relevant when there is ambiguous language to interpret.[28] HTP itself acknowledges that the Commission did not find the tariff language in question to be ambiguous,[29] which alone suffices to defeat its resort to rules of interpretation.

Moreover, if interpretative rules were applicable to this issue, it is the Commission's (and the NYISO's) reading of the relevant language, not HTP's, that would conform to them. Most

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[25] HTP Request at 23-32.

[26] *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al*., 134 FERC ¶ 61,229 at P 15 (2011) ("collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged.")(citing *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co*., 112 FERC ¶ 61,117, at P 12 (2005)); *see also EPIC Merchant Energy NJ/PA, LP v. PJM Interconnection, LLC*, 131 FERC ¶ 61,130 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to re-litigate the same issues that were raised in the prior case citing no new evidence or changed circumstances).

[27] *See* HTP Request at 23-26.

[28] *See, e.g., Pacific Gas and Electric Company*, 85 FERC ¶ 61,180 at 61,724 (1998)("When the meaning of a contract is clear upon its face, the use of extrinsic evidence to interpret the contract is improper. If a contract is ambiguous, however, the parties may introduce extrinsic evidence of the parties' intent to prove a meaning to which the contract language is reasonably susceptible.") *and Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.")

[29] *See* HTP Request at 20.

importantly, it is HTP that would render other Services Tariff provisions "nonsensical" and deprive them of relevance or meaning. As the NYISO has previously explained, the HTP Project was, and remains, the only project that possessed the attributes of a Category III facility.[30]

Notwithstanding HTP's protest, other parties have affirmed that this was generally understood to be the case.[31] To be clear, if HTP's revision via reinterpretation of the Services Tariff were accepted, the "Category III" definition would be meaningless because no project would ever fall under it. Thus, even if the Commission were to conclude that the provisions governing the scope of Category III were unclear, it could not reasonably interpret them in a way that would render it meaningless.[32] Similarly, because the HTP Project does not satisfy the requirements to be a Category I or II project,[33] HTP's interpretation would unreasonably place the HTP Project outside the framework of the BSM Rules. These facts alone outweigh all of the contrived examples of supposed "conflicts" that the HTP Request claims result from the Commission's interpretation.[34]

Similarly, to the extent that the Commission were to consider extrinsic evidence in its analysis, the weight of that evidence favors the November Order's interpretation. "UDR project" is not a defined term in the Services Tariff and there is no direct basis for concluding that "UDR

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[30] *See* New York Independent System Operator, Inc., *Request for Leave to Answer and Answer,* Docket EL12-98-000 (December 17, 2012) at 10 ("December 2012 Answer").

[31] *See Protest of the New York City Suppliers*, Docket EL12-98-000 at 15-19 (Nov. 12, 2012).

[32] *See, e.g., DC Energy, LLC v. PJM Interconnection, L.L.C.,* 144 FERC ¶ 61,024 at P 38 (2013) (refusing to adopt an interpretation proffered by a complainant because the interpretation would render a tariff provision meaningless) *and Idaho Power Co. v. FERC*, 312 F.3d 454, 462 (D.C. Cir. 2002).

[33] *See* December 2012 Answer at 12-13 (explaining that HTP had not claimed to be eligible for Category II and that its claims for eligibility to be a Category I project are not tenable).

[34] *See* HTP Request at 19, 25-26. HTP essentially argues that the Commission's reading of the tariff would result in a handful of redundant implied references to UDR projects. But such references would not render the existing tariff language inoperative or "nonsensical." By contrast, HTP's interpretation of the tariff would completely nullify the Category III definition.

projects" do not fall within the ambit of "Generators." There is an inherent logical connection between UDR projects and generators stemming from the fact that the very purpose of creating the UDR mechanism was to permit unforced capacity from generators located outside of a New York Locality to be treated as if it were provided by a generator electrically located within that Locality.[35] Moreover, when "UDR projects" are evaluated under the BSM Rules, the NYISO's evaluation includes, and the Offer Floor and twelve-month clearing rule are both applied to, offers of generating capacity by UDR rightsholders rather than to "UDR projects."

The Commission should also reject the theory that any ambiguity in the Services Tariff must be construed against the NYISO based on common law precepts requiring language to be interpreted against the interest of the drafting party.[36] The tariff language that HTP seeks to revise was not unilaterally adopted by the NYISO. It was instead developed through an extensive stakeholder process under which the NYISO needed to secure super-majority stakeholder support before proposing tariff language to the Commission under Section 205 of the Federal Power Act ("FPA").[37] Therefore, the language cannot be said to have been drafted by or on behalf of the NYISO in the sense contemplated by the common law rule. Furthermore, as an independent, not-for-profit, non-transmission or generation-owning entity, the NYISO does not have the kind of self-interested financial motives that the traditional canon was intended to

[35] November Order at P 43; *Linden VFT, LLC v. New York Independent System Operator, Inc.*, 141 FERC ¶ 61,008 at P 21 (2012).

[36] HTP Request at 42.

[37] *See* ISO Agreement, Article 7. The one exception to this requirement, which is not relevant here, is the rule allowing the NYISO to propose temporary tariff changes under Section 205 when "exigent circumstances" exist. *See* ISO Agreement § 19.01.

counter.[38] Thus, the notion that the contract language should be construed against the drafter should have no applicability here.

Finally, the Commission should not lose sight of the fact that, for all of HTP's claims of unfair treatment it has enjoyed a full opportunity to be heard on this point. As the NYISO previously emphasized, HTP "cannot legitimately claim a reliance interest in its newly-asserted interpretation of the Category III definition." Any such claim would contradict HTP's position from earlier filings that the HTP Project's "go forward" date was nearly a year before the NYISO submitted the Post-Amendment version of the BSM Rules to the Commission. Thus, HTP decided to invest in the HTP Project at a time when it knew, or at the very least should have known, that the mitigation rules that would apply to the project were subject to change. HTP argues that it would have challenged the NYISO's definition of Category III Examined Facilities if it had understood its breadth at the time that it was filed. But as the NYISO also noted, "[w]hether this claim is true, or merely opportunistic, is of little practical importance," because HTP's interpretation has been presented to, and fully considered by, the Commission in this proceeding.

B. The HTP Project Was Properly Examined Concurrent with Class Year 2009 and 2010 Examined Facilities

The HTP Request argues that the November Order violated the Services Tariff by upholding the NYISO's decision to consider the HTP Project concurrently with projects in Class Years 2009 and 2010.[39] It asserts that Attachment S to the NYISO Open Access Transmission Tariff ("OATT"), which establishes the rules for the cost allocation of new projects on the

[38] *See, e.g., Restat. 2d of Contracts*, § 206(a) ("Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party.")

[39] HTP Request at 34-42.

NYISO's system and requires the NYISO to "evaluate projects one Class Year at a time," mandates a "sequential" evaluation of projects under the BSM Rules in Attachment H to the Services Tariff.[40]

HTP is wrong on both points. The November Order reasonably concluded, and provided a complete explanation for its conclusion, that the NYISO properly concurrently examined all projects entering, or deemed to be entering, the market in the same Mitigation Study Period. This encompassed Class Year 2009 and 2010 facilities, which would enter in the Mitigation Study Period starting in Summer 2013, and the HTP Project, which was a member of Class Year 2008 but, in conformance with the February 2011 Order granting HTP's specific request, HTP was deemed to enter the market in Summer 2013.

As the NYISO has explained,[41] the HTP Project's treatment was the result of HTP's own request to be evaluated using the "Reasonably Anticipated Entry Date Rule." HTP specifically sought this treatment in response to the NYISO's 2010 proposal[42] to revise the BSM Rules. Under the Pre-Amendment Rules, the exemption test in Section 23.4.5.7.2 of the Services Tariff required the NYISO to consider the two Capability Periods beginning with the first one in which an ICAP supplier "is reasonably anticipated to offer to supply [Unforced Capacity]" (the "Reasonably Anticipated Entry Date Rule"). The NYISO's 2010 revisions to Section 23.4.5.7.2 provided that this "Mitigation Study Period" would begin with "the Summer Capability Period commencing three years from the start of the year of the Class Year" (the "Three Year Rule").[43]

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[40] *Id*. at 10.

[41] *See Answer of the New York Independent System Operator* at 10-14 (Nov. 13, 2012) ("November 2012 Answer").

[42] See *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 ("NYISO 2010 BSM Proposal").

[43] *See* Services Tariff Section 23.4.5.7.2, in relation to the Mitigation Study Period.

HTP argued that the Three Year Rule should not apply to the HTP Project and requested that the Commission order the NYISO to use the HTP Project's actual projected start date of 2013 under the existing Reasonably Anticipated Entry Date Rule, instead of the proposed Three Year Rule.[44] When the Commission accepted the Three Year Rule[45] it also granted HTP's request and ordered the NYISO to evaluate projects in Class Year 2008, like the HTP Project, using the existing Reasonably Anticipated Entry Date Rule.[46] Consequently, the HTP Project's entry date for purposes of the mitigation exemption test was 2013 instead of 2011, the date that would have otherwise applied under the Three Year Rule.[47] Except for this limited exception, the HTP Project was otherwise to be examined under the Post-Amendment Rules as a Category III Examined Project.[48]

Accordingly, the NYISO used the Reasonably Anticipated Entry Date Rule to evaluate the projected revenues of the HTP Project. In order to arrive at an accurate projection, the NYISO concurrently evaluated projects from Class Years 2009 and 2010, which were, pursuant to the Three Year Rule, deemed to be entering the market in the same Mitigation Study Period as the HTP Project.[49]

The November Order agreed with the NYISO's approach. It explained that "[t]he mitigation exemption determination is not based upon the hypothesis that any particular entrant will be the only entrant. Rather, it is a factual one, based upon the most accurate projections of

[44] February 2011 Order at P 14.

[45] *Id*. at PP 1, 23.

[46] *Id.* at P 25.

[47] November Order at P 47.

[48] *Id.* at P 50.

[49] *Id.* at P 53.

prices and costs during the Mitigation Study Period that can be made at the time the analysis is performed."[50]

The HTP Request offers no valid explanation of why it was unreasonable for the Commission to refuse to require the NYISO to evaluate the HTP Project in a vacuum or to ignore relevant facts when conducting its analysis. This is especially true to the extent that HTP's arguments are predicated on the faulty assumption that the HTP Project is a Category I Examined Facility.[51] HTP's request for rehearing on this point should therefore be denied.

There is likewise no merit to HTP's argument that the mere fact that Attachment S of the OATT prescribes evaluation for each Class Year separately and in sequence (albeit in the case of Class Years 2009 and 2010 they were concurrent,)[52] somehow mandates that the NYISO must examine projects under the BSM Rules, which are in the Services Tariff, in the exact same manner. The November Order correctly concluded that there is "nothing in Attachment S that dictates the sequential analysis that HTP contends is required."[53] Although the BSM Rule analyses incorporate cost data arising from the Attachment S Project Cost Allocation process, Services Tariff Attachment H cannot be read to incorporate each requirement of OATT Attachment S. Services Tariff Attachments H and OATT Attachment S are distinct rule sets that have different purposes and focus on different considerations. The terms or requirements of one do not automatically apply to the other.

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[50] *Id*.

[51] HTP Request at 19.

[52] As the Commission noted in its February 2011 Order, the Interconnection Facilities Study for Class Years 2009 and 2010 were combined, citing NYISO OATT, Attachment S, section 25.10.2. *See* February 2011 Order at P 25 n.10.

[53] November Order at P 54.

Moreover, Attachment H clearly allows for concurrent evaluations of projects from different Class Years. The Post-Amendment Rules include section 23.4.5.7.3.2 which expressly contemplates that there would be instances when the NYISO would be "evaluating more than one Examined Facility concurrently ..... "[54] The tariff provides for a concurrent evaluation of Examined Facilities in different Class Years if a Category III Examined Facility meets the Category III criteria and has the same Starting Capability Period as Category I and/or Category II Examined Facilities. The NYISO's 2010 BSM Rules Proposal explained that one of the NYISO's principal objectives was to ensure that all new entrants, regardless of their technical characteristics and of whether (or when) they sought an exemption, would be evaluated in a timely way.[55]

The HTP Project was among the inaugural evaluations that were required to be conducted under the Post-Amendment Rules. The NYISO's 2010 BSM Proposal specifically contemplated that Examined Facilities in multiple Class Years would be evaluated concurrently. When the NYISO made that filing, it requested expedited Commission action so that its tariff revisions could take effect by November 2010 as Class Year 2009 and Class Year 2010 projects were expected to receive and consider their Project Cost Allocations in that timeframe. The projects' initial decision point in the Project Cost Allocation process would mark the "commencing" of the Class Year Facilities Study in the "calendar year in which the Class Year Facilities Study determination" was being made, and under the Post-Amendment Rules, this was to coincide with the NYISO's issuance to the projects of the initial exemption and Offer Floor determinations. Thus, the first examinations under the Post-Amendment Rules would be for Class Year 2009 and Class Year 2010 projects, and the only project in a Class Year prior to 2009 that had not yet

[54] *See also* September 2010 Filing at 13.

[55] *See id*. at 9-10.

entered the market or had not received an exemption of Unit Net CONE determination, *i.e.,* the HTP Project, which also was the only project in a Class Year prior to Class Year 2009 for which a determination under the BSM Rules had to be made.[56]

The NYISO's November 2012 Answer explained that "[e]ven though the HTP Project is in Class Year 2008, the BSM Rules and the February 2011 Order required the NYISO to examine it based on existing capacity and concurrent with other Examined Facilities that shared the same Starting Capability Period, *i.e.,* Summer 2013."[57] The November 2012 Answer described the history summarized above regarding HTP's specific request to be deemed to have a May 2013 entry date, noted that this placed the HTP Project in the same Mitigation Study Period as Class Year 2010 projects, and concluded that a concurrent analysis was required consistent with Section 23.4.5.7.3.2 (referenced above).[58] Moreover, the NYISO's 2010 BSM Proposal specifically described the need for a provision to examine facilities that had not yet been examined at the time the amendments to the rules became effective.[59]

Consequently, the November Order was correct to find that it was both legally permissible and more reasonable, given both the facts and the nature of the BSM Rules, for the NYISO to perform concurrent BSM Rule examinations of Class Year 2009 and 2010 projects and the HTP Project.

C. The November Order Correctly Found the NYISO Used the Proper "Analysis Reference Date"

The HTP Request contends that the NYISO was required to use the "most up-to-date data and information [available] as of the same time frame as the final cost allocation" for the HTP

[56] December 2012 Answer at 12.

[57] November 2012 Answer at 10.

[58] *Id*. at 10.

[59] *Id.* at 12.

Project, *i.e.,* information from no later than January 2010[60] rather than the December 2011 data that the NYISO actually used.[61] HTP claims that this "rule" was established by the September 2012 Order.[62] It further claims that the NYISO was not eligible to follow an "exception" to that rule under which it would use the information available at the time that it conducted a revised analysis for the HTP Project, *i.e.,* December 2011.[63] According to HTP, the Commission's alleged failure to explain its decision to allow the NYISO to deviate from the "rule" is inconsistent with reasoned decision-making. HTP also appears to interpret the November Order's directive that the NYISO "re-do the exemption determination using HTP's actual cost of capital"[64] to mean that the NYISO must use January 2014 data in the updated analysis. The HTP Request therefore seeks rehearing on these "analysis reference date" questions. In the alternative, HTP urges the Commission "to exercise its remedial discretion" to subject the HTP Project to the lower Offer Floor that the NYISO calculated for it in June 2011.[65]

HTP's arguments on rehearing should be rejected because they are based on a misunderstanding of the context of the September 2012 Order and other precedents. HTP overlooks the fact that the September 2012 Order interpreted the Pre-Amendment Rules on the

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[60] HTP Request at 10, 42-50.

[61] To be clear, the NYISO used an analysis reference date that was nearest to the completion of Class Years 2009 and 2010, *i.e.,* the Class Years in which the projects considered concurrent with the HTP Project were members. November 2012 Answer at 10-14, Jerke Affidavit at P 18.

[62] HTP Request at 42.

[63] *Id*. at 42.

[64] November Order at P 112. The HTP Request notes that it is not seeking rehearing of this determination. *See* HTP Request at n.15. The NYISO believed that it acted correctly in November 2012 when, based on the September 2012 Order, it undertook a revised HTP Project exemption analysis using a generic cost of capital. The NYISO, however, also did not seek rehearing of this aspect of the November Order.

[65] HTP Request at 51. As discussed below in this Section, the June 2011 determination was an initial determination. *See* FN 9 above, quoting the June 2011 notice of initial determination in which the NYISO specified that the determination "will be revised."

Analysis Reference Date. By contrast, as the November Order reiterates, HTP's analysis was to be conducted under the Post-Amendment Rules, with the single exception that HTP would not be subject to the Three Year Rule.[66] It is therefore not relevant that the September 2012 Order made an exception to the Pre-Amendment Rules, based in part on its grant of a waiver to the NYISO, to clear the way for the NYISO to make a BSM Rule determination "based on the most up-to-date data information available during the period" when NYISO was conducting the analysis.[67] The November Order makes clear that the same rule is to be applied under the PostAmendment Rules.[68] The Commission reasonably and fully explained why this is appropriate[69] and reasonably concluded that the NYISO had adhered to it.

HTP is also wrong to read the November Order as requiring the NYISO to re-do the HTP exemption determination using January 2014 data. The NYISO interpreted P 112 of the November Order as only requiring it to revise its determination based on changing a single element of its analysis, *i.e.,* the cost of capital, and it conducted the re-determination based on this interpretation. The NYISO took the same approach, *i.e.,* making "directive-specific" adjustments but not adopting the most recent possible analysis reference date, when it performed re-determinations for Astoria Energy II and the Bayonne Energy Center in compliance with the

[66] *See* November Order at P 50. As discussed above in Section III.C, the November Order's directive that the NYISO use the HTP Project's actual cost of capital, *see* November Order at P 112, rather than the NYISO's use of an alternate cost of capital consistent with a Commission finding in the September 2012 Order (*i.e.*, the re-test for the NYISO's November 2011 mitigation determination), is based on the application of principles that are consistent in both the Pre-Amendment Rules and Post-Amendment Rules.

[67] *See* September 2012 Order at P 78 ("Instead, based on that finding and our waiver of the Pre-Amendment tariff above, we conclude that the projection of capacity prices for the Unit exemption test should be made based on the most up-to-date data information available during the period when NYISO was evaluating the request to exempt Astoria II and Bayonne from offer floor mitigation, *i.e.*, during 2010.")

[68] *See* November Order at P 60.

[69] *See id*. at P 63.

September 2012 Order.[70] Those re-determinations were not questioned by the Commission or other parties on analysis reference date grounds. HTP's reading therefore appears to be overly literal and there is no reason to consider its arguments to the extent that they assume that the NYISO's redetermination would be based on January 2014 data.[71] If, however, the Commission were to agree with HTP's reading of the November Order, then the NYISO would need to revise its January 2014 redetermination for the HTP Project to update all of the inputs, instead of merely changing the cost of capital.

Finally, the Commission should reject HTP's "alternative request" to exercise its remedial discretion and use the initial Offer Floor calculated for the HTP Project as part of the NYISO's initial June 2011 analysis. First, HTP's argument is based on an assumption that it has been harmed by certain supposed tariff violations.[72] That underlying assumption is faulty because the November Order found that the NYISO's approach to those issues was consistent with the Services Tariff. Since HTP has not been wronged by the NYISO, the Commission, or any other party, there is no basis for granting it equitable relief. Second, as is clear in the record, the June 2011 analysis was a preliminary, non-binding determination, only intended to provide information leading to the December 2011 determination of the Offer Floor based on the NYISO's final analysis.[73] Third, using in the final determination an Offer Floor based on a set of ICAP Demand Curves other than the curves that were effective at the time of the

[70] In the September 2012 Order, the Commission ordered the NYISO to "recalculate its exemption determinations using different, updated data on prices, revenues, and costs as of October 2010." *Id*. at PP 64, 85, 139, and 140.

[71] *See* HTP Request at 45-47.

[72] The HTP Request improperly characterizes the NYISO's treatment of the HTP Project as a Category (III)(a) Examined Facility; its conducting the mitigation exemption determination concurrently with projects from other Class Years; and its applying a scaling factor to determine the HTP Project's projected energy revenues as tariff violations. HTP Request at 9-11. Each of the foregoing were upheld by the November Order.

[73] December 2012 Answer at 14-16. *See also* FN 9, above.

determination would introduce internal inconsistencies throughout the BSM analysis of the HTP Project. HTP's proposed approach directly contradicts clear precedent holding that "if the Commission has accepted and made effective updated demand curves at the time of the mitigation determination then . . . NYISO should use demand curve values in making the mitigation exemption and offer floor determinations."[74] The final December 2011 determination utilized the ICAP Demand Curves that were accepted by the Commission and effective at that time of the final determination. These ICAP Demand Curves were reflected throughout the analysis, in the calculation of the HTP Project's Unit Net CONE and the ICAP revenue projections. HTP's alternative request is a transparent attempt to have that advantageous assumption applied. However, doing so would introduce an element that is inconsistent with other inputs, which would result in a mitigation determination that is inconsistent with the BSM rules. Further, the outcome would be inconsistent with the purpose of Offer Floor mitigation: *i.e.,* to prevent price suppression. It also should be noted that the Offer Floor determined by HTP's "alternative request" could have an effect on the capacity market and other Market Participants and their expectations.

D. The November Order Correctly Upheld the NYISO's Use of a Scaling Factor in the HTP Project Analysis

The HTP Request argues that the November Order erred by upholding the NYISO's use of a "scaling factor" because a scaling factor is not expressly mentioned in the Services Tariff and therefore supposedly cannot be used without violating the filed rate doctrine[75] and rule

[74] *See Astoria Generating Co., L.P. et. al. v. New York Independent System Operator, Inc.,* 139 FERC ¶ 61,244 at P 86 (2012). That order also explained that "if the Commission has not accepted proposed updated demand curves applicable to the periods used in the mitigation test at the time of such mitigation exemption determination, then, consistent with section 23.4.5.7.4 of NYISO's Services Tariff, the most recently approved demand curves must be used. This is true for both Default net CONE and in calculating projected clearing prices." *Id*.

[75] HTP Request at 52.

against retroactive ratemaking.[76] It likewise argues that the November Order is unduly discriminatory because the Services Tariff does not say that the NYISO may apply a scaling factor to merchant transmission lines but not to generating units.[77]

All of these arguments are quickly disposed of by reference to the plain language of the Services Tariff. As the November Order found,[78] and as the HTP Request itself notes,[79] Section 23.2.1 of the Services Tariff defines Unit Net CONE as the "localized levelized embedded costs of a specified Installed Capacity Supplier . . . net of likely projected annual Energy and Ancillary Services revenues." As the NYISO previously argued, and as the November Order confirmed, this required the NYISO to project the "likely" energy revenues of a merchant transmission facility. Even HTP acknowledged that "traders do not have perfect foresight of energy prices and thus, would be unable to perfectly arbitrage day-ahead price differences between the PJM and the NYISO markets."[80]

Thus, the November Order correctly held that the NYISO was justified to use a scaling factor for merchant transmission facilities. Similarly, there was no need, and thus no requirement, for the NYISO to apply a scaling factor to generating units because their likely revenues can be estimated without having to employ a scaling factor. The mere fact that HTP would have accounted for the imperfect arbitrage associated with merchant transmission facilities differently does not make the NYISO's scaling factor unjust, unreasonable, or unduly discriminatory.

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[76] *Id*. at 54-55.

[77] *Id*. at 11-12, 55-57.

[78] November Order at P 83.

[79] HTP Request at 53.

[80] November Order at P 83.

The HTP Request proposes to read the NYISO's obligation to determine "likely" energy and ancillary services revenues out of the tariff on the ground that the language should be read as only requiring the NYISO to use "reasonable assumptions." Even if HTP were right, the use of a scaling factor would be a necessary reasonable assumption given the recognized imperfection of inter-regional scheduling across merchant transmission lines. It is thus unclear to the NYISO what HTP's attempt to effectively modify Section 23.2.1. to eliminate the reference to "likely" revenues is meant to accomplish. It is clear that HTP's argument is an unclear and unpersuasive attempt to do the very thing that it wrongly accuses the NYISO of attempting, *i.e.,* to retroactively revise the tariff.

HTP also argues that the November Order's directive that the NYISO make a compliance filing to more clearly explain its use of the scaling factor, both as applied to HTP and to future merchant transmission projects, somehow means that applying a scaling factor to HTP violated the filed rate doctrine and the rule against retroactive ratemaking. This suggestion wholly ignores core tenets of FPA jurisprudence. It is black letter law that multiple alternative tariff provisions can simultaneously be just and reasonable for purposes of the FPA.[81] The mere fact that reasonable alternatives might exist, or that a Commission finding that additional detail should be included to satisfy the "Rule of Reason," does not mean that existing provisions are not just and reasonable. Thus, it is entirely lawful and consistent with precedent for the Commission to authorize a jurisdictional public utility, such as the NYISO, to implement

[81] *See, e.g., Southwest Power Pool, Inc.,* 136 FERC ¶ 61,050 at P 33 (2011) (internal citations omitted); *see also*, *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats & Regs. ¶ 31,241 at PP 1650-1651 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, 129 FERC ¶ 61,126 (2009) (finding that only rules, standards and practices which significantly affect transmission service must be included in a transmission provider's OATT, although they must be posted on the transmission provider's public website); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985).

accepted but general tariff language at the same time that is under a compliance obligation to develop and propose a more specific or detailed version of that language.[82] There is thus no basis whatsoever for HTP's claim that the November Order's ruling was unlawful.

There is similarly no merit to HTP's contention that the NYISO's compliance filing in response to the November Order must be made under Section 205 of the FPA. HTP either overlooks or ignores the fact that compliance filings are procedurally distinct from Section 205 filings. Compliance filings are not subject to the sixty day notice period.[83] Judicial precedent is clear that Section 205 filings, unlike compliance filings, are inherently voluntary in nature and that regulators cannot compel utilities to submit them. An additional NYISO-specific distinction is the fact that the NYISO cannot make "unilateral" Section 205 filings without the consent of its Board and a super-majority of its stakeholder Management Committee.[84] Finally, and most importantly, the November Order is very clear that the NYISO is to respond to the Commission's instructions related to the scaling factor via a compliance filing. HTP offers no coherent explanation of why the NYISO should be, or how it could lawfully be, directed to make a Section 205 filing instead. To the extent that HTP's real concern is that interested parties have an opportunity to comment on the filing, the NYISO assumes that the Commission would review and evaluate any timely comment on or protest of that compliance filing exactly as it does with other compliance filings.

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[82] *See, e.g. Midwest Independent Transmission System Operator,* 122 FERC ¶ 61,283 (2008) (accepting the MISO's proposed revisions to its Open Access Transmission and Energy Markets Tariff and ordering the MISO to make compliance filings after clarifying and developing certain provisions with stakeholder input).

[83] *See* 18 C.F.R. § 35.3(a)(1), which mandates a sixty day notice period before a utility files new or revised schedules or tariffs.

[84] *See supra* n.37.

Finally, the HTP Request claims that the November Order erred to the extent that it ignored arguments that the NYISO had focused on the HTP Project's anticipated day-ahead energy revenues to the exclusion of its real-time energy revenues. It emphasizes that HTP had presented evidence showing that the HTP Project could theoretically earn substantial real-time energy market revenues and claims that no party "presented any evidence to the contrary."[85] At the same time, it acknowledges that the NYISO addressed the issue but attempts to dismiss it in a conclusory footnote.

The NYISO reiterates that it accounted for real-time energy revenues in its mitigation analyses for the HTP Project. The NYISO will explain its calculation further in its upcoming compliance filing in response to the November Order, in which it will describe the scaling factor calculation for HTP in more detail.[86]

E. The HTP Request's Assertion that the HTP Project Will be Precluded from Participating in the In-City Capacity Market for Years or Decades Is Highly Speculative

The HTP Request contends that if the November Order is not overturned on rehearing, then the NYISO's application of Offer Floor mitigation "will preclude Hudson Transmission from participating in NYISO's capacity market for years or perhaps decades into the future."[87] This statement is highly speculative and far from certain to be accurate. Offer Floor mitigation does not "preclude" participation in the market. Rather, as noted above in Section II, it limits new entrants that are determined to be mitigated pursuant to the BSM Rules, *i.e.*, that are determined to be uneconomic, to participating in the ICAP Spot Market Auctions and prevents them from offering to sell in those auctions below the applicable Offer Floor price. Economic

[85] *See* HTP Request at 59.

[86] As discussed in Section I, the November Order's denial of the HTP complaint was not conditioned on its consideration of the compliance filing.

[87] HTP Request at 2.

entrants that "pass" the NYISO's exemption tests are not subject to these requirements. It is, at a minimum, premature for HTP to claim that it will be subject to an Offer Floor for "years," let alone "decades." This is because of ICAP Spot Market Auction clearing prices cannot be known with certainty and are affected by many factors, including the entrance and exit of other Resources, and the fact that HTP Project capacity will gradually cease to be subject to an Offer Floor to the extent that it clears in the auctions for twelve, not necessarily consecutive, months.

F. The Commission Should Once Again Reject HTP's Attempt to Obtain Compensation for Providing "Reliability Benefits" and for Returning UDRs

Finally, the HTP Request asserts that the November Order ignored HTP's request that the Commission clarify that the Services Tariff does not require a UDR project or UDR rightsholder to return its rights. HTP has evidently abandoned in part and significantly narrowed its overt demand that the Commission create an unprecedented "additional cost-based compensation mechanism" for the supposed "reliability benefits" conferred by the HTP Project, which was properly rejected in detail by the November Order.[88] It now claims that the Commission erred by ignoring its request for clarification regarding UDR holders' right to retain their UDRs. The HTP Request asserts that such a ruling would have obviated the need for a Commission ruling on its "reliability benefits compensation" claim.[89] It goes on to suggest that the November Order's rejection of its reliability compensation proposal somehow constitutes "a confirmation that a UDR holder is not required to return its UDRs to the NYISO without compensation under any circumstances."[90] It attempts to support its argument by invoking the fact that the Services Tariff and the NYISO's *Installed Capacity Manual* do not specify whether compensation is to be

[88] November Order at P 127.

[89] HTP Request at 60-61.

[90] *Id*. at 61.

provided.[91] Thus, although the HTP Request is less than clear, HTP appears to be implying that there are circumstances in which a UDR rightsholder should receive compensation. HTP also mischaracterizes the NYISO's position on this issue by wrongly claiming that the December 2012 Answer supported the HTP interpretation.

To be clear, the NYISO continues to oppose HTP's unprecedented and unjustifiable request for non-market-based reliability compensation. There is no inconsistency between the NYISO's opposition to HTP's meritless claim that the November Order was somehow deficient for not comprehensively refuting each potential permutation and sub-element of HTP's various arguments, and the NYISO's refusal to accept HTP's related demand for compensation if it returns UDRs. The December 2012 Answer did not support, and cannot plausibly be read to support (let alone accept) HTP's compensation theories. The December 2012 Answer only stated that the NYISO's "tariffs and manuals do not compel the UDR rightsholders that are ICAP Suppliers to offer capacity (*i.e.,* use the rights) except for certain instances where they are Pivotal Suppliers or are subject to other anti-market manipulation related requirements."[92] It further explained that UDR rightsholders were free to retain their rights if not used.[93] The HTP Request's attempt to distort these factual statements into support for its interpretation is misleading and without merit. HTP's argument that the NYISO's rules are silent on compensation is equally unpersuasive. The rules specifically do not provide for compensation for returning UDRs, and the record is clear that compensation for returned UDRs is not

[91] *Id*. at n. 146.

[92] December 2012 Answer at 19.

[93] *Id.*at 20.

appropriate or calculable.[94] Thus, the November Order appropriately rejected HTP's claim that the rules should so provide.[95]

IV. CONCLUSION

For the reasons set forth above, the NYISO respectfully requests that the Commission deny the *Request for Rehearing and Clarification of Hudson Transmission Partners, LLC* in its entirety.

Respectfully Submitted,

/s/Ted J. Murphy
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January 21, 2014

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[94] November 2012 Answer at 31-41; December 2012 Answer at 18-21.

[95] November Order at PP 127-130.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 21st day of January, 2014.

/s/ Joy A. Zimberlin

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