

**PUBLIC VERSION -- HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
REDACTED PURSUANT TO PROTECTIVE ORDER IN
FERC DOCKET NO. EL11-50-000 AND CONFIDENTIAL INFORMATION PURSUANT
TO 18 C.F.R. SECTION 388.112**

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Astoria Generating Company, L.P. and)	
TC Ravenswood, LLC)	
)	
Complainants)	
)	
v.)	Docket No. EL11-50-000
)	
New York Independent System Operator, Inc.)	
)	
Respondent)	

**CONFIDENTIAL SUPPLEMENTAL ANSWER OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Paragraph 25 and Ordering Paragraph “A” of the Commission’s August 31, 2011 *Order Directing Submission of Supplemental Information and Issuing Protective Order*¹ (“August 31 Order”), the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this Confidential Supplemental Answer.² The body of this Confidential Supplemental Answer does not contain “Protected Materials.” However, consistent with Paragraph 5 of the *Protective Order* that was issued as part of the August 31 Order, the

¹ *Astoria Generating Co., L.P. and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 136 FERC ¶ 61,155 (2011).

² The NYISO respectfully requests leave to submit this filing out-of-time. It was not possible to ensure that all of the confidential information included in the supporting affidavits was properly redacted from the public version of this filing by the Commission’s 5 p.m. filing deadline. The NYISO was unable to make the filing overnight because of an outage affecting the Commission’s website. The filing was electronically submitted and served as early as possible on the next business day. The NYISO concurrently sent copies of the unredacted version to all “Reviewing Representatives” that had confirmed their eligibility to receive it under the Protective Order.

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NYISO has marked the pages of the supporting affidavits appended hereto, that contain “Highly Sensitive Protected Materials.”³ The NYISO has redacted the confidential information found on those pages from the public version of this filing. The NYISO will make a complete unredacted version of this filing available to “Reviewing Representatives” that satisfy the criteria established by Paragraph 9 of the Protective Order.⁴ To the extent necessary, the NYISO is also requesting privileged treatment for all Highly Sensitive Protective Materials included in this Confidential Supplemental Answer and its Supporting Affidavits under Section 388.112 of the Commission’s regulations.⁵

The six supporting affidavits appended to this Confidential Supplemental Answer explain in detail the inputs, and the analyses and methodology, that the NYISO used to conduct its buyer-side mitigation exemption examinations and make determinations under the Pre-Amendment Rules⁶ for the Astoria Energy II LLC project (“AEII”) and the Bayonne Energy Center, LLC project (“BEC”). The affidavits are:

³ The NYISO has not identified any confidential information relevant to this proceeding which constitutes “Protected Materials” and which does not also qualify as “Highly Sensitive Protected Materials,” as defined in Paragraph 5 of the *Protective Order*. The NYISO has not included any information that would qualify as Critical Energy Infrastructure Information in this filing.

⁴ The NYISO described its interpretation of Paragraph 9(b)(5) of the *Protective Order* in the *Notice* that it submitted in this docket on September 6, 2011.

⁵ By its very nature, information that qualifies as “Highly Sensitive Protected Materials” under the *Protective Order* constitutes confidential commercial and financial information that ought to be exempt from disclosure under 18 C.F.R. 388.107 and 112 (2011).

⁶ The “Pre-Amendment Rules” were the buyer-side capacity market power mitigation rules that existed in Attachment H to the NYISO Services Tariff prior to the effective date of the In-City BuyerSide Capacity Mitigation Measures.

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- Appendix I -- Confidential Affidavit of Joshua A. Boles Regarding Astoria Energy II.
- Appendix II -- Confidential Affidavit of Joshua A. Boles Regarding Bayonne Energy Center.
- Appendix III -- Affidavit of Dr. David B. Patton.
- Appendix IV -- Affidavit of Christopher D. Ungate Regarding Astoria Energy II.
- Appendix V -- Affidavit of Christopher D. Ungate Regarding Bayonne Energy Center.
- Appendix VI -- Affidavit of Eugene T. Meehan.

Together, the supporting affidavits demonstrate that the NYISO's decisions to exempt AEII and BEC from Offer Floor⁷ mitigation were reasonable and conformed to the Pre-Amendment Rules, as discussed in the NYISO's August 3 Answer⁸ and in this Confidential Supplemental Answer. They further demonstrate that the NYISO's determinations reflected the input and recommendations of the independent Market Monitoring Unit for the NYISO ("MMU"), Potomac Economics, Ltd. The affidavits therefore refute the Complainants'⁹ claims that the NYISO's exemption determinations were "patently absurd,"¹⁰ explicable only by

⁷ Capitalized terms that are not otherwise defined herein shall have the meanings specified in the Pre-Amendment Rules, and if not defined therein, the terms shall have the meaning specified in the Answer.

⁸ See *Answer and Request for Expedited Action of the New York Independent System Operator, Inc.* at 29-30, Docket No. EL11-50-000 (August 3, 2011) ("August 3 Answer"). See also *Motion to Intervene Out-of-Time and Request for Leave to Answer and Answer of the NYISO's Market Monitoring Unit* (August 9, 2011) at 3 ("Based on a review of NYISO's assumptions and accepting NERA's estimates of net revenues, the MMU finds no issues with the analysis that would cause the NYISO's determination that Astoria Energy II and the Bayonne Energy Center are exempt from buyer-side mitigation to be incorrect.")

⁹ Complainants are Astoria Generating Company, L.P. and TC Ravenswood, LLC.

¹⁰ See *Complaint Requesting Fast Track Proceeding, Emergency, Interim Relief and Shortened Comment Period*, Docket No. EL11-50-000 (filed July 11, 2011) ("Complaint") at 25, n. 25.

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“contorted readings,” or “outright violations” of the Services Tariff,¹¹ or tainted by a supposed “systematic bias” in favor of exempting new entrants.¹² The Commission should therefore act expeditiously to dismiss the Complaint.

I. SUPPLEMENTAL ANSWER

A. The Boles Affidavits

Appendices I and II to this Supplemental Answer are affidavits prepared by Mr. Joshua A. Boles, the Supervisor of Monitoring, Analysis, and Reporting for the Market Mitigation and Analysis Department (“MMA”) of the NYISO. The two affidavits, together the “Boles Affidavits,” provide detailed descriptions of the mitigation exemption analyses that the NYISO performed for AEII and BEC respectively. They also identify the differences between the NYISO’s actual assumptions and analyses and those used by Mr. Mark Younger in his affidavits on behalf of the Complainants (together the “Younger Affidavits.”)¹³

The Boles Affidavits first describe the two tests under the Pre-Amendment Rules for determining whether a proposed new project should be exempt from Offer Floor Mitigation, (*i.e.*,

¹¹ *Id.* at 8.

¹² See *Complainants’ Motion for Leave to Answer and Answer*, Docket No. EL11-50-000 (filed August 19, 2011) (“Complainants’ Answer”) at 15-16.

¹³ See Complaint at Attachment A, Affidavit of Mark D. Younger (“Younger Affidavit”); Complainants’ Answer at Attachment A Supplemental Affidavit of Mark D. Younger (“Younger Supplemental Affidavit” and together with the Younger Affidavit the “Younger Affidavits”). For the reasons specified in the August 11, 2011 *Answer of the New York Independent System Operator, Inc. to Comments and Protests*, at 14-15, the Boles Affidavits do not address the Affidavit of Scott W. Niemann (“Niemann Affidavit”) that was attached to the August 3, 2011 Motion to Intervene and Comments of Brookfield Energy Marketing LP in Support of Complaint in this proceeding.

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the “Part A Test” and the “Part B Test.”)¹⁴ Mr. Boles then explains that both AEII and BEC “failed” the Part A Test but passed the Part B Test and were therefore properly determined to be exempt under the Pre-Amendment Rules.¹⁵ Because both projects failed the Part A Test, the arguments set forth in Section V.A.2(a) of the Complaint and the related portions of the Younger Affidavits regarding that test should be ignored by the Commission.¹⁶

The Part B Test compares the average annual price forecast for the first three years after entry, to the project’s Unit Net CONE. The Boles Affidavits delineate and explain the inputs, methodology, and analyses that the NYISO used to calculate Unit Net CONE for AEII and BEC.¹⁷ Mr. Boles describes how the NYISO calculated investment costs, the real levelized carrying charge, and fixed operations and maintenance costs, and their use in establishing the annualized cost of new entry for each project.¹⁸ He also explains the NYISO’s use of the NERA Economic Consulting (“NERA”) econometric model, with certain adjustments, to estimate net energy revenues, and the NYISO’s calculation of ancillary services revenues based on revenue

¹⁴ See, e.g., Appendix I at Section III.

¹⁵ *Id.* at Section IV.

¹⁶ The August 3 Answer previously noted that Sections V.A.1 and V.A.3 of the Complaint should likewise be disregarded because they addressed speculative determinations that the NYISO did not actually make. See *Answer and Request for Expedited Action of the New York Independent System Operator, Inc.* (filed August 3, 2011) (“August 3 Answer”) at 16-18. The affidavits appended to this Confidential Supplemental Answer respond in detail to the Complaint’s only remaining substantive allegations, which are found in Section V.A.2(b) and the related portions of the Younger Affidavit.

¹⁷ See Appendix I at Sections VI-VII ; Appendix II at Sections VI-VII.

¹⁸ See, e.g., Appendix I at Section VI.

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information for similar in-service plants.¹⁹ Mr. Boles discusses that the net energy and ancillary services revenues were subtracted from the annual CONE values to compute annual net CONEs for each of the first three years after entry.²⁰ Unit Net CONE for each of AEII and BEC were established by averaging the three values in ICAP terms and then converting them into UCAP values.²¹ Mr. Boles also explains how the NYISO established the average annual price forecast for the first three years after entry.²²

In Appendix I, Mr. Boles explains that the NYISO computed a Unit Net CONE for AEII in the confidential \$/kW-year amount set forth therein, which was lower than the three-year average annual price forecast for Capability Years 2011/2012 through 2013/2014 of \$78.06/kW year. AEII therefore passed the Part B Test. Mr. Younger had argued that AEII should fail the Part B Test because the Unit Net CONE values that he computed for his two scenarios were higher than his proposed price forecasts for those scenarios.²³

Similarly, in Appendix II, Mr. Boles explains that the NYISO computed a Unit Net CONE for BEC in the confidential \$/kW-year amount set forth therein, which was lower than its three-year average annual price forecast for Capability Years 2012/2013 through 2014/2015 of \$35.67/kW-year. BEC therefore also passed the Part B test. Mr. Younger had contended that

¹⁹ See, e.g., Appendix I at Section VI.e-f.

²⁰ See, e.g., Appendix I at Section VI.g.

²¹ *Id.*

²² See, e.g., Appendix I at Section VII.

²³ See Appendix I at PP 49-50.

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BEC should fail the Part B Test because the Unit Net CONE values that he computed for his two scenarios were higher than his proposed price forecasts for those scenarios.²⁴

Mr. Boles presents a table summarizing the NYISO's computation of the exemption determination,²⁵ and an exhibit detailing the computation.²⁶ At the relevant points in his discussion, he also compares what the NYISO actually did to what Mr. Younger claims the NYISO should have done. These comparisons demonstrate that Complainants were wrong to suggest that the NYISO had a "systematic bias" towards selecting "assumptions that were most likely to result in an exemption determination."²⁷ In reality, a number of the NYISO's assumptions were comparable to or more "conservative" than Mr. Younger's assumptions - *i.e.*, less likely to result in an exemption.²⁸ The Boles Affidavits also identify a number of differences between the analyses actually conducted by the NYISO, and Mr. Younger's versions, which resulted in their reaching different outcomes. When it is warranted, Mr. Boles explains why the NYISO's approach was reasonable and consistent with the Pre-Amendment Rules and cites to specific supporting information in the Ungate, Meehan and MMU affidavits to support his rationale.²⁹ Mr. Boles describes that the NYISO conferred with the MMU throughout its

²⁴ See Appendix II at PP 48-49.

²⁵ See Appendix I at Table 1; Appendix II at Table 1.

²⁶ See Appendix I, Exhibit JAB-AEII-1; Appendix II, Exhibit JAB-BEC-1.

²⁷ Complainants' Answer at 15-16.

²⁸ See, *e.g.*, Appendix I at PP 27, 32, 44.

²⁹ See, *e.g.*, Appendix I at PP 29-31, 37.

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examination process and delineates recommendations that the MMU discusses in the Patton Affidavit.

B. The Patton Affidavit

Appendix III is an affidavit prepared by Dr. David B. Patton, the President of the MMU, which discusses several recommendations that the MMU made to the NYISO during the course of the exemption analyses for AEII and BEC. These include the MMU's recommendations as to how the NYISO should: (1) consider the timing of the investment decision,³⁰ (2) treat costs incurred prior to the decision to invest (known as "sunk costs")³¹, and (3) consider the financing terms obtained by a specific project.³² Dr. Patton identifies a number of instances where Mr. Younger has taken positions that are contrary to the MMU's recommendations and explains why the approach recommended by the MMU, and adopted by the NYISO, was reasonable.

C. The Ungate Affidavits

Appendices IV and V are affidavits prepared by Mr. Christopher D. Ungate, a Senior Principal Management Consultant with Sargent & Lundy LLC ("S&L"). Mr. Ungate's affidavits provide information on the investment cost and performance inputs that were used to determine the CONE values for AEII and BEC respectively. As Mr. Ungate explains, he reviewed the detailed information that AEII and BEC provided to S&L, asked questions when it appeared to

³⁰ See Appendix III at Section IV.

³¹ See Appendix III at Section V.

³² See Appendix III at Section VI.

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him that data might fall outside of reasonable ranges, and determined the values he would recommend to the NYISO as appropriate to use to determine the cost of new entry.³³ The Ungate Affidavits describe in detail S&L's analyses and recommendations regarding technology performance, capital investment costs, operating costs, and carrying charges, for AEII and BEC respectively.

D. The Meehan Affidavit

Appendix VI is an affidavit prepared by Eugene T. Meehan of NERA. It describes the NERA econometric model and NERA's role in estimating energy revenue offsets for use in the Unit Net CONE calculations for AEII and BEC. It also explains the adjustments that were made to the version of the model that was used in the two most recent ICAP Demand Curve resets in order to determine reasonable net energy and ancillary services revenue estimates for use in the AEII and BEC Unit Net CONE analyses. Finally, it describes NERA's contribution to S&L's determination of the annual levelized carrying charge.

II. REQUEST FOR EXPEDITED ACTION

The NYISO renews its request that the Commission issue an order as expeditiously as possible, consistent with due process, to bring this case to a conclusion.³⁴ A timely Commission order will end any market uncertainty that the Complaint may have created.

In the context of this proceeding, due process requires that the NYISO and other parties be allowed a reasonable time to review, and if necessary to seek leave to respond to, any answers

³³ See, e.g., Appendix IV at Section III.

³⁴ August 3 Answer at 3.

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filed within fifteen days of the date of this filing.³⁵ Responses to such answers may, in fact, be permitted as of right depending on their nature and content.³⁶

The supporting affidavits describe the exemption analyses for AEII and BEC in detail. Complainants and their supporters will have a reasonable time to raise any concerns that they may have to these analyses in their answers. Once interested parties have had an opportunity to respond to Complainants, the Commission will have a complete record that will allow it to address the only questions that are at issue in this proceeding, *i.e.*, whether the NYISO's exemption determinations for AEII and BEC were reasonable, and consistent with the Pre-Amendment Rules. Although these questions are important, they are relatively straightforward. They can be decided on their merits without an examination of the motives, intent, or credibility of the NYISO, the NYISO staff that conducted the exemption analyses, the NYISO's consultants, or the MMU.³⁷ To the extent that the Commission nevertheless concludes that one or more issues require additional review, the NYISO respectfully renews its request that they be resolved using expedited paper hearing procedures.³⁸

³⁵ See August 31 Order at P 25 (allowing fifteen days for parties to file answers to this Supplemental Answer.)

³⁶ For example, in the event that Complainants submit an answer that includes entirely new arguments and testimony the NYISO, and other interveners, should be permitted to answer, just as they would be entitled to do as a matter of right if the Complainants were to amend the Complaint.

³⁷ Complainants have provided no information to support their claims that the NYISO's determinations were not reached independently or somehow reflected a "systematic bias" in favor of artificial price suppression.

³⁸ As the NYISO has noted, Complainants have effectively conceded that paper hearing procedures would be an appropriate means to resolve any unsettled questions in this proceeding. See *Limited Answer of the New York Independent System Operator, Inc.*, (filed August 31, 2011) at 5.

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III. CONCLUSION

For the reasons set forth above, and in the attached supporting affidavits, the NYISO respectfully requests that the Commission dismiss the Complaint in its entirety.

Respectfully submitted,

/s/ Ted J. Murphy

Ted J. Murphy
Counsel to the
New York Independent System Operator, Inc.

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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 8th day of September, 2011.

/s/ Vanessa A. Colón
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