

**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)	

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

In accordance with Rule 213 of the Commission’s Rules of Practice and Procedure the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this answer to the *Motion to Strike and Motion for Leave to Answer of the NRG Companies* (“Motion to Strike”). The NYISO also requests leave to answer and answers the *Complainants’ Answer in Support of Motion to Strike* (“Complainants’ October 31 Answer”).

NRG’s and Complainants’ statements regarding the alleged disclosure of confidential information contained in the NYISO’s October 12, 2011 answer (“October Answer”)¹ are inaccurate and unsupported. The NYISO did not disclose any confidential information in the October Answer and has not violated its tariffs. Therefore, there is no basis for the Motion to Strike, and it should be denied.

¹ *New York Independent System Operator, Inc. Request for Leave to Submit Answer and Answer to Pleadings Opposing Exemptions and Answer to Motion to Lodge*, Docket No. EL11-50-000 (filed October 12, 2011) (“October Answer”).

**PUBLIC VERSION - HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
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This answer also responds to one new argument by NRG against the NYISO's mitigation exemption determination for the Bayonne Energy Center ("BEC"). The fact that the NYISO has elected not to respond to other aspects of NRG's or the Complainants' other arguments, or to the Complainants' *Motion for Leave to Answer and Answer* should not be construed as agreement with them or as an admission of fault or error. To the contrary, the Complainants and NRG have again failed to demonstrate that the NYISO's mitigation exemption determinations were unreasonable.

I. REQUEST FOR LEAVE TO ANSWER

The NYISO may answer the Motion to Strike as a matter of right.² The NYISO also requests leave to answer the portion of NRG's pleading that is styled as an answer and, to the extent that the Commission deems necessary, the Complainants' October 31 Answer.³ The Commission has discretion to accept answers to answers when they help to clarify complex issues or to facilitate the resolution of a proceeding.⁴ The NYISO's answer will help the Commission's resolution of this matter as it will clarify factual and legal misrepresentations and errors in Complainants' October 31 Answer and the portion of NRG's pleading that is styled as an answer.

² 18 C.F.R. 213(a)(3) (2011).

³ Because the Complainants' October 31 Answer supports the Motion to Strike by making a wholly different allegation, it is arguably a distinct motion itself that the NYISO would be entitled to answer as of right.

⁴ See e.g., *New York Independent System Operator Inc.*, 133 FERC ¶ 61,178 at P 11 (2011) (allowing answers to answers and protests "because they have provided information that have assisted [the Commission] in [its] decision-making process"); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was "helpful in the development of the record...").

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II. ANSWER

A. The October Answer Did Not Disclose Confidential Information

The Motion to Strike incorrectly claims that the NYISO disclosed material that “constituted confidential market information entitled to protection.”⁵ Further, NRG’s assertion that that the NYISO disclosed information entitled to protection “willfully and intentionally”⁶ has no support in the record of this proceeding. NRG refers to excerpts from a letter it sent to the NYISO which reflected NRG’s view that the Pre-Amendment Rules⁷ allow the NYISO to make final mitigation exemption determinations for a new entrant before the conclusion of the new entrant’s Class Year. That NRG reading, which is identical to the NYISO’s and the independent MMU’s, directly contradicts NRG’s litigation position in this proceeding. NRG’s statements are thus relevant and material because they underscore the unreasonableness of the novel tariff interpretation that NRG offered for litigation purposes.

NRG asserts that its interpretation of the Pre-Amendment Rules constitutes “Protected Information” under Attachment O to the Services Tariff. The support that NRG offers for its claim is a selective excerpt of the tariff’s definition of “Protected Information.” NRG quotes the phrase “information that has been designated as such in writing by the party supplying the information to the ISO”⁸ However, NRG omits the definition’s limiting language which

⁵ Motion to Strike at 3. Specifically NRG takes issue with the October Answer at 11-12 and its Attachment I - Affidavit of Joshua A. Boles at Section V (“Boles Supplemental Affidavit”).

⁶ *Id.*

⁷ 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 November 27, 2010 effective date of the current In-City Buyer-Side Capacity Mitigation Measures. The NYISO’s mitigation exemption determination for BEC was made pursuant to the Pre-Amendment Rules.

⁸ Motion to Strike at 4.

**PUBLIC VERSION - HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
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TO 18 C.F.R. SECTION 388.112**

clearly states that information so designated only constitutes “Protected Material” if the “designation is consistent with the ISO’s tariffs and this [Market Monitoring] Plan.” The complete definition defines “Protected Information” as

(a) information that is confidential proprietary, commercially valuable or competitively sensitive or trade secret, (b) information that is Confidential Information under Attachment F to the ISO OATT, (c) information that the Market Monitoring Unit or the ISO is obligated by tariff, regulation or law to protect, (d) information which, if revealed, would present opportunities for collusion or other anticompetitive conduct, or that could facilitate conduct that is inconsistent with economic efficiency, (e) information relating to ongoing investigations and monitoring activities (including the identity of the person or Market Party that requested or is the subject of an investigation, unless such party consents to disclosure), (f) information subject to the attorney-client privilege, the attorney work product doctrine, or concerning pending or threatened litigation, or (g) information that has been designated as such in writing by the party supplying the information to the ISO or its Market Monitoring Unit, or by the ISO or its Market Monitoring Unit, provided that such designation is consistent with the ISO’s tariffs and this Plan.

The statements quoted in the October Answer do not fall into any of the categories of Protected Information. The NYISO quoted only language articulating NRG’s legal interpretation of the Pre-Amendment Rules. NRG’s tariff interpretation is not commercially sensitive or valuable, does not present opportunities for parties that learn it to engage in anti-competitive conduct, and is not otherwise eligible for confidential treatment for any reason. The NYISO did not submit NRG’s letter, which included other information that was confidential, or reveal anything about the letter that might inadvertently disclose NRG’s business strategies or trade secrets.

Complainants are likewise wrong to assert that the NYISO’s very general response to their October 7, 2011 Motion to Lodge disclosed confidential information concerning either or

**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**

both of them.⁹ Complainants' Motion to Lodge claimed that the NYISO was not responsive to supplier requests related to market power mitigation issues. That claim is factually incorrect, and the NYISO's October Answer sought to correct this inaccuracy. Complainants have offered no explanation of how the NYISO's general language reveals any confidential information. Their unsupported assertion that it did so should be rejected by the Commission.

In short, NYISO takes seriously its obligations to enforce its tariffs including the obligation to not disclose Protected Information. The NYISO carefully prepared the October Answer to avoid revealing Protected Information. NRG and Complainants have not shown that the NYISO violated its tariff. The Motion to Strike and the Complainants' October 31 Answer should therefore be denied.

B. The Motion to Strike Is Overbroad

It is not clear whether NRG is asking the Commission to strike the October Answer in its entirety, as appears to be the case from its opening pages, or is making a request limited to specific portions of the October Answer. In the event that NRG is requesting the former, its requested remedy is overbroad and should be rejected.¹⁰ Under Commission precedent, there is no basis to strike any portion of, let alone the entire, October Answer. As the Commission has previously held "[m]otions to strike are not favored, and objectionable material will not be struck unless the matters sought to be omitted from the record have no possible relationship to the

⁹ Complainants' Answer at 2.

¹⁰ Motion to Strike at 1 (moving to "strike the [NYISO Answer]" filed on October 12, 2010 in this proceeding).

**PUBLIC VERSION - HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
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controversy, may confuse the issues, or otherwise prejudice a party.”¹¹ The NYISO has established the relevance of the information from the NRG letter; therefore, there is no basis to strike that portion of the October Answer. Neither NRG nor Complainants have provided a basis for striking any other portion of the October Answer, and there is no basis to do so.

C. The NYISO Properly Calculated Revenues When Making the Mitigation Exemption Determination for BEC

NRG asserts that because BEC’s air permit limited the facility to running a maximum of 4,748 hours per year, the NYISO used an incorrect number of run hours producing a “highly unreasonable” estimate of BEC revenues. NRG submits the Reply Affidavit of Johannes P. Pfeifenberger as support for the proposition that the reduced run hours would lead to a change in revenues that would result in the imposition of an Offer Floor on BEC. However, as explained in the attached Confidential Supplemental Affidavit of Joshua A. Boles Regarding Bayonne Energy Center, even if BEC’s net energy revenues were calculated by the NERA econometric model using 4,478 run hours, or even fewer, BEC would still pass the “Part B Test”¹² and be exempt from the Offer Floor. As Mr. Boles explains, BEC would be granted an Offer Floor mitigation exemption even if a lower number of run hours were used, with and without the 345 kV adjustment.

¹¹ See *Power Mining, Inc.*, 45 FERC ¶ 61,311 at 61,972 n.1 (1988)); see also *San Diego Gas & Electric Co.* 114 FERC ¶ 61,070 at P 20 (2006) (quoting *Central Hudson Gas & Electric Corp.*, 92 FERC ¶ 63,004 (2000) and *Power Mining, Inc.*, 45 FERC ¶ 61,311 at 61,972 n.1 (1988)).

¹² The “Part B Test” is the mitigation exemption test performed pursuant to the Pre-Amendment Rules in Services Tariff Attachment H Section 23.4.5.7.2(b).

**PUBLIC VERSION - HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
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TO 18 C.F.R. SECTION 388.112**

III. CONCLUSION

For the reasons set forth above, and in the attached Supplemental Affidavit of Joshua A. Boles Regarding Bayonne Energy Center, the NYISO respectfully requests that the Commission deny the Motion to Strike and accept the NYISO's answer as described above.

Respectfully submitted,

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

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

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 9th day of November, 2011.

/s/ Ted J. Murphy
Ted J. Murphy
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500

**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**

ATTACHMENT

**Confidential Supplemental Affidavit of
Joshua A. Boles Regarding Bayonne Energy Center**

**PUBLIC VERSION -- HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
REDACTED PURSUANT TO PROTECTIVE ORDER IN
FERC DOCKET NO. EL11-50-000 AND CONFIDENTIAL INFORMATION PURSUANT
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)	
New York Independent System Operator,)	
Inc.)	

**CONFIDENTIAL SUPPLEMENTAL AFFIDAVIT OF JOSHUA A. BOLES
REGARDING BAYONNE ENERGY CENTER**

Mr. Joshua A. Boles declares:

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

I. Purpose of this Affidavit

2. I submit this affidavit in support of the *Answer to Motion to Strike and Request for Leave to Submit Answer and Answer* of the New York Independent System Operator, Inc. ("NYISO") to which this affidavit is appended.
3. I previously prepared three confidential affidavits in this docket (collectively, the "Confidential Affidavits"). The most recent affidavit was filed in support of the NYISO's October 12, 2011 *Answer to Pleadings Opposing Exemptions* ("October 12

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

- Answer”).¹ The previous two affidavits were filed in support of the NYISO’s September 8, 2011 *Confidential Supplemental Answer*,² the “Confidential Affidavit Regarding Astoria Energy II” (“AEII”), and the “Confidential Affidavit Regarding Bayonne Energy Center” (“BEC”) collectively, the (“Confidential Affidavits”).
4. This affidavit addresses the argument presented by the NRG Companies (“NRG”) regarding a limitation on BEC’s annual run hours.³ NRG references BEC’s environmental permit restriction on the number of run hours of each combustion turbine: 4,748 hours per year.⁴ The net energy revenue calculation performed by the NYISO and its consultant, NERA Economic Consulting (“NERA”), utilized a higher number of run hours for BEC.
5. I directed NERA’s Senior Vice President Eugene T. Meehan and Vice President Jonathan Falk, the NYISO’s expert ICAP consultants, to perform the net energy revenue calculation using 4,500 run hours.⁵ The results of this calculation and the impact on the

¹ *New York Independent System Operator, Inc. Request for Leave to Submit Answer and Answer to Pleadings Opposing Exemptions and Answer to Motion to Lodge*, Attachment I Supplemental Affidavit of Joshua A. Boles (“Supplemental Affidavit”), Docket No. EL11-50-000 (filed October 12, 2011) (“October 12 Answer”).

² *Confidential Supplemental Answer of the New York Independent System Operator, Inc.*, Appendix I Confidential Affidavit of Joshua A. Boles Regarding Astoria Energy II (“Boles AEII Affidavit”) and Appendix II Confidential Affidavit of Joshua A. Boles Regarding Bayonne Energy Center (“Boles BEC Affidavit”), Docket No. EL11-50-000 (filed September 8, 2011) (“Confidential Supplemental Answer”).

³ *Motion to Strike and Motion for Leave to Answer of the NRG Companies*, Docket No. EL11-50-000 (October 25, 2011) (“NRG Answer”).

⁴ *Id.* at p. 7.

⁵ Mr. Meehan and Mr. Falk previously filed Affidavits in this proceeding. *See Confidential Supplemental Answer at Appendix VI Affidavit of Eugene T. Meehan* (“Meehan Affidavit”) and October

**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**

Part B Test⁶ are described below. In summary, reducing BEC's run hours to 4,500 (before adjusting for forced outages) does not change the outcome of the Part B Test; *i.e.*, BEC is exempt from the Offer Floor.

II. BEC Net Energy Revenue Estimates

6. The original calculation of BEC's net energy revenues was performed by NERA using the NERA econometric model. My previous Confidential Affidavits and the affidavits of Mr. Meehan and Mr. Falk of NERA provide detailed explanations of the methodology that was employed.⁷ The NERA model produced a net energy revenue estimate for BEC of \$[REDACTED]/kW-year at the 15 percent excess level. The corresponding run hours were [REDACTED] hours (*i.e.*, [REDACTED] hours reduced by the BEC Equivalent Demand Forced Outage Rate ("EFORd") of [REDACTED] percent).
7. I directed Mr. Meehan and Mr. Falk to revise the inputs to the calculation of BEC's net energy revenues to use a level of run hours approaching but below the 4,748 permit maximum. NERA performed this calculation at 4,500 run hours.

12 Answer at Attachment IV Joint Affidavit of Eugene T. Meehan and Jonathan Falk ("Joint Meehan-Falk Affidavit").

⁶ The "Part B Test" referred to herein and in the Confidential Affidavits is the mitigation exemption test performed pursuant to the Pre-Amendment Rules in Services Tariff Attachment H Section 23.4.5.7.2(b). Terms with initial capitalization not defined herein have the meaning set forth in the NYISO's Answer to which this Affidavit is appended.

⁷ See Boles BEC Affidavit at P 35-42; *see also* Meehan Affidavit and Joint Meehan-Falk Affidavit.

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

8. Because net energy revenues are determined at a level that accounts for the EFORD, the net energy revenues needed to be derived by reducing the 4,500 run hours by the BEC EFORD of [REDACTED] percent, which is [REDACTED] unforced out hours. To perform the calculation of net energy revenues, Mr. Meehan and Mr. Falk reduced the run hours by removing BEC's least profitable contiguous blocks of operation. First, the average profit per MWh for each block of operation was calculated. Next, the least profitable blocks were identified and discarded from the profit summation until [REDACTED] run hours were obtained. Mr. Meehan reported to me that this calculation produced net energy revenues of \$[REDACTED]/kW-year.
9. Mr. Meehan and Mr. Falk believe, and I agree, that this method was a reasonable way to incorporate a lower number of run hours into the BEC exemption analysis. Removing the least profitable contiguous blocks of operation is a realistic depiction of how a plant would be expected to run. The adjustment is also consistent with how the hypothetical dispatch in the NERA econometric model would treat startup costs and designate run hours.
10. NERA believes, and I agree, that the net energy revenues estimated using this method are consistent with expected outcomes. The elimination of [REDACTED] run hours resulted in a \$[REDACTED]/kW-year reduction in net energy revenues. Because many hours have trivial net energy revenues, operating blocks can be reduced substantially with little impact on net energy revenues. The reduction of hours with lower net energy revenues is consistent with a plant operating in order to maximize net energy revenues. Thus, it is reasonable to

**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**

anticipate that the reduction in net energy revenues would not be exactly proportional to the reduction in hours of operation.

11. The reduction in run hours would also have an impact on the “345 kV adjustment” that I described in the Boles BEC Affidavit.⁸ I explained in the Boles BEC Affidavit an alternate approach to calculate net energy revenues: by making a downward adjustment to account for lower prices at the 345 kV level relative to the Zone J prices predicted by the NERA model. The adjustment was calculated as the average per MWh price difference times the number of run hours, converted to kilowatts. For BEC, this adjustment to net energy revenues was equal to \$[REDACTED]/kW-year, or \$1.70/MWh times [REDACTED] run hours divided by 1,000 kilowatts per MW.⁹
12. Reducing the number of run hours to [REDACTED] hours would reduce the impact of the 345-kV adjustment. With [REDACTED] hours, the 345-kV adjustment to net energy revenues would be equal to \$[REDACTED]/kW-year, or \$1.70/MWh times [REDACTED] run hours divided by 1,000 kilowatts per MW.

III. Part B Mitigation Exemption Test

13. To complete the analysis in response to the NRG Answer, the Part B Test was performed using the net energy revenues (based on [REDACTED] run hours) and also making the 345-kV adjustment corresponding to the reduced run hour estimate. Table 1 to this Affidavit

⁸ See Boles BEC Affidavit at PP 37, 40-42.

⁹ *Id.* at P 41.

**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**

shows the NYISO's original computation of the BEC Unit Net CONE of \$[REDACTED]/kW-year.

With the 345 kV adjustment, the BEC Unit Net CONE would be \$[REDACTED]/kW-year.¹⁰

Table 2 to this Affidavit shows the computation of BEC's Unit Net CONE in response to the NRG Answer as described herein. With the reduced run hours, the BEC Unit Net CONE would be \$[REDACTED]/kW-year. With the 345 kV adjustment, the BEC Unit Net CONE would be \$[REDACTED]/kW-year.

14. Both of the BEC Unit Net CONE values computed in response to the NRG Answer are lower than the three-year average annual price forecast of \$35.67/kW-year. Therefore, accounting for a reduced number of run hours when performing the Part B Test does not alter the determination that BEC is exempt from the Offer Floor.
15. The Unit Net CONE values presented in Tables 1 and 2 do not account for alternative assumptions that would have resulted in a lower Unit Net CONE for BEC or a higher ICAP forecast for use in the Part B Test. As stated previously, these alternative assumptions include additional Ancillary Services revenues from supplying Regulation Services and 10-minute non-synchronous reserves, a reduction of capacity imports over the Linden VFT, and exits of existing capacity in response to BEC's entry.¹¹

This concludes my affidavit.

¹⁰ *Id.* at P 46, Table 1.

¹¹ *See* Supplemental Boles Affidavit at P 32 (regarding Ancillary Services); *see id.* at P 18 and Supplemental Patton Affidavit at P 13 (regarding Linden VFT); *see* Supplemental Boles Affidavit at P 19 (regarding capacity exits).

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

Table 1. Original Computation of BEC Unit Net CONE

	Capability Year	<u>2012/2013</u>	<u>2013/2014</u>	<u>2014/2015</u>
A	Total investment cost per kW			
B	Real levelized carrying charge			
C	Annual fixed O&M			
D	CONE (ICAP)			
E	Net energy revenues (15% excess)			
F	Ancillary services revenues			
G	Net E&AS revenues			
H	Annual net CONE			
I	Unit Net CONE (ICAP)			
J	Unit Net CONE (UCAP)			

With Alternate 345 kV Approach

K	345 kV adjustment			
L	Annual net CONE			
M	Unit Net CONE (ICAP)			
N	Unit Net CONE (UCAP)			

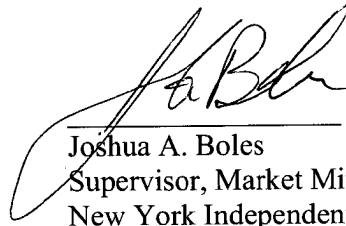
**PUBLIC VERSION -- HIGHLY SENSITIVE PROTECTED MATERIALS HAVE BEEN
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FERC DOCKET NO. EL11-50-000 AND CONFIDENTIAL INFORMATION PURSUANT
TO 18 C.F.R. SECTION 388.112**

Table 2. Computation of BEC Unit Net CONE in Response to NRG Answer

	Capability Year	2012/2013	2013/2014	2014/2015
A	Total investment cost per kW			
B	Real levelized carrying charge			
C	Annual fixed O&M			
D	CONE (ICAP)			
E	Net energy revenues (15% excess)			
F	Ancillary services revenues			
G	Net E&AS revenues			
H	Annual net CONE			
I	Unit Net CONE (ICAP)			
J	Unit Net CONE (UCAP)			
<i>With Alternate 345 kV Approach</i>				
K	345 kV adjustment			
L	Annual net CONE			
M	Unit Net CONE (ICAP)			
N	Unit Net CONE (UCAP)			

ATTESTATION

I am the witness identified in the foregoing 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.
November 8, 2011

Subscribed and sworn to before me
this 8th day of November 2011.

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

