

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Hudson Transmission Partners, LLC

Docket No. EL12-98-000

v.

New York Independent System Operator, Inc.

**MOTION FOR ADOPTION OF A PROTECTIVE ORDER  
AND REQUEST FOR COMMISSION ACTION BY JANUARY 15, 2014**

Pursuant to Rule 212 of the Commission's Rules and Regulations,<sup>1</sup> the New York Independent System Operator, Inc. ("NYISO") respectfully moves for the adoption of the attached Protective Order for use in the above-referenced docket. **The NYISO is requesting that the Commission issue an order by January 15, 2014,** for the reasons described in this motion. In support of this Motion, the NYISO states as follows:

**I. BACKGROUND**

On November 21, 2013, the Commission issued an *Order on Complaint* (the "November Order")<sup>2</sup> that addressed a complaint by Hudson Transmission Partners ("HTP") against the NYISO concerning the NYISO's application of its buyer-side capacity market power mitigation measures for New York City ("BSM Rules") to HTP's 660 MW merchant transmission facility ("HTP Project"). The November Order generally upheld the NYISO's application of the BSM Rules to the HTP Project but directed the NYISO "redo the exemption determination using HTP's actual cost of capital"<sup>3</sup> and make a compliance filing within sixty days to:

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<sup>1</sup> 18 C.F.R. § 385.212 (2013).

<sup>2</sup> *Hudson Transmission Partners, LLC v. New York Independent System Operator, Inc.*, 145 FERC ¶ 61,156 (2013).

<sup>3</sup> November Order at P 112.

- “[P]rovide the specific scaling factor that it applied to HTP, to explain in detail how such factor was calculated, and to support its methodology;”<sup>4</sup> and
- “[F]ile a proposed tariff provision to incorporate the scaling methodology into its tariff;”<sup>5</sup>

The NYISO will make a compliance filing to address fully these directives by the January 21, 2014 deadline. This Motion proposes a protective order to govern access to any confidential information that may be included in, or may be inferable from data included in, the compliance filing.

## **II. MOTION FOR ADOPTION OF PROPOSED PROTECTIVE ORDER**

The NYISO proposes that the Commission adopt the proposed protective order, which is attached to this Motion as Attachment I, to govern access to any information that the NYISO may designate as “Protected Materials” when it makes its compliance filing in this proceeding. The November Order’s directive that the NYISO “provide the specific scaling factor that it applied to HTP,” “explain in detail how such factor was calculated,” and “support its methodology;” implicates the NYISO’s obligation, described below, to protect confidential information. As of the date of this filing, the NYISO has determined that compliance with this directive could require the direct or indirect disclosure of confidential information. In this context, an “indirect” disclosure would result if the NYISO provided information regarding the scaling factor calculation utilized in the buyer-side mitigation determination for HTP, that would allow third parties to infer or extrapolate confidential information about entities unrelated to HTP. Such a disclosure could involve confidential information regarding entities that are not parties to this proceeding.

The NYISO’s Code of Conduct<sup>6</sup> and Market Monitoring Plan<sup>7</sup> prohibit it from disclosing confidential information unless required to do so by Commission order or by a subpoena or other

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<sup>4</sup> *Id.* at PP 82, 90.

<sup>5</sup> *Id.*

<sup>6</sup> Section 12.4, Attachment F of the NYISO Open Access Transmission Tariff.

<sup>7</sup> Section 30.6.4, Attachment O of the NYISO Market Administration and Control Area Services Tariff.

compulsory process from another authority. When the NYISO provides the Commission with confidential information, the NYISO is not required to provide advance written notice to the entity that provided the confidential information. Instead, the NYISO must request that the Commission treat the information as confidential and protect it from disclosure. If the Commission notifies the NYISO that another party has requested the disclosure of the confidential information, the NYISO will notify the entity that provided such information.<sup>8</sup>

Because the confidential information implicated by the November Order would be submitted in response to a Commission directive the NYISO is not required to notify the entities whose confidential information would be included in the compliance filing in January. Nevertheless, the NYISO is separately serving this filing on the following entities to inform them that their confidential information could be included in the compliance filing and thus could be the subject of the protective order:

- Brookfield Energy Marketing LP
- Cargill Power Markets, LLC
- Conectiv Energy Supply, Inc.
- Consolidated Edison Energy, Inc.
- Linden VFT
- PSEG Energy Resource & Trade, LLC

The Commission's adoption of the proposed protective order will advance the NYISO's "legitimate interest in keeping both competitively sensitive information and NYISO's market monitoring and mitigation processes confidential."<sup>9</sup> The NYISO's proposed protective order is essentially identical to the one issued by the Commission in Docket No. EL11-50 in late 2011. That proceeding involved a need to protect potentially highly sensitive information related to the application of the BSM Rules. The information that the NYISO presently expects to disclose in this proceeding,

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<sup>8</sup> Section 12.4, Attachment F of the NYISO Open Access Transmission Tariff.

<sup>9</sup> *Astoria Generating Company, L.P. and TC Ravenswood, LLC v. New York Independent System Operator, Inc.*, 136 FERC ¶ 61,155 at P23 (2011). See also *West Deptford Energy, LLC*, 134 FERC ¶ 61,189 at P 26 (2011) (noting that entities have "a legitimate interest in appropriately protecting the confidentiality" of data where a release of such information could lead to competitive harm).

however, would not only be that of the project developer, it would be data of other unaffiliated entities. The protective order in that proceeding was based on the Commission's Model Protective Order with the addition of language designed to provide additional protection to highly sensitive materials at issue. The Commission found that it would "meet the legitimate needs of the parties who should be able to view NYISO's supplemental information" while "safeguard[ing] the interests of NYISO and market participants in maintaining confidentiality of sensitive proprietary information."<sup>10</sup> The NYISO respectfully submits that a similar level of protection is warranted here given the sensitivity of determinations under the BSM Rules and given that confidential information associated with nonparties may be implicated in this case.

The NYISO has proposed purely ministerial revisions to the Docket No. EL11-50 protective order. Specifically, it has: (i) revised docket references; (ii) removed cross references to the Commission's order in Docket No. EL11-50; and (iii) eliminated one reference that could be read as implying that only information produced in response to a discovery request could constitute "Protected Materials." A blackline showing the differences between the NYISO's proposal and the language of the protective order that the Commission previously accepted in Docket No. EL11-50, all of which are minor, is attached as Attachment II to this Motion.

The NYISO is making this proposal now in order to afford the Commission as much time as possible to act before the January 21 deadline. If the Commission indicates that the NYISO should not include information that would directly or indirectly disclose confidential information in its compliance filing the NYISO would withdraw this motion.

### **III. PROPOSED PROCESS TO IMPLEMENT THE PROVISION OF CONFIDENTIAL INFORMATION PURSUANT TO THE PROTECTIVE ORDER**

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<sup>10</sup> *Astoria Generating* at P 24.

The NYISO is also proposing in this Motion the process through which confidential information can be provided pursuant to the Protective Order, if accepted by the Commission. This process is similar to that adopted in Docket No. EL11-50.<sup>11</sup> Unless otherwise directed by the Commission, the NYISO will follow these procedures and encourages the other parties to do so as well. This will ensure that the provision of Protected Materials in this proceeding moves forward in an expeditious and orderly fashion. The proposed process is set forth below.

Upon receiving a request that a person be designated a “Reviewing Representative” pursuant to Paragraphs 9 (b)(5) or 16 of the *Protective Order* to review Protected Materials or Highly Sensitive Protected Materials, the NYISO and, if applicable, the source of such materials or data (“materials”), will inform the requesting party, whether it objects or consents to such designation. Requests are to specify whether the proposed Reviewing Representative seeks to review all such materials or specific materials.

Requests should be e-mailed to Ted J. Murphy at [tmurphy@hunton.com](mailto:tmurphy@hunton.com) and Gloria Kavanah at [gkavanah@nyiso.com](mailto:gkavanah@nyiso.com) with a “Subject” line that states “Request for Reviewing Representatives to receive Protected or Highly Sensitive Protected Materials Docket No. EL12-98.”

The request must include the name of the individual, name of the party requesting the designation, employer of the individual, title, e-mail address, and a brief description of the person's job description and responsibilities that will enable the NYISO and the source of the Protected Materials to be able to consent or object to the request.

The request must also identify clearly for the NYISO and the source of the Protected Materials that the person has signed the Non-Disclosure Certificate as well as identify which category under Paragraph 9 of the Protective Order each signatory falls under. Specifically, for each signatory falling

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<sup>11</sup> *Notice Regarding Certain Procedures Under the Protective Order*, Docket No. EL11-50 (Sept. 8, 2011).

under Paragraph 9(a), the request should specify the subcategory under 9(a) into which that person falls. Likewise, for each signatory falling under Paragraph 9(b), the request should specify the subcategory under 9(b) into which that person falls.

If the person falls under Paragraph 9(b)(5), in order to facilitate the review of the request, the requestor should identify for each named person whether that individual is an employee of a party that is not directly involved in, or have direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm.

The NYISO and/or the source of the Protected Materials will state whether it objects or consents to such designation no later than 5 pm on the next business day following the receipt by it of such request.

The NYISO will also provide the Commission and the parties with separate lists of Reviewing Representatives that it and the sources of the Protected Materials each have agreed are eligible to receive the information that the NYISO designated as (i) Protected Materials or (ii) Highly Sensitive Protected Materials. The lists would specify the grounds under the *Protective Order* on which each Reviewing Representative was determined to be eligible to receive such materials.

#### **IV. COMMUNICATIONS**

Copies of correspondence concerning this filing should be served on:

Robert E. Fernandez, General Counsel  
Ray Stalter, Director of Regulatory Affairs  
\*Gloria Kavanah, Senior Attorney  
New York Independent System Operator, Inc.  
10 Krey Boulevard  
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ncoates@hunton.com

\*persons designated to receive service

**V. CONCLUSION**

For the reasons specified above, the New York Independent System Operator, Inc. respectfully requests that the Commission issue an order adopting its proposed protective order, and approving the process proposed by the NYISO for implementing that protective order, no later than January 15, 2014. An order by that date would provide an opportunity for the NYISO to coordinate timely service of the Protected Materials.

Respectfully submitted,

THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

/s/ Ted J. Murphy  
Ted J. Murphy, Esq.  
Hunton & Williams, LLP  
*Counsel for*  
*The New York Independent System Operator, Inc.*

Dated: December 20, 2013

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<sup>12</sup> Waiver of the Commission's regulations (18 C.F.R. § 385.203(b)(3) (2012)) is requested to the extent necessary to permit service on counsel for the NYISO in both Miami, FL and Washington, DC.

### **CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2013). In addition, I have served the entities listed in this Motion whose confidential information could be the subject of the proposed protective order.

Dated at Washington, D.C. this 20<sup>th</sup> day of December 2013.

/s/ Noelle J. Coates  
Noelle J. Coates  
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**Attachment I**  
*Proposed Protective Order*

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Hudson Transmission Partners, LLC  
v.  
New York Independent System Operator, Inc.

Docket No. EL12-98-000

PROTECTIVE ORDER  
(Issued January \_\_, 2014)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Federal Energy Regulatory Commission (Commission).

2. This Protective Order applies to the following two categories of materials:

- (a) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and
- (b) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 C.F.R. § 388.113(c)(1) (“Critical Energy Infrastructure Information”).

3. Definitions -- For purposes of this Protective Order:

4. The term “Participant” shall mean a Participant as defined in 18 C.F.R. § 385.102(b) in the above docket.

5. The term “Protected Materials” means

- (a) materials (including depositions) provided by a Participant and designated by such Participant as protected;
- (b) any information contained in or obtained from such designated materials;
- (c) any other materials which are made subject to this Protective Order by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants;
- (d) notes of Protected Materials; and

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- (e) copies of Protected Materials.

The Participant producing the Protected Materials shall physically mark them on each page as “PROTECTED MATERIALS PROVIDED PURSUANT TO PROTECTIVE ORDER IN FERC DOCKET NO. EL12-98-000” or with words of similar import as long as the term “Protected Materials” is included in that designation to indicate that they are Protected Materials. In addition:

- (a) If the Protected Materials contain Critical Energy Infrastructure Information, the Participant producing such information shall additionally mark on each page containing such information the words “CONTAINS CRITICAL ENERGY INFRASTRUCTURE INFORMATION - DO NOT RELEASE.”
- (b) If the Protected Materials contain market sensitive information, public disclosure of which the disclosing Participant believes in good faith would competitively harm the Participant, the disclosing Participant shall additionally mark on each page containing such information the words “HIGHLY SENSITIVE PROTECTED MATERIALS.” Except for the more limited list of persons who qualify as Reviewing Representatives for purposes of reviewing Highly Sensitive Protected Materials, such materials are subject to the same provisions in the Protective Order as Protected Materials.

6. The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 5. Notes of Protected Materials are subject to the same restrictions provided in this Protective Order for Protected Materials except as specifically provided in this Protective Order.

7. Protected Materials shall not include (A) any information or document contained in the files of the Commission (unless the information or documents were submitted to the Commission subject to a request for privileged treatment pursuant to 18 C.F.R. § 388.112, and such information or documents is accorded privileged treatment by the Commission), or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order, or (C) any information or document labeled as “Non-Internet Public” by a Participant, or in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. & Reg. ¶ 31,140. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

8. The term “Non-Disclosure Certificate” shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials, including Protected Materials marked as “Highly Sensitive Protected Materials” pursuant to Paragraph 5(b), shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the

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Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

9. The term “Reviewing Representative” shall mean a person who has signed a Non-Disclosure Certificate and:

(a) For purposes of reviewing Protected Materials not covered by Paragraph 5(b) who is:

1. An attorney who has made an appearance in this proceeding for a Participant;
2. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Paragraph 9(a)(1);
3. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
4. A person designated as a Reviewing Representative by order of the Commission; or
5. Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

(b) For purposes of reviewing Highly Sensitive Protected Materials covered by Paragraph 5(b), who is:

1. Members or staff of any state or local utilities commission which is a Participant;
2. Employees of the NYISO working on this case.
3. An outside attorney who has made an appearance in this proceeding for a Participant;
4. Attorneys, paralegals, and other employees of the firm of the outside attorney described in Paragraph 9(b)(2) working with such outside attorney for purposes of this case;
5. An outside expert or an employee of an outside expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding who is working under the direction of an attorney described in Paragraph 9(b)(2) or 9(b)(3) and who is an unaffiliated expert (or employees thereof) not directly involved in, or having direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation

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or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm;

6. If, after a good faith effort, parties fail to agree on designating a specifically-named inside employee(s) of a non-governmental Participant as a Reviewing Representative for the review of specific Highly Sensitive Protected Material(s) or all Highly Sensitive Protected Material(s), a party may request that the Commission so designate such a specifically-named inside employee(s) who, for example, is not directly involved in, or having direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm; or
7. A person designated as a Reviewing Representative by order of the Commission specifically ruling on and indicating each such person by name.

10. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives.

11. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Materials is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen (15) days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts, and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraphs 12 and 13. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraphs 12 and 13. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

12. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 14 and 15. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission

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retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities.

13. For documents submitted to Commission Staff (Staff), Staff shall follow the notification procedures of 18 C.F.R. § 388.112 before making public any Protected Materials.

14. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 17. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

15. If a Reviewing Representative's scope of employment includes the marketing of energy or generation assets, the direct supervision of any employee or employees whose duties include the marketing of energy or generation assets, the provision of consulting services to any person whose duties include the marketing of energy or generation assets, or the direct supervision of any employee or employees whose duties include the marketing of energy or generation assets, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

16. In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 9, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 9 with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Commission for resolution.

17. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial, and clerical personnel employed by the same entity as the attorney and under the attorney's instruction, supervision, or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

18. Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

19. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative entitled to receive the specific category of Protected Materials under Paragraph 5, as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any

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Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 9, access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

20. Subject to Paragraph 27, the Commission shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Commission, the parties to the dispute shall use their best efforts to resolve it. Any Participant that contests the designation of materials as protected shall notify the party that provided the Protected Materials by specifying in writing the materials whose designation is contested. This Protective Order shall automatically cease to apply to such materials fifteen (15) business days after the notification is made unless the designator, within said 15-day period, files a motion with the Commission, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the Participant seeking protection. If the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 27 shall apply. The procedures described above shall not apply to Protected Materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

21. Unless filed or served electronically all copies of all documents reflecting Protected Materials, including the portion of other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS PROVIDED PURSUANT TO PROTECTIVE ORDER IN FERC DOCKET NO. EL12-98-000" with the appropriate designation (as relevant) under Paragraph 5 and shall be filed under seal and served under seal upon the Commission and all Reviewing Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information - Do Not Release." For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such will also be filed with the Commission and served on all parties on the service list. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

22. If any Participant desires to include, utilize, or refer to any Protected Materials or information derived there from in testimony or exhibits in these proceedings in such a manner that might require disclosure of such material to persons other than Reviewing Representatives, such Participant shall first notify both counsel for the disclosing participant and the Commission of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Commission.

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23. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

24. Nothing in this Protective Order shall preclude any Participant from requesting the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

25. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Commission.

26. Unless filed or served electronically all Protected Materials filed with the Commission, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order and with the appropriate designation (as relevant) under Paragraph 5. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information - Do Not Release."

27. If the Commission finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for a time period designated by the Commission, but not less than 15 business days from the date of issuance of the Commission's decision. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Commission's decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 C.F.R. § 388.112 shall apply to any requests for Protected Materials in the files of the Commission under the Freedom of Information Act. (5 U.S.C. § 552).

28. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

29. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

30. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

31. If a Participant believes that Protected Materials previously distributed to Reviewing Representatives was not marked as Protected Materials or was not marked with the

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appropriate designation under Paragraph 5, the Participant must e-mail Participants on the restricted service list and the listserv established for e-mail addresses in this proceeding, specifically state which documents contain such data, identify the specific material which should have received the designation, and seek their consent to such treatment, and such consent shall not be unreasonably withheld. If no agreement is reached, the Participant shall submit the dispute to the Commission.



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*Proposed Protective Order*

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Docket No. EL12-98-000

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials, including any Protected Materials designated as “Highly Sensitive Protected Materials,” is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order and shall be used only in connection with this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Representing: \_\_\_\_\_

Date: \_\_\_\_\_

## Attachment II

*Blackline comparison between Protective Order  
issued in EL11-50-000 and Proposed Protective Order*

### UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

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

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

### PROTECTIVE ORDER (Issued January \_\_, 2014~~August 31, 2011~~)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Federal Energy Regulatory Commission (Commission).

2. This Protective Order applies to the following two categories of materials:
- (a) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and
  - (b) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 C.F.R. § 388.113(c)(1) ("Critical Energy Infrastructure Information").

3. Definitions -- For purposes of this Protective Order:

4. The term "Participant" shall mean a Participant as defined in 18 C.F.R. § 385.102(b) in the above dockets.

5. The term "Protected Materials" means

- (a) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected;

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- (b) any information contained in or obtained from such designated materials;
- (c) any other materials which are made subject to this Protective Order by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants;
- (d) notes of Protected Materials; and
- (e) copies of Protected Materials.

The Participant producing the Protected Materials shall physically mark them on each page as “PROTECTED MATERIALS PROVIDED PURSUANT TO PROTECTIVE ORDER IN FERC DOCKET NO. EL12-98-0001-50-000” or with words of similar import as long as the term “Protected Materials” is included in that designation to indicate that they are Protected Materials. In addition:

- (a) If the Protected Materials contain Critical Energy Infrastructure Information, the Participant producing such information shall additionally mark on each page containing such information the words “CONTAINS CRITICAL ENERGY INFRASTRUCTURE INFORMATION - DO NOT RELEASE.”
- (b) If the Protected Materials contain market sensitive information, public disclosure of which the disclosing Participant believes in good faith would competitively harm the Participant, the disclosing Participant shall additionally mark on each page containing such information the words “HIGHLY SENSITIVE PROTECTED MATERIALS.” Except for the more limited list of persons who qualify as Reviewing Representatives for purposes of reviewing Highly Sensitive Protected Materials, such materials are subject to the same provisions in the Protective Order as Protected Materials.

6. The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 5. Notes of Protected Materials are subject to the same restrictions provided in this Protective Order for Protected Materials except as specifically provided in this Protective Order.

7. Protected Materials shall not include (A) any information or document contained in the files of the Commission (unless the information or documents were submitted to the Commission subject to a request for privileged treatment pursuant to 18 C.F.R. § 388.112, and such information or documents is accorded privileged treatment by the Commission), or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order, or (C) any information or document labeled as “Non-Internet Public” by a

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Participant, or in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. & Reg. ¶ 31,140. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

8. The term “Non-Disclosure Certificate” shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials, including Protected Materials marked as "Highly Sensitive Protected Materials" pursuant to Paragraph 5(b), shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

9. The term “Reviewing Representative” shall mean a person who has signed a Non-Disclosure Certificate and:

- (a) For purposes of reviewing Protected Materials not covered by Paragraph 5(b) who is:
  - 1. An attorney who has made an appearance in this proceeding for a Participant;
  - 2. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Paragraph 9(a)(1);
  - 3. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
  - 4. A person designated as a Reviewing Representative by order of the Commission; or
  - 5. Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.
- (b) For purposes of reviewing Highly Sensitive Protected Materials covered by Paragraph 5(b), who is:
  - 1. Members or staff of any state or local utilities commission which is a Participant;
  - 2. Employees of the NYISO working on this case.
  - 2.3. An outside attorney who has made an appearance in this proceeding for a Participant;

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3.4. Attorneys, paralegals, and other employees of the firm of the outside attorney described in Paragraph 9(b)(2) working with such outside attorney for purposes of this case;

4.5. An outside expert or an employee of an outside expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding who is working under the direction of an attorney described in Paragraph 9(b)(2) or 9(b)(3) and who is an unaffiliated expert (or employees thereof) not directly involved in, or having direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm;

5.6. If, after a good faith effort, parties fail to agree on designating a specifically-named inside employee(s) of a non-governmental Participant as a Reviewing Representative for the review of specific Highly Sensitive Protected Material(s) or all Highly Sensitive Protected Material(s), a party may request that the Commission so designate such a specifically-named inside employee(s) who, for example, is not directly involved in, or having direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm; or

6.7. A person designated as a Reviewing Representative by order of the Commission specifically ruling on and indicating each such person by name.

10. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives.

11. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Materials is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen (15) days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts, and exhibits in this proceeding

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that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraphs 12 and 13. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraphs 12 and 13. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.

12. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 14 and 15. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities.

13. For documents submitted to Commission Staff (Staff), Staff shall follow the notification procedures of 18 C.F.R. § 388.112 before making public any Protected Materials.

14. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 17. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

15. If a Reviewing Representative's scope of employment includes the marketing of energy or generation assets, the direct supervision of any employee or employees whose duties include the marketing of energy or generation assets, the provision of consulting services to any person whose duties include the marketing of energy or generation assets, or the direct supervision of any employee or employees whose duties include the marketing of energy or generation assets, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

16. In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 9, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 9 with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Commission for resolution.

17. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this

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Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial, and clerical personnel employed by the same entity as the attorney and under the attorney's instruction, supervision, or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

18. Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

19. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative entitled to receive the specific category of Protected Materials under Paragraph 5, as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 9, access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

20. Subject to Paragraph 27, the Commission shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Commission, the parties to the dispute shall use their best efforts to resolve it. Any Participant that contests the designation of materials as protected shall notify the party that provided the Protected Materials by specifying in writing the materials whose designation is contested. This Protective Order shall automatically cease to apply to such materials fifteen business days after the notification is made unless the designator, within said 15-day period, files a motion with the Commission, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the Participant seeking protection. If the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 27 shall apply. The procedures described above shall not apply to Protected Materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

21. Unless filed or served electronically [as provided in P 25 of the order to which this Protective Order is attached](#), all copies of all documents reflecting Protected Materials, including the portion of other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS PROVIDED PURSUANT TO PROTECTIVE ORDER IN FERC DOCKET NO. EL11-50-0002-98-000" with the appropriate designation (as relevant) under Paragraph 5 and shall be filed under seal and served under seal upon the Commission and all Reviewing

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Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked “Contains Critical Energy Infrastructure Information - Do Not Release.” For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such will also be filed with the Commission and served on all parties on the service list. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

22. If any Participant desires to include, utilize, or refer to any Protected Materials or information derived there from in testimony or exhibits in these proceedings in such a manner that might require disclosure of such material to persons other than Reviewing Representatives, such Participant shall first notify both counsel for the disclosing participant and the Commission of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Commission.

23. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

24. Nothing in this Protective Order shall preclude any Participant from requesting the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

25. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Commission.

26. Unless filed or served electronically [as provided in P 25 of the order to which this Protective Order is attached](#) all Protected Materials filed with the Commission, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order and with the appropriate designation (as relevant) under Paragraph 5. Such documents containing Critical Energy Infrastructure Information shall be additionally marked “Contains Critical Energy Infrastructure Information - Do Not Release.”

27. If the Commission finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for a time period designated by the Commission, but not less than 15 business days from the date of issuance of the Commission’s decision. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Commission’s decision respecting Protected Materials or Reviewing Representatives, or the Commission’s denial of any appeal thereof. The provisions of 18 C.F.R. § 388.112 shall apply to any requests for Protected Materials in the files of the Commission under the Freedom of Information Act. (5 U.S.C. § 552).



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28. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

29. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

30. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

31. If a Participant believes that Protected Materials previously distributed to Reviewing Representatives was not marked as Protected Materials or was not marked with the appropriate designation under Paragraph 5, the Participant must e-mail Participants on the restricted service list and the listserv established for e-mail addresses in this proceeding, specifically state which documents contain such data, identify the specific material which should have received the designation, and seek their consent to such treatment, and such consent shall not be unreasonably withheld. If no agreement is reached, the Participant shall submit the dispute to the Commission.

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials, including any Protected Materials designated as “Highly Sensitive Protected Materials,” is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order and shall be used only in connection with this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Representing: \_\_\_\_\_

Date: \_\_\_\_\_