UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P., NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Oswego Harbor Power LLC and TC Ravenswood, LLC	)	
Complainants,	)	**Docket No. EL11-42-000**
vs.	)	
New York Independent System Operator, Inc.	)	
Respondent.	)	

ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure[1] and the Commission's June 30, 2011, *Notice of Extension of Time* the New York Independent System Operator, Inc. ("NYISO") respectfully submits this answer to the June 3, 2011 *Complaint Requesting Fast Track Processing* ("Initial Complaint") and the June 16 *Amendment to Complaint and Request for Shortened Comment Period* ("Amended Complaint") (collectively, the "Complaint") in this proceeding. As the NYISO explains in the sections that follow, the Complaint must be denied because the Complainants[2] have not met their burden of proof. Complainants rely on little more than speculation and mischaracterization to support their claims. They have not shown that they have suffered, or will suffer, any harm. The entire

[1] 18 C.F.R. § 385.213 (2011).

[2] The Complainants are Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC. These entities have participated in recent NYISO proceedings involving capacity market mitigation and ICAP Demand Curve issues as the "New York City Suppliers."

Complaint makes only a single point that touches on a legitimate market design question, and even that relates to a new issue that is not yet ripe for consideration by the Commission. The Complaint includes many more arguments that are no longer ripe for consideration because they constitute impermissible collateral attacks on settled precedent.

The NYISO has complied, and will continue to comply in the future, with all applicable tariff requirements and Commission policies. Indeed, it is the Complainants that are seeking to force the NYISO to take actions that would violate both its tariff and Commission precedent. Similarly, although the Complainants wrongly accuse the NYISO of "cherry-picking" rules and inputs from pending compliance filings to use in its mitigation determinations, it is actually Complainants that selectively seek to implement tariff provisions that have not yet been accepted, or that have been rejected, by the Commission.

There is no basis for adopting any of the tariff revisions that Complainants would impose on the NYISO and all other stakeholders in contravention of the shared governance process for submitting tariff revisions under Section 205 of the Federal Power Act ("FPA"). Complainants have not shown that the NYISO's existing tariff revisions are unjust or unreasonable, or that their proposed vague changes would be just and reasonable as required under FPA Section 206.

There is also no justification for holding the NYISO's Class Year[3] Facilities Study process in indefinite abeyance. Such a "remedy" would harm both project developers and the markets without serving any legitimate purpose. As the NYISO has explained in its preliminary

[3] Capitalized terms that are not otherwise defined herein shall have the meaning specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") and if not defined therein, they shall have the meaning specified in the NYISO's Open Access Transmission Tariff ("OATT").

answers in this proceeding,[4] and reiterates below, Complainants' repeated suggestions that such an extraordinary Commission action is necessary to prevent irreparable harm to themselves or the market are wrong. Complainants also have not justified the equally extraordinary step of shifting market power mitigation responsibilities from the NYISO to the independent market monitoring unit ("MMU") in contravention of the NYISO tariff and Commission precedent.

Finally, the Complainants must not be permitted to usurp the roles of the NYISO and the MMU in detecting and mitigating market power in the New York City ("In-City") capacity market. Allowing them to do so would create a real risk that economic new investments would be discouraged.

I. EXECUTIVE SUMMARY

The Complaint must be denied because Complainants have not met their burden of proof under FPA Sections 206 and 306 or Commission Rule 206. Instead of presenting clear evidence of NYISO tariff violations that have resulted, or will result, in actual harm to them, Complainants rely on incorrect and speculative assertions and assumptions, as well as mischaracterizations of the Services Tariff and the NYISO's own statements. Many of their arguments must also fail because they are collateral attacks on earlier Commission orders.[5] The critical flaws underlying Complainants' various claims are summarized below and then refuted in detail in subsequent sections of this Answer.[6]

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[4] *See Preliminary Answer of the New York Independent System Operator, Inc.* (June 6, 2011) at 2-3, *Answer to the Amendment to Complaint and Request for Shortened Comment Period (June 17, 2011)* at 2-3, Docket No. EL11-42-000.

[5] See Section III.B below.

[6] In addition, Attachment 1 to this Answer addresses the formal requirements of Commission Rule 213(c)(2) in order to ensure the NYISO's compliance with them.

Complainants claim that the NYISO's implementation of the "In-City Buyer Side Mitigation Measures"[7] is not governed by objective tariff criteria and lacks sufficient transparency. The truth is that Attachment H to the Services Tariff includes detailed rules governing each facet of the NYISO's administration of the In-City Buyer Side Mitigation Measures.[8] The NYISO has provided market participants with more information regarding its implementation of those rules than Attachment H and Commission policy require. At the same time, it has appropriately limited access to information that, if shared publicly, would violate tariff and Commission policy requirements that protect confidential information.[9] The NYISO affords similar protection for confidential information when it administers its supplier-side capacity mitigation measures. Complainants have never objected to that treatment and have provided no basis for weakening the protection of their competitors' confidential information.

The NYISO has not cut-off further communication with market participants regarding its administration of the In-City Buyer Side Mitigation Measures. To the contrary, the NYISO has told stakeholders that it intends to continue the discussion on a number of issues, including two that receive considerable attention in the Complaint. The NYISO told stakeholders, prior to the Complainants' filing, that it was evaluating the question of whether Offer Floors, once determined, should escalate, and would follow up on that question with stakeholders.[10] The Complaint obfuscates this issue unnecessarily by incorrectly asserting that the NYISO does not

[7] The NYISO uses "In-City Buyer Side Mitigation Measures" to refer to the currently-effective buyer-side capacity market mitigation provisions in Attachment H to its Services Tariff, including those that were accepted by the Commission in its series of orders in Docket ER10-3043.

[8] *See* Sections III.C.1.a.i and iii below.

[9] *See* Sections III.C.1.a.ii and iii below.

[10] *See* Sections II.D and III.C.5.b below.

account for inflation when calculating the Offer Floor. In fact, the NYISO does.[11] In any event, the NYISO's view is that providing for the escalation of Offer Floors after they are determined, could improve the In-City Buyer Side Mitigation Measures. The Services Tariff, however, currently does not authorize escalation of an established Offer Floor, specify the escalation rate, or provide any other guidance as to how escalation should be performed. The NYISO believes that the necessary design elements should and can be developed through a process that considers stakeholder input.[12]

Similarly, the NYISO told stakeholders, prior to the Complainants' filing, that it intends to provide a numerical example to demonstrate how the buyer-side Offer Floor is calculated. The NYISO disagrees with certain aspects of the "benchmarking analysis" that Complainants assert the NYISO must be compelled to undertake, including their notion that it must be done before the In-City Buyer Side Mitigation Measures are implemented. Nevertheless, the NYISO is striving to provide stakeholders with a useful illustration in response to Complainants' May 2011 request for an analysis. The NYISO intends to do so as soon as reasonably practicable given the limitations on its resources.[13]

Complainants assert that greater transparency is needed so that they may review the NYISO's implementation of the In-City Buyer Side Mitigation Measures in order to ensure that the NYISO has complied with its tariff. The role that Complainants envision for themselves is neither necessary nor appropriate. It is unnecessary because Potomac Economics, Ltd., the independent MMU for the NYISO, already works closely with the NYISO and assists it in its implementation of the In-City Buyer Side Mitigation Measures, to the extent permitted by

[11] *See* Section III.C.2 below.

[12] *See* Section III.C.5.b below.

[13] *See* Section II.D below.

Commission Order No. 719 and the Services Tariff. If the NYISO were to fail to follow its tariff, the MMU is responsible for referring the matter to the Commission.[14] The MMU has authorized the NYISO to state that it has not, to date, identified any tariff compliance concerns with respect to the NYISO's implementation of the In-City Buyer Side Mitigation Measures. Complainants are therefore in effect arguing that the Commission must allow them to second guess both the NYISO's and the MMU's determinations.

Complainants' proposal to appoint themselves as *de facto* market monitors is also inappropriate because they lack the independence to be entrusted with market monitoring and market power mitigation responsibilities. As owners of substantial In-City generating resources, Complainants have a clear economic incentive to try to discourage new entry that might compete with them, regardless of whether that entry would be economic. Providing greater "transparency" in order to enable Complainants to play a larger role in the market monitoring function, would thus likely discourage new entry, not encourage it as they claim.[15]

Complainants also accuse the NYISO of "cherry-picking" the rules and inputs used under the In-City Buyer Side Mitigation Measures. Their assertion is exactly backwards. The NYISO is following the Services Tariff's requirements. Where Commission-accepted tariff language directs the NYISO to use "currently effective" values, that is what the NYISO does.[16] Conversely, where Commission-accepted language requires the use of "reasonably anticipated" values, the NYISO will use them.[17] It is Complainants that would have the NYISO ignore its

[14] *See* Section II.C and below

[15] *See* Section III.C.4.a below

[16] *See* Section III.C.4.a below

[17] *See* Section III.C.4.b below

tariff and use not yet accepted ICAP Demand Curve values that would favor their own financial interests.

Complainants fail to demonstrate that the market, or they themselves, would actually be harmed even if the NYISO were to make the implementation errors that they allege (which the NYISO does not concede.) Even if one were to accept all of the Complaints' claims, the combined impacts of the NYISO's supposed "errors" would not harm either Complainant that has disclosed that it has a project that is currently being examined under the In-City Buyer Side Mitigation Measures**.**

Complainants have failed to show that the NYISO's practices are in any way inconsistent with the Services Tariff or Commission policy. They have presented no evidence demonstrating that the tariff is not just and reasonable. They have only offered general concepts for alternative tariff provisions, and they have not even demonstrated that those concepts are just and reasonable. They have therefore not met the "dual burden" of proof to justify tariff revisions under Section 206 of the FPA. The mere fact that a NYISO determination results in lower revenues for Complainants, or in new capacity resources clearing the market before those owned by Complainants, does not mean that the determination is an "error," a tariff violation, or a justification for revising the Services Tariff.

Complainants also have not presented any evidence that would justify granting the other forms of extraordinary relief that they seek. For example, they have not demonstrated that there is any need to hold the NYISO's Class Year Facilities Study process in abeyance.[18] They have not even acknowledged the harm that this "remedy" would cause. Similarly, they have fallen far short of justifying the extraordinary measures of: (i) transferring the responsibility for mitigation

[18] *See* Section III.E below.

functions that the NYISO is responsible for performing under its tariff to the MMU;[19] or (ii) overriding the MMU's discretion to determine what issues warrant its attention and how it should use its resources. Their requests also would violate the existing Services Tariff.

In short, Complainants have not met their burden of proof and have failed to show that the NYISO: (i) is calculating Unit Net CONE in a manner that is inconsistent with the Services Tariff or Commission precedent;[20] (ii) is impermissibly making mitigation determinations using "outdated" ICAP Demand Curve and Mitigation Net CONE (or Net CONE) data;[21] (iii) "does not plan to adjust Offer Floors;"[22] (iv) has erred to the extent that it has not followed PJM's example of using the exact same assumptions for ICAP Demand Curve and mitigation purposes;[23] or (v) would fail to review contracts that are necessary for it to make reasonable Unit Net CONE determinations.[24]

Accordingly, there is no basis for the Commission to: (i) require the NYISO to "correct" supposed "flaws" in its implementation of the In-City Buyer Side Mitigation Measures or to "clarify" the tariff in order to make such "corrections;"[25] (ii) direct the NYISO to file tariff revisions "clarifying" how the mitigation and Offer Floor determinations are made in order to establish more objective tariff criteria or greater transparency;[26] (iii) order the NYISO to file a "benchmarking analysis;"[27] (iv) compel the MMU to file a report regarding the NYISO's

[19] *See* Section III.G below.

[20] *See* Section III.C.2 below.

[21] *See* Section III.C.4 below.

[22] *See* Section III.C.2 below.

[23] *See* Section III.C.3 below.

[24] *See* Section III.C.6 below

[25] *See* Sections III.B,C and D below.

[26] *See* Section III.C.1 below.

[27] *See* Sections II.D and III.C.1.b below.

implementation of the In-City Buyer Side Mitigation Measures;[28] or (v) "consider" whether the MMU should implement the In-City Buyer Side Mitigation Measures in the future.[29] Instead, the Commission should deny the Complaint in its entirety.

II. BACKGROUND

A. Overview of the In-City Buyer Side Mitigation Measures

The In-City capacity markets are organized around a series of NYISO-administered ICAP auctions. Because the In-City capacity market has traditionally been highly concentrated, it has been subject to market power mitigation measures since the NYISO's inception in 1999.[30] The current capacity mitigation regime was developed through multiple rounds of proceedings before the Commission[31] beginning in 2007, and went into effect in 2008. The mitigation measures include an ICAP Spot Market Auction offer cap and a must-offer provision to mitigate withholding by Pivotal Suppliers of ICAP. The In-City ICAP mitigation measures also include a set of buyer-side mitigation measures which are designed to guard against the exercise of buyerside market power in the In-City ICAP markets.[32]

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[28] *See* Section III.G below.

[29] *See* Section III.G below.

[30] *See Consol. Edison Co. of New York, Inc.,* 84 FERC ¶ 61,287 (1998) (accepting a $105/kW-year offer and revenue cap on ICAP sales by New York City generators divested by Consolidated Edison Company of New York, Inc.)

[31] The existing mitigation structure was most recently addressed by the Commission in its May 2010 Order, *New York Independent System Operator, Inc.,* 131 FERC ¶ 61,170 (2010), and in its subsequent orders addressing the NYISO's proposed enhancements to the In-City Buyer Side Mitigation Measures, *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 (2010) (November 2010 Order); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,083 (2011); *New York Independent System Operator, Inc.*, Letter Order, Docket No. ER10-3043-003 (March 17, 2011).

[32] *Id.* at P 2.

Unless exempt from the buyer-side mitigation measures, ICAP Suppliers (other than Special Case Resources ("SCRs"))[33] that enter the In-City Capacity market are required to offer UCAP into the ICAP Spot Market Auctions and must do so at a price no lower than the Offer Floor. An ICAP's Supplier's Offer Floor is set at the lower of Unit Net CONE or 75% of Mitigation Net CONE.[34] To prevent circumvention of the Offer Floor, capacity that is subject to an Offer Floor can only be offered into the ICAP Spot Market Auction;[35] it cannot be certified towards bilateral capacity transactions or sales in a Capability Period or Monthly Auction. The Offer Floor is thus a deterrent to uneconomic entry because an Installed Capacity Supplier that is subject to it would only receive capacity revenue in months when its Offer Floor was below the ICAP Spot Market Auction Market-Clearing Price. A new Installed Capacity market entrant is exempt from the Offer Floor if it passes the NYISO's mitigation exemption tests set forth in Services Tariff Attachment H.

B. Recent Enhancements to the In-City Buyer Side Mitigation Measures

[33] The Complaint, with the sole exception of the Affidavit of William Hieronymus ("Hieronymus Affidavit") does not raise issues regarding mitigation measures applicable to Special Case Resources ("SCRs") or the NYISO's implementation thereof. Nor does it appear to propose to modify existing, or propose new, provisions applicable to SCRs. Accordingly, references herein to Installed Capacity Suppliers, the mitigation of capacity suppliers, and similar terms do not refer to SCRs. However, should Complainants argue, or the Commission consider Complainants' statement regarding SCRs, through Mr. Hieronymus, to be at issue in this proceeding, the NYISO denies any such claim and wioud respectfully seek to supplement this Answer. *See* Hieronymus Affidavit at 13 (referring to "the substantial amount of demand-side capacity and capacity bids from renewable resources that may be subsidized or compelled to be built for public policy reasons.")

[34] The NYISO proposed to add "Mitigation Net CONE" to the definition section of Attachment H in its compliance with the Commission's May 20, 2010 order, *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 (2010) ("May 2010 Order"). *See* New York Independent System Operator, Inc., *Compliance* Filing, Docket No. ER10-2210-000, *et al* (August 12, 2010) ("August 2010 Compliance Filing"). The August 2010 Compliance Filing is currently pending before the Commission; however, the Commission has already accepted the use of the term "Mitigation Net CONE" in Attachment H. *See* Services Tariff Attachment H Section 23.4.5.7.3.2.

[35] *See* Attachment H, Section 23.4.5.7.1. The Services Tariff provides that an Installed Capacity Supplier subject to an Offer Floor shall cease to be subject to it for that portion of its UCAP that has cleared for any twelve, not-necessarily consecutive, months (the "Duration Rule"). *See* Services Tariff Attachment H Section 23.4.5.7.

Prompted by its experience implementing the In-City buyer-side mitigation measures, and by stakeholder comments, the NYISO began exploring possible improvements to the measures in 2009. The effort became more focused after the MMU issued its *2009 State of the Market Report*[36] in April 2010. That report concluded that the In-City supply-side mitigation measures appeared to be working well but that it was too early to evaluate whether the buyer-side Offer Floor had been effective. The MMU noted that it had reviewed the "detailed thresholds and testing procedures used to implement the offer floor" and recommended that the NYISO review "the thresholds and procedures used to implement the offer floor, and identify those that may: cause uneconomic entry to be exempted from the floor; or erect an inefficient barrier to economic entry."[37]

Subsequently, in May 2010, the NYISO proposed a number of improvements to the In-City buyer-side mitigation measures for stakeholders to consider.[38] Over the course of several months, and six stakeholder meetings, the NYISO's preliminary suggestions evolved into proposed tariff enhancements that were approved in its stakeholder process and filed under Section 205 of the FPA on September 27, 2010.[39] Notwithstanding Complainants' suggestions

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[36] *See* Potomac Economics, LLC, April 2010. 2009 State of the Market Report. Available at: *http://www.nyiso.com/public/webdocs/documents/market_advisor_reports/2009/2009_NYISO_SOM_Final_4-30-2010.pdf*.

[37] *Id.* at 180.

[38] By contrast, the NYISO did not propose any changes to its supplier-side capacity mitigation rules, in part because the MMU did not recommend any such changes.

[39] *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 (September 27, 2010) ("September Filing") The September Filing was clear that "any exemption or Offer Floor determinations" under the version of Attachment H effective prior to the effectiveness of the revisions that it proposed "would not be altered or affected by the amendments proposed in this filing." *See* September Filing at 14. *See also*, *Request for Leave to Answer and Answer of the New York Independent System Operator, Inc.*, filed November 1, 2010 ("November Answer") at 14, n. 39, Docket No. ER10-3043-000.

to the contrary,[40] the enhancements were carefully designed to "increase transparency to all Market Participants, provide potential new entrants with greater certainty at the time that they must make critical investment decisions, and prevent new entrants from facing either under- or over-mitigation while protecting the market from the consequences of both."[41] With the single exception of the proposed duration for which a mitigated Installed Capacity Supplier would be subject to the Offer Floor, the MMU supported the NYISO's entire package of proposed enhancements finding that they "improved clarity to how the various tests will be applied and how the mitigation will be implemented."[42]

On November 26, 2010, the Commission issued an order that generally accepted the NYISO's proposed tariff enhancements, subject to conditions.[43] Contrary to Complainants' mischaracterizations, the November 2010 Order was not a rebuke to what they depict as a NYISO attempt to "significantly cut short the duration of the Offer Floor" in order to "water down" the In-City buyer-side mitigation measures.[44] In reality, the Commission rejected one component of the NYISO's proposed enhancements to the Offer Floor duration rule[45] (the

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[40] *See* Initial Complaint at 22-23.; Younger Affidavit at 9-12, 30-31.

[41] *See* September Filing at 1.

[42] *See* Motion to Intervene and Comments of the New York ISO's Market Monitoring Unit filed October 22, 2010, Docket No. EL10-3043-000, at 2. Complainants are therefore at best disingenuous when they state that the September 27 Filing was made "over the objections of .the MMU..... " *See* Initial Complaint at 15.

[43] *See* November 2010 Order at PP 49-52, 71-74. The aspects of the proposed tariff enhancements that the November 2010 Order required the NYISO to revise or further justify are not the subject of the Complaint: *e.g.,* the rules governing the duration of mitigation and the application of the previously effective "reasonably anticipated entry date rule" when examining a project in a Class Year prior to 2009 for which a mitigation determination had not yet been issued.

[44] Initial Complaint at 15. Indeed, the NYISO proposed, over the objections of load interests, to maintain a then-existing tariff rule establishing a three year minimum Offer Floor duration. That proposal, which is hardly consistent with Complainants' misleading depiction of the NYISO's purpose, was rejected by the November 2010 Order. *See* November 2010 Order at P 51.

[45] *See* Services Tariff Attachment H Section 23.4.5.7.

"Duration Rule") because it concluded that an alternative to the NYISO-proposed rule would, with one modification, be superior.[46] Complainants' objections to other NYISO-proposed enhancements were generally rejected and the NYISO's objective of fostering greater transparency, certainty, and consistency with other rules was satisfied. Complainants submitted a request for rehearing of the November 2010 Order, which is still pending, but which raised only relatively narrow issues.[47]

When it made the September Filing, the NYISO indicated that action on identified additional potential enhancements to the In-City Buyer Side Mitigation Measures was being deferred to allow more time for further stakeholder consideration, in some cases as a result of stakeholder votes[48] expressly asking the NYISO to do so, and in others, as a result of NYISO

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[46] *See* November 30 Order at P 48 ("Under the current rules, mitigation will be lifted after the later of when the capacity surplus (included that created by the new entry) is expected to be absorbed (based on historical load growth) or three years. NYISO proposes to maintain this approach in its first methodology option in its proposed Services Tariff section 23.4.5.7(a), but proposes to use forecasted instead of historical load growth in the determination ..... We find that, although the capacity absorption concept that we previously accepted conceptually is a reasonable one for determining when new resources are likely to become economic, actually observing that the new capacity is accepted in the market at a price approximating its cost of entry, as reflected in NYISO's second duration methodology in proposed section 23.4.5.7(c) discussed below, is not subject to the ambiguities and complexities inherent in a method that relies on forecasts of load growth and other factors to estimate when the absorption of surplus capacity has occurred. Therefore, we reject the first offer floor duration methodology in proposed section 23.4.5.7(a).")

[47] *See Request for Clarification or in the Alternative Rehearing of the New York City Suppliers,* Docket No. ER10-3043-002 (December 22, 2010) (seeking clarification or rehearing with respect to the timing of exemption testing.)

[48] The NYISO's stakeholder Business Issues Committee voted to hold additional discussions regarding the appropriate treatment of facilities that are "repowered" or that uprate their Capacity. *See <http://www.nyiso.com/public/webdocs/committees/bic/meeting_materials/2010-08-04/Final_Motions_revised.pdf>* (Motions 4 and 4A). The stakeholder Management Committee likewise voted for additional discussions regarding the timing and manner of Offer Floor determinations for a facility initially found to be only partially deliverable (and therefore initially permitted to sell only the deliverable portion of its Capacity) that subsequently seeks permission to sell additional capacity. *See <http://www.nyiso.com/public/webdocs/committees/mc/meeting_materials/2010-08-25/082510_final_Motions.pdf>* (Motion 5).

Board of Directors' decision.[49] As with any other tariff revision proposal, the NYISO will present it first to stakeholders for their review and vetting at ICAP Working Group meetings, and if there is support for a proposal, present it for a vote in the NYISO's stakeholder process.

C. The NYISO's Administration of the In-City Buyer-Side Mitigation Measures

The NYISO diligently fulfills its market monitoring and mitigation responsibilities, including those regarding the In-City Buyer-Side Mitigation Measures. The NYISO recognizes the necessity of both supply-side and buyer side mitigation rules and is not an "enthusiastic proponent"[50] of one relative to the other. There is no evidence or precedent suggesting that the NYISO is more diligent-, or aggressive in its implementation of supplier-side measures. As noted above, the NYISO proposed enhancements to the buyer-side measures, but not its supplier-side capacity mitigation rules, because there was a clear basis for improving the former but not the latter. Further, when the Commission asked the NYISO to evaluate the narrowing of the supplier-side capacity mitigation exemption, the NYISO conducted an analysis and concluded that it should not be narrowed.[51] The NYISO has pursued, and will continue to pursue, the design of well-balanced rules. It has implemented, and will continue to implement, the rules impartially.

The NYISO strives to implement all of its mitigation measures with as much transparency as reasonably practicable, consistent with its obligation to preserve the confidentiality of a supplier's commercially sensitive information, the limits on its resources, and the dictates of administrative efficiency. Balancing the need for transparency against these other

[49] The Board of Directors instructed the NYISO to explore several further possible enhancements to the In-City Buyer-Side Mitigation Measures with stakeholders. *See* Section IV, below.

[50] *See* Initial Complaint at 2

[51] *See* August 2010 Compliance Filing at 15-16.

factors is not the simple task that Complainants would have the Commission believe it is. The importance of both promoting transparency and protecting the confidentiality of commercially sensitive information is well established.[52]

The NYISO tariffs likewise include a number of provisions that require it to preserve confidentiality, regardless of whether the "owner" of the information is a proposed new entrant or an incumbent generator.[53] The NYISO's protection and treatment of confidential information is evidenced by: (i) its practices regarding the determination of Going Forward Costs;[54] (ii) and the manner in which it seeks confidential treatment for, and masks information regarding, potential capacity withholding behavior.[55] Likewise, the NYISO was not required to disclose whether or when it made a determination, and if so, whether a proposed project was determined to be exempt or subject to an Offer Floor, under the version of the buyer-side mitigation tariff provisions that were in effect prior to the November 2010 Order. Therefore, it would not have disclosed such information. To the best of the NYISO's knowledge, no party sought to include in the previously effective version of the NYISO's buyer-side mitigation tariff provisions a provision that would require the disclosure of such information.

There can be no question that the entrant-specific cost information for Offer Floor and mitigation exemption analyses warrants confidential treatment.[56] Even Complainants do not claim a right to access such information or that it is needed even under their concept of what

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[52] *See, e.g.,* Order No. 719 at P 424.

[53] *See, e.g.,* sections 30.6.2.1, 30.6.4of the NYISO Market Monitoring Plan, Article 6 of the Services Tariff, and the Code of Conduct rules in NYISO OATT Attachment F, Section 12.4.

[54] *See* Section III.C.1.a.iibelow.

[55] *See New York Independent System Operator, Inc.,* 129 FERC P 61,103 (2009). As an example of the NYISO's treatment of confidential information, see the NYISO's Annual Report on ICAP Demand Curves and New Generation Projects, Docket Nos. ER01-3001-000 and ER03-647-000, filed December 20, 2010, at 2.

[56] *See, e.g.,* Order No. 719 at PP 423-24.

transparency entails.[57] Indeed, they profess that they "are not seeking access to confidential information that new entrants provide to the NYISO in the course of the mitigation process[58] or the "disclosure of confidential cost data about any particular new entrant."[59]

The NYISO's tariff establishes objective mitigation criteria that constrain its discretion. Far from seeking to expand that discretion, the September Filing's enhancements to the In-City Buyer-Side Mitigation Measures further limited it by adopting more detailed language and specifying inputs and parameters for the individual unit exemption and Offer Floor determinations. For example, the revisions specify the timing of the examination[60] and specific inputs into the forecast.[61]

Moreover, the NYISO does not implement the In-City Buyer-Side Mitigation Measures in isolation. Attachment H provides that "the ISO shall seek comment from the Market Monitoring Unit on matters relating to the determination of price projections and cost calculations."[62] The scope of the MMU's role, and the appropriateness of the various responsibilities that it and the NYISO's internal Market Mitigation and Analysis Department ("MMA") perform was reaffirmed in the Commission proceeding on the NYISO's Order No. 719 compliance filing.[63] The Affidavit of Joshua A. Boles that is Attachment 2 to this filing (the

[57] *See* Initial Complaint at pgs. 22-25. The NYISO understands that its concern for confidentiality with respect to buyer-side mitigation measures is not unique among ISOs/RTOs.

[58] Initial Complaint at 46.

[59] Initial Complaint at 45.

[60] Attachment H Section 3.4.5.7.3.3.

[61] Attachment H Section 23.4.5.7.3.2.

[62] Attachment H Section 23.4.5.7.3.3.

[63] *See New York Independent System Operator, Inc.,* 129 FERC ¶ 61,164 (2009); *order on reh'g., New York Independent System Operator, Inc.,* 131 FERC ¶ 61,114 (2010), *order denying reh'g. and granting clarification*, *New York Independent System Operator, Inc.,* 133 FERC ¶ 61,123 (2010).

"Boles Affidavit") confirms that the NYISO fulfills its tariff obligations.[64] The NYISO works closely with the MMU as part of its effort to ensure that all assumptions regarding CONE, energy and ancillary services net revenues, and capacity prices are reasonable and that the resulting exemption determinations are sound. If the MMU were to ever have any concerns with the NYISO's approach it would have all of the information needed, and every opportunity, to raise them with the NYISO or with the Commission.

Complainants' attack on the NYISO's practices is another facet of their untimely effort to challenge the Commission's determinations in the November 2010 Order. In spite of their submission of multiple pleadings[65] on the proposed tariff revisions, including a petition for rehearing, the Complaint represents the first time that Complainants have challenged the reasonableness of the Attachment H provisions delineating what and when information must be provided.[66] As discussed below, this aspect of the Complaint is part of a broader collateral attack on earlier Commission orders. It is also an attempt to circumvent the NYISO stakeholder process to the extent that they seek to further increase - beyond the level of detail added by the September Filing - Attachment H's requirements regarding the amount and timing of information disclosures.

D. The NYISO Responded Reasonably to Complainants' Questions Regarding the NYISO's Implementation of the In-City Buyer-Side Mitigation Measures

[64] *See* Boles Affidavit at P 12

[65] Complainants have thus filed a total of eight pleadings addressing the In-City Buyer Side Mitigation Measures.

[66] The Initial Complaint does not accuse the NYISO of violating any of the other In-City Buyer Side Mitigation Measures or its market monitoring related tariff provisions. Nor does it appear to make any challenge related to the buyer-side capacity mitigation measures that were in place prior to the November 27, 2010 effective date of the tariff enhancements accepted by the November 2010 Order.

As is discussed in Section ___, below, and in earlier NYISO filings,[67] considerations regarding commercially sensitive information and a Commission determination on certain proposed tariff revisions necessitated some delay in the NYISO's response to the questions that Complainants reference in the Complaint. Although the NYISO responded to all of Complainants' questions, the confidential nature of certain information prevented the NYISO from answering all of Complainants questions to their satisfaction. Nevertheless, the NYISO has provided more information than is required under its tariffs and will provide still more in the future as it has stated it would do.

The NYISO informed stakeholders that it would be continuing the discussion of implementation questions involving the In-City Buyer Side Mitigation Measures. Specifically, with respect to the question of whether the Offer Floor, once determined, should be escalated, the NYISO informed stakeholders at the May 16, 2011 ICAP Working Group meeting that it was evaluating the issue and would communicate further with them. The NYISO also informed stakeholders at that same meeting that it would review and respond to the request for a "benchmarking analysis," which was first made at the May 2, 2011 ICAP Working Group meeting. At the May 16, 2011 ICAP Working Group meeting, the NYISO informed stakeholders it would provide a numerical example to demonstrate how the buyer-side Offer Floor is calculated. The NYISO indicated the example would be prepared when staff time permitted given other obligations in relation to the ICAP market. Complainants' decision to file the Complaint before the NYISO could respond does not mean that the NYISO will not provide the analysis in the future.

[67] *See Request for Leave to Answer and Answer o the New York Independent System Operator, Inc.*, Docket No. ER10-3043-002, filed January 7, 2011 and *Request for Leave to Answer and Answer o the New York Independent System Operator, Inc.*, Docket No. ER10-3043-004, filed March 14, 2011.

The amount and type of information the NYISO is to make available, and the date by which it is to be made available, were addressed by the September Filing. These issues were vetted in the stakeholder process that culminated in that filing. Prior to the Commission's acceptance of the September Filing, the tariff did not require that the NYISO disclose any information to stakeholders regarding the administration of the In-City buyer-side mitigation exemption and Offer Floor examinations.[68]

The NYISO has thus made available to Complainants and all stakeholders more information than is required, and it will provide additional information. There is no need to revise the tariff to require still greater disclosures. As discussed below and in the Boles Affidavit, Complainants are not disinterested, independent entities but market participants that have In-City capacity resources.[69] They do not have a legitimate need for more information to "confirm" the NYISO's mitigation determinations because they are not, and should not, be permitted to function as "extra" market monitors.

III. ANSWER

A. COMPLAINANTS HAVE NOT MET THEIR BURDEN OF PROOF UNDER RULE 206 AND SECTIONS 206 AND 306 OF THE FPA

[68] *See* Boles Affidavit at P 36

[69] As Mr. Boles notes, the NYISO prepared an additional exhibit to his Affidavit which addressed the extent to which Complainants would be expected to benefit from the exclusion of new entrants into the New York City capacity market. *See* Boles Affidavit at __. The NYISO has chosen not to submit this exhibit because doing so would result in the disclosure of Complainants' confidential information. The NYISO does not believe that it is necessary to make such a disclosure, even recognizing that it could be limited to the non-competitive duty personnel of parties that signed a protective agreement, because there is more than a sufficient basis in the record for dismissing the Complaint. The NYISO is therefore prepared to have this Answer be considered by the Commission without using the additional exhibit. Nevertheless, if the Commission were to request the information, or if the Complainants.were to consent to its disclosure (perhaps subject to a protective agreement), the NYISO would submit the additional evidence along with an appropriate form of protective agreement.

The Commission has repeatedly held that complainants bear the burden of proof under Rule 206, which governs complaints submitted under both Sections 206 and 306 of the FPA. Complainants must offer "clear and convincing" evidence to support their requests for relief.[70] Among other things, Rule 206 requires complainants to: (1) "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;" and (2) "explain how the action or inaction violates applicable statutory standards or regulatory requirements."[71] The Commission rightly looks with disfavor on "poorly supported" complaints based on nothing but speculation and "broad allegations" of violations.[72] To the extent that a complaint seeks to compel changes to a respondent's tariff it must also satisfy the "dual burden" established under Section 206 of the FPA. Specifically, the complainant must demonstrate both that the existing tariff provision is unjust and unreasonable and that the revisions complainant proposes are just and reasonable.[73]

Complainants have failed to satisfy the mandated burden of proof or even meet the informational requirements. The Complaint offers nothing but speculation, mischaracterization, and inaccurate assertions to support its claims. For example, as discussed in Section III.C.1.c,

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[70] *See Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc.,* 131 FERC ¶ 61,205 at P 19 (2010) ("NRG, as the complainant, bears the burden of proof in this case, but failed to demonstrate with clear and convincing evidence that it met that burden.")

[71] See 18 C.F.R. 206(b)(1) and (2) (2011).

[72] *See, e.g.*, *Arena Energy, LP v. Sea Robin Pipeline Company, LLC*, 133 FERC ¶ 61,140, at P 59 (2010) (denying a request to remove provisions from a tariff because the claims regarding the misuse of certain tariff provisions were speculative and unsupported and the tariff was not shown to be unjust and unreasonable); *Public Service Company of New Mexico*, 95 FERC ¶ 61,481, at 62,715 (2001) (rejecting a claim that Public Service Company of New Mexico (PSNM) will reap windfall profits because [it] will not likely lay off generation at times of over-deliveries as speculative and unsupported, because there was no showing that PSNM has engaged in such a practice historically and therefore such an argument has no merit); *Trans-Allegheny Interstate Line Company*, 119 FERC ¶ 61,219, at P 62 (2007) (finding that concerns over discrimination were unsupported and speculative, and there was no evidence that would cause the Commission to suspect that a holding company would favor one affiliate over another). (MORE)

[73] *Ark. PSC v. Entergy Corp*., 128 F.E.R.C. P61,020 at P 23 (2009) (footnotes omitted).

Mr. Hart's affidavit contains numerous inaccurate and misleading statements. The Complaint, and its supporting affidavits, repeatedly qualifies their assertions by noting that they are addressing assumptions and procedures that the NYISO "appears" to be following or supposedly "intends" to follow.[74] Complainants state that the NRG Companies' have experienced a lack of transparency in the NYISO's administration of the In-City Buyer Side Mitigation Measures without offering any evidentiary support.[75]

The Hieronymus Affidavit does not demonstrate that the In-City Buyer-Side Mitigation Measures are not just and reasonable. The Hieronymus Affidavit consists of generalized criticisms of the In-City ICAP market, which he incorrectly describes as being "systematically revenue inadequate as a result of exempting buyer-side sponsored units built before 2008 from mitigation"[76] This erroneous allegation of systematic revenue inadequacy is belied by the fact that there are five capacity projects that are proposed or that have begun construction in New York City,[77]while In-City retirements have been rare. Complainants' opinion that the New York City market is "systematically revenue inadequate" is also contradicted by Complainants' statements that two of them are seeking to invest in new In-City projects.

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[74] *See, e.g.,* Initial Complaint at 2, 4, 5, 35; Younger Affidavit at .

[75] *See* Initial Complaint at n. 61 (asserting with absolutely no support that "[t]he NRG Companies' experience with the NYISO's mitigation process in the course of developing the Berrians GT III project has similarly been characterized by a lack of transparency.")

[76] Hieronymus Affidavit at p. 5 If this statement were to be taken as true, then to address the rootcause, it would seem to follow s that Mr. Hieronymus would support eliminating the buyer-side mitigation exemption for Complainants' existing units because the construction of those units was sponsored by a buyer-side Load Serving Entity and the units were built before 2008.

[77] The 2011 Load and Capacity Data Report at Goldbook Table IV-1, p. 61 (commonly referred to as the "Gold Book", available at

<http://www.nyiso.com/public/webdocs/services/planning/planning_data_reference_documents/2011_GoldBook_Public_Final.pdf >

At the same time, Complainants' claim that 2,500 MW of new entry is about to be evaluated under the In-City Buyer Side Mitigation Measures, and their arguments based on that claim are speculative. There are a host of factors that could result in proposed projects never entering the capacity market. For example, a proposed project could decide not to accept its SDU and SUF project cost allocations. Complainants also simply assume that the cumulative impact of the "errors" they allege would be great enough to change the outcome of the NYISO's determinations. This assumption is not necessarily valid.[78]

Moreover, Complainants assume that none of the projects they include in their 2,500 MW entry estimate have already been analyzed under the previously-effective version of the buyer-side mitigation measures. Previous NYISO filings have clearly indicated that any such determinations would not be impacted by the tariff enhancements that were proposed in the September Filing and that are now part of the In-City Buyer Side Mitigation Measures.[79]

Because Offer Floor and mitigation exemption determinations are afforded confidential treatment, Complainants do not, and should not, have actual knowledge of the NYISO's determinations for other entities' projects. Complainants attempt to characterize the NYISO's protection of confidential information as evidence that its mitigation processes are impermissibly "opaque." They suggest that it would somehow be "patently unfair and unreasonable" if the

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[78] The additional confidential exhibit to the Boles Affidavit that is referenced above also addressed this point. As was noted above, however, the NYISO will not disclose this information unless it is requested by the Commission, or if the Complainants consent to disclosure subject to a protective agreement.

[79] *See* Proposed Enhancements to In-City Buyer-Side Mitigation Measures, Docket No. ER10-3043-000, filed September 27, 2010; Request for Leave to Answer and Answer of New York Independent System Operator, Inc., Docket No. ER10-3043-000, filed November 1, 2010. In addition, the In-City Buyer-Side Mitigation Measures prohibit retesting of projects for which a determination has been made except under the limited specified circumstances. *See* Services Tariff Attachment H Section 23.4.5.7.3.5.

NYISO were allowed to use its obligation to protect confidential information as a "defense" against the Complaint.[80] Such arguments are absurd and should be rejected by the Commission.

As discussed below , it is not reasonable to draw general inferences regarding the NYISO's interactions with each project, or the level of diligence that the NYISO applies to its examination of any project, based on the extent of its direct communications with an individual developer. Complainants resort to supporting their pleading with what they acknowledge and describe as "educated guesses" and concede that the allegations they have made against the NYISO may not reflect its actual practices.[81] There is nothing in the Amended Complaint that corrects these evidentiary deficiencies. Even Complainants' predictions regarding the timing of Class Year cost allocation determinations are highly speculative and, in one case, have already proven wrong.

Complainants have thus fallen far short of what Rule 206 requires. They have not even met the threshold requirement to identify an actual violation that has harmed them. Their case is still weaker to the extent that they seek tariff changes under Section 206. Complainant's admission that the alleged "problems" they perceive "stem not from the mitigation rules in the Services Tariff itself..... " but from supposed defects in the NYISO's implementation of them shows that they cannot meet the "dual burden" test for the simple reason that they do not demonstrate that the existing tariff is unjust and unreasonable. Complainants' one sentence suggestion "in the alternative" that if the NYISO's practices are found to be consistent with the tariff then the tariff should be changed to invalidate them, is obviously insufficient under Section 206.

[80] *See* Initial Complaint at n. 49.

[81] Initial Complaint at n. 46.

Finally, Complainants' citation of the Commission's market manipulation precedents[82] is misplaced. Those cases are irrelevant because Complainants have not claimed, and could not possibly show, that the NYISO's independent administration of its tariff amounts to market manipulation under Section 222 of the FPA.[83]

B COMPLAINANTS ARE IMPERMISSIBLY ATTEMPTING TO COLLATERALLY ATTACK EARLIER COMMISSION ORDERS

In addition to the Complainants' total failure to satisfy the burden of proof under Rule 206 and Section 206 of the Federal Power Act, the Complaint constitutes an improper collateral attack on, and untimely petition for rehearing of, two different series of Commission orders. Commission precedent does not allow collateral attacks on previous orders[84] or untimely requests for rehearing dressed in other guises.[85]

Presumably aware of these restrictions, Complainants contend that their Complaint "is narrowly focused on the defects in the NYISO's implementation of these rules, and is therefore outside the scope of the Docket No. ER10-3043 Proceeding."[86] That statement is contradicted by what the Complainants are actually attempting. First, by its very nature, the Complaint is a

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[82] Initial Complaint at 19 and n.51.

[83] Among other things, market manipulation claims require a demonstration that a party acted fraudulently or deceptively with the requisite degree of scienter. *See, e.g., Richard Blumenthal, Attorney General of the State of Connecticut, et al. v. ISO New England, Inc.,* 135 FERC ¶ 61,211 (2011). at PP 37, 39 (explaining that Section 222 of the FPA is governed by different standards, including the scienter requirement, than FPA sections 205 and 206).

[84] See, e.g., *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, *et al.,*134 FERC P 61,229 at P 15 (2011) ("[c]ollateral 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, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances).

[85] *See, e.g.,* Order No. 719-A at P 11 (rejecting request for clarification that the Commission deemed to be "in essence, an untimely request for rehearing.")

[86] Initial Complaint at 52.

collateral attack on previously-accepted tariff rules. Complainants assert that the tariff is susceptible to mis-implemenation and must therefore be revised. As discussed above, however, they articulate no genuine support for their suspicion that the NYISO has failed, or will fail, to faithfully follow the requirements of Attachment H and Commission policy. Second, they attempt to circumvent the NYISO stakeholder process to modify rules that were specifically vetted in it and were subsequently determined to be just and reasonable.[87] They attempt this despite the fact that the September Filing revisions added greater objectivity and transparency to the In-City Buyer Side Mitigation Measures.

1. The Complaint Is a Collateral Attack on Commission Orders Establishing the In-City Buyer-Side Mitigation Measures

The Complaint constitutes a collateral attack on the series of Commission orders that accepted the In-City Buyer-Side Mitigation Measures as part of the NYISO's Services Tariff.[88] The tariff's rules for performing exemption and Offer Floor determinations were vetted in the stakeholder process. Complainants appealed the stakeholder vote approving the rules to the NYISO's Board of Directors, and the Board denied their appeal. Complainants then filed two protests against the proposed rules with the Commission, and then filed a request for rehearing.

Complainants' attempt to raise these same issues yet again must therefore be rejected as an impermissible collateral attack.[89] Complainants also attack the Commission's acceptance of tariff provisions which specify the inputs the NYISO is to use when performing its exemption

[87] As discussed elsewhere in this Answer, the only market design component that was not vetted was the question of whether the Offer Floor, once established, should be escalated, and if so what rules should govern its escalation. However, Complainants do not propose a tariff provision (*i.e.*, the escalation factor, its parameters, or the mechanics), nor do they demonstrate that the In-City Buyer Side Mitigation Measures are unjust and unreasonable absent a provision by which an Offer Floor should be escalated.

[88] *See New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 (2010); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,083 (2011).

[89] *See* Request for Clarification or, in the Alternative, Rehearing of the New York City Suppliers, Docket No. ER10-3043-004, filed March 4, 2011.

and Offer Floor analyses. Those provisions will provide considerably increased transparency and objectivity over the measures that were effective prior to the November 2010 Order.

Complainants' collateral attack also encompasses the Duration Rule fashioned by the November 2010 Order.[90] They argue that the Offer Floor must move "in tandem with demand curves that are in place for any given month's Spot Market Auction."[91] Complainants are, in effect, attempting to revise the tariff so that entrants will be given a new Offer Floor each time the ICAP Demand Curves are reset. They would thereby effectively revise the Duration Rule, under which a new entrant that is not initially exempt from mitigation will cease to be mitigated to the extent that its capacity clears the market at the Offer Floor price for twelve not - necessarily-consecutive, monthly auctions.[92] The November 2010 Order gave no indication that the Duration Rule was meant to be impacted by changing Offer Floor values. Indeed, it seems impossible to square a continuously shifting Offer Floor with the November 2010 Order's dictate that "only the ***consistently-cleared*** portion of the capacity of a given resource over a total of 12 monthly auctions should have its offer floor mitigation lifted." (Emphasis Added). A test based on "consistent-clearing" would have no meaning if the Offer Floor that is used to determine whether a resource clears fluctuates over time. If Complainants objected to this feature of the Duration Rule, the proper course would have been for them to seek rehearing or clarification.

2. The Complaint Is an Impermissible Collateral Attack on the Commission's 2011 ICAP Demand Curve Reset Orders

[90] *See* November 2010 Order at PP 47-51.

[91] *See* Younger Affidavit at P 110. *See also* Younger at P 112, Initial Complaint at 36.

[92] *See* November 2010 Order at P 50.

The Complaint also collaterally attacks the series of orders in Docket No. ER11-2224 considering the NYISO's proposed revised ICAP Demand Curve, including orders specifying the timing of the NYISO's compliance filings.[93]

For example, Complainants allege that the NYISO did not comply with the Services Tariff because it is not applying an escalation factor to the "currently effective demand curves."[94] The "currently effective" ICAP Demand Curves do not include an inflation factor - as the Commission has explicitly stated;[95] therefore, it would be inappropriate for the NYISO to apply one. Thus, the Complaint is a collateral attack on the initial order as well as the order on rehearing.

Complainants also claim that NYISO's Class Year Facilities Study process, "and, correspondingly, the exemption and mitigation determinations" should be held in "abeyance" pending "Commission action on this Complaint and the NYISO's implementation of the final Demand Curves in compliance with Commission orders ..... "[96] Complainants thus are attempting to utilize this proceeding as an additional forum to have the NYISO adopt revised ICAP Demand Curves, and the escalation factor that might be applicable to them, in making its exemption and Offer Floor determinations. However, Complainants' request for revisions to the "currently effective demand curves" was already rejected. For example, the Commission denied Complainants' request for rehearing in which they requested that higher ICAP Demand Curves be established for the period prior to the implementation date of the revised ICAP Demand Curves that the Commission may approve in Docket No. ER11-2224. The Commission also

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[93] *See New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058, *order on reh'g.,*, 134 FERC ¶ 61,178, *order on reh'g.*, 135 FERC ¶ 61,170 (2011).

[94] *See* Initial Complaint at 29.

[95] *See* 134 FERC ¶ 61,178 at PP 14-15.

[96] Initial Complaint at 34.

rejected Complainants' attempts to persuade it to apply an escalation rate to the "currently effective demand curves." Complainants' seek to delay the Class Year Facilities Study process and the issuance of buyer-side mitigation determinations so that a higher ICAP Demand Curve, and a higher escalation rate, may be available to set a higher Mitigation Net CONE or a higher Offer Floor for a potential new entrant. This constitutes exactly the kind of self-interested selectiveness that they accuse the NYISO of engaging in.

C. COMPLAINANTS HAVE FAILED TO SHOW THAT THE NYISO HAS, OR WILL IN THE FUTURE, VIOLATE ITS TARIFF OR COMMISSION POLICY

1. The NYISO Has Satisfied the Commission's Requirements that Market Mitigation Be Conducted Pursuant to Objective Tariff-Based Criteria and in a Transparent Manner

Complainants wrongly suggest that the NYISO has made its Offer Floor and mitigation exemption calculations with insufficient transparency. Notwithstanding their colorful mischaracterizations, the NYISO has fully complied with its tariff and with Commission policy. In addition, the NYISO has also kept the commitment that it made in Docket No. ER10-3043 to respond to the Complainants' questions. Complainants have therefore not met their burden of proof, which requires that they demonstrate that the NYISO's implementation of the In-City Buyer-Side Mitigation Measures violates its tariff. Nor have they shown that the NYISO's is administering the In-City Market Mitigation Measures in a manner that is inconsistent with any Commission policy.

a. The NYISO's Administration of the In-City Buyer-Side Mitigation Measures Has Been and Is Consistent with Commission Policy and the Tariff

(i) The NYISO's Tariff Establishes Clear and Objective Criteria Governing the NYISO's Implementation of the In-City Buyer Side Mitigation Measures

Complainants suggest that the "NYISO has violated the Commission's policy requiring that mitigation determinations be made on the basis of transparent and objective tariff criteria (*i.e.,* rather than on the basis of unfettered discretion)"[97] The Commission has also been clear that market mitigation must be governed by objective tariff standards and that market monitors may not operate with unlimited discretion.[98]

The Commission has approved the allocation of responsibilities between the NYISO's MMA and the MMU as consistent with the requirements of Order No. 719.[99] Consistent with the Order No. 719 framework, the NYISO is ultimately responsible for the implementation of the In-City Buyer Side Mitigation Measures.[100] The MMU does not directly participate in their administration.[101] The MMU may, and does, assist the NYISO in its "efforts to develop, the inputs required to conduct mitigation ..... "[102] The MMU also performs its normal monitoring function with regard to the NYISO's implementation of the In-City Buyer Side Mitigation Measures. Thus, it reviews and evaluates the NYISO's "imposition of appropriate measures for

[97] Initial Complaint at n. 49.

[98] *See, e.g., Marketing Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC P 61,267, at P 5 (2005) (declaring that "ISO/RTOs may administer compliance with tariff provisions only if they are expressly set forth in the tariff" and "involve objectively identifiable behavior"); *PJM Interconnection, L.L.C.*, 119 FERC P 61,318, at P 180 (2007) (finding that "[b]ecause this discretion [with regard to the Minimum Offer Price Rule would allow the Market Monitor to use its sole judgment to determine inputs that can ultimately set the market clearing price, we reaffirm our determination that such discretion is not appropriate" and "[i]nstead of relying on the Market Monitor's discretion, objective criteria should be developed for use in such instances so that predictable results will emerge.")

[99] *See New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,225 (2010); 129 FERC ¶ 61,164 (2009).

[100] *See* NYISO Services Tariff, Attachment O, Section 30.8.3.

[101] *See* NYISO Services Tariff, Attachment O, Section 30.4.4 (specifying that the MMU "shall not participate in the administration of the ISO's Tariffs, except for performing its duties under this Attachment O.")

[102] *Id.*

the mitigation of market power" and would be responsible for reporting any failure by the NYISO to comply with the In-City Buyer Side Mitigation Measures.[103]

Accordingly, the NYISO's administration of the In-City Buyer-Side Mitigation Measures in no way resembles instances in which the Commission found that other ISOs/RTOs were conducting market mitigation without objective limitations. For example, the decisions cited in the Complaint as the basis for the policy against "unfettered discretion" involved an earlier PJM proposal to eliminate its "Minimum Offer Price Rule" ("MOPR") and leave buyer-side mitigation in PJM solely to the discretion of its Independent Market Monitor ("IMM"). In this case, the In-City Buyer-Side Mitigation Measures provide for the NYISO a detailed set of rules that establish objective criteria governing exemption and Offer Floor determinations.

(ii) The NYISO Has More than Satisfied Tariff and Commission Requirements Regarding the Transparency of Market Power Mitigation Measures

Commission policy favors market transparency so long as confidential information is protected. As discussed above, the NYISO's tariffs also require it to protect confidential information.

The In-City Buyer-Side Mitigation Measures describe the information that the NYISO is required to disclose and the timing of the disclosure.[104] The NYISO more than satisfied these requirements by posting a spreadsheet including all of the required information on November 12, 2010,[105] which it updated and reissued on June 8, 2011, before the anticipated Initial Decision

[103] *See* NYISO Services Tariff, Attachment O, Section 30.1.1.

[104] *See* Services Tariff Attachment H Section 23.4.5.7.3.2.

[105] *See* < http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/In-City_ICAP.pdf>.

Period of 2009 and 2010 Class Years,[106] again exactly as required by Attachment H.[107] The spreadsheet also delineates how the NYISO computes certain inputs. The NYISO also provided a narrative description, in writing and orally at the May 2, 2011 and May 16, 2011 ICAP Working Group meetings, to stakeholders, as further described below and in the Boles Affidavit. These additional efforts went beyond what is required by the NYISO tariffs.

The tariff provisions establishing the In-City Buyer Side Mitigation Measures likewise do not require the NYISO to inform stakeholders of exemption and Offer Floor determinations made for other entities. Treating that information as confidential is consistent with the NYISO's approach to Going Forward Costs. Establishing Going Forward Costs is very similar to a buyer-side mitigation exemption or Offer Floor determination in that the process sets a parameter for a mitigated Installed Capacity Supplier's offers into the ICAP Spot Market Auctions.[108] Going Forward Costs are comprised of data similar to those used to determine a project's Unit Net CONE.[109] The NYISO treats as confidential and does not disclose its determination of an Installed Capacity Supplier's Going Forward Costs - or even the fact that a Going Forward Cost determination has been requested or made. To the NYISO's knowledge, Complainants have never objected to the NYISO's confidential treatment of that information.

Incumbent generators have previously requested that that the NYISO not disclose information regarding potential withholding behavior. The NYISO seeks to protect such

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[106] As discussed in Section E, the NYISO had expected the Initial Decision Period to commence on June 9, 2011 because the Class Year Facilities Studies were on the Operating Committee agenda for that date.

[107] *See* < http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/In-City_ICAP_Buyer-side_Mitigation_Test_Data.pdf>.

[108] *See* Attachment H §23.4.5.2.

[109] *See* Attachment H§23.2.1.

information, and data from which confidential information could be derived, in its annual capacity withholding report.[110]

Not disclosing the exemption and Offer Floor determination is also consistent with Commission precedents requiring measures to protect against market participant collusion by keeping energy reference level determinations confidential. As in those cases, if an ICAP Supplier knew - or could derive -- the costs or Offer Floor of its competitors, it could modify its offer behavior in a way that would raise prices above competitive levels. The NYISO's approach is likewise consistent with Commission precedents confirming that market power monitoring and mitigation processes should not provide a level of "complete transparency" that would inappropriately disclose confidential information.[111] Commission precedent also indicates that providing too much information regarding the implementation of market power mitigation measures creates the risk of better enabling market participants to evade mitigation.

Complainants have attempted to twist the Commission's policy favoring transparency into a requirement that market participants play an active role in mitigation decisions involving

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[110] Complainants' representatives made this request at the NYISO's August 21, 2009 ICAP Working Group meeting. In recognition of their concern, when the NYISO next presented to the ICAP Working Group the planned revisions to the annual ICAP withholding report on October 8, 2009, the NYISO stated that "[a]ny inclusion of plant specific information in the report to FERC would protect confidential information." At p. 4. NYISO October 8, 2009 presentation available at <http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2009-10-08/ICAPWG10_08_09_ROS_Reporting_FINAL.pdf>. In addition, in its filing with the Commission on the confidentiality of Installed Capacity Supplier information in the annual ICAP withholding report, the NYISO stated that "any confidential data and information, and the results of analyses from which Market Participant data can be gleaned, will be submitted to FERC in confidential appendices, and with a request for confidential treatment." See New York Independent System Operator, Inc., *Updated Status Report on Stakeholder Discussions Regarding Annual Installed Capacity Demand Curve Reports and Plan for Future Reports*, Docket Nos. ER01-3001-02,ER01-3001-022, ER03-647-012, ER03-647-013, at Attachment A, p. 4, Section III**.**

[111] *See New England Power Pool and ISO New England, Inc.* 103 FERC ¶ 61,304 at P 48 (2003) ("We do not require complete transparency of ISO-NE's mitigation, as some of the information is competitively and commercially sensitive.") *See also NSTAR Electric & Gas Corporation v. Sithe Edgar LLC*, 101 FERC ¶ 61064 (2002) (rejecting demands for greater transparency in ISO-NE monitoring and mitigation procedures,)

potential competitors. As is discussed below, their attempt is not appropriate. Demands for "transparency" should not be allowed to disguise attempts by market participants to inject themselves into market monitoring and market power mitigation functions that properly belong solely to independent entities. Commission precedent is clear that market power mitigation must strike "an appropriate balance between the need to protect consumers from the exercise of market power and the goal of avoiding over-mitigation that may keep capacity out of the market"[112] If market participants are empowered to "confirm the accuracy" of NYISO determinations under the In-City Buyer Side Mitigation Measures, there is a great risk that the balance will be disrupted and that the measures would then become unreasonable barriers to entry.

(iii) The NYISO's Recently Approved Tariff Enhancements Made its Administration of the In-City Buyer Side Mitigation Measures More Objective and Transparent

The Commission has recently determined that the NYISO's In-City Buyer-Side Mitigation Measures are just and reasonable. In the November 2010 Order, the Commission accepted buyer-side mitigation tariff enhancements that the NYISO had proposed in order to make the exemption and Offer Floor determination process and rules more transparent and objective. There should be no question that the In-City Buyer-Side Mitigation Measures satisfy the requirement for transparent and objective criteria. For self-interested reasons, Complainants apparently wish to insert or read additional criteria into the In-City Buyer-Side Mitigation Measures, under the guise that their suggestions will provide needed transparency and objectivity. Their desire to achieve this end does not mean that adequate transparency and objectivity are absent now.

[112] *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶61,297 at P 63 (2008).

The In-City Buyer-Side Mitigation Measures that were accepted by the November 2010 Order and subsequent orders in that proceeding add considerably more transparency and objectivity than the Commission-approved NYISO tariff rules previously in place. During the extensive vetting of the current tariff provisions, stakeholders discussed objectivity and transparency. Consistent with those discussions, the NYISO's September Filing, and subsequent filings in that proceeding explained that the proposed tariff revisions substantially improved the then-existing tariff in that regard. No party requested that the Commission reject or modify the proposed rules to add even more transparency or objectivity after the issuance of the November 2010 Order. Each of the Complainants was actively involved throughout the stakeholder process vetting the proposed buyer-side mitigation tariff revisions, and they filed numerous pleadings in the docket considering the tariff revisions. If they genuinely believed that additional transparency was necessary, they should have raised the issue before or pursued additional measures in the stakeholder process prior to seeking relief from the Commission. .

b. The NYISO Responses to Complainants' Questions Were as Timely and as Complete as Practicable

Complainants contend that the NYISO acted contrary to Commission policy both because it did not answer their written questions until April and May, and supposedly did not provide sufficiently detailed responses. The NYISO previously explained in Docket No. ER10-3043 that it could not answer certain questions until the Commission resolved issues concerning the application of the "Three Year Look Ahead Rule." It also explained that some of Complainants' questions touched on commercially sensitive market participant information. The NYISO committed to respond to the questions "in a timely manner" soon after those issues were resolved. That is exactly what the NYISO did.

In addition to responding in writing, the NYISO devoted two ICAP Working Group meetings to responding to Complainants' questions and engaging in a discussion with their representatives, as described above and the Boles Affidavit. Addressing the questions consumed a significant amount of limited NYISO staff resources. The information provided was more than the NYISO was required to make available under its tariff or Commission policy. As the NYISO informed stakeholders, its responses to certain questions were constrained because a full answer would require disclosing a proposed entrant's commercially sensitive information. The NYISO also declined to answer questions if commercially sensitive information could be deduced from the response.

Complainants also note that Mr. Younger requested that the NYISO conduct a benchmarking analysis at the May 2 ICAP Working Group and provided additional written details on May 5.[113] The NYISO stated that a numerical example would likely be a "useful exercise." The NYISO does not agree that the analysis requested by Mr. Younger would be a useful exercise. As discussed below and in the Boles Affidavit, there are material differences between the purposes and natures of the ICAP Demand Curve Unit Net CONE and In-City Buyer-Side Mitigation Measures analyses. These distinctions justify using different assumptions for certain elements of each and therefore greatly reduce the value of the kind of side-by-side analysis proposed by Mr. Younger.

The NYISO did indicate that providing a numerical example could be useful but noted that resource constraints would prevent it from preparing an example in the timeframe that Mr. Younger had wanted his proposed benchmarking analysis to be done. Complainants are wrong, however, to state that the NYISO said it would not provide a numerical example until after any

[113] Younger Affidavit at PP 37-42.

upcoming Offer Floor or mitigation determinations were final (*i.e.*, at the conclusion of the current Class Year Facilities Study process.)[114] They are also wrong to suggest that the NYISO's decision not to prepare such an analysis by their preferred deadline somehow invalidates any determinations that the NYISO may make. Agreeing that the analysis might be useful does not mean that it is necessary for those determinations to be just and reasonable. Nor does it support Complainant's alternative allegation that the In-City Buyer Side Mitigation Measures are unjust and unreasonable to the extent that they allow the NYISO to make mitigation determinations without completing a benchmarking analysis.

There is no tariff provision or Commission policy that requires the NYISO to conduct a benchmarking analysis, or to take any other action that certain market participants might deem necessary, before it fulfills its actual tariff obligations. One such obligation is the requirement that the NYISO must complete any Offer Floor or mitigation exemption analyses coincident with the Class Year Facilities Study process. Even if the absence of a benchmarking analysis somehow limited Complainants' ability to "confirm that the NYISO was applying the test parameters correctly," that would not be a legitimate reason to require that the benchmarking analysis be performed. Complainants, like other market participants, lack the independence necessary to perform market monitoring functions, are not, and should not be, responsible for overseeing every aspect of the NYISO's administration of its In-City Buyer Side Mitigation Measures and "confirming" NYISO determinations.

Thus, Complainants' assertions that the NYISO has been unresponsive to their questions, and that the tariff is unjust and unreasonable to the extent that it does not require even greater transparency, are false. There is no support for their claims that the NYISO has somehow

[114] Younger Affidavit at P 40.

violated requirements regarding transparency and objectivity in market monitoring and market power mitigation. Instead, the NYISO has provided information above and beyond what its tariff requires. The only "standards" that the NYISO has not met are those that the Complainants have invented.

c. The Hart Affidavit Is Riddled with Inaccuracies and Provides No Reliable Evidence in Support of Complainants' Claims

Complainants offer the Hart Affidavit to support their assertions that the NYISO is implementing its In-City Buyer Side Mitigation Measures without adequate transparency. However, there are so many inaccurate and misleading statements in the Hart Affidavit regarding the NYISO's interaction with US Power Generating Company ("USPG") regarding its proposed South Pier Improvement project that the affidavit should be afforded no weight.

(i) Mr. Hart's Allegation that the NYISO's Practices Are Vulnerable to Manipulation is Without Merit

Mr. Hart claims that the NYISO would permit a new entrant to manipulate the Unit Net CONE determination.[115] Mr. Hart's assertions presume both that developers would provide false or misleading information and that there is nothing that the NYISO, the MMU or the Commission, would do about it. In reality, there are numerous NYISO and Commission requirements that would subject a developer that took such an approach to severe consequences.[116] In addition to the NYISO's own review, the MMU also functions as an

[115] Hart Affidavit at P 10. Mr. Hart refers to the Unit Net CONE test as the "second prong."

[116] The Commission's market-behavior rules prohibit any entity that has, or that seeks, authority to sell capacity at market-based rates from presenting false information to the NYISO or the MMU. *See, e.g.,* 18 C.F.R. § 35.41(b) (2011) ("*Communications.* A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.") A violation of the market-behavior rules would also be a violation of the seller's market-based rate tariff governing its sales of energy, capacity, and ancillary services. A knowing submission of false

independent check to ensure that violations of Commission and NYISO rules are detected and reported.

As is noted below and in the Boles Affidavit, Mr. Hart has failed to present evidence suggesting that the NYISO might not be "vigilantly" fulfilling its responsibilities. Indeed, Mr. Hart's purported concerns about the NYISO's diligence based on the extent of the direct communications between a developer and the NYISO are countered by the Boles Affidavit, which identifies various communications between USPG and the NYISO, including direct communications between USPG and the NYISO's consultants, NERA Economic Consulting ("NERA") and Sargent & Lundy regarding USPG's data.[117]

Mr. Hart argues that new entrants can manipulate the Unit Net CONE examination by "cherry picking" aspects of the Demand Curve peaking unit. However, the NYISO does not simply accept the information provided by the developer, or a developer's suggestion that the Demand Curve peaking plant's costs are an appropriate input, as discussed below in subsection (iii), The NYISO, with assistance of its two consultants, and input from the MMU, diligently reviews information well beyond the information provided by the developer.

(ii) Mr. Hart's Claims Regarding USPG's Supposedly Limited Interactions with the NYISO Are Not Accurate

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information could also constitute market manipulation since new entrants have a duty to disclose the information under the NYISO Services Tariff. *See* 18 C.F.R. § 1.c.2(a)(2) (2011). A violation of either the market-behavior or market manipulation rules would constitute an automatic violation of Section 4.1.7.1 of the NYISO's Services Tariff which would in turn represent a breach of the entity's Service Agreement with the NYISO. The NYISO's tariffs themselves include separate provisions requiring customers to provide accurate information, particularly in connection with the ISO Market Power Monitoring Program. *See, e.g.,* Services Tariff Section 3.4. Potential sanctions for these violations include civil (and possible criminal) penalties and the loss of the ability to participate in Commission-jurisdictional markets.

[117] NERA and Sargent & Lundy were the independent consultants utilized to formulate the ICAP Demand Curve report in the NYISO's presently pending, and prior two, ICAP Demand Curve resets.

Mr. Hart suggests that the NYISO has not diligently fulfilled its tariff responsibilities because USPG has "received just one, very limited, inquiry from the NYISO" regarding the potential applicability of the In-City Buyer Side Mitigation Measures to its South Pier Improvement project.[118] Mr. Hart's claim is simultaneously inaccurate, misleading, and internally contradictory. Mr. Hart claims that USPG has received only one "inquiry" from the NYISO yet he references the following communications between USPG and the NYISO or its consultants: An October 7, 2011 call with Sargent & Lundy and NERA (P 11), a May 19, 2011 conference call (P 14), and April 7, 2011 conference call (P 14). The full extent of the communications between the NYISO (and its consultants) and USPG is recounted in the Boles Affidavit.

In fact, there have been numerous communications with USPG regarding the examination of the South Pier Improvement project. These communications include the eighteen referenced in the Boles Affidavit, as well as others by the NYISO, NERA, and Sargent & Lundy, individually and jointly, directly with USPG. The communications addressed specific data and inputs being considered by the NYISO and its Consultants in the course of the NYISO's application of the In-City Buyer-Side Mitigation Measure determination to the South Pier Improvement project.

In any event, Mr. Hart offers no credible support for his underlying premise that the number and frequency of the NYISO's communications with a developer reliably indicates the extent to which the NYISO is fulfilling its mitigation responsibilities. In addition to the NYISO's and the NYISO's consultants' direct interactions with the developers, and as described in the Boles Affidavit the NYISO examines materials submitted, it works with its consultants NERA and Sargent & Lundy, communicates with the MMU, and engages in joint discussions

[118] *Id.* at P 13.

with the consultants and the MMU. Further, the NYISO reviews and compares the information submitted by the project with information the developer provided to governmental and publicly available information. The NYISO also examines manufacturer specifications.

(iii) Mr. Hart's Claims Regarding the NYISO's Overall Administration of the In-City Buyer Side Mitigation Measures Are Inaccurate and Misleading

Mr. Hart's claims regarding the NYISO's administration of the In-City Buyer Side Mitigation Measures are also inaccurate. Mr. Hart correctly notes that the NYISO has consistently said that it will not disclose to an entity other than a project's developer whether it has made an exemption or Offer Floor determination, or reveal the outcome of a determination.[119] He is wrong, however, to argue that the NYISO should provide that information to all other stakeholders. As was noted above, such disclosures are not required under the NYISO's tariffs and would be inconsistent with the NYISO's rules, mitigation practices, and Commission precedent. It also would be a violation of rules requiring the NYISO to keep commercially sensitive information confidential. It is logically inconsistent for Complainants, who have repeatedly insisted that the supplier-side and buyer-side mitigation rules should be as similar as possible, to argue that the buyer-side mitigation measures should provide less protection for confidential information. What the NYISO actually said is that the tariff delineated the information that the NYISO is required to provide to developers at various points concurrent with revised exemption and Offer Floor determinations made as part of the Class Year Facilities Study process.

[119] Initial Complaint at 43; Hart Affidavit at P 14.

Mr. Hart is also incorrect when he states that the NYISO does not provide the study parameters or the price forecast.[120] As is set forth above, the tariff requires that the study parameters and the price forecasts and inputs be timely posted to the NYISO's website. The NYISO complied with this requirement. Further, each developer is given two templates: one for capital costs and one for operating and maintenance costs, to complete and return with supporting documentation. The templates serve as an initial tool through which the NYISO begins to gather data. The templates are the same as those used by Sargent & Lundy in the NYISO's ICAP Demand Curve reset process to gather information. The NYISO collects additional information based on project-specific situations, and data from other sources, as discussed above..

Similarly, Mr. Hart states that "[d]uring a conference call with NERA and S&L on October 7, 2010, we were advised that the 'safest response' for any cost category was to default to the NYC proxy unit Demand Curve assumptions."[121] Mr. Hart mischaracterizes the call and the conversation. As set forth above and in the Boles Affidavit, the purpose of the call was for the NYISO's consultants to discuss the data request. They do not recall whether the phrase "safe response" was used during the discussion. Even if those words were used, it would have only been in the context of the equity and debt financing assumptions. It would not have been used, as Mr. Hart states, in relation to "any cost category" because the scope of the discussion was not that broad. In response to a USPG statement, a discussion followed and during that discussion the NYISO's consultants indicated that it would be safe to use the proxy unit financing structure and cost solely as a temporary placeholder.

[120] Hart Affidavit at P 14.

[121] Hart Affidavit at P 11.

Further belying Mr. Hart's assertion is the action that USPG took shortly after the referenced call.. That action creates the clear impression that USPG understood that the insertion of capital cost information from the ICAP Demand Curve report was merely a placeholder.

It would not have been reasonable for USPG to have understood the NYISO's consultant's statement to mean that it was "advising" USPG to present inaccurate information. The NYISO and its consultants are mindful, as Complainants should be, that USPG and other developers are subject to various Commission and tariff requirements that require them to submit accurate information.

It also would not have been plausible for USPG to have understood the consultant's statement to relate to "any cost category." Although the South Pier Improvement project uses the same technology as the peaking plant identified for the proposed New York City Demand Curves,[122] there are well, and publicly, known differences between it and the peaking plant which would cause them to have different costs. For example, the ICAP Demand Curve reset peaking plant is comprised of two units, not one like the South Pier Improvement project; and the South Pier Improvement project is proposed for a site with existing generating facilities owned by the same company, and utilizing some of the same interconnection facilities.

Further, as with all projects, the NYISO uses the South Pier Improvement project's SUF and SDU allocated costs from the Interconnection Facilities Study Report presented to the NYISO Operating Committee. It does not use the SUF and SDU costs estimated for ICAP Demand Curve peaking plant costs. Other examples of the differences between the plant costs used by the NYISO to establish the Unit Net CONE, and the estimated costs for the ICAP Demand Curve peaking plant are those stemming from different emissions controls, different

[122] Hart Affidavit at P 12.

operating assumptions, and different financing costs. Moreover, the NYISO would not use the ICAP Demand Curve peaking plant costs for a project that is not similar to the ICAP Demand Curve peaking plant. Even if a project used the same technology as the ICAP Demand Curve peaking plant , its costs could differ because of differing technical ore economic characteristics. A project's developer could also have a different capital cost structure than that used to estimate the New York City peaking plant's costs.

It is noteworthy that Mr. Hart consistently uses the word "advise" in several contexts in which it is not plausible to believe that it could mean to "offer advice" or "recommend."[123] Contrary to what Mr Hart's affidavit implies, the NYISO cannot provide advice to Market Participants and must and does remain independent of all commercial outcomes.

(iv) Mr. Hart's Perspective Is Too Narrow to Shed Any Light on the Actual Level of Diligence Exercised by the NYISO

Mr. Hart represents that USPG provided the NYISO with a substantial amount of information. He also suggests that to the extent that USPG's communications with the NYISO have been less extensive than he anticipated that USPG's own "[thoroughness] in preparing [its] submission" may have been the reason.[124] The frequency and number of the NYISO's communications with developers will naturally vary from project to project. Some will present information that clearly indicates the cost that should or should not be considered. Some data submitted requires clarification. The NYISO is likely to have more discussions with projects that fall in the latter category since they will require a more careful and intensive examination. Moreover, as discussed above and in the Boles and Meehan Affidavits, the NYISO's diligence goes well beyond its direct communications with developers.

[123] In the same paragraph where he asserts the Consultants "advised" USPG, he also asserts that the NYISO did so. Again at P 14, he states that the "NYISO advised" USPG.

[124] Hart Affidavit at P 13.

2. Complainants Have Failed to Show that the NYISO Has Violated, or Will Violate, Tariff Requirements Concerning the Use of Inflation in Offer Floor Calculations

Complainants attack the NYISO for its supposed intent to calculate Unit Net CONE "without reflecting inflation costs ..... " They claim further that the NYISO intends to "ignore" clear tariff provisions requiring it to do so.[125] They have drawn speculative and incorrect inferences which they allege are based on the NYISO's responses to their questions and other posted information. They also confuse the issue by blending two concepts that should be considered separately.

To be clear, the NYISO accounts for inflation when computing the Offer Floor for a new entrant. Complainants therefore cannot meet their burden of demonstrating that the NYISO has violated the tariff on this point because the NYISO shares its understanding of what the tariff requires and has acted accordingly. As described in the Boles Affidavit, the NYISO applies inflation in its Unit Net CONE determination. The Unit Net CONE reflects the long term inflation rate of 2.15% That rate is a long term inflation rate of 2.4 net of 0.25% for technological progress**.**

In order to perform the Unit Net CONE analysis, the NYISO first expresses the project's costs in the year's dollars of the first year of the Mitigation Study Period. In order to adhere to the tariff requirement that the NYISO compare the average of the ICAP Spot Market Auction prices in six Capability Periods with the reasonably anticipated Unit Net Cone, the NYISO incorporates inflation. It does so by inflating the Unit Net Cone for years two and three of the Mitigation Study Period, and then takes a straight average of those three values. The straight average is the Unit Net Cone. The NYISO then compares the Unit Net CONE to the straight

[125] Initial Complaint at 25-26.

average of the ICAP Spot Market Auction prices for six Capability Periods.[126] The Boles Affidavit describes this calculation. Accordingly, the NYISO's application of inflation is consistent with its tariff obligations, contrary to the Complaint's claims.

Mitigation NET CONE reflects escalation in the same manner as the currently effective ICAP Demand Curves. In accordance with Commission orders, the currently effective demand curve does not have an escalation rate; therefore, the NYISO attributed zero percent escalation. Thus, Complainants have not met their burden of proof on this point.

The Complaint obfuscates issues and facts by blending the incorrect assertion that the NYISO does not recognize inflation when computing the Offer floor with the issue of whether a project's Offer Floor, once determined, should be escalated over time to reflect actual inflation. The Services Tariff does not speak to this question. That issue is discussed below.

3. Complainants Have Failed to Show that the NYISO Must Always Use the Exact Same Assumptions When Making In-City Buyer Side Mitigation Calculations as it Uses in its ICAP Demand Curve Reset Process

a. Commission Determinations in PJM's Minimum Offer Price Rule Proceeding Should Not Be Automatically Dispositive in this Proceeding

Complainants argue that Commission precedent from PJM requires the NYISO to use the exact same assumptions when making buyer-side mitigation and capacity demand curve calculations.[127] Their assertion is wrong. The NYISO tariff does not establish any such requirement. The PJM MOPR precedent is not binding on the NYISO because it was not a party to the MOPR docket and because NYISO-specific issues were not considered there. Moreover, the Commission's MOPR order accepted a voluntary proposal by PJM under Section 205 of the

[126] See Attachment H §23.4.5.7.2.

[127] *See* Initial Complaint at 20, 28 and n. 80 ("Indeed the Commission requires ISOs/RTOs to calculate their demand curves and buyer market power mitigation measures on a consistent basis.")

FPA that the same assumptions be used in both contexts. No party raised any objection to that linkage in the MOPR docket. There has been no such proposal and no such linkage in the NYISO context.

The Commission has been clear in the past that it will not require ISOs/RTOs to adopt standardized market rules,[128] including capacity market rules.[129] The Commission concluded in the most recent NYISO ICAP Demand Curve reset proceeding that the NYISO's proposed escalation factor was just and reasonable notwithstanding the fact that the NYISO had proposed to determine it using a different methodology than either PJM or ISO-New England.

b. The NYISO Is Not and Should Not Be Required to Always Use the Same Assumptions in its ICAP Demand Curve Process and its In-City Buyer Side Mitigation Measures

There is no merit to the Complaint's general contention that the NYISO must always use the same assumptions when applying the In-City Buyer Side Mitigation Measures as it does when conducting its ICAP Demand Curve reset process unless it makes an FPA Section 205 filing to explicitly adopt different assumptions. Similarly, there is no merit to Complainants' specific claims regarding supposedly impermissible discrepancies between the NYISO's analyses in the two areas.[130]

Exemptions and Offer Floor determinations under the In-City Buyer Side Mitigation Measures are based on the actual level of excess with the inclusion of the Examined Facilities

[128] *See, e.g., Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking*, FERC Stats. and Regs. ¶ 32, 628 (2008), at P 18-20 (rejecting arguments for fail[ing] to appreciate the differences in market design that exist in each region). *ISO New England Inc.*, 125 FERC ¶ 61,102, at P 97 (2008) (the fact that other RTOs have enacted (or failed to enact) a particular rule is not dispositive of the justness and reasonableness‖ of market rules in other RTOs.)

[129] *See, e.g.*, *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 29 (2006) (stating, while one or more of the elements of PJM's current capacity construct may exist and be just and reasonable in other regional transmission organizations, the Commission finds the combination of these elements, results in an unjust and unreasonable capacity construct within PJM)

[130] *See* Hieronymus Affidavit at 16.

and other forecast adjustments as specifically set forth in Attachment H. The ICAP Demand Curve reset analysis, however, uses a level of excess equal to or slightly above the minimum Installed Capacity requirement. The purposes of the two analyses are different. The In-City Buyer Side Mitigation Measures process appropriately uses the forecast level of actual excess in order to determine whether a developer is making a rational economic decision to enter. Conversely, the ICAP Demand Curve reset is examining the appropriate level to send the signal to developers to enter the market. The time horizons are also different. The technology, the estimate of Ancillary Services revenues, operations and maintenance expenses, property and other taxes, and financing assumptions, among many other project-specific costs would be different.[131]

4. Complainants Have Failed to Show that the NYISO Has Determined, or Will Determine, Future Capacity Prices, Mitigation Exemptions, or Offer Floors in Violation of Tariff Requirements

Complainants claim that the NYISO will make various calculations using "outdated" data and that this somehow constitutes a violation of In-City Buyer Side Mitigation Measures. In contradiction to that claim, they assert, through their witness, William H. Hieronymus, that the NYISO should be using data developed as much as three years earlier in the ICAP Demand Curve reset process, to establish a project's Unit Net CONE. They even offer specific examples, including taxes, the cost of capital, and fuel costs, that they believe the NYISO should use.[132] Thus, in reality, it is the Complainants that are asking that the NYISO be compelled to

[131] Section (c)(iii) provides further examples, in the context of refuting Mr. Hart's allegation regarding the use of the ICAP Demand Curve peaking plant costs for USPG's South Pier Improvement project.

[132] *See* Hieronymus at 20.

make calculations that would be contrary to the In-City Buyer Side Mitigation Measures' requirements.[133]

(a) The NYISO's Tariff and Commission Orders Require the NYISO to Look to the Currently Effective "ICAP Demand Curves" When Calculating Mitigation Net CONE

Complainants argue that the NYISO should use ICAP Demand Curve values that are currently pending in compliance filings before the Commission when calculating Mitigation Net CONE.[134] The In-City Buyer Side Mitigation Measures, however, require that the NYISO use the currently effective ICAP Demand Curves when making certain determinations. As Complainants are well aware, but overlook in the Complaint, the Commission concluded in its January 28, 2011 Order, and reiterated in its March 9 Order, April 4 Order, and May 19 Order on Rehearing, that the current ICAP Demand Curves are just and reasonable. The NYISO has stated that it will be prepared to implement the revised ICAP Demand Curves within twelve days of a Commission order accepting them without further modification.[135]

The Commission specifically rejected the NYISO's request for clarification that the ICAP Demand Curves in effect starting on May 1, 2011 be escalated. The Commission has repeatedly rejected Complainants' arguments in other proceedings that revised ICAP Demand Curves be implemented sooner. In the March 9 Order, April 4 Order, and May 19 Order on

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[133] Complainants' proposal is at odds with their own assertion that it is somehow inappropriate for the NYISO to use the term "Mitigation Net CONE." *See, e.g.,* Initial Complaint at n. 100; Amended Complaint at 8. Complainants also cannot invoke the NYISO's use of that defined term to justify their own proposal, at n.100, that the NYISO should act in contravention of Attachment H. In any event, as delineated herein, the NYISO's use of "Mitigation Net CONE" is fully compliant with May 2010 Order.

[134] *See* Initial Complaint at 31-34.

[135] In its March 29, 2011 and June 20, 2011 Compliance Filing, the NYISO stated that it anticipates it could accomplish this if the Commission "does not require further analysis or revised computations" and noted that "[i]f a Commission order requires further analysis or revised computations, the NYISO may need additional time to implement the new ICAP Demand Curves." June 20 Compliance Filing, Transmittal Letter at 4.

Rehearing, the Commission also rejected these same Complainants' arguments that the currently effective curves be escalated. Thus, the NYISO has no legal basis for utilizing any value other than its "currently effective Demand Curves" to establish the Mitigation Net CONE. It would be flouting multiple Commission orders if it did otherwise. Thus, the NYISO is not "projecting backwards" when it makes the calculations referenced by the Complaint. It is using the most consistent and up to date information that it can in light of the Commission's orders.

In addition to violating the tariff, Complainants' suggestion that an alternative demand curve should be used to establish Mitigation Net CONE ignores the reality that the question of which value should be used is already the subject of protracted litigation in Docket No. ER11-2224. Moreover, Complainants' proposal to use alternative ICAP Demand Curves is both unsupported and contrary to the Commission's ICAP Demand Curve reset orders.

Similarly, the fact that the NYISO would apply a version of the Offer Floor test that uses the defined term "Mitigation Net CONE" is not evidence that it is "cherry-picking" pieces of pending compliance filings when implementing the In-City Buyer Side Mitigation Measures. The NYISO has proposed the label "Mitigation Net CONE" to capture the definition it must apply in compliance with an earlier Commission order.[136] The only purpose of inserting a new defined term was to clarify the tariff and avoid confusion with other terms in the Services Tariff.[137] Complainants acknowledge that it makes no difference for purposes of their Complaint

[136] Applicable precedent is clear that the NYISO must comply with the May 2010 Order even though the August 2010 compliance filing is pending before the Commission. *See, e.g., Dominion Transmission Inc., 118* FERC ¶ 61,036 at P 31 (2007).

[137] Specifically, as the NYISO has previously explained, the defined term was added to "clarify the mitigation measures and avoid any implication that determinations in the In-City mitigation context regarding the definition of Mitigation Net CONE might have precedential effects on the Demand Curves.). *See* August 2010 Compliance Filing at 4-5.

if "Mitigation Net CONE" or "Net CONE," is the relevant defined term.[138] In addition, "Mitigation Net CONE" is already used in the Commission-accepted version of the In-City Buyer Side Mitigation Measures.[139] The NYISO must comply with Commission-accepted tariff language. There is thus no basis for Complainants assertion[140] that, given the NYISO's use of Mitigation Net CONE, "consistency" somehow requires that the NYISO use ICAP Demand Curve values that have not yet been accepted by the Commission instead of currently effective values.

(b) The NYISO's Tariff and Commission Orders Require the NYISO to Look to the Reasonably Anticipated ICAP Demand Curves When Calculating Unit Net CONE

When determining Unit Net CONE, the In-City Buyer Side Mitigation Measures require the NYISO to use "reasonably anticipated" ICAP Demand Curves.[141] Therefore, in the NYISO's June 8, 2011 web site positing of data used in the Unit Net CONE determinations,[142] the NYISO used the value from the reasonably anticipated Demand Curves ; namely, the ICAP Demand Curves that are set forth in the NYISO's June 20, 2011 ICAP Demand Curve reset Compliance Filing, with the escalation factor that the Commission accepted in its January 28, 2011 Order.

(c) The Commission Should Not Seek to Alter the In-City Buyer Side Mitigation Measures Provisions Governing These Issues

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[138] *See* Initial Complaint at n. 9.

[139] *See* Services Tariff Attachment H Section 23.4.5.7.3.2. No party objected to the use of the term "Mitigation Net CONE in the stakeholder process considering the tariff revisions or in the Commission proceeding which accepted Section 23.4.5.7.3.2 along with the other revisions to the buyerside mitigation measures. *See* Docket ER10-3043.

[140] *See* Initial Complaint at n. 100; Amended Complaint at 8. [141]

See Attachment H §23.4.5.7.3.2

[142] The June 8, 2011 web site posting is further described in Answer Section c(a)(ii).

It would also be unreasonable to alter the tariff provisions that determine which ICAP Demand Curve values the NYISO uses when implementing the In-City Buyer Side Mitigation Measures because to do so would essentially require the establishment of a new ICAP Demand Curve reset process. Based on the intensity of litigation in the current ICAP Demand Curve proceeding it is very likely that such a process would be contentious and time consuming. Such an undertaking would be needlessly duplicative of the efforts and analyses performed in the ICAP Demand Curve reset process pursuant to Services Tariff Section 5.14.1.

5. The NYISO's Tariff Does Not Provide for Continuously Escalating Offer Floors

(a) Complainants Have Failed to Show that the NYISO is Required to Adjust the Default Offer Floor Component Over Time

Complainants assert that the NYISO must revise the "Default Offer Floor"[143] each time that the ICAP Demand Curves are revised for so long as a new entrant is subject to mitigation.[144] Under Complainants' interpretation of the tariff, a mitigated entrant would have a new Offer Floor based on the "NYC ICAP Demand Curve that is "currently effective" each month that the Offer Floor is applied for a mitigated unit. As Mr. Younger would have it, each time new ICAP Demand Curve became effective for a given month, the NYISO would determine a new Mitigation Net CONE.[145] To do what Mr. Younger suggests would require that each month the NYISO update the following inputs to recalculate the Default Offer Floor: (i) the NYC annual revenue requirement; (ii) the NYC excess capacity assumption that was assumed in the latest ICAP Demand Curve reset (which Mr. Younger apparently believes should move with each

[143] The "Default Offer Floor" means the portion of the definition of "Offer Floor" which is the "numerical value equal to 75% of the Mitigation Net CONE translated into a seasonally adjusted monthly UCAP value." *See* Services Tariff Attachment H Section 23.2.1 at definition of "Offer Floor".

[144] Initial Complaint at 35-38.

[145] *See* Younger Affidavit at 112.

reset); (iii) NYC system winter/summer ratio; (iv) unit-specific winter/summer ratio; (v) NYC system EFORd; and (vi) the project-specific EFORd. The NYISO would then determine for each month whether the Mitigation Net CONE or the Unit Net CONE was lower, and the mitigated new entry would be subject to that value as the Offer Floor for the month. It is also unclear exactly when Mr. Younger would expect the NYISO to give Installed Capacity Supplier their revised Offer Floors.

That scenario and its consequences are not contemplated by the tariff and would conflict with the Commission's clear policy that mitigation determinations be made once in advance of entry. It is noteworthy and telling that Complainants do not even attempt to provide precedent or cite to any Commission record to support their assertion that the established Offer Floor should be subject to revision. It also does not appear that the question of whether an established Offer Floor should be subject to revision has ever been vetted in earlier Commission proceedings or orders or, based on a review of meeting materials, via the NYISO stakeholder process.

The relevant precedent is clear, however, that it would be unjust and unreasonable to punish new entrants if economic conditions change in ways that were not anticipated at the time of entry. As recent experience demonstrates, changing economic circumstances can result in significant changes to the ICAP Demand Curves from one reset to the next. Allowing Offer Floors to vary to a commensurate extent would introduce a new element of uncertainty that would complicate, and perhaps discourage, investment by new entrants that believe their projects are economic at the time of investment. For example, if a new project receives the default Offer Floor based on a New York City Demand Curve which includes full property tax abatement, and then three years later the Demand Curves are reset without tax abatement, that substantial change

(which could be on the magnitude of forty percent) would have no relation to whether a project was economic at the time it made its decision to enter.

(b) Escalating an Established Offer Floor Would Require that the Services Tariff Set Forth an Escalation Rate and Describe the Mechanics for Applying It

In response to the issue being raised during its May ICAP Working Group meetings, the NYISO examined the issue of whether an Offer Floor, once established, should escalate. The NYISO's view is that providing for the escalation of established Offer Floors could be an improvement to the current In-City Buyer Side Mitigation Measures. However, the Services Tariff currently includes no rules governing the escalation of an Offer Floor and such rules cannot reasonably be inferred from any other tariff provision. The NYISO does not object in principle to adding new and revising existing Services Tariff provisions necessary to accommodate escalating an established Offer Floor, however, the NYISO believes that stakeholder input should be obtained first.

There is no information in the record in this, or in any other NYISO proceeding, that could reasonably support the imposition of any specific escalation rate or the frequency of the escalation. Complainants themselves once again offer no suggestion as to what those rules should be. They have not even suggested what escalation factor the NYISO should use, let alone justified a particular rate.[146] The Commission's "rule of reason" under Section 205 of the FPA would not permit the NYISO to implement an escalation factor if these details are not included in the tariff.

If the Commission were to conclude that Offer Floors should escalate, new rules and mechanics would have to be added to Attachment H and existing tariff provisions would have to

[146] The Younger Affidavit at P 69 uses a long term inflation rate of 2.4% solely for purposes of an example.

be amended. Other tariff revisions might also be needed to accommodate the core escalation provision. For example, there would need to be a rule specifying the escalation rate the NYISO would use and, presumably, the source from which the rate would be derived. The tariff would also have to specify the frequency of escalation. The adjustment could conceivably be made annually, every Capability Period, or monthly. In addition, the Services Tariff does not expressly address the impact of escalation on the calculation of the duration of the Offer Floor. It appears that the November 2010 Order did not consider that an Offer Floor, once established, may escalate under the Duration Rule. Indeed, as was noted above, the Duration Rule's focus on the level of capacity that "consistently cleared" appears to conflict with accounting for escalation in the first place.

The NYISO's stakeholders have not vetted escalating an Offer Floor.. Given the variety of options, issues, and implications that the design of escalation rules would have the Commission should provide an opportunity for the NYISO's stakeholders to provide input on the questions of whether, and if so, how, escalation should be implemented.

6. Complainants Fail to Show that the NYISO Will Not Calculate Unit Net CONE "Reasonably"

Complainants contend that the NYISO's responses to their questions imply that it "does not intend to review important contracts underlying the Unit Net CONE calculations, including wholesale power and capacity contracts."[147] They have misunderstood the NYISO's response and consequently drawn an inaccurate conclusion. The fact is that the NYISO does evaluate contracts when and as necessary to validate costs identified by a developer and to determine whether a cost is appropriate to use in a project's Unit Net CONE.

[147] Initial Complaint at 38-40.

Complainants confuse matters by suggesting that it is necessary for the NYISO to attempt to project an entrant's anticipated revenues, and thus to review revenue contracts, if it is to fulfill its tariff obligations. The NYISO and need not examine whether it is profitable for the developer to construct a plant based on the revenue it would receive from various sources including non-market payments. Instead, the NYISO evaluates new entry based on whether or not the project's entrance decision is economic if it were to receive payments through the NYISO's ICAP Spot Market Auction. Whether a developer entered into an above market capacity contract does not shed light on whether it is economic. Moreover, the NYISO's consideration of cost information is consistent with one of the principal objectives of the In-City buyer side mitigation measures, since they were first established.[148] Accordingly, Complainants' allegations regarding contracts do not help them to satisfy their burden of proof.

D. COMPLAINANTS HAVE FAILED TO SHOW THAT THEIR PROPOSED TARIFF CHANGES ARE SUPERIOR TO EXISTING NYISO TARIFF PROVISIONS

The NYISO has disposed of Complainants' various stated justifications for revising the In-City Buyer Side Mitigation provisions. [149] Complainants also ask that the NYISO be directed to "clarify" the Services Tariff to effectuate their various asserted "corrections" and to provide greater "transparency" and "objectivity" where it is supposedly needed.[150] Their request for "clarification" is effectively a request for further tariff revisions since Complainants are really asking the Commission to "clarify" that the NYISO should take actions that are either contrary

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[149] *See* Initial Complaint at 6. Such high level conceptual suggestions fall far short of meeting Complainants' burden under Section 206 of the FPA to offer proposed revisions and demonstrate that they are just and reasonable.

[150] *See, e.g.,* Initial Complaint at 6 (requesting that the Commission declare various Services Tariff provisions to be unjust and unreasonable to the extent that Complainants' interpretation of them is deemed to be incorrect.)

to, or not provided for by, currently-effective tariff provisions. Complainants also ask the Commission to consider making the MMU responsible for calculating and verifying the Unit Net CONE for new entrants in the future.[151] Granting this request would also require modifications to Attachment O of the Services Tariff, which makes the NYISO responsible for performing these analyses.

Complainants' attempt to use the Hieronymus Affidavit to support their call for changes to the Unit Net CONE provisions of the In-City Buyer Side Mitigation Measures. However, in addition to being a collateral attack on prior Commission orders, their suggestions would all but eliminate an opportunity for a project to demonstrate that it is economic. The Unit Net CONE test provides an opportunity for a project to make a determination of whether it will enter the market even if it is subject to an Offer Floor based on a project specific projection of its Unit Net CONE. Complainants' rely on Mr. Hieronymus' declaration that Unit Net CONE examinations are too subjective,[152] and thus claim that the tariff should be revised. However, Mr. Hieronymus' premise fails. It is possible to have a Unit Net CONE that is less than Mitigation Net CONE. The MMU's 2010 State of the Market Report concludes that combined cycle plants may be more economic than the Demand Curve combustion turbine peaking plant.[153] Further, a new entrant may have unit characteristics that make it more economic than the ICAP Demand Curve peaking plant. Mr. Hieronymus even acknowledges that Mitigation Net CONE "itself is not market-derived, but is set by making a large number of assumptions, intended to anticipate

[151] Initial Complaint at 6.

[152] Hieronymus Affidavit at pp. 5-6.

[153] *See* Potomac Economics, LLC, April 2011. 2010 State of the Market Report. Available at: < http://www.nyiso.com/public/webdocs/documents/market_advisor_reports/2010/2010_NYISO_SOM_-_Final_4-22-11.pdf> at pp. 6, 11, 42, 203.

expected real world outcomes but nevertheless determined administratively"[154] That is a supporting reason for using Unit NET CONE in one of the two exemption tests and for having ti be available to set the Offer Floor price.[155] Because Complainants have completely failed to show that the NYISO's existing tariff provisions are not just and reasonable they have failed to carry the first part of the "dual burden" under FPA Section 206. They likewise fail to meet the second part of the dual burden analysis, which requires a demonstration that their own suggested changes are just and reasonable. Indeed, to the limited extent they do anything other than offer vague suggestions for alternate tariff provisions, they provide no support for them other than their broad claims that the concept will help to promote transparency and objectivity. Their suggestions also fail to address important design considerations, such as the choice of escalation rate.

In addition, the Commission has long disfavored attempts by individual stakeholders to make "end-runs" around ISO/RTO stakeholder processes and impose new tariff provisions through litigation.[156] Under the NYISO's shared governance system, proposed tariff revisions

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[154] Hieronymus Affidavit at p.11.

[155] It also appears Complainants may be seeking rule revisions that favor "steel in the ground … in relatively close proximity to the load that must be served." *See* Hieronymus at p. 11. Mr. Hieronymus overlooks the important role of controllable lines, generator leads, and Special Case Resources in the capacity markets. For the New York City capacity market specifically, there are two new significant capacity projects that have begun construction and plan to enter the New York City capacity market and thus would be Complainants' competitors. One project is not "steel in the ground" (Hudson Transmission Partners), and the other is not "in relatively close proximity to the load' (Bayonne Energy Center, a plant located in New Jersey with a generator lead to New York.). Thus, Complainants' call for "steel in the ground" is telling of their motivation to revise the In-City Buyer-Side Mitigation Measures to tilt them in favor of their own existing and proposed new capacity projects.

[156] *See, e.g., New York Independent System Operator, Inc.,* 90 FERC ¶ 61,319 (2000) (rejecting alternative ICAP recall bid proposal put forward by a single party in opposition to a system approved by the NYISO's stakeholder committees); *USGen New England, Inc.,* 90 FERC ¶ 61,323 (2000) (rejecting unilaterally filed contract for system restoration services); *New England Power Pool,* 90 FERC ¶ 61,168 (2000) (expressing preference for consensus market redesign proposal in New England); *Sithe New England Holdings, LLC and Sithe New Boston, LLC v. New England Power Pool and ISO New England Inc.,* 86 FERC ¶ 61,283 (1999); *reh'g denied*, 88 FERC ¶ 61,080 (1999) (rejecting a market participants

are developed collaboratively, and Section 205 filings are made, with rare exceptions not relevant here, only with the concurrence of the NYISO's stakeholder Management Committee and its independent Board of Directors. Complainants are signatories to the agreements establishing this shared governance structure and should not be permitted to flout it.

The NYISO has indicated that it is open to further stakeholder discussions concerning the only question raised by Complainants that is not addressed by the current tariff and has not been addressed in the stakeholder process or in a Commission order, *i.e.,* the issue of the escalation of an Offer Floor, once the Offer Floor is determined. Section III.C.4 above explains that Complainants do not even propose a specific escalation rate, and that there is no basis in the record of any proceeding to insert an escalation rate, let alone establish the mechanics of escalating an Offer Floor once it is determined.

In addition, the NYISO previously indicated that it is considering possible additional revisions to the In-City Buyer-Side Mitigation Measures, among which are those identified by the Management Committee and those delineated by the NYISO Board of Directors.[157] There is no reason why a future stakeholder discussion of those new enhancements could not also address Complainants general concern that the existing tariff should be revised to provide stakeholders with more information. There is thus no reason for the Commission to address their proposals before they have been vetted with stakeholders.

E. COMPLAINANTS HAVE FAILED TO JUSTIFY HOLDING THE NYISO'S CLASS YEAR COST ALLOCATION PROCESS IN ABEYANCE

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attempted unilateral revision of a complex arrangement developed by an ISO); *PJM Interconnection, L.L.C.,* 84 FERC ¶ 61,212 at 62,035 (1998) ("[W]e emphasize that in accepting PJM's proposed revisions . . . we deferred to the judgment of the PJM ISO and its Board concerning a regional solution to an identified regional problem based on what we understand is a broad, if not unanimous, consensus.").

Given the arguments and evidence presented above in Sections A and C and the supporting affidavits) the Complainants have not raised any legitimate concerns that could possibly justify holding the NYISO's Class Year Facilities Study process in abeyance. Complainants have failed to identify, let alone meet, the legal standards that must be met before the Commission could lawfully grant such relief.

Complainants do not specify what authority they are asking the Commission to exercise. They appear to essentially be asking for an injunction against the NYISO but have not made a proper request that the Commission seek such an injunction under Section 314 of the FPA. If Complainants are asking the Commission to waive the NYISO tariff provisions governing the Class Year Facilities Study process schedule they have failed to address, and cannot satisfy the well-established criteria for obtaining tariff waivers. Among other things, the Commission requires parties seeking waivers to demonstrate that "a concrete problem needs to be remedied" and that "the waiver will not have undesirable consequences, such as harming third parties."[158] Because Complainants have failed to carry their burden of proof under Rule 206, they cannot be said to have identified "a concrete problem that needs to be remedied." Nor could they plausibly assert that indefinitely suspending the Class Year Facilities Study process would not have "undesirable consequences." Suspending the process would be contrary to Commission policies favoring the efficient processing of interconnection requests. It is likely that at least some

[158] The Commission's evaluation of whether it should permit tariff waivers has focused on several key points, including whether: (1) the entity seeking the waiver acted in good faith; (2) the waiver is of limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver will not have undesirable consequences, such as harming third parties. *See, e.g., New York Independent System Operating, Inc.,* 125 FERC ¶ 61,005 (2008); *ISO New England, Inc.*, 117 FERC ¶ 61,171 at P 21 (2006); *see also Wisvest-Connecticut*, 101 FERC ¶ 62,551 (observing that errors was "an inadvertent mishap"); *Great Lakes Gas Transmission Limited Partnership*, 102 FERC ¶ 61,331 (2003); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 (2003); *Northern Border Pipeline Co.*, 76 FERC ¶ 61,141 (1996).

project developers would be materially harmed by an indefinite delay and Complainants have offered nothing to show that this would not be the case.[159]

The Commission has long sought to streamline and eliminate unnecessary barriers to ISO/RTO interconnection processes.[160] Complainants' suggestion that holding the Class Year Facilities Study in abeyance would have no significance because the process "has historically lagged behind schedule anyway"[161] indicates a remarkably blatant disregard for both Commission policy and the importance of the interconnection process.

Complainants exaggerate the urgency of the supposed need to prevent the Class Year Facilities Study process from moving forward. They originally claimed that action was needed by June 10, 2011 because the NYISO's stakeholder Operating Committee might act on Class Year 2009 and 2010 Facilities Studies by that date.[162] In fact, the Operating Committee decided, without any discussion regarding the Complaint or buyer-side mitigation issues more generally, to defer action on both of those studies until its next meeting. That meeting is currently scheduled for July 14, 2011. Based on that meeting date, there is no possibility that the NYISO would issue final mitigation exemption or Offer Floor determinations under its currently effective tariff provisions[163] until after the NYISO confirms each project's acceptance, which would be due to the NYISO on August 15, 2011.[164]

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[159] Complainants' request would impact projects on Long Island and in the Rest-of-State region because of the inter-related nature of the Class Year process.

[160] *See, e.g., Interconnection Queuing Practices,* 122 FERC ¶ 61,252 (2008). [161]

Initial Complaint at 48; Younger Affidavit at PP 45-47.

[162] Initial Complaint at 19.

[163] Whether the NYISO has made a determination, and whether a unit is exempt or has an Offer Floor, is confidential and commercially sensitive information. The NYISO's September Filing and November Answer made clear that any determinations made prior to the effectiveness of the then-proposed enhancements to In-City Buyer-Side Mitigation Measures, *i.e.*, under the prior version of the tariff, "would not be altered or affected by the amendments proposed in this filing." *See* September Filing at 14. *See also*, November Answer at 14, n. 39, Docket No. ER10-3043-000. The measures in effect

Moreover, the only possible way August 15 would be the date after which the NYISO's determination were final is if all twelve projects in the 2009 and 2010 Class Years accept their SDU and SUF cost allocations, assuming approval by the Operating Committee on July 14, 2011. Experience suggests that this is unlikely to occur. In addition, it is possible that the Operating Committee might not approve the Class Year Facilities Studies at the July 14, 2011 meeting, in which case, final determinations would not be made until later.

It is true that the Commission, like the NYISO, recognizes the potential harm of uneconomic entry but that does mean that extraordinary scrutiny is needed on the theory that any possible error will irrevocably harm the market. If the Commission were to accept the Complaint's arguments, which it should not, it could set a refund effective date as early as June 4, 2011. Complainants express concern about detrimental reliance but such claims would appear to conflict with existing Services Tariff provisions which clearly state that the tariff is always

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prior to the November 27, 2010 effective date of the current Buyer-Side Mitigation Measures and the NYISO's implementation of them do not appear to be at issue in this proceeding.

[164] Pursuant to OATT Attachment S Section 25.10.2, which sets forth the provisions applicable to Class Years 2009 and 2010, the next but not final phase will be:

- If the Operating Committee approves both study reports, a notice will be sent to Class Year 2009 and Class Year 2010 developers. Developers would then have 30 calendar days to indicate their acceptance or non-acceptance of their System Upgrade Facility ("SUF") and/or System Deliverability Upgrade ("SDU") cost allocations.
    - *Non-Acceptance of SUF cost allocation would result in the removal of the project from the Class.*
    - *Non-Acceptance of SDU cost allocation would result in the removal of the project from the Class Year Deliverability Study.*
- If any Class Year 2009 Developer rejects their cost allocation for either SUFs or SDUs, the NYISO has four weeks to prepare and issue revised SUF and/or SDU reports and cost allocations, as applicable, for both Classes.
- If all Class Year 2009 Developers accept their SUF and SDU cost allocations, but any Class Year 2010 Developer rejects its cost allocation for SUFs or SDUs, NYISO has two weeks to prepare and issue revised SUF and/or SDU reports and cost allocations, as applicable, for Class Year 2010.

subject to change pursuant to Section 205, and thus under Section 206, of the FPA.[165] Complainants invalidate their own argument by asserting that the mere existence of the Complaint eliminates detrimental reliance concerns. In any case, Complainants specifically state that they are not asking for extraordinary action to avoid creating a situation where auction results would have to be re-settled. Nor do they appear to be asking the Commission to take any kind of impermissible retroactive action, such as revising the tariff in a manner that would impact any buyer-side mitigation exemption and Offer Floor determination that may have been made in the past. They are merely seeking to put developers on notice that future determinations made pursuant to the In-City Buyer-Side Mitigation Measures, as accepted in Docket No. ER10-3043, would be subject to modification if the Commission were to accept the Complaint. No extraordinary action is required to achieve this result.

Complainants also fail to demonstrate that the market, or they themselves, would actually be harmed even if the NYISO were to make the kinds of implementation errors that they allege, which the NYISO does not concede. The potential combined impacts of the NYISO's supposed "errors" would not change the outcome of the exemption or Offer Floor determination for either of the two Complainants that have projects which the NYISO is presently examining.[166]. Moreover, the mere fact that a NYISO determination results in lower revenues for

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[165] *See* Services Tariff, Sections 3.3 ("[t]he ISO Services Tariff and any related Service Agreement are made subject to all applicable federal, state and local laws, regulations and orders.); and 14.4 ("Nothing contained in the ISO Services Tariff or any Service Agreement shall be construed as affecting in any way the right of the ISO . . . to make application to the Commission for a change in: rates, terms, conditions, charges, or classifications of service; the provision of Ancillary Services; a Service Agreement; or a rule or regulation, under the FPA and pursuant to the Commission's rules and regulations promulgated thereunder.)

[166] As was noted above, the NYISO prepared an additional exhibit to the Boles Affidavit that also addressed.this issue. The NYISO will not submit that exhibit, and is prepared to have this Answer be considered without reference to it, unless the Commission requests the information or the Complainants consent to its disclosure.

Complainants,[167] or in new capacity resources clearing the market before those owned by Complainants, does not mean that the determination is an "error," a tariff violation, or a justification for revising the tariff.

F. COMPLAINANTS MUST NOT BE ALLOWED TO INAPPROPRIATELY INJECT THEMSELVES INTO MARKET POWER MITIGATION FUNCTIONS THAT MUST ONLY BE PERFORMED BY INDEPENDENT ENTITIES

The Complaint includes a single sentence claiming that "Complainants are not seeking to inject themselves into individual exemption or mitigation decisions, or seeking access to confidential information that new entrants provide to the NYISO in the course of the mitigation process."[168] The inclusion of this language reveals that Complainants recognize that it is neither appropriate nor consistent with precedent (or with the NYISO's understanding of the practices of other ISOs/RTOs) for them to be involved in administering market power mitigation measures. Nevertheless, the very next sentence of the Complaint betrays their desire to do exactly that by acknowledging that their objective is to be in a position to "confirm that the NYISO is, in fact, complying with the requirements of the Services Tariff."[169] This is not properly the Complainants' responsibility. Permitting them to usurp the role of the MMU (if not the Commission itself) in this respect would allow them to tip the "balance between the need to protect consumers from the exercise of market power and the goal of avoiding over-mitigation that may keep capacity out of the market..... "[170] and create a serious risk of impeding entry.

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[167] *See Sithe New England Holdings, LLC v. FERC,* 308 F.3d 71 (1st Cir. 2002).(stating that ICAP Suppliers had no "statutory entitlement" to a particular level of capacity revenue or even to any capacity revenue at all.)

[168] Initial Complaint at 46.

[169] *Id.*

[170] *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶61,297 at P 63 (2008).

Commission precedent has been clear, starting with Order No. 888 and continuing through the early ISO/RTO implementation orders, Order No. 2000, the market monitoring policy statement(s), Order No. 719, and the Order No. 719 compliance proceedings, that market power monitoring and mitigation are functions that must be performed by independent entities. They are not to be undertaken by, or even in collaboration with, market participants. This is in part because of the need to protect confidential and competitively sensitive information (which was discussed above. It is also because mitigation measures must balance the need to protect the continued existence of well-functioning competitive markets against the need to avoid overly restrictive or unpredictable restrictions that could discourage entry.[171] The Commission has confirmed that the same principle must guide the design and implementation of the In-City Buyer Side Mitigation Measures.

Complainants, however, have powerful economic incentives to try to use the In-City Buyer Side Mitigation Measures as a tool to prevent new entry, regardless of whether it is economic, that would compete with their own In-City resources. Mr. Hieronymus openly reflects this self-interest when he argues that it is safer to err on the side of over-mitigating new entrants and that the balancing should "tilt to favor protection of the market."[172] The Commission should not lose sight of Complainants' motivations when evaluating their claims that one independent entity - the NYISO - is failing to fulfill its mitigation responsibilities. Complainants ignore the fact that another independent entity, the MMU, is already responsible

[171] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 122 FERC ¶ 61,172 at P 121 (accepting a proposal that "both protects consumers from market power, while also avoiding over-mitigation that can cause reliability problems to the extent that it keeps capacity out of the market over the longer term"); *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶61,297 at P 63 (2008) (finding that the conduct threshold proposed "strikes an appropriate balance between the need to protect consumers from the exercise of market power and the goal of avoiding over-mitigation that may keep capacity out of the market")

[172] Hieronymus Affidavit at pp. 16, 23.

for detecting such issues, and the In-City Buyer-Side Mitigation Measures already specifically provide for the MMU's input.

In the MOPR proceeding, one of the Complainant's corporate parents invoked the axiom that the antitrust laws are supposed to work for the benefit of competition, not competitors, and suggested that the same principle should apply to Commission-jurisdictional market power mitigation measures.[173] The NYISO agrees with the principle but is very concerned it would be violated if Complainants are permitted to have a *de facto* role in the administration of the In-City Buyer Side Mitigation Measures, or are otherwise allowed to make the measures more burdensome and unpredictable to their potential competitors.

G. COMPLAINANTS SHOULD NOT BE PERMITTED TO DICTATE THE ACTIONS OF THE INDEPENDENT MARKET MONITOR

Complainants would have the Commission compel the NYISO's independent MMU to take various actions.[174] For example, they ask that the MMU (along with the NYISO) be directed to "require new entrants to provide all contracts necessary for the NYISO to verify their respective estimates of Unit Net CONE and to identify any arrangements providing implicit or explicit subsidies or that would otherwise give the new entrant an incentive to bid below costs or

[173] Specifically, the NRG Companies' corporate parent, NRG Energy, is a member of the "PJM Power Providers Group" which has contended in the PJM MOPR proceeding that "that the purpose of the law is 'the protection of *competition*, not *competitors*.' *Brunswick Corp.v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) [emphasis in original] (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (a Sherman Act claim "must allege and prove harm, not just to a single competitor, but … to competition itself")." *See Request for Rehearing and Clarification,* PJM Power Providers Group, Docket No. EL11-20 and ER11-2875 at 13 (May 13, 2011).

[174] Complainants fail to explain what legal basis the Commission would rely upon to compel the MMU to take these actions. Because Complainants have neither named the MMU as a respondent to the Complaint, nor expressly accused it of any failure to fulfill its existing responsibilities, and because the MMU does not appear to be a "public utility" for purposes of the Federal Power Act, it is not clear what authority Complainants would have the Commission exercise.

that would make it indifferent to ICAP clearing prices."[175] They also recommend that the Commission consider directing the "MMU, rather than the NYISO" to "calculate and verify new entrants' Unit Net CONEs in the future."[176]

These requests should be rejected because individual market participants should not be allowed to dictate the actions, or the monitoring and mitigation priorities, of an independent MMU. The MMU is already responsible for detecting potential market power abuse and market manipulation in the NYISO-administered markets for energy, ancillary services, financial transmission rights, and capacity.[177] As an independent entity, it determines what issues warrant its attention consistent with its overall responsibility to detect and report potential market problems to the Commission. The MMU is monitoring and supporting the NYISO's administration of the In-City Buyer Side Mitigation Measures. To the extent that the MMU believes that the NYISO's effort warrants closer attention, it has discretion to give the issue a higher priority. If the MMU is satisfied with the NYISO's actions it should not be compelled to devote more attention to them than it thinks necessary.

Commission precedent is clear that ISOs/RTOs, even though they are themselves independent entities, should not be dictating to MMUs.[178] It follows that Complainants should not be permitted to do so, especially given their failure to show that the NYISO has failed to fulfill its responsibilities.

As was explained above, the NYISO's tariff delineates the roles of the MMA and the MMU. Complainants' have not come close to carrying the "dual burden" of proof under FPA

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[175] Initial Complaint at 40.

[176] Initial Complaint at 46.

[177] *See* Services Tariff Attachment O**.**

[178] *See, e.g., Allegheny Electric Cooperative, Inc., et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,257.

Section 206 that they must overcome in order to justify revising the tariff to allow market participants to instruct the MMU to increase its focus on particular issues of concern to them.

III. CONCLUSION

For the foregoing reasons, the NYISO respectfully requests that the Commission deny the Complaint in its entirety.

July 6, 2011

Respectfully submitted,

s/ Ted J. Murphy
Ted J. Murphy
Hunton & Williams LLP

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 6th day of July, 2011.

/s/

Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20426
(202) 955-1500

ATTACHMENT 1

ATTACHMENT 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket Nos. EL11-42-000

AFFIDAVIT OF JOSHUA A BOLES

Mr. Joshua A. Boles declares:

1. I have personal knowledge of the facts and opinions herein and if called to testify could and would testify competently hereto.

I. Purpose of this Affidavit:

2. I submit this affidavit in support of the NYISO's Answer to the Complaint filed by Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC (collectively the "Complainants"). Specifically, I address and refute the claims made by the Complainants that the NYISO's implementation of the "In-City Buyer-Side Mitigation Measures,"[1] has been flawed or will be flawed in the future.[2] I demonstrate that the NYISO's implementation adheres to all aspects of Attachment H and Attachment O to the Services Tariff and Commission Orders.

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[1] As the NYISO does in the Answer, I use the term "In-City Buyer-Side Mitigation Measures" to refer to the currently-effective buyer-side capacity market mitigation provisions in Attachment H to its Services Tariff, including those that were accepted by the Commission in its series of orders in Docket ER10-3043.

[2] The Complaint does not raise issues regarding mitigation measures applicable to Special Case Resources ("SCRs") or the NYISO's implementation of mitigation measures for SCRs, and it does not purport to propose to modify existing, or propose new, provisions applicable to SCRs. Accordingly, I am not addressing or discussing mitigation measures regarding SCRs. References herein to Installed Capacity Suppliers, the mitigation of capacity suppliers, and similar terms do not mean SCRs.

3. This affidavit does not address Complainants' alternative claim that, to the extent the Commission agrees that the NYISO has properly implemented the Services Tariff, that the tariff should be revised. The NYISO's Answer explains that Complainants have not made a legally sufficient showing to justify such changes. This affidavit also does not address possible enhancements that might be made to the existing Services Tariff provisions, specifically, the possibility of making tariff changes to provide for the escalation of Offer Floors, once established.

II. Qualifications

4. I am the Supervisor of Monitoring, Analysis, and Reporting for the Market Mitigation and Analysis Department ("MMA") of the New York Independent System Operator, Inc. ("NYISO"). My responsibilities include supporting the Director of MMA in administering the NYISO's market power mitigation measures, including the capacity market measures, which are set forth in Attachment H to the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff").

5. I received an M.A. in Applied Economics and a B.A. in Economics from the State University of New York at Buffalo.

6. For the past six years I have been involved in numerous market power mitigation matters, including those involving the In-City Installed Capacity[3] ("ICAP") market. I have been actively involved in the NYISO's development and implementation of

[3] Terms with initial capitalization that are not otherwise defined herein shall have the meaning specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") and if not defined therein, they shall have the meaning specified in the NYISO's Open Access Transmission Tariff ("OATT").

capacity market mitigation rules since 2007. I was part of the NYISO team that developed the tariff enhancements that now comprise the In-City Buyer-Side Mitigation Measures. I have also worked on all of the subsequent NYISO filings in response to the Commission's orders, or other parties' pleadings, on that subject.

7. I have submitted affidavits in support of several mitigation proceedings,[4] including an In-City ICAP proceeding. Most recently, I submitted an Affidavit to support the NYISO's recommendation to retain a 500 MW threshold for determining Pivotal Supplier status[5] in response to the Commission's May 2010 Order on capacity mitigation.[6] I also submitted an affidavit in support of the NYISO's annual report on the effectiveness of the Demand Curves and withholding in the Rest of State capacity market.[7]

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[4] *See Supporting Affidavit of Joshua A. Boles in An explanation of the reasons why MMP concluded that offers submitted for a NYCA Generator exceeded the thresholds set forth in Sections 1(b) and 3.2.3 of the MMM, and that the Generator should be made subject to the mitigation measure proposed in Rate Schedule M-1, including a supporting Affidavit of Joshua A. Boles*, Attachments C, D, E, in *New York Independent System Operator, Inc.'s, in Filing Requesting Authority to Prospectively Apply New Mitigation Rules to Three Specifically Identified Generators, Requesting Limited Waivers of the NYISO's Tariff and of the Commission's Regulations, Seeking Expedited Commission Action, and Requesting Shortened Notice and Comment Periods*, Docket No. ER09-1682-000 (filed September 4, 2009); *see also Supplemental Affidavit of Mr. Joshua A. Boles, the Supervisor of Monitoring, Analysis and Reporting for the NYISO*, Attachment B, in *Motion for Leave to Respond, and Response, and Request for Confidential Treatment and Exemption from Freedom of Information Act Disclosure of the New York Independent System Operator, Inc. (October 13, 2009)* Docket ER09-1682-000; *See also, Affidavit of Joshua A. Boles*, Attachment A, in *New York Independent System Operator, Inc.*, Dockets ER09-1682-000, ER09-1682-004 (filed Dec 3, 2009); *see also, Affidavit of Joshua Boles*, in *Compliance Filing of the New York Independent System Operator, Inc.* Dockets ER09-1682-000, ER09-1682-001, ER09-1682-002 (filed Jan 20 2010).

[5] *See* New York Independent System Operator, Inc., *Compliance* Filing, Docket No. ER10-2210-000, *et al* (August 12, 2010) at Affidavit of Joshua A. Boles.

[6] *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,170 (2010) ("May 2010 Order").

[7] *See* New York Independent System Operator, Inc. Compliance Filing and Request for Confidential Treatment, Docket ER01-3001-019, ER03-647-011 (July 25, 2008) at Attachment III.

8. I have been and am actively involved in all aspects of the NYISO's ICAP market mitigation measures. For the past year, I have been responsible for the implementation of all aspects of the NYISO's In-City Capacity market mitigation measures, including the buyer-side market power mitigation rules.

III. Implementation of the In-City Buyer-Side Mitigation Measures

9. In my role as the Supervisor in the MMA, one of my core responsibilities is the implementation of the NYISO's In-City Buyer-Side Mitigation Measures. I am responsible for ensuring that the NYISO's implementation complies with all of its tariff obligations.

10. In-City Buyer-Side Mitigation Measures require that the NYISO examine proposed capacity projects ("Projects") identified in accordance with the Services Tariff and Commission Orders.[8]

11. The NYISO adheres to the In-City Buyer-Side Mitigation Measures when making exemption and Offer Floor Determinations. My affidavit will address the following aspects of the NYISO's compliance with the In-City Buyer-Side Mitigation Measures: (A) the application of inflation in the Unit Net CONE calculation, (B) the use of the currently effective Demand Curves to determine Mitigation Net CONE[9] for purposes of performing the exemption test pursuant to 23.4.5.7.2(a) (the "Part A

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[8] *See* Services Tariff Attachment H Section 23.4.5.7.3; *see* also, Order on Compliance 134 FERC P 61,083 (2011) at P.25.

[9] The term Mitigation Net CONE is in Services Attachment H Section 23.4.5.7.3.2. The use of Mitigation Net CONE is in accordance with the May 2010 Order. *See* further discussion of the term in Answer at n. 34 and Section III.C.4.a.

Exemption Test") and to calculate the default Offer Floor[10] ("Default Offer Floor") based on 75 percent of the Mitigation Net CONE, (C) the calculation of projected ICAP Spot Market Auction prices for purposes of (i) the Part A Exemption Test, (ii) the exemption test pursuant to 23.4.5.7.2(b) (the "Part B Exemption Test"), and (iii) the determination of reasonably anticipated Unit Net CONE, (D) the provision of required and additional information, (E) the involvement of the NYISO's Market Monitoring Unit ("MMU"), (F) Due Diligence; and (G) the various misstatements in the Affidavit of Craig Hart. [

A. The NYISO's Use of Inflation in Exemption and Offer Floor Determinations

12. The NYISO does apply inflation in its determination of a proposed Project's reasonably anticipated Unit Net CONE for purposes of the Part B Exemption Test. It also accounts for inflation when establishing an Offer Floor if the Offer Floor is based on a Project's Unit Net Cone.

13. The Part B Exemption Test states that "An Installed Capacity Supplier shall be exempt from an Offer Floor if … the price that is equal to the average of the ICAP Spot Market Auction prices in the six Capability Periods beginning with the Starting Capability Period is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than the reasonably anticipated Unit Net CONE of the

[10] The NYISO uses the term "Default Offer Floor" to mean the portion of the definition of "Offer Floor" which is the "numerical value equal to 75% of the Mitigation Net CONE translated into a seasonally adjusted monthly UCAP value." *See* Services Tariff Attachment H Section 23.2.1 at definition of "Offer Floor".

Installed Capacity Supplier."[11] The Unit Net CONE used in the Part B Exemption Test is the same Unit Net CONE that is utilized to establish the Project's Offer Floor if the reasonably anticipated Unit Net CONE is lower than Mitigation Net CONE.[12]

14. For purposes of demonstrating how inflation is applied throughout the Unit Net CONE calculation I provide the following example using a hypothetical Project with a Mitigation Study Period of 2012 through 2014. Note that, in accordance with the In-City Buyer-Side Mitigation Measures, the Mitigation Study Period is the three-year Period "beginning with the Summer Capability Period commencing three years from the start of the year of the Class Year."[13] For ease of reference, the example will simply refer to a year.

15. As the Table below illustrates, inflation is used in the Unit Net CONE calculation in order to provide the correct treatment of real and nominal dollars, for both costs and revenues.

16. The NYISO's calculation of a Project's reasonably anticipated Unit Net CONE begins by expressing a Project's costs in the year's dollars of the first year of the Mitigation Study Period. In the example in the Table below, the first year of the Mitigation Study Period is 2012. The total investment cost and fixed operations and maintenance ("O&M") costs are escalated to 2012 dollars as the starting point. For years two and three of the Mitigation Study Period, the levelized carrying charge and

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[11] Services Tariff Attachment H Section 23.4.5.7.2(b).

[12] *See* Services Tariff Attachment H Section 23.2.1 at definition of "Offer Floor."

[13] *See* Services Tariff Attachment H Section 2.4.5.7.2.

fixed O&M costs are escalated so that the values are appropriately expressed as nominal values.

17. The Table also illustrates that inflation is also reflected in the calculation of the revenue components. Ancillary services revenues are escalated for the second and third years of the Mitigation Study Period. Ancillary services revenues require escalation because they are representative of dollars of the first year of the Mitigation Study Period and thus need to be converted from real to nominal values in years two and three.

18. As the Table depicts, net energy revenues are not escalated in the same manner as the other Unit Net CONE values. The reason they are not is that the calculation of net energy revenues uses an average of forward gas prices for the years of the Mitigation Study Period. The nominal gas price forwards implicitly include inflation. NERA uses the average of forward gas prices to calculate a single net revenue value that is used for each year of the Mitigation Study Period as stated in the Meehan affidavit.

19. The straight average of the three annual Net CONE values for each year of the Mitigation Study Period is the Unit Net CONE. The single value represents the average net cost of new entry over the first three years of a Project's life.

20. The Part B Exemption Test compares Unit Net CONE to the "average of the ICAP Spot Market Auction prices in the six Capability Periods beginning with the Starting Capability Period."[14] This comparison is also illustrated in the Table below.

21. The inflation rate the NYISO used for purposes of calculating the reasonably anticipated Unit Net CONE is 2.15 percent. The 2.15 percent value represents the long term inflation rate (2.4%) net of technological progress (.25%), as stated in the Meehan affidavit.

Demonstration of Inflation Applications in Unit Net CONE Calculation

	Year	2012	2013	2014	Notes
A	Total Investment Cost per kW	$2,000			Capital costs inflated to 2012 $
B	Levelized Carrying Charge	12.00%	12.26%	12.52%	Years 2 and 3 escalated
C	Annual Fixed O&M	$20.00	$20.43	$20.87	Years 2 and 3 escalated
D	Net Energy Revenues	$100.00	$100.00	$100.00	Gas forwards reflect inflation
E	Ancillary Services Revenues	$5.00	$5.11	$5.22	Years 2 and 3 escalated
F	Annual Net CONE	$155.00	$160.48	$166.08	= A * B + C - D - E
G	Unit Net CONE	$160.52			= Average (2012, 2013, 2014)

22. In addition to Mr. Younger's incorrect statements regarding the NYISO's supposed failure to use inflation in performing the Unit Net CONE analyses,[15] the examples he provides contain errors. He is wrong to say that a Class Year 2009 project has a Unit Net CONE in 2009 dollars. He takes the flat $100/kW-year 2009 dollar value and applies it beginning in 2012, which gives the appearance that inflation is completely

[14] *See* Services Tariff Attachment H Section 23.2.1 at definition of "Offer Floor".

[15] Younger Affidavit at PP 61-72, and Exhibit MDY-6.

ignored between years 2009 through 2012. The Table demonstrates that the NYISO does recognize inflation.

23. Finally, Mr. Younger has incorrectly calculated the Default Offer Floors in Exhibits MDY-S-2 and MDY-S-3 in Younger's Supplemental Affidavit in the Amendment to the Complaint. In Exhibit MDY-S-2, the Default Offer Floor for 2012 of $126.04 appears to have been calculated based on the 2013 Demand Curve and not the 2012 Demand Curve, which would have produced a correct value of $123.93. Younger's calculation of the Default Offer Floor for 2013 is similarly miscalculated. The overstated values widen the difference between the Default Offer Floors based on the two Demand Curves, thus supporting Younger's comparison. The magnitude of the correction is relatively minimal, but it is important to note for accuracy.

B. Determination of Mitigation Net CONE

24. The NYISO's Answer explains that the NYISO's use of Mitigation Net CONE is in compliance with the Commission's May 2010 Order.[16] When performing the Part A Exemption Test, the NYISO uses the capacity price on the currently effective New York City Demand Curve corresponding to the average amount of excess capacity above the In-City Installed Capacity requirement, expressed as a percentage of that requirement, that formed the basis for the Demand Curve approved by the Commission. That value is the "Mitigation Net CONE".

25. The currently effective ICAP Demand Curve for New York City is established pursuant to Section 5.14.1.2. of the Services Tariff. As discussed in Section D of this

[16] *See* Answer at n. 34 and Section III.C.4.a.,

Affidavit, on June 8, 2011, the NYISO posted on its web site certain data, including, as of that date, the Mitigation Net CONE of $111.34/kW-year in ICAP terms and Default Offer Floor of $83.50/kW-year in ICAP terms.

26. To compute these values, the NYISO used the $143.15 NYC Annual ICAP Revenue Requirement as the starting point. The point on the currently effective ICAP Demand Curve corresponding to the average amount of excess capacity used to form the basis of those curves is 4 percent; this is the Mitigation Net CONE value of $111.34/kW-year in ICAP terms. To compute the Default Offer Floor, the NYISO took 75 percent of the Mitigation Net CONE to arrive at a Default Offer Floor of $83.50/kW-year in ICAP terms.

27. The NYISO then determines the monthly Offer Floor values for the Summer and Winter Capability Periods using the same methodology that was accepted by the Commission for the currently effective New York City Demand Curve. Because the Demand Curves are stated as ICAP, the NYISO converted that value to UCAP.

28. Another step required in the calculation of the UCAP value for the Mitigation Net CONE determined through the steps in the preceding paragraph is: "for the each year after the last year covered by the most recent Demand Curves approved by the Commission [to increase it] by the escalation factor approved by the Commission for such Demand Curves."[17] As discussed in the Answer, the currently effective ICAP Demand Curves as of June 8, 2011 specifically do not include an escalation factor; therefore, the NYISO attributed zero percent escalation. If the ICAP Demand Curves

[17] *See* Services Tariff Attachment H Section 23.4.5.7.4. This section of the tariff does not refer to escalating, or provide for the escalation of, an Offer Floor once the Offer Floor is determined. The Answer responds to the Complainant's proposal to escalate an established Offer Floor.

that are effective at the time the NYISO makes a future determination pursuant to the In-City Buyer-Side Mitigation Measures include a Commission-approved escalation factor, the NYISO will use the escalation factor in accordance with the Attachment H provision quoted in the paragraph above when applying Mitigation Net CONE in the Part A Exemption Test and the Part B Exemption Test.

29. The In-City Buyer-Side Mitigation Measures also require that the NYISO use Mitigation Net CONE to determine the Default Offer Floor. The NYISO utilizes the value determined in accordance with Attachment H, which is as described in the paragraphs 24-26. The Default Offer Floor is equal to 75 percent of the Mitigation Net CONE.

C. Projected ICAP Spot Market Auction Prices

30. The NYISO's calculation of the projected ICAP Spot Market Auction Price for use in both the Part A Exemption Test and the Part B Exemption Test is in accordance with Attachment H. For the Part A Exemption Test, the NYISO is to use "the ... average of the ICAP Spot Market Auction price for each month in the two Capability Periods, beginning with the Summer Capability Period commencing three years from the start of the year of the Class Year (the "Starting Capability Period") ... projected by the ISO."[15] For the Part B Exemption Test, the NYISO is to use "the price that is equal to the average of the ICAP Spot Market Auction prices in the six Capability Periods

[15] See Services Tariff Attachment H at Section 23.4.5.7.2.

beginning with the Starting Capability Period … projected by the ISO, with the inclusion of the Installed Capacity Supplier."[19]

31. Accordingly, for the In-City Buyer-Side Mitigation Measure data posted on June 8, 2011, the NYISO used the New York City Demand Curves that it filed in March,[20] as revised in accordance with the Commission's May 19, 2011 Order (such New York City Demand Curves, the "Filed Demand Curves").[21] The Filed Demand Curves used, therefore, are identical to the New York City Demand Curves filed by the NYISO in its June 20, 2010 Demand Curve Compliance Filing.[22]

32. The NYISO believes that its Filed Demand Curves are in accordance with the series of Commission orders in Docket ER11-2224. Accordingly, it is reasonable to project future ICAP Spot Market Auction prices utilizing the Filed Demand Curves.

33. If the Commission issues an order accepting new New York City Demand Curves or provides the NYISO with a basis to reasonably anticipate a forecast that is based on Demand Curves other than the Filed Demand Curves, the NYISO would use them to project the average of the ICAP Spot Market Auction prices when performing the Part A Exemption Test and the Part B Exemption Test.

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[19] *Id.*

[20] *See* New York Independent System Operator, Inc., *Compliance Filing and Request for Flexible Effective and Implementation Dates*, Docket Nos. ER11-2224-004 and ER11-2224-005 at Attachments I and II.

[21] *New York Independent System Operator, Inc.*, 135 FERC P 61,170 (2011) ("May 2011 Order").

[22] *See* New York Independent System Operator, Inc., *Compliance Filing and Continued Request for Flexible Effective and Implementation Dates*, Docket Nos. ER11-2224-009 ("June Compliance Filing") at Attachments I and II.

34. The Services Tariff also requires that the NYISO use the "reasonably anticipated ICAP Spot Market Auction forecast price" in its computation of a Project's Unit Net CONE.[23] For the June 8, 2011 web posting, the NYISO utilized the Filed Demand Curves.

D. The NYISO Provides Stakeholders with as Much Information as Reasonably Practicable Regarding the Implementation of the In-City Buyer-Side Mitigation Measures

35. The NYISO timely complied with the data posting requirements set forth in the In-City Buyer-Side Mitigation Measures. Specifically, Attachment H requires that "[b]efore the commencement of the Initial Decision Period for the Class Year, the ISO shall post on its website the inputs of the reasonably anticipated ICAP Spot Market Auction forecast prices determined in accordance with 23.4.5.7.3.2, the Expected Retirements, and the Examined Facilities, before the Initial Project Cost Allocation" (the "Required Data").[24] This requirement was not present in Attachment H, nor was there any similar requirement, prior to the Commission's acceptance of the In-City Buyer-Side Mitigation Measures in the November 2010 Order.[25]

36. On November 12, 2010, the NYISO first posted to its website the Required Data[25] and notified its stakeholders of the web posting. That posting was prior to the Commission's November 2010 Order, which was issued on November 26, 2010. In

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[23] See Services Tariff Attachment H Section 23.4.5.7.3.2.

[24] Services Tariff Attachment H Section 23.4.5.7.3.2.

[25] *See New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178 (2010) (the "November 2010 Order").

[25] The November 12, 2010 web posting of Required Data is available at <http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/In-City_ICAP.pdf>.

addition to the Required Data, the NYISO posted additional information. Specifically, the NYISO provided the New York City Annual ICAP Revenue Requirement, and the escalation rate that, as of that date, would have been used for purposes of establishing Mitigation Net CONE. The November 12, 2010 web site posting also provided the Default Offer Floor in both ICAP and UCAP terms, and the reasonably anticipated ICAP Spot Market Auction prices.

37. As described in the Answer,[27] the NYISO anticipated that the Initial Decision Period for Class Year 2009 and Class Year 2010 was going to commence on June 10, 2011, based on the Operating Committee's meeting agenda. Accordingly, on June 8, 2011, the NYISO posted on its web site the then-current Required Data[28] and notified its stakeholders of the web posting. The Initial Decision Period did not commence on June 10, 2010, and it has not yet commenced as of the date of this filing.

38. If prior to the anticipated commencement of the Initial Decision Period, there is a change to value set forth on the web posting, the NYISO would update the web posting. Consistent with other aspects of the In-City Buyer-Side Mitigation Measures as described in this Affidavit, if the Commission issues an order accepting new Demand Curves or provides the NYISO with a basis to reasonably anticipate ICAP Spot Market Auction prices based on Demand Curves other than the Filed Demand

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[27] *See* Answer at Section II.D.

[28] The June 8, 2011 web posting of Required Data is available at <http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/In-City_ICAP_Buyer-side_Mitigation_Test_Data.pdf>.

Curves, the NYISO would post on its website a spreadsheet with the revised data and would notify its stakeholders.

39. The NYISO and its consultants, NERA Economic Consulting and Sargent & Lundy, (collectively, the "Consultants") communicated, individually and jointly, with the Projects. As discussed below, Mr. Hart's affidavit contains numerous significant errors including his statements regarding the number of communications between the NYISO, NERA, and Sargent & Lundy with US Power Generating Company ("USPG").

40. The NYISO also responded in writing to a series of Complainants' written questions, regarding the In-City Buyer-Side Mitigation Measures and posted those responses on its web site, and notified its ICAP Working Group of the posting of that information.[29] As indicated on the NYISO's agenda for its May 2, 2011 ICAP Working Group meeting,[30] the NYISO discussed its responses to the questions and answered stakeholders' additional questions, nearly all of which were posed by Complainants. The NYISO did not respond to Complainants' questions, or questions from any other stakeholder, which would require the disclosure of confidential information or information from which confidential information could be derived.

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[29] The NYISO's responses are available at <http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2011-05-02/BSM_Ans_to_Questions_ICAPWG_050211.pdf>.

[30] ICAP Working Group agenda for May 2, 2011 meeting available at <http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2011-05-02/ICAPWG_Agenda_050211.pdf>. (The Complaint notes that the discussion occurred, too.)

41. The NYISO posted to its web site a list of additional questions regarding the In-City Buyer-Side Mitigation Measures that it noted at the meeting, and notified the ICAP Working Group of the posting and provided an opportunity for stakeholders to submit additional questions.[31] Only the Complainants submitted added questions, and the NYISO posted those to the NYISO's website.[32] At its May 2, 2011 ICAP Working Group meeting, the NYISO informed stakeholders it would be responding to further questions regarding the In-City Buyer-Side Mitigation Measures. The topic was also noticed to stakeholders when it issued the agenda for the May 16 ICAP Working Group meeting.[33]

42. The NYISO responded to the questions at the May 16, 2011 ICAP Working Group meeting. The NYISO responded to Complainants' questions, except for those which sought confidential information or information from which confidential information could be derived.

E. Involvement of the NYISO's Independent Market Monitoring Unit

43. The In-City Buyer-Side Mitigation Measures, and Attachment O require that "the ISO shall seek comment from the Market Monitoring Unit on matters relating to the

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[31] List of questions compiled by NYISO available at <http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2011-05-02/ICAPWG_meeting_5-2-2-11_Buyer-side_mitigation.pdf>

[32] Complainants' list of additional questions available at <http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2011-05-16/USPG-TCRavenswood-NRG_Redline_5-5-11.pdf>

[33] ICAP Working Group May 16, 2011 meeting agenda available at: http://www.nyiso.com/public/webdocs/committees/bic_icapwg/meeting_materials/2011-05-16/ICAPWG_Agenda_051611.pdf.

determination of price projections and cost calculations."[32] The NYISO has complied with that requirement. As explained in this section and in the "Due Diligence" section below, the NYISO's interaction with its MMU goes well beyond the requirements outlined above.

44. Prior to identifying the reasonably anticipated ICAP Spot Market Auction prices which are included with the Required Data, the NYISO provides the information to, reviews the information with, and receives comments from the MMU. As explained in paragraphs 30-34 above, these price projections are used in the NYISO's determination of Mitigation Net CONE used in the Part A Exemption Test, the Part B Exemption Test, and to determine a Project's reasonably anticipated Unit Net CONE.

45. The NYISO also provides the MMU with the price projections used for each of the Projects when performing the Part A Exemption Test and the Part B Exemption Test. The NYISO and the MMU both review that data.

46. As explained further in the "Due Diligence" section, the NYISO provides the MMU with the information contained in the templates it receives from developers at the initial stage of the mitigation examination. These templates are the starting point for the cost calculations performed in the Unit Net CONE determination process. The NYISO provides the MMU with additional information from the developers, and other pertinent information that is has, including information received from the NYISO's Consultants. The MMU and the NYISO discuss this information to the extent that the MMU desires.

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[32] *See* Services Tariff Attachment H Section 3.4.5.7.3.3; see also Attachment O at 30.4.6.2.11.

47. The NYISO has also requested that the MMU review and provide input on net energy and ancillary services revenues used as an offset in the Unit Net CONE calculations, and the MMU has done so.

48. The MMU has also provided comments to the NYISO and its Consultants on proposed methodologies to use, the analysis of information provided by Projects, and other aspects of the implementation of the In-City Buyer-Side Mitigation Measures.

F. The NYISO Exercises the Appropriate Level of Due Diligence in its Administration of the In-City Buyer-Side Mitigation Measures

49. The process by which the NYISO determines a Project's reasonably anticipated Unit Net CONE ensures an appropriate level of due diligence necessary to determine the reasonably anticipated Unit Net CONE for any given project. The NYISO's implementation of both supply-side mitigation and buyer-side mitigation is fair and impartial.

50. The NYISO retained the Consultants to assist it in performing the Unit Net CONE analysis. NERA has extensive knowledge and expertise in forecasting energy and ancillary services revenues, as is evident from the Affidavit of Gene Meehan. Sargent & Lundy's extensive knowledge and expertise identifying and estimating costs necessary for a Unit Net CONE determination is evident from the Affidavit of Christopher Ungate submitted in the Demand Curve Reset proceeding.[25] With their

[25] *See* New York Independent System Operator, Inc., *Compliance Filing and Request for Flexible Effective and Implementation Dates*, Docket Nos. ER11-2224-004 and ER11-2224-005 (collectively, "March 29 Compliance Filing") at Attachment V.

expertise, and input from the MMU, the NYISO is positioned to reasonably and faithfully implement the In-City Buyer-Side Mitigation Measures.

51. When discussing due diligence associated with market mitigation measures, there are a few important considerations to keep in mind. In accordance with Services Tariff Attachment H, Service Tariff Attachment O, and the FERC Behavioral Rules, Market Participants have an obligation to provide accurate information to the NYISO. This data and information created to submit such information to the NYISO must be retained for a period of six years. If the MMU suspects that a Market Participant has provided false or misleading information to the NYISO it has an obligation to refer such matters to the Commission.

52. On September 28, 2011, the NYISO sent data requests to each of the Projects. Since that time, the NYISO has been working with its Consultants and the MMU on the calculation of the reasonably anticipated Unit Net CONE for each of the Projects. Two templates that were sent to each one of the Examined Facilities. The first is a template for data related to capital costs and the second is specific to plant characteristics and variable operating and maintenance costs. These templates are also described in the NYISO's responses to Complainants' questions, which were provided to all stakeholders and discussed at the May 2, 2011 ICAP Working Group meeting.

53. Promptly after sending the templates to each Project, the NYISO and its Consultants individually or jointly had a teleconference with each Project to review the data required by the templates. At the direction of the NYISO, Sargent & Lundy and

Consultants and the MMU, the NYISO complies with the requirements of the In-City Buyer-Side Mitigation Measures.

57. The NYISO uses Sargent & Lundy to aid it with its examination and analyses of information necessary to determine Unit Net CONE, including capital costs and other plant-specific information utilized to formulate certain values identified in the Table in Section A. At the direction of the NYISO, Sargent & Lundy communicates directly with the Project's representatives, including answering their questions regarding required information, and having the Project clarify information. Sargent & Lundy also obtains information and clarifications requested by the NYISO and the MMU.

58. In addition to examining the templates and other information submitted by the developer, Sargent & Lundy reviews other information, as described in P 52. Sargent & Lundy has multiple experts from many different disciplines reviewing and evaluating pertinent information.

59. Mr. Younger incorrectly states that the NYISO does not review contracts.[36] The NYISO and its Consultants do evaluate contracts. Contracts are one of a number of means to validate costs identified by a developer to determine whether it is appropriate to use a cost identified by a developer in the calculation of a project's Unit Net CONE.

[35] Younger at PP 10, 15, 81-33.

60. The NYISO does not consider the anticipated revenues a Project might receive under power supply agreements. The In-City Buyer-Side Mitigation Measures require the NYISO to determine whether a project is economic based on the revenues it is projected to receive through an ISO-administered market.. In addition, the purpose of the In-City Buyer-Side Mitigation Measures is to prevent uneconomic entry. It is not to determine whether a project is reasonably anticipated to be profitable based on all of its potentially non-market revenue streams.[37]

61. The NYISO uses NERA to aid the NYISO in its calculation of net energy and ancillary services revenue and the incorporation of net revenues into the Unit Net CONE analysis. NERA also evaluates the reasonableness of the cost of debt and equity to be used in the analysis. At the direction of the NYISO, NERA estimated the energy revenues for the Projects being evaluated. NERA's role is further described in the Affidavit of Eugene Meehan submitted with the Answer (the "Meehan Affidavit").

62. The NYISO provides to NERA the range of the level of excess to be used in determination of the energy revenues. The Meehan Affidavit describes NERA's use of the NERA energy model in relation to Unit Net CONE determinations. The NYISO also provides to NERA the ancillary services revenue to be included in the Unit Net CONE calculations.

63. The NYISO estimates ancillary services revenues based on historic ancillary clearing prices for a plant with similar characteristics that qualifies to receive the same

[37] *See* Services Tariff Attachment H Section 23.4.5.7.

ancillary services revenues as the examined Project. The NYISO also evaluates ancillary services revenue estimates provided by the Project, if submitted.

G. Hart Affidavit

64. The Hart Affidavit provides four "examples" of the purported lack of transparency and other alleged deficiencies in the NYISO's application of its In-City Buyer-Side Mitigation Measures. The preceding sections of this affidavit refute those claims. This section further refutes them by responding to each of Mr. Hart's "examples" and demonstrating that they are inaccurate, misleading, not plausible, and contrary to the facts. The truth is that the NYISO has provided, and will continue to provide, more transparency and information than its tariffs require.

65. Mr. Hart's first example involves data submission for a new entrant's UNC calculation.[38] He refers to the NYISO's responses at the May 2, 2011 and May 16, 2011 ICAPWG meetings and then claims that the NYISO did not make it clear whether a new entrant was required to submit cost data for each cost category. His claim is completely unfounded. The In-City Buyer-Side Mitigation Measures require the NYISO to make Unit Net Cone determinations. This determination requires cost data from the developer.

66. The tariff revisions accepted by the Commission in its November 2010 Order included a new provision which recognizes that the developer must timely submit

[38] See Hart Affidavit at P 11.

requested data for the Unit Net CONE determination.[39] That requirement is in addition to other Attachment H and Commission requirements for market participants to provide complete and accurate information to ISOs.

67. Further, the NYISO's written answer to Question #7 at the May 2, 2011 ICAP Working Group meeting provided a two-page list of capital costs, fixed O&M costs, and variable O&M costs that the NYISO uses in its determination of each Project's reasonably anticipated Unit Net Cone calculation. In addition to the two-page list, the NYISO response to Question 7 stated: "The NYISO requests from the Examined Facility all of the necessary information for making a Unit Net CONE determination. The NYISO reviews the information and, when necessary, requires additional and/or supporting documentation from the Examined Facility." The requirement for projects to provide cost data could not be more clear.

68. Mr. Hart also references an October 7, 2010 conference call between USPG and the Consultants. Mr. Hart claims that the Consultants "advised" USPG that the "safest response" was to default to the cost assumptions from the Demand Curve proxy unit.[40] He then uses this response to suggest that other developers may "cherry-pick" low costs to artificially reduce a project's Unit Net CONE.

69. The Answer explains the inaccuracy of Mr. Hart's description. In addition, it is not the practice of the NYISO or its Consultants to merely accept the costs figures received from a developer, regardless of whether those costs were the Demand Curve

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[39] *See* Services Tariff Attachment H Section 23.4.5.7.3.4.

[40] *See* Hart Affidavit at PP 11 -12.

peaking plant's costs. The NYISO, and the Consultants scrutinize the data submitted and evaluate them to determine whether it is reasonable to assume that they accurately represent the Project's actual costs, and if an estimate, whether the estimate is reasonable. The NYISO, the Consultants, and the MMU also require clarifying and supporting information and documentation from the developer, if the information submitted raises questions.

70. The submission of the Demand Curve peaking plant's costs would only provide a data point from which to compare a Project's actual costs and estimates. Even that would be the case only if the Project was the same as the Demand Curve peaking plant and the developer had the same capital structure, among other common characteristics. Moreover, the Consultants who participated on that call do not share USPG's recollection and would not have made that specific statement. Thus, even if Mr. Hart used the word "advise" in his affidavit to mean "inform", it would be inaccurate. Further, the NYISO's Consultants do not "advise" project representatives.

71. The NYISO requires each Project for which it is making a Unit Net CONE determination to submit cost information. Because the Unit Net Cone may be calculated prior to actual costs being incurred, before procurement contracts, or financing commitments are executed, a developer may need to estimate certain costs.

72. Mr. Hart's assertion that new entrants may "cherry-pick" is thus not plausible. To accept his characterization would require an assumption that a Project would provide

false, inaccurate, or incomplete information to the NYISO, and that NYISO, the Consultants, and the MMU would overlook and simply accept the information.[41]

73. Mr. Hart's second example criticizes the level of interaction between the NYISO, the NYISO's Consultants, and the developer in the Unit Net CONE determination process.[42] Hart asserts that USPG received just one limited inquiry from the NYISO. To the contrary, the NYISO and its Consultants engaged USPG on numerous occasions, through telephone calls and through an exchange of e-mail, including communications in which Mr. Hart was directly involved.

74. In fact, I have determined that there were at least eighteen interactions between NYISO staff, and/or its Consultants, with USPG regarding the South Pier Improvement project between September 2010 and June 2011. Because the NYISO believes that the content of these communications constitutes confidential information I have not prepared a synopsis of them for inclusion in this Affidavit. I can say, without disclosing USPG confidential information, that the various interactions addressed specific data and inputs being considered by the NYISO and its Consultants in the course of the NYISO's application of the In-City Buyer-Side Mitigation Measures to the South Pier Improvement project.

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[41] Thus the NYISO demonstrates that it does not do what Mr. Hieronymus fears because it does rely on "clear, observable factors derived from project specific characteristics that ... have been verified by the NYISO." See Hieronymus Affidavit at 16.

[42] *See* Hart Affidavit at P 13.

75. These facts disprove Mr. Hart's second example and serve to further demonstrate the transparency and the diligence with which the NYISO applies in administering the In-City Buyer-Side Mitigation Measures.

76. Mr. Hart's third example identifies a "May 19, 2011 conference call," and claims that during the call "the NYISO advised us…" of information provided to proposed projects.[43] This interaction was, in fact, a one-on-one phone conversation initiated by a NYISO employee under my supervision at my direction, with a USPG employee that the NYISO understands directly reports to Mr. Hart. The NYISO initiated the call because the NYISO identified errors in financing cost information submitted by USPG.

77. The Hart Affidavit misrepresents this dialogue, making it appear as if the NYISO provides no other information to the new entrant, which is simply not true. Thus, Mr. Hart's third example fails to support his claims.

78. Mr. Hart is correct in one respect. The NYISO has stated that "no information will be provided to [USPG] concerning other Class Year projects."[44] However, he is incorrect when he then states that "[w]ithholding such information leaves Market Participants with no ability to confirm that the testing parameters are being applied consistently and fairly." The Answer explains that it is not the Complainants' role to confirm whether the testing parameters are being applied consistently and fairly to the Complainants' potential competitors. It also explains the NYISO's tariff

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[43] Hart Affidavit at P 14.

[44] *Id.*

requirements to protect this commercially sensitive information. The Answer, this Affidavit, and the Meehan Affidavit demonstrate that the Buyer-Side Mitigation Measures are being applied consistently and fairly.

79. Mr. Hart's fourth example is that the NYISO did not identify the differences in the NERA model used in the Demand Curve reset and in the Unit Net CONE determinations.[45] The NYISO responded to that question at the May 2, 2011 and the May 16, 2011 ICAP Working Group meeting. There is a gas price adjustment, as described in the Meehan Affidavit. Rather than the level of excess capacity used in the Demand Curve reset process, which, in accordance with Services Tariff Section 5.14.1.2, is equal to or slightly above the locational minimum Installed Capacity requirement, for the Unit Net CONE determination the level of excess capacity used is in accordance with the In-City Buyer-Side Mitigation Measures.[46] Another difference, as previously explained, is the period of years for the energy and ancillary services revenues. The Unit Net CONE calculation uses the first three years of energy and ancillary services revenues, along with an annualized cost of new entry consistent with the In-City Buyer-Side Mitigation Measures which provide that the Unit Net CONE is for the Mitigation Study Period of three years. In the Demand Curve reset, net energy revenues are calculated for thirty years, discounted by a risk

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[45] See Hart Affidavit at 15.

[46] *See* Services Tariff Attachment H Section 23.4.5.7.3.2. See also Section 23.4.5.7.3.3 (which provides for the NYISO to revise its forecast for "prior to the ISO's issuance of the Revised Project Cost Allocation" in the Class Year Facilities Study Process "based on the Examined Facilities that remain in the Class Year for CRIS and the Examined Facilities that meet 23.4.5.7.3 (II) or (III)").

adjustment factor, and present valued in real terms.[47] The validity of this period and the rationale for using a different period than is used for the Demand Curve Reset.

80. Another difference is that a "demand payment" is not calculated. The "demand payment" feature of the NERA model used for the Demand Curve is so that the NERA "Model solves for the Demand Curve by finding capacity payments (referred to as "demand payments" in the model) that satisfy the zero supernormal profit criteria (revenues equal expenditures)."[48] The Unit Net CONE determination does not involve the setting of a Demand Curve; therefore, the "demand payment" feature of the NERA model is not used, and the model does not solve for a Demand Curve.[49]

81. Mr. Hart takes out of context and misstates a comment made during a conference call between USPG and the NYISO. Mr. Hart asserts that the NYISO said "it did not see any reason why the methodologies used to set the Offer Floors and make the Mitigation Exemption Test determinations needed to be consistent with the methodologies that it had just used in the Third Reset Process."[50] The NYISO's statement was not that there was no reason, it was that there was a reason for the differences and there was not Commission Order or tariff or tariff requirement that

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[47] See Meehan Affidavit, PP. 22-28.

[48] *See* Independent Study to Establish Parameters of the ICAP Demand Curve for the New York Independent System Operator, Attachment 2 (Meehan Affidavit) Exhibit B at 69, in *New York Independent System Operator, Inc., Tariff Revisions to Implement ICAP Demand Curves for Capability Years 2011/2012, 2012/2013, and 2013/2014*, Docket No. ER11-2224-000 (filed November 30, 2010).

[49] Thus, PP 81-82 refutes Mr. Hieronymus' fear that there is not a clear basis for the methodological differences. *See* Hieronymus Affidavit at p. 16.

[50] *See* Hart Affidavit at 16.

the same methodologies be used for both purposes, which I understand is the case in the PJM Interconnection, LLC's capacity market design.

Conclusion

82. This Affidavit, in conjunction with the Meehan affidavit, demonstrates that the NYISO's implementation of the In-City Buyer-Side Mitigation Measures is and will continue to be consistent with all aspects of Attachment H and Attachment O to the Services Tariff and related Commission Orders. Complainants are wrong to claim that they are implemented in a manner that is flawed or that will be flawed in the future.

This concludes my affidavit.

ATTESTATION

I am the witness identified in the foregoing Affidavit of Joshua A. Boles dated July 6, 2011 (the "Affidavit"). I have read the Affidavit and am familiar with its contents. The facts set forth therein are true to the best of my knowledge, information, and belief.

*/s Joshua A. Boles*_____
Joshua A. Boles
Supervisor, Market Mitigation and Analysis
New York Independent System Operator, Inc.
July 6, 2011

Subscribed and sworn to before me
this 6th day of July.

ATTESTATION

I am the witness identified in the foregoing Affidavit of Joshua A. Boles dated July 6, 2011 (the "Affidavit"). I have read the Affidavit and am familiar with its contents. The facts set forth therein are true to the best of my knowledge, information, and belief.

Joshua A. Boles
Supervisor, Market Mitigation and Analysis
New York Independent System Operator, Inc.
July 6, 2011

Subscribed and sworn to before me
this 6th day of July.

DIANE L. EGAN
Notary Public, State of New York
Qualified in Schenectady County
No. 4924890
Commission Expires March 21, 20 13

ATTACHMENT 3

NERA
Economic Consulting

Eugene T. Meehan
Senior Vice President

National Economic Research Associates, Inc.
1255 23rd Street NW
Washington, DC 20037

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc. **Docket No. EL11-42-000**

AFFIDAVIT OF EUGENE T. MEEHAN

Mr. Eugene T. Meehan declares:

1. I have personal knowledge of the facts and opinions herein and if called to testify could and would testify competently hereto.

I. Purpose of this Affidavit

2. The purpose of this affidavit is to describe the role of NERA Economic Consulting ("NERA") in connection with the New York Independent System Operator's ("NYISO") implementation of the current version of the buyer-side mitigation measures. These measures are set forth in Attachment H of the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff"). As the NYISO does in its Answer, I refer to these measures as the "In City Buyer Side Mitigation Measures". NERA is performing work related to the NYISO's determination of Unit Net CONE[1] that is part of

[1] Terms with initial capitalization that are not otherwise defined herein shall have the meaning specified in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") and if not defined therein, they shall have the meaning specified in the NYISO's Open Access Transmission Tariff ("OATT").

the In-City Buyer-Side Mitigation Measures[2] for proposed new capacity projects in New York City ("Projects"). In describing NERA's role, I also describe certain aspects of the Unit Net CONE methodology.

II. Qualifications

3. I am a Senior Vice President with NERA and have more than thirty years experience consulting with electric and gas companies. I have testified as an expert witness before numerous state and federal regulatory agencies, and in Federal court and arbitration proceedings.

4. My consulting practice at NERA focuses on the areas of electricity tariff design, electricity procurement, wholesale power market design, electricity costing and pricing, market power analysis and mitigation, power contract analysis, and power cost risk management.

5. I have worked extensively on electric utility and electricity market issues in New York State. I have provided consulting services for New York electric companies on a continuous basis since 1980, advising the companies on production cost modeling, transmission expansion, competitive bidding and reliability, and marginal generating capacity cost quantification. In 1987, I prepared and sponsored the New York Power Pool's position paper on competitive bidding for independent power producer supplies. That paper set forth the New York Power Pool's policy position on the establishment of

[2] As the NYISO does in the Answer, I use the term "In-City Buyer Side Mitigation Measures" to refer to the currently-effective buyer-side capacity market mitigation provisions in Attachment H to its Services Tariff, including those that were accepted by the Commission in its series of orders in Docket ER10-3043.

competitive bidding processes, power purchase contracts based on avoided cost, and the various implementation issues. Many of these positions were adopted by the New York Public Service Commission ("NYPSC"). I provided testimony on behalf of the New York State investor-owned electric utilities concerning the proper methodology to use when analyzing the cost-effectiveness of conservation programs. This methodology was adopted by the NYPSC and used as the basis for demand-side management evaluation in New York from 1982 through 1988.

6. I worked with the NYISO as well PJM Interconnection, LLC ("PJM") and ISO New England Inc. ("ISO-NE") in 2003 and 2004 to study the joint capacity market design proposal known as the Centralized Resource Adequacy Market or ("CRAM") and was a co-author of NERA's CRAM report.

7. I was retained by National Grid to advise the load serving entities in New England with respect to the ISO-NE forward capacity market settlement negotiations and attended many of the settlement sessions.

8. I directed NERA's efforts for the NYISO in connection with the ICAP Demand Curve reset for the three Capability Years of 2011/2012, 2012/2013, and 2013/2014, and the NYISO's previous ICAP Demand Curve reset.

9. A full statement of my qualifications is provided as Exhibit Meehan-A.

III. Overview of NERA's Role and Aspects of the Methodology

10. NERA was retained by the NYISO to determine certain components of the Unit Net Cone for individual Projects. NERA's role included estimating energy and ancillary services revenue offsets for use in the Unit Net CONE calculations.

11. Sargent and Lundy LLC (Sargent & Lundy), another consultant retained by the NYISO, provides information for the Unit Net Cone determinations. Specifically, Sargent & Lundy provides cost and performance data for individual Projects, including information concerning capital costs, fixed and variable operating and maintenance ("O&M") costs, property and other taxes, insurance costs, real levelized carrying charges (based on inputs from NERA, as described below), heat rates and emissions, start costs, capacity levels and forced outage rates. It is my understanding that Sargent & Lundy obtains the information from the developers and other sources.

12. NERA used the information provided by Sargent & Lundy and the NYISO when estimating net energy and ancillary service revenues. NERA provided information and analysis to NYISO regarding the costs of capital and the capital structure specific to individual Projects and the developers that Sargent & Lundy used in calculating levelized carrying charges.

13. NERA actively participated in teleconferences between and among the NYISO, Sargent & Lundy, and the independent Market Monitoring Unit (MMU) for the NYISO, Potomac Economics, Ltd., regarding the Unit Net CONE methodology and the data and inputs. NERA made certain recommendations as part of this collaboration.

14. At the NYISO's direction, NERA also spoke directly with Project representatives.

IV. Net Energy and Ancillary Services Estimates

15. NERA developed net energy and ancillary services revenues using the econometric model used in the NYISO's Demand Curve reset process. The econometric model uses the Project-specific inputs, such as heat rates and other physical characteristics, for each Project to simulate a hypothetical dispatch and calculate net energy revenues over three years.

16. As discussed in the final NERA Demand Curve report, I did not believe in the context of the Demand Curve reset that it was necessary or desirable to adjust for the difference between actual conditions in the historical period used to develop the statistical representation of the energy market and forecast conditions over the ICAP Demand Curve reset period.[3] Such adjustments can introduce error. While adjusting for an input as basic as gas prices could be argued to improve the accuracy of the price signal, gas prices are volatile and a snapshot of gas price futures taken and used during the ICAP Demand Curve reset process may or may not better represent actual gas prices over the reset period than does the historic average. Additionally, even the gas price adjustment requires some judgments. For the ICAP Demand Curve reset, the net cost of new entry is updated every three years and, over time, net energy revenues not adjusted for gas prices will reflect actual gas prices, albeit with a lag.

17. In the context of determining Unit Net CONE pursuant to the In-City Buyer-Side Mitigation Measures, I believe that the intent is to capture whether the entry decision is

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[3] *See* Independent Study to Establish Parameters of the ICAP Demand Curve for the New York Independent System Operator, Attachment 2 (Meehan Affidavit) Exhibit B at Appendix 4 pp. 41-43, 52-58, in *New York Independent System Operator, Inc., Tariff Revisions to Implement ICAP Demand Curves for Capability Years 2011/2012, 2012/2013, and 2013/2014*, Docket No. ER11-2224-000 (filed November 30, 2010).

economic as of a specified time. Estimating energy prices using a snapshot of future gas prices at that specific time should reflect the economics of the entry decision over the Mitigation Study Period. I believe, even with the judgments that are implicit in the gas price adjustment, it can be done with sufficient accuracy so that it more accurately represents the economic entry decision as of a specified time than calculating the energy net revenues without the gas price adjustment. Accordingly, for purposes of the In-City Buyer Side Mitigation Measures, energy revenues should be derived using projected gas prices based on gas futures prices over the Mitigation Study Period. Therefore, I recommended to the NYISO that we adjust the gas prices using current gas futures prices in determining the net energy revenues to use in the Unit Net CONE determinations.

18. For the Unit Net CONE determination, the econometric model uses gas futures prices to predict energy prices and derive net energy revenues. Gas futures prices for the years corresponding to the years of the Mitigation Study Period are used.

19. NERA used Transco-Z6 (NY) gas prices with an adder for LDC transportation charges. These prices are reasonable representations of the cost of gas delivered to the Projects.

20. The NERA econometric model shows that net energy revenues are sensitive to the level of excess. When calculating net energy revenues, we develop results for a wide range of excess capacity levels.

21. I understand that the methodology used by NYISO provides for revising net energy revenues and the Unit Net CONE values in relation to changes in the expected excess capacity level based on the Class Year Facilities Study process. The expected levels would change if a Project for which a determination is being made concurrently with

other Projects is no longer being considered for Capacity Resource Interconnection Service ("CRIS") in the NYISO's Class Year process. In that instance, that Project is removed from the expected excess capacity level but will remain in the energy forecast. Energy revenues are also adjusted if a Project ceases to move forward in the Class Year process, and thus it is also no longer in the energy forecast. It is for this reason that we provide the NYISO the Unit Net CONE results for a wide range of excess capacity levels.

22. The energy revenues in the Unit Net CONE calculation are not computed over the life of the unit but are estimates of energy revenues for the three-year period starting with initial entry. It is my opinion that, in most cases, only energy revenues in the near-term period after entry, rather than energy revenues over a longer period, are germane to the decision on when to develop the unit, as the timing of development is largely discretionary. To the extent that a developer would expect future energy revenues to increase significantly in real terms, the development of the unit could be delayed. It is only energy revenues in the first few years of unit operation that offset ownership costs in those years. Forecasting net energy revenues over a 30-year period is inherently speculative and there is a wide range of plausible predictions as fuel prices and load are very uncertain over such a long period. The speculative nature and uncertainty would render an objective estimation of Unit Net CONE difficult.

23. Estimated ancillary service revenues are also a cost offset in the determination of Unit Net CONE. The NYISO provides NERA estimates of ancillary services revenues. It is NERA's understanding that the NYISO uses recent actual ancillary services revenues

earned by similar plants that would qualify for the same ancillary services, to develop an estimate of ancillary services revenues for a Project.

V. Unit Net CONE Determination

24. NERA also prepares the Unit Net CONE for a wide range of excess capacity levels so that the NYISO can apply the results to scenarios in which other Projects being examined do not proceed in the Class Year process for CRIS but proceed as an energy-only resource, or if other Projects reject their allocations and thus will not enter the market for capacity or energy. In this step of the calculation, NERA multiplies the Project's total investment cost by the carrying charge, adds annual fixed O&M costs, and subtracts annual net energy and ancillary services revenues to determine the annual Unit Net CONE for each of the three years of the Project's Mitigation Study Period. The Project's Unit Net CONE is equal to the average of the three annual values. In calculating net energy revenues over the three years, NERA uses an average of the gas futures price for the three year period to calculate a single net revenue value that is used for each of the three years.

VI. Annual Levelized Carrying Charge

25. NERA provided information and analysis used in Sargent & Lundy's determination of the annual levelized carrying charge, which is used to develop the annual levelized cost of the Project. Sargent & Lundy calculated real carrying charges for various amortization periods. Sargent & Lundy calculated the carrying charge considering the developer's capital structure and cost of capital, and debt and equity cost data.

26. NERA examined information provided to Sargent & Lundy by each developer regarding the costs of capital and the capital structure specific to the Project and the developer. NERA also considered information from other sources. NERA provided its opinion with respect to the cost of capital and capital structure specific to each Project, including commenting on the reasonableness of information provided by the developer in consideration of the specific developer and Project. The NYISO, with input from the MMU, identified the cost of capital and capital structure to be used for each Project.

27. NERA recommended to the NYISO, and the NYISO agreed, that the levelized carrying charge be increased at 2.15 percent per year, which is inflation less technical progress. That carrying charge reflects an assumed long-term rate of inflation of 2.4 percent and an assumed long-term rate of inflation net of technical progress of 2.15 percent. Sargent & Lundy computed the real carrying charges accordingly.

28. In assembling the data and summarizing results, NERA used the carrying charge based on the 2.15 percent inflation rate net of technological progress, and used that rate to adjust the costs to the nominal dollars for each year of the Mitigation Study Period.

VII. Additional NERA Analysis and Recommendations

29. NERA analyzed the information provided by Sargent & Lundy, addressed the alternatives discussed below, and made the recommendations for the calculation of Unit Net CONE as discussed herein.

30. Amortization period. Sargent & Lundy provided carrying charges for multiple amortization periods. The Demand Curve reset uses as a starting point assumption a review of cost and revenue over a full 30-year period. If no asymmetric risks were

identified and modeled, the amortization period used in the Demand Curve reset would be 30 years. The actual amortization period used in the Demand Curve reset is lower to account for the preference in the NYCA towards always maintaining reliability. That preference results in capacity being expected to be long on average, and therefore requires that a shorter amortization period be used to set the Demand Curve reference point so that the Demand Curve peaking unit will recover a full return on and of capital costs over 30 years. However, in determining Unit Net CONE, there is no reason to use the shorter amortization period that adjusts for excess capacity. The Project is not being used to set the Demand Curve but only to estimate the net cost of ownership. In fact, the Demand Curve has been set to allow the Demand Curve peaking unit to recover costs based on a 30-year amortization period, recognizing that it will receive, on average, revenues less than if it were at the reference point; therefore, the Demand Curves are developed using a shorter amortization period. For the Unit Net CONE determination, accordingly, the economic life of the unit is estimated. NERA recommends an amortization period appropriate for each Project.

31. Use of nominal levelized or real levelized carrying charge. A nominal levelized carrying charge implies an assumed annual revenue level that is constant in nominal dollars. A real carrying charge implies an assumed annual level of revenue that increases at inflation or at inflation net of technical progress. Hence, a real levelized charge is lower. Essentially a real levelized charge calculates the cost of ownership in the early years of a project's life recognizing that it will receive increasing revenues in the later years. The Demand Curve reset uses a real levelized carrying charge that increases at 2.4 percent and in the risk model assumes that revenues will decrease at 0.25 percent for technical

progress. As we are not using the risk model in this analysis, NERA recommends a real levelized carrying charge that increases at 2.15 percent per year, which is inflation less technical progress.

32. With respect to NERA's recommendations provided to the NYISO regarding the cost of capital and capital structure specific to individual Projects and the developers that Sargent & Lundy used in its calculation of carrying charges, and other recommendations such as adjusting net energy revenues for actual gas future prices, NERA's role is advisory. The NYISO requested NERA to provide its advice and opinion on the issues discussed above in addition to using the econometric model to estimate net energy revenues, and computing the Unit Net CONE based on the inputs. NERA was not charged with making final decisions.

33. During the development of the methodology, and NERA's development of its analyses, recommendations, and opinions, and throughout the process, NERA collaborated with the NYISO, Sargent & Lundy and the independent Market Monitoring Unit on various issues. The NYISO, with that input, made final decisions on these issues.

34. NERA was not asked to interpret or apply the NYISO tariffs. Its role was as described above. Throughout the process, NERA followed direction provided by the NYISO.

VIII. Conclusion

35. The paragraphs above provide an accurate description of the activities undertaken by NERA in examining the Unit Net Cone for Projects pursuant to the Buyer-Side Mitigation Measures. They also accurately describe aspects of the methodology that NERA applied and used to prepare the results for NYISO.

This concludes my affidavit.

ATTESTATION

I am the witness identified in the foregoing Affidavit of Eugene T. Meehan dated July 6, 2011 (the "Affidavit"). I have read the Affidavit and am familiar with its contents. The facts set forth therein are true to the best of my knowledge, information, and belief.

Eugene T. Meehan
Senior Vice President
NERA Economic Consulting
July 6, 2011

Subscribed and sworn to before me
this 6th day of July.

NARI TROTTER
NOTARY PUBLIC-STATE OF UTAH
1670 BONANZA DRIVE STE 105
PARK CITY, UTAH 84060
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EUGENE T. MEEHAN
SENIOR VICE PRESIDENT

Mr. Meehan is a Senior Vice President at NERA. He has over thirty years of experience consulting with electric and gas utilities and has testified as an expert witness before numerous state and federal regulatory agencies, as well as appeared in federal court and arbitration proceedings.

At NERA, Mr. Meehan's practice concentrates on serving energy industry clients, with a focus on helping clients manage the transition from regulatory to more competitive environments. He has performed consulting assignments for over fifty large electric, gas, and combination utilities in the areas of retail access, regulatory strategy, strategic planning, financial and economic analysis, merger and acquisition advisory services, power contract analysis, market power and market definition, stranded cost analysis, power pooling, power markets and risk management, ISO and PX development, and costing and pricing. In addition, he has advised numerous utilities on power procurement issues and administered power procurements on behalf of utilities and regulators.

Mr. Meehan has experience leading NERA's advisory work on several major restructuring and unbundling assignments. These assignments were multi-year projects that involved integration of regulatory and business strategy, as well as development of regulatory filings associated with the recovery of stranded cost and rate unbundling.

Education

Boston College, BA, Economics, *cum laude*
New York University (NYU), Graduate School of Business, completed core courses for the doctoral program.

Professional Experience

	NERA Economic Consulting
1999-	Senior Vice President
1996-1999	Vice President
1973-1980	Senior Economic Analyst; Research Assistant
	Deloitte & Touche Consulting Group
1994-1996	Principal
	Energy Management Associates, Inc.
1980-1994	Vice President

Areas of Expertise

Restructuring/Stranded Cost Recovery

Mr. Meehan has directed several multi-year projects associated with restructuring and stranded cost recovery. These projects involved facilitating the development of an integrated regulatory and business strategy and formulating regulatory filings to accomplish strategy. As part of these assignments, Mr. Meehan facilitated sessions with senior management to set and track filing strategy. Clients include Public Service Gas & Electric and Baltimore Gas and Electric.

Unbundling/Generation Pricing

Mr. Meehan has formulated unbundling strategies, with a specialization in generation pricing. He has advised several utilities in standard offer pricing and has testified on shopping credits on behalf of First Energy and Baltimore Gas and Electric.

Power Procurement

Mr. Meehan has been involved in power procurement activities for a variety of utilities and regulatory agencies. He has advised utilities in developing and implementing evaluation processes for new generation, with the objective of achieving the best portfolio evaluation. He has helped regulators in Ireland and Canada design and implement portfolio evaluation processes. He has testified before FERC and state regulatory agencies on competitive power procurement. In addition, Mr. Meehan helped to design and implement the New Jersey BGS auction process.

Power Contracts

Mr. Meehan has extensive experience with power contracts and power contract issues. He has reviewed and testified on the three principal types of power contracts: integrated utility to integrated utility contracts, IPP to utility contract, and integrated or wholesale utility to distribution utility contracts. He has testified in power contracts disputes on behalf of Carolina Power and Light, Duke Power Company, Southern Company, Orange and Rockland Utilities, and Tucson Electric Power. He has also advised Oglethorpe Power Corporation in the reform of its wholesale contracts with its distributor cooperative members.

Retail and Wholesale Settlements

In addition to his expertise on power pooling issues, Mr. Meehan has significant experience with assignments related to the settlement process. He has focused on the issues of credit management as new entrants appear in retail and wholesale markets and has designed efficient specifications for retail settlement systems, including the use of load profiling, and examined the risk and cost allocation issues of alternative settlement systems.

Risk Management

Mr. Meehan has advised several large utilities on price risk management. These assignments have included evaluation of price management service offers solicited from power marketers in association with management of assets and entitlements, as well as provision of price managed service for various terms.

Marginal Costs

Mr. Meehan has provided comprehensive marginal cost analyses for over 25 North American Utilities. These assignments required detailed knowledge of utility operations and planning.

Power Supply and Transmission Planning

Mr. Meehan has advised electric utilities on economic evaluations of generation and transmission expansion. He has testified on the economics of particular investments, the prudence of planning processes, and the prudence of particular investment decisions.

Generation Strategy

Mr. Meehan has led NERA efforts on a client task force charged with developing an integrated generation asset/power marketing strategy.

Power Pooling

Mr. Meehan has in-depth working knowledge of the operating, accounting, and settlement processes of all United States power pools and representative international power pools. He has provided consulting services for New York Power Pool members on a continuous basis since

1980, advising the Pool and its members on production cost modeling, transmission expansion, competitive bidding and reliability, and marginal generating capacity cost quantification. In NEPOOL, he has quantified the benefits of continued utility membership in the Pool and the impact of the Pool settlement process on marginal cost. He has worked with a major PJM utility to explore the impact of PJM restructuring proposals upon generating asset valuation and examine the implications of alternative restructuring proposals. He has consulted for Central and Southwest Corporation, Entergy, and Southern Company on issues that involved the internal pooling arrangements of the utility operating companies of those holding companies, as well as for various utilities on the impact of pooling arrangements on strategic alternatives.

Representative Assignments

Worked with Public Service Electric & Gas Company (PSE&G) to direct a three year NERA advisory effort on restructuring. Facilitated a two-day senior management meeting to set regulatory strategy in 1997. Throughout 1997 and 1998, worked over half time at PSE&G to help implement that strategy and advised on testimony preparation, cross-examination, and briefing. Also advised PSE&G on business issues related to securitization, energy settlement and credit requirements for third party suppliers. During 1999, advised PSE&G during settlement negotiations and litigation of the settlement. PSE&G achieved a restructuring outcome that involved continued ownership of generation by an affiliate and the securitization of $2.5 billion in stranded costs.

Worked on separate assignments for a large utility in the Northeast and a large utility in the Southeast, advising on the evaluation of risk management offers from power marketers. The assignments included reviewing proposals, attending interviews with marketers and providing advice on these, and the developing analytical software to evaluate offers.

Worked with government of Ontario beginning in 2004 to help design the RFP and economic evaluation process for the solicitation of 2500 Mw of new generating capacity. Supervising NERA's portfolio-based economic evaluation on behalf of the Ontario Ministry of Energy.

Testified on behalf of Pacific Gas & Electric Company before the FERC in a case benchmarking the PSA between the distribution utility and a soon-to-be-created generating company. This effort involved developing detailed expertise in applying the Edgar standard and a detailed review of DWR procurement during the western power crisis. In addition, this effort involved the review of more than 100 power contracts in the WECC.

Directed NERA's efforts, on behalf of the electricity regulator in Ireland, to design an RFP and implementation process for the purchase of 500 Mw of new generating capacity in 2003. NERA advised on the RFP, the portfolio evaluation method, and the power contract and also conducted the economic evaluation.

Reviewed the economic evaluation conducted by Southern Company Service for affiliated operating companies in connection with an RFP for over 2000 Mw of new generating capacity. Submitted testimony before FERC on behalf of Southern Company Service.

Worked with Baltimore Gas and Electric (BG&E) to conduct a one and one-half year consulting assignment that involved providing restructuring advice. The project began in March/April 1998 with senior management discussions and workshops on plan development and filing strategy. Advised BG&E in the development of testimony, rebuttal testimony, and public information dissemination. Worked to review and coordinate testimony from all witnesses and offered testimony on shopping credits and in defense of the case settlement. BG&E achieved a restructuring outcome enabling it to retain generation ownership. As part of this assignment, advised BG&E on generation valuation and unregulated generation business strategy.

Directed the efforts of a large Southeastern utility to develop a short-term power contract portfolio and to evaluate the relative value of power options, forwards, and unit contracts to determine the optimal mix of instruments to manage price risk.

Testified for XCEL Energy on the use of competitive bids for new generation needs. Examined whether XCEL was prudent not to explore a self-build plan and the reasonableness of relying on ten-year or shorter contracts as opposed to life-of-facility contracts, in order to meet needs and facilitate a possible future transition to competition. This project addressed the comparability of fixed bids to rate base plant additions.

Advised and testified on behalf of First Energy in the Ohio restructuring proceeding on the issues of generation unbundling and stranded cost. Defended the First Energy shopping credit proposal.

Advised Consolidated Edison and Northeast Utilities on merger issues and testified in Connecticut and New Hampshire merger proceedings. Testimony focused on retail competition in gas and electric commodity markets.

Directed NERA's effort to train selected representatives of a major European power company in American power marketing and risk management practices. The project involved numerous meetings and interviews with power marketing firms.

Led NERA's effort to advise the New England ISO on the development of an RTO filing. Examined performance-based ratemaking for transmission and market operator functions.

Examined ERCOT power market conditions during the period of time from 1997 to 1999 and testified on behalf of Texas New Mexico Power Company for the prudence of its power purchase activity.

Advised a Midwestern utility on restructuring of a wholesale contract with an affiliate. Involved forecasting of the unbundled wholesale cost-of-service and market prices, as well as development of a regulatory strategy for gaining approval of contract restructuring and the transfer of generation from regulated to EWG states.

Performed market price forecasts for numerous utility clients. These forecasts have employed both traditional modeling and newly developed statistical approaches.

Examined the credit issues associated with the entry of new entities into retail and wholesale settlement market. These assignments involved a review of current Pool credit procedures, examination of commodity and security trading credit requirements, coordination with financial institutions, and recommendations concerning credit exposure monitoring, credit evaluation processes, and credit requirements.

Oversight of EMA's consulting and software team in designing and implementing the LOLP capacity payment, a portion of the UK wholesale settlement system.

Advised Oglethorpe Power Corporation in the reform of its contracts with its distribution cooperative members and the evolution of full requirement power wholesale power contracts into contracts that preserve Oglethorpe's financial integrity and are suitable for a competitive environment.

Developed long run marginal and avoided costs of natural gas service, as well as avoided cost methods and procedures. These costs have been used primarily for the analysis of gas DSM opportunities. Clients include Consolidated Edison Company, Southern California Edison Company, Niagara Mohawk Power Corporation, and Elizabethtown Gas Company.

Review of power contracts and testimony in numerous power contract disputes.

Development of long run avoided costs of electricity service and avoided cost methods and procedures. These costs have been used to assess DSM and cogeneration, as well as to develop integrated resource plans. Clients include Public Service Company of Oklahoma, Central Maine Power Company, Duquesne Light Company, and the New York investor-owned utilities.

Advised Central Maine Power Company (CMP) on the development of a competitive bidding framework. This framework was implemented in 1984 and was the first of its kind in the nation. CMP adopted the framework outlined in EMA's report and won prompt regulatory approval.

Advised a utility in the development of an incentive ratemaking plan for a new nuclear facility. This assignment involved strategic analysis of alternate proposals and quantification of the financial impact of various ratemaking alternatives. Presented strategic and financial results in order to convince senior management to initiate negotiations for the incentive plan.

Advised and testified on behalf of the New York Power Pool utilities on the methodology for measuring pool marginal capacity costs. This work included development of the methodology and implementation of the system for quantifying LOLP-based marginal capacity costs.

Provided testimony on behalf of the investor-owned electric utilities in New York State, concerning the proper methodology to use when analyzing the cost-effectiveness of conservation programs. This methodology was adopted by the Commission and used as the basis for DSM evaluation in New York from 1982 through 1988.

Developed the functional design of a retail access settlement system and business processes for a major PJM combination utility. This design is being used to construct a software system and develop business procedures that will be used for retail settlements beginning January 1999.

Reviewed the power pool operating and interchange accounting procedure of the New York Power Pool, the Pennsylvania, New Jersey, Maryland Interconnection, Allegheny Power System, Southern Company, and the New England Power Pool as part of various consulting assignments and in connection with the development of production simulation software.

Summarized and analyzed the operational NEPOOL to examine the feasibility of incorporating NEPOOL interchange impacts with Central Maine and accounting procedure of the New England Power Pool Power Company's buy-back tariffs.

Developed and presented a two-day seminar delivered to electric industry participants in the UK (prior to privatization), outlining the structure and operation of power pools and bulk power market transactions in North America.

Benchmark analysis and FERC testimony of PGE's proposed twelve-year contract between PG&E and Electric Gen LLC (contract value in excess of $15 billion).

Responsible for NERA's overall efforts in advising New Jersey's Electric Distribution Companies on the structuring and conduct of the Basic Generation Service auctions (the 2002 auction involved $3.5 billion, and the 2003 and 2004 auctions involved over $4.0 billion).

Publications, Speeches, Presentations, and Reports

Capacity Adequacy in New Zealand's Electricity Market, published in *Asian Power*, September 18, 2003

Central Resource Adequacy Markets For PJM, NY-ISO AND NE-ISO, a report written February 2004

Ex Ante or *Ex Post*? Risk, Hedging and Prudence in the Restructured Power Business, The Electricity Journal, April 2006

Distributed Resources: Incentives, a white paper prepared for Edison Electric Institute, May 2006

Restructuring Expectations and Outcomes, a presentation presented at the Saul Ewing Annual Utility Conference: The Post Rate Cap and 2007 State Regulatory Environment, Philadelphia, PA, May 21, 2007

Making a Business of Energy Efficiency: Sustainable Business Models for Utilities, prepared for Edison Electric Institute, August 2007

Restructuring at a Crossroads, presented at Empowering Consumers Through Competitive Markets: The Choice Is Yours, Sponsored by COMPETE and the Electric Power Supply Association, Washington, DC, November 5, 2007

Competitive Electricity Markets: The Benefits for Customers and the Environment, a white paper prepared for COMPETE Collation, February 2008

The Continuing Rationale for Full and Timely Recovery of Fuel Price Levels in Fuel Adjustment Clauses, The Electricity Journal, July 2008

Impact of EU Electricity Competition Directives on Nuclear Financing presented to: SMI – Financing Nuclear Power Conference, London, UK, May 20, 2009

Testimony

Forums

Arkansas Public Service Commission

Federal Energy Regulatory Commission

Florida Public Service Commission

Maine Public Utilities Commission

Minnesota Public Service Commission

Nevada Public Service Commission

New York Public Service Commission

Nuclear Regulatory Commission – Atomic Safety and Licensing Board

Oklahoma Public Service Commission

Public Service Commission of Indiana

Public Utilities Commission of Ohio

Public Utilities Commission of Nevada

Public Utilities Commission of Texas

Public Utilities Commission of New Hampshire

United States District Court

United States Senate Committee on Energy and Natural Resources

Various arbitration proceedings

Clients

Arkansas Power & Light Company

Baltimore Gas & Electric

Carolina Power & Light Company

Central Maine Power

Consolidated Edison Company of New York, Inc.

Dayton Power and Light Company

Florida Coordinating Group

Houston Lighting & Power Company

Minnesota Power and Light Company

Nevada Power Company

Niagara Mohawk Power Corporation

Northern Indiana Public Service Company

Oglethorpe Power Corporation

Pacific Gas and Electric Company

Power Authority of the State of New York

Public Service and Electric Company

Public Service Company of Oklahoma

Sierra Pacific Power Company

Southern Company Services, Inc.

Tucson Electric Power Company

Texas-New Mexico Power Company

Recent Expert Testimony and Expert Reports

Supplemental Testimony on behalf of Texas-New Mexico Power Company, Docket No. 15660, September 5, 1996.

Direct Testimony on behalf of Long Island Lighting Company before the Federal Energy Regulatory Commission, September 29, 1997.

Rebuttal Testimony on behalf of Texas-New Mexico Power Company, SOAH Docket No. 473-97-1561, PUC Docket No. 17751, March 2, 1998.

Prepared Testimony and deposition testimony on behalf of Central Maine Power Company, United Stated District Court Southern District of New York, 98-civ-8162 (JSM), March 5, 1999.

Prepared Direct Testimony Before the Public Service Commission of Maryland on behalf of Baltimore Gas & Electric Company, PSC Case Nos. 8794/8804, June 1999.

Rebuttal Testimony Before the Maryland Public Service Commission, on behalf of Baltimore Gas & Electric Company, PSC Case Nos. 8794/8804, March 22, 1999.

NORCON Power Partners LP v. Niagara Mohawk Energy Marketing, before the United States District Court, Southern District of New York, June 1999.

Prepared Supplemental Testimony Before the Maryland Public Service Commission, on behalf of Baltimore Gas & Electric Company, PSC Case Nos. 8794/8804, July 23, 1999.

Prepared Supplemental Reply Testimony Before the Maryland Public Service Commission, on behalf of Baltimore Gas & Electric Company, PSC Case Nos. 8794/8804, August 3, 1999.

Direct Testimony on behalf of Niagara Mohawk, Before the New York State Public Service Commission, PSC Case No. 99-E-0681, September 3, 1999.

Rebuttal Testimony on behalf of Niagara Mohawk, PSC Case No. 99-E-0681 Before the New York State Public Service Commission, November 10, 1999.

Arbitration deposition on behalf of Oglethorpe Power Corporation, last quarter of 1999.

Direct Testimony Before the Public Utilities Commission of Ohio on behalf of FirstEnergy Corporation, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, Case No. 99-1212-EL-ETP re: Shopping Credits.

Direct Testimony on behalf of Niagara Mohawk, Before the New York State Public Service Commission, PSC Case No. 99-E-0990, February 25, 2000.

Testimony on behalf of Consolidated Edison Company of New York, Inc., State of Connecticut, Department of Public Utility Control, Docket No.: 00-01-11, April 28, 2000 and June 30, 2000.

Testimony on behalf of Texas-New Mexico Power Company, Fuel Reconciliation Proceeding before the Texas PUC, June 30, 2000.

Testimony on behalf of Consolidated Edison Company of New York, Inc., Before the New Hampshire Public Service Commission, Docket No.: DE 00-009, June 30, 2000.

Rebuttal Testimony Before the Public Utilities Commission of the State of Colorado, Docket No. 99A-549E, November 22, 2000.

Testimony Before the Public Utilities Commission of the State of Colorado, Docket No. 99A-549E, January 19, 2001.

DETM Management, Inc. Duke Energy Services Canada Ltd., And DTMSI Management Ltd., Claimants vs. Mobil Natural Gas Inc., And Mobil Canada Products, Ltd., Respondents. American Arbitration Association Cause No. 50 T 198 00485 00, August 27, 2001.

State of New Jersey Board of Public Utilities, In the Matter of the Provision of Basic Generation Service Pursuant to the Electric Discount and Energy Competition Act of 1999, Before President Connie O. Hughes, Commissioner Carol Murphy on Behalf of the Electric Distribution Companies (Public Service Electric and Gas Company, GPU Energy, Consolidate Edison Company and Conectiv) Docket No.: EX01050303, October 4, 2001.

Direct Testimony Before the Federal Energy Regulatory Commission on behalf of Pacific Gas and Electric Company, Docket No.: ER02-456-000, November 30, 2001.

Fourth Branch Associates/Mechanicville vs. Niagara Mohawk Power Corporation, January 2002 (Expert Report).

Arbitration Deposition on behalf of Oglethorpe Power Corporation, March 2002.

Direct Testimony and Deposition Testimony Before the Federal Energy Regulatory Commission on behalf of Electric Generation LLC in Response to June 12 Commission Order, Docket No.: ER02-456-000, July 16, 2002.

Rebuttal Testimony Before the Federal Energy Regulatory Commission on behalf of Electric Generation LLC in Response to June 12 Commission Order, Docket No.: ER02-456-000, August 13, 2002.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company, in the matter of the Application of Nevada Power Company to Reduce Fuel and Purchased Power Rates, PUCN Docket No. 02-11021, November 8, 2002 and subsequent Deposition Testimony.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Deferred Energy Case, Docket No. 03-1014, January 10, 2003.

Direct Testimony Before the Public Utility Commission Of Texas on behalf of Texas-New Mexico Power Company, Application Of Texas-New Mexico Power Company For Reconciliation Of Fuel Costs, April 1, 2003.

Rebuttal Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company, PUCN Docket No. 02-11021, April 1, 2003.

Rebuttal Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company, Docket No. 03-1014, May 5, 2003.

Testimony on behalf of Consolidated Edison Company of New York, Inc., Before the Public Service Commission of New York, Case No.: 00-E-0612, September 19, 2003.

State of New Jersey Board of Public Utilities, In the Matter of the Provision of Basic Generation Service Pursuant to the Electric Discount and Energy Competition Act of 1999, Before President Connie O. Hughes, Commissioner Carol Murphy on Behalf of the Electric Distribution Companies (Public Service Electric and Gas Company, GPU Energy, Consolidate Edison Company and Conectiv), September 2003.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's Deferred Energy Case, November 12, 2003.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Deferred Energy Case, January 12, 2004.

Rebuttal Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Deferred Energy Case, May 28, 2004.

Direct Testimony on behalf of Texas-New Mexico Power Company, First Choice Power Inc. and Texas Generating Company LP to Finalize Stranded Cost under PURA § 39.262, January 22, 2004.

Rebuttal Testimony on behalf of Texas-New Mexico Power Company, First Choice Power Inc. and Texas Generating Company LP to Finalize Stranded Cost under PURA § 39.262, April, 2004.

State of New Jersey Board of Public Utilities, In the Matter of the Provision of Basic Generation Service Pursuant to the Electric Discount and Energy Competition Act of 1999, Before President Connie O. Hughes, Commissioner Carol Murphy on Behalf of the Electric Distribution Companies (Public Service Electric and Gas Company, GPU Energy, Consolidate Edison Company and Conectiv), September 2004.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's Deferred Energy Case, November 9, 2004.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Deferred Energy Case, January 7, 2005.

Expert Report on behalf of Oglethorpe Power Corporation, March 23, 2005.

Arbitration deposition on behalf of Oglethorpe Power Corporation, April 1, 2005.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's December 2005 Deferred Energy Case.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's 2006 Deferred Energy Case, January 13, 2006.

Remand Rebuttal for Public Service Company of Oklahoma before the Corporation Commission of the State of Oklahoma, Cause No. PUD 200200038, **Confidential**, March 17, 2006

Answer Testimony on behalf of the Colorado Independent energy Association, AES Corporation and LS Power Associates, LP, Docket No. 05A-543E, April 18, 2006.

Cross-Answer Testimony on behalf of the Colorado Independent energy Association, AES Corporation and LS Power Associates, LP, Docket No. 05A-543E, May 22, 2006.

Distributed Resources: Incentives, a report prepared for Edison Electric Institute, May 2006

Rebuttal Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's 2006 Deferred Energy Case, Docket No. 06-01016, June 2006.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Deferred Energy Case, December 2006.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Application for Recovery of Costs of Achieving Final Resolution of Claims Associated with Contracts Executed During the Western Energy Crisis, December 2006.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's Application for Recovery of Costs of Achieving Final Resolution of Claims Associated with Contracts Executed During the Western Energy Crisis, December 2006.

Direct Testimony Before the Public Utilities Commission of the State of Hawaii, on behalf of Hawaiian Electric Company, Inc., Docket No. 2006-0386, December 22, 2006.

Direct Testimony Before the Public Utilities Commission of the State of Hawaii, on behalf of Hawaiian Electric Company, Inc., Docket No. 05-0315, December 29, 2006.

Rebuttal Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's 2007 Deferred Energy Case, January 2007.

Declaration Before the State of New York Public Service Commission, on behalf of Consolidated Edison Company of New York, Inc.'s Long Island City Electric Network, Case 06-E-0894 – Proceeding on Motion of the Commission to Investigate the Electric Power Outage and Case 06-E-1158 – In the Matter of Staff's Investigation of Consolidated Edison Company of New York, Inc.'s Performance During and Following the July and September Electric Utility Outages. July 24, 2007

Direct Testimony Before The Public Utilities Commission of Colorado, In The Matter of the Application of Public Service Company of Colorado for Approval of its 2007 Colorado Resource Plan, April 2008

Answer Testimony Before the Public Utilities Commission of the State of Colorado on behalf of Trans-Elect Development Company, LLC, and The Wyoming Infrastructure Authority, Docket No. 07A-447E, April 28, 2008

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's 2008 Deferred Energy Case, February 2009.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's 2008 Deferred Energy Case, February 2009.

Direct Testimony Before the Public Utilities Commission of Texas, on behalf of Entergy Texas, Inc. Docket No. 33687, April 29, 2009

Direct Testimony Before The Public Utilities Commission Of Nevada On Behalf of Nevada Power Company D/B/A Nevada Energy, 2010 – 2029 Integrated Resource Plan, June 26, 2009

Before the Public Service Commission of New York, Case 09-E-0428 Consolidated Edison Company of New York, Inc. Rate Case, Rebuttal Testimony, September 2009

Direct Testimony Before the Public Utilities Commission of Nevada on Behalf of Sierra Pacific Power Company's 2009 Deferred Energy Case, February 2010.

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's 2009 Deferred Energy Case, February 2010

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Nevada Power Company's 2010 – 2029 Integrated Resource Plan, Docket No. 09-07003, July 2010

Direct Testimony Before the Public Utilities Commission of Nevada on behalf of Sierra Pacific Power Company's Eighth Amendment to its 2008 – 2027 Integrated Resource Plan, Docket No. 10-03023, July 2010

Rebuttal Testimony Before the Public Utilities Commission of Nevada, Application of Nevada power Company d/b/a NV Energy Seeking Acceptance of its Triennial Integrated Resource Plan covering the period 2010-2029, including authority to proceed with the permitting and construction of the ON Line transmission project, Docket No. 10-02009

Rebuttal Testimony Before the Public Utilities Commission of Nevada, Petition of Nevada Power Company d/b/a NV Energy requesting a determination under NRS 704.7821 that the terms and conditions of five renewable power purchase agreements are just and reasonable and allowing limited deviation from the requirements of NAC 704.8885, Docket No. 10-03022

Rebuttal Testimony Before the Public Utilities commission of Nevada, Application of Sierra pacific Power Company d/b/a/ NV Energy Seeking Acceptance of its Eight Amendment to its 2008-2007 Integrated Resource Plan, Docket No. 10-02023

Direct Testimony Before the Public Utilities Commission of Nevada, on behalf of Sierra Pacific Power Company, d/b/a NV Energy, Docket No. 11-03 ____ 2011 Electric Deferred Energy Proceeding, February 2011

Direct Testimony Before the Public Utilities Commission of Nevada, on behalf of Nevada Power Company, d/b/a NV Energy, Docket No. 11-03 ____ 2011 Electric Deferred Energy Proceeding, February 2011

February 2011