UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

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

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure,[1] the NYISO respectfully submits this answer to the *Motion for Leave to Answer and Answer of Hudson Transmission Partners, LLC* ("HTP Answer") in this proceeding.[2] For the reasons set forth herein and in the NYISO's November 13 Answer ("NYISO Answer"), the Commission should reject the arguments originally made in Hudson Transmission Partners, LLC's ("Complainant's") original August 3, 2012 complaint ("August Complaint") and the new and amended arguments set forth in the HTP Answer. Neither the August Complaint nor the HTP Answer satisfy Complainant's burden of proof under the Federal Power Act. Complainant still has not shown that the NYISO violated or "improperly implemented"[3] its tariff or otherwise acted unjustly or unreasonably, or in an unduly discriminatory manner. The NYISO correctly determined that Complainant's merchant transmission project ("HTP Project") would be subject

[1] 18 C.F.R. § 385.213 (2012).

[2] As discussed in Section I, because the HTP Answer raises new issues and substantially modifies Complainant's prior arguments, it should be treated as an amendment to the HTP Complaint. Accordingly, the NYISO is entitled to answer it as of right. To the extent that the Commission does not treat the HTP Answer as an amended complaint, the NYISO respectfully requests leave to answer, as discussed below.

[3] August Complaint at 1.

to Offer Floor[4] mitigation upon entry. The NYISO therefore continues to request that the August Complaint along with the new arguments in the HTP Answer be denied in their entirety.

This answer does not address the November 28th *Motion for Leave to Answer and Limited Answer of TC Ravenswood, LLC to Protest and Answer Regarding Complaint of Hudson Transmission Partners, LLC* ("TCR Limited Answer"). The NYISO disagrees with the arguments set forth in that pleading but has already addressed them in the NYISO Answer and in other dockets.[5]

I. REQUEST FOR LEAVE TO ANSWER

The HTP Answer does not simply respond to the NYISO Answer. Instead, it introduces new claims that were not included in the August Complaint and revises arguments that were included. Complainant's new claims include its objection to the cost of capital used in the NYISO's Offer Floor determination, its assertion that certain mothballed units should have been excluded from the NYISO's energy revenue forecasts, and its attempted use of the "analysis reference date" rulings from the Commission's September 10, 2012 order in Docket No. EL11-50-000 ("September Order").[6] The HTP Answer also changes its original argument

[4] Terms with initial capitalization that are not otherwise defined herein have the meaning set forth in the NYISO's Market Administration and Control Area Services Tariff (Services Tariff), as modified by Commission's June 22, 2012 Order (*Astoria Generating Company, L.P., et al. v. New York Independent System Operator, Inc*., 139 FERC ¶ 61,244 (2012)), and accordingly as described in the NYISO's August 6, 2012 compliance filing in Docket No. ER12-2414-001. If not defined therein, the term shall have the meaning set forth in the Open Access Transmission Tariff ("OATT").

[5] *See, e.g., Motion to Intervene, Comments, Request for Limited Tariff Waivers, and Alternative Protest of the New York Independent System Operator, Inc.,* Docket No. ER12-1418-000 at 12-19 (April 12, 2012). To the extent that the Commission considers the issues raised by the TCR Limited Answer in this proceeding, the NYISO respectfully requests that its arguments in Docket No. ER12-1418-000 be deemed to be incorporated by reference into this filing.

[6] *Astoria Generating Co., et al. v. New York Independent System Operator, Inc.,* 140 FERC ¶ 61,189 at PP 134-137 (2012) ("September Order").

for "reliability benefits compensation."[7] The HTP Answer is therefore tantamount to an amendment to the HTP Complaint that the NYISO would be permitted to answer as a matter of right.[8]

To the extent the Commission concludes that the HTP Answer should not be treated as an amended complaint, it should exercise its discretion to accept this answer. Regardless of whether the HTP Answer is deemed to be an amended complaint, it raises new issues and offers revised arguments that the NYISO has not had an opportunity to address before. Simple fairness dictates that the NYISO be permitted to respond.

In addition, the Commission has previously accepted answers when they help to clarify complex issues or aid the Commission in its decision-making process.[9] This answer should be accepted because it corrects the HTP Answer's factual errors and mischaracterizations, as well as the misinterpretations of the Services Tariff. Accepting this answer will therefore clarify the record and facilitate the Commission's review in this case.

The NYISO has limited the scope of this answer to responding to Complainant's new and revised arguments, and to making the types of record corrections noted above. This approach should not be construed as agreement with, or acceptance of, other assertions in the HTP Answer that the NYISO has chosen not to address.

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[7] The HTP Answer also withdraws the August Complaint's arguments regarding the NYISO's exclusion of certain categories of "sunk costs" from the Unit Net CONE analysis for the HTP Project. HTP Answer at 4, n.15.

[8] 18 C.F.R. §385.215 (2012).

[9] *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…").

II. ANSWER

A. HTP has Failed to Show that the NYISO's "Scaling Factor" Adjustment Was Inappropriate or Unreasonable

The NYISO Answer refuted the August Complaint's allegations that applying a "scaling factor" adjustment in the NYISO's determination of the HTP Project's net energy revenues was unlawful, discriminatory, or unreasonable. The NYISO explained that this adjustment was firmly rooted in the Services Tariff's requirement that the NYISO's Unit Net CONE examination under its buyer-side mitigation rules ("BSM Rules")[10] reasonably estimate net energy revenues. If such an adjustment were not made then the energy revenues for transmission projects used in the BSM determination would be unrealistically overstated because the NYISO implicitly would be assuming that such projects could perfectly arbitrage inter-regional price differences. An assumption of perfect arbitrage of NYISO and PJM Interconnection ("PJM") prices would thus not have resulted in a "reasonable estimate" of energy revenues. Applying the scaling factor to the estimate of the HTP Project's estimate of net energy revenues was also not unduly discriminatory because it reflected the significant differences between the manner in which net energy revenues are available using the HTP Project compared to generators.

The HTP Answer concedes that perfect arbitrage of inter-regional prices across the PJM-NYISO interface is currently not possible.[11] It also admits that the Services Tariff requires the NYISO to project "likely" energy revenues. Nevertheless, it asserts that the NYISO should not be allowed to use a scaling factor to account for the impossibility of perfect arbitrage in its energy revenue projections. Essentially, Complainant recognizes that the NYISO had to do

[10] The BSM Rules are set forth at section 23.4.5.7 of Attachment H to the NYISO's Services Tariff.

[11] HTP Answer at 31 (stating that Complainant "does not contend that it would be able to perfectly arbitrage day-ahead price differences between the PJM and the NYISO markets . . . . Hudson Transmission also recognizes that perfect arbitrage is not possible in the real-time markets ").

something to satisfy the Services Tariff's "reasonable estimate" requirement; however, it then argues that such an adjustment should not have been made. Its objection is an illogical and unsupported challenge to the legality of, or the necessity for, the NYISO's actions.

Complainant next argues that the scaling factor adjustment was flawed because it "effectively assumes that Hudson Transmission must earn all of its revenues from the day-ahead market."[12] In fact, the NYISO's analysis considered revenues from both the day-ahead and real-time markets. As explained in the NYISO Answer, and reiterated in the attached *Supplemental Affidavit of Daniel A. Jerke* ("Supplemental Affidavit"), the NYISO used a scaling factor that was equal to the ratio of (a) historic net energy revenues from the day-ahead and real-time markets to (b) theoretical net energy revenues from the day-ahead market over the same historic time period.[13] The NYISO did not assume that the HTP Project's customers (*i.e.*, Market Participants' using it to sell energy) would not participate in the real-time market. To the contrary, as described in the Supplemental Affidavit, the NYISO calculated the scaling factor adjustment using historic day-ahead and real-time revenues.[14] Combined historic day-ahead and real-time revenues were considerably less than the theoretical maximum day-ahead net revenues, but the real-time revenues included in the NYISO's calculation were far greater than zero or the *de minimis* amounts claimed by the Complainant.[15]

Complainant's erroneous assumptions appear to have resulted from its not being aware of changes in the NYISO's approach that developed after the NYISO provided Complainant with the information included in Attachment 4 to the HTP Answer. Attachment 4 correctly indicates

[12] HTP Answer at 30.

[13] *See* NYISO Answer at 17.

[14] *See* Supplemental Affidavit at PP 7-11.

[15] *Id*.

that in August 2011 the NYISO intended to account for just ten percent of theoretically achievable real-time net energy revenues in determining a "reasonable estimate" of HTP Project revenues. After further review, and after considering input from the independent Market Monitoring Unit ("MMU"), and prior to December 2011 Offer Floor determination, the NYISO revised its approach and adopted the calculation method described above.[16] The NYISO also used this approach in its analysis under the BSM Rules for the HTP Project's November 2012 re-determination.

The HTP Answer looks to the MMU Report to support its erroneous claim that the NYISO wrongly included mothballed units in its energy revenue projections.[17] When the NYISO calculates net energy revenues for an Examined Facility, the level of excess modeled is largely based on the amount of capacity modeled in the ICAP forecast. Under the Services Tariff, a resource should only be removed from the ICAP forecast used in the BSM mitigation determination if it has filed a notice of retirement with the New York State Public Service Commission.[18] As of December 2011, there were no resources in New York City that had submitted a "retirement" notice since the April 2011 publication of the 2011 Load and Capacity Data Report (*i.e.*, the "Gold Book"). It would therefore have been inappropriate to remove any MW from the ICAP forecast used in the December 2011 determination. There was likewise no basis for any adjustment to be made in the November 2012 determination.

[16] Although this adjustment in the NYISO's approach was not discussed with Complainant, it was foreseeable that it would be a favorable change from Complainant's perspective.

[17] HTP Answer at 35; *citing* MMU Report at 11.

[18] *See* Services Tariff at § 23.4.5.7.3.2.

B. HTP has Not Shown that it Would Be Reasonable for the NYISO to Use Capacity Prices from PJM's Incremental Auctions in its Analyses or that it Was Unreasonable for it to Have Used PJM's Base Residual Auction ("BRA") Prices

The HTP Answer repeats the August Complaint's claims that the NYISO should not have used PJM BRA prices to estimate the price of PJM capacity and should have instead looked to prices in PJM's incremental auctions.[19] The NYISO Answer refuted this argument in detail. It demonstrated that there were many important similarities between the NYISO's ICAP Spot Market Auctions and the PJM BRAs, and many material distinctions between the ICAP Spot Market Auctions and PJM's incremental auctions. These considerations far outweighed the superficial timing similarities between the NYISO auctions and PJM's incremental auctions.

The HTP Answer offers virtually nothing to contest the points made in the NYISO Answer. Instead, the HTP Answer tries a new argument. It claims that it is unlikely that PJM generators would opt out of the BRA in order to sell their capacity into New York three years later. The Supplemental Affidavit explains that this theory does not appear to support Complainant's argument at all since it mostly has to do with contracting uncertainties that UDR rightsholders may experience during the early years of the HTP Project's operations.[20] If anything, the argument suggests that the projected revenues for the HTP Project should be adjusted to a level lower than what the NYISO actually used in its analysis.[21] Complainant's new argument also does not alter the reality that the differences between the incremental auctions and the NYISO's auctions that were described in the NYISO Answer are far greater than the comparatively minor ones between the BRAs and NYISO spot auctions.

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[19] HTP Answer at 36-37; August Complaint at 48-49.

[20] *See* Supplemental Affidavit at PP 13-19.

[21] *Id.* at P 18.

C. HTP has Failed to Show that the NYISO Was Wrong to Examine the HTP Project Concurrent with Class Year 2010 Examined Facilities

The NYISO Answer explained that although the HTP Project was in Class Year 2008 that the BSM Rules and the February 2011 Order[22] clearly required that it be analyzed concurrent with other Examined Facilities that shared the same Starting Capability Period.[23] This treatment was driven by the Commission's acceptance of Complainant's express request that the entry date for the HTP Project be determined using the "Reasonably Anticipated Entry Date Rule,"[24] instead of the "Three Year Rule."[25]

Complainant's principal response to the NYISO Answer is a brand new claim that Section 23.4.5.7.3 of the Services Tariff does not permit the NYISO to treat the HTP Project as a "Category III" Examined Facility.[26] In reality, the HTP Project unquestionably is, and was always intended to be,[27] a "Category III" facility. The HTP Project has all of the substantive characteristics of a Category III(a)(i) project. At the time that the NYISO filed the BSM Rules, it was "in the ISO Interconnection Queue, in a Class Year prior to 2009/10," had not yet "commenced commercial operations or been canceled" and the NYISO had not previously made "an exemption or Unit Net CONE determination" for it. Significantly, the HTP Project was the only project to have these attributes and thus was the only project covered by the Category III(a)(i) definition. Neither the NYISO's filing proposing the BSM Rules, which introduced the

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[22] *New York Independent System Operator, Inc.,* 134 FERC ¶ 61,083 (2011).

[23] *See* NYISO Answer at 10-14.

[24] Under the "Reasonably Anticipated Entry Date Rule" the mitigation exemption analysis used a starting date based on when an ICAP Supplier was reasonably anticipated to first offer to supply UCAP.

[25] Under the "Three-Year Rule" the mitigation exemption analysis uses a start date based on the Summer Capability Period that begins three years from the start of the proposed facility's Class Year.

[26] *See* HTP Answer at 12-19.

[27] Complainant is thus wrong to suggest that the NYISO meant to exclude the HTP Project from the Category III definition. *See* HTP Answer at n. 40.

Category III definition, nor its communications to its stakeholders,[28] articulated any reason why the HTP Project would be outside the scope of Category III. Other parties in this proceeding have indicated that they understood the intended scope of the Category III definition to include the HTP Project.[29]

The Services Tariff definition of Category III facilities does not expressly reference "UDR projects" as the Category I and II definitions do. That does not mean, however, that the Category III definition is inapplicable to the HTP Project. The Services Tariff definition of "Generator" is very broad. It encompasses any "facility capable of supplying Energy, Capacity and/or Ancillary Services that is accessible to the NYCA." By contrast, "UDR project" is not a defined term in the Services Tariff.[30] The absence of a reference to "UDR projects" from the Category III definition therefore should not be used as the basis for a formal presumption that the HTP Project was meant to be excluded from that definition.

The UDR rules permit Unforced Capacity outside of a Locality, which in the case of the HTP Project is capacity located in an External Control Area, to be treated the same as Generators

[28] Moreover, NYISO presentations to its stakeholder during the development of the BSM Rules clearly indicated that all three Categories of "Examined Facilities" encompassed "entities," *i.e.,* both generators and merchant transmission projects. *See, e.g.*, the NYISO August 25, 2010 presentation to the Management Committee at p. 5*, available at* <http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2010-08-25/agenda_07_pres_Exemption_Determination_and_Duration_of_Offer_Floor.pdf>.

[29] *See Protest of the New York City Suppliers* at 15-19, Docket No. EL12-98-000 (November 13, 2102).

[30] The Services Tariff defines Unforced Capacity Deliverability Rights, but does not define the term "UDR project." *See* Services Tariff §2.21 at definition of Unforced Capacity Deliverability Rights. That definition describes that the UDR must be "combined with Unforced Capacity which is located in an External Control Area or non-constrained NYCA region" is Locational (in this case, Zone J) Installed Capacity. Thus it would not be appropriate to solely use the term "UDR" in the BSM Rules. The UDR when coupled with capacity from outside the relevant NYCA Locality is referred to as a "UDR project" for purposes of the BSM Rules.

electrically located within a Locality.[31] It is therefore entirely natural to read the Category III definition to encompass the HTP Project. The Commission has also previously held that the NYISO buyer-side mitigation measures apply to merchant transmission facilities, including specifically the HTP Project. It has been clearly understood that controllable transmission and generation capacity "should be subject to the same mitigation" since the issuance of the Commission's March 2008 order.[32] This has been the case even though the Pre-Amendment Rules[33] did not expressly reference controllable transmission lines. In addition to it being the NYISO's intent to provide an explicit basis to examine the HTP Project which had not been examined under the Pre-Amendment Rules, it was reasonable to read the Category III definition to include the HTP Project. The absence of an express reference to "UDR projects" from the Category III definition therefore should not be used as the basis for drawing a formalistic inference that the HTP Project was meant to be excluded from that definition.[34]

Complainant cannot legitimately claim a reliance interest in its newly-asserted interpretation of the Category III definition. Any claim of detrimental reliance by HTP belies its position in the HTP Answer and in earlier pleadings that the HTP Project's "go forward" date was nearly a year before the NYISO filed the BSM Rules.[35] Complainant does claim that it would have challenged or sought clarification of Section 23.4.5.7.3 if it had thought that

[31] *See* Services Tariff Section 2.21.

[32] *New York Independent System Operator, Inc.,* 122 FERC ¶ 61,211 at P 121 (2008).

[33] 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 BSM Rules.

[34] *See also Linden VFT, LLC v. New York Independent System Operator, Inc.*, 141 FERC ¶ 61,008 at PP 29-30 (2012), where the Commission determined that it was appropriate to interpret the term "generators" to include controllable lines.

[35] *See* HTP Answer at 23-24; August Complaint at 62.

Category III might have been read to include the HTP Project.[36] Whether this claim is true, or merely opportunistic, is of little practical consequence since Complainant's interpretation is now squarely before the Commission in this proceeding. If the Commission rejects Complainant's position in this proceeding, then Complainant would have no basis for raising due process objections.

Adopting Complainant's interpretation would have illogical and perverse unintended consequences. It would read the HTP Project out of the portion of the "Examined Facility" definition that was specifically crafted to include it (*i.e.,* Category III(a)(i)). It would therefore completely remove the HTP Project from the definition of "Examined Facilities" because it cannot properly be included in Category "I" or "II". Such a result would contradict both the intent of the BSM Rules and the canon of construction that dictates that the Services Tariff must not be read in a manner that would render the Category III(a)(i) definition superfluous or inoperative.

Complainant does not claim that the HTP Project comes within the ambit of Category II but argues that it should have been treated as a "Category I" facility.[37] Complainant's reading of the Category I definition is not tenable. The Services Tariff defines a Category I facility as one that:

> requested CRIS, or that requested an evaluation of the transfer of CRIS rights from another location, in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facilities Study determination is being made (the Capability Periods of expected entry as further described below in this Section, the "Mitigation Study Period").[38]

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[36] *See id*. at n.40.

[37] *See id*. at 12-19.

[38] Services Tariff at §23.4.5.7.3(I).

When the NYISO first proposed the BSM Rules it requested expedited Commission action so that its tariff revisions could take effect by November 2010.[39] It explained that Commission action was needed by then because Class Year 2009 and Class Year 2010 projects were expected to receive and consider their Project Cost Allocations in that timeframe.[40] The projects' decision point in the Project Cost Allocation process would mark the "commencing" of the "Class Year Facilities Study in the "calendar year in which the Class Year Facilities Study determination" was being made, and under the then-proposed and now-accepted BSM Rules was to coincide with the NYISO's issuance to the projects of the exemption and Offer Floor determinations. Thus, for the first examinations under the new BSM Rules, it is Class Year 2009 and Class Year 2010 projects that belonged in Category I.[41] The HTP Project, as a member of Class Year 2008, did not. The HTP Answer itself implicitly acknowledges this distinction by observing that Astoria Energy II ("AEII") and the Bayonne Energy Center ("BEC") could not possibly satisfy the requirements of Category II or III because "neither . . . is in a Class Year prior to 2009/2010 . . . ."[42] It follows that the HTP Project, as the only project in a Class Year prior to 2009 that had not yet entered the market,[43] which therefore meant that a determination under the BSM Rules had to be made, could only be a Category III facility because it did not fit within Category I or Category II.

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[39] *Proposed Enhancements to In-City Buyer-Side Capacity Mitigation Measures, Request for Expedited Commission Action, and Contingent Request for Waiver of Prior Notice Requirement*, Docket No. ER10-3043-000 (filed September 27, 2010) ("BSM Rules Filing").

[40] *See* BSM Rules Filing at 17-19.

[41] *See New York Independent System Operator, Inc.*, 139 FERC ¶61,244 at P 134 (holding that the Order's directives for retests under and changes directed to the BSM Rules were not intended to affect determinations made for projects prior to the November 27, 2010 effective date of the BSM Rules).

[42] HTP Answer at 13-14.

[43] Under the Pre-Amendment rules, projects that entered the market were either grandfathered pursuant to Section 23.4.5.7.6, or were examined for an exemption or Offer Floor determination.

Moreover, if Complainant's tariff interpretation were to prevail, and the NYISO were required to analyze the HTP Project prior to and independent of its analysis of Class Year 2009 and Class Year 2010 projects, substantial market uncertainty would be created. Such a drastic change would necessarily impact the exemption re-determinations that the NYISO recently completed for AEII and BEC.

If the Commission concludes that the current version of the Category III(a)(i) definition does not encompass the HTP Project, it should waive that limitation in order to preserve the intent of the provision and to avoid the consequences described above.[44] Alternatively, if the Commission believes that the definition is insufficiently clear, it could direct the NYISO to make a compliance filing to "correct" the definition to expressly include "UDR projects" or to make any other "corrections" that it deems necessary.[45]

The HTP Answer's remaining tariff arguments are all devoid of merit. They fail because they are dependent on Complainant's flawed interpretation of the Category III definition or because they are contradicted by the February 2011 Order's express directive that the

[44] To the extent that a waiver of the "Category III" definition is needed, granting one would be consistent with the Commission's four-prong waiver test. *See, e.g.*, *PJM Interconnection, LLC*, 137 FERC ¶61,184 at P 13 (2011); *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,193 at P 67 (2011). The NYISO has acted in good faith (and nothing in the record suggests otherwise), the waiver would be of limited scope (since the HTP Project is the only "Category III" facility); granting the waiver would remedy a "concrete problem," and there would be no undesirable consequences, including harm to third parties (since no party, including Complainant, could have a legitimate interest in the BSM Rules being applied in a manner contrary to their intended design).

[45] The Commission has previously accepted "errata" filings that corrected typographical errors and other clerical drafting issues months or years after the underlying tariff language was accepted. *See, e.g.*, *New York Independent System Operator, Inc.*, Letter Order Docket No. ER12-416-000 (December 27, 2011) (accepting an errata to a filing over a year after the provisions had been filed, accepted and made effective); *New York Independent System Operator, Inc.*, Letter Order, Docket Nos. ER04-230-037 and ER04-230-038 (Sept. 5, 2008) (accepting revised sheets to include erroneously omitted language and correct the table of contents several months after the Commission's acceptance of the filing). Thus, the NYISO could propose any correction that the Commission deems necessary, or the Commission could require such a correction on its own initiative, without engaging in impermissible "retroactive" tariff revisions.

Reasonably Anticipated Entry Date Rule apply to the HTP Project. As the NYISO Answer explained, the Commission's order required the NYISO to use a May 2013 entry date for the HTP Project. Using that entry date placed the HTP Project in the same Mitigation Study Period as the Class Year 2010 projects. To the extent that the Commission might conclude that any tariff provisions are arguably inconsistent with this outcome, it must read them as consistent with the February 2011 Order. Otherwise the February 2011 Order would have no meaning. As the NYISO Answer noted, it is simply not plausible for Complainant to try now to escape from the implications of a Commission ruling that it specifically sought.[46]

Finally, the HTP Answer repeats Complainant's earlier mischaracterization of a September 2010 NYISO data request by claiming that it somehow shows that the NYISO initially interpreted the Services Tariff as "requiring it to first render a MET [mitigation exemption test] determination for the Class Year 2008 project before it could start the Attachment S costs allocation and Attachment H MET determination for projects in Class Years 2009 and 2010."[47] The NYISO Answer explained that this claim is inaccurate.[48] The HTP Answer simply ignores the NYISO's explanation and continues to make factually inaccurate assertions.

D. The HTP Answer's Claims Regarding the Proper "Analysis Reference Date" for the HTP Project Are Based on Inapplicable Precedent

The HTP Answer invokes the September Order to try to bolster its argument that the NYISO should have conducted the exemption determination for the HTP Project using information available as of its "go forward" date, or, as newly crafted by the HTP Answer, its

[46] *See* NYISO Answer at 11-12; *see also,* September Order at P 3 (establishing that the Pre-Amendment Rules were applicable to exemption determinations made prior to November 27, 2010 and that the BSM Rules applied to all determinations made from that date onward).

[47] HTP Answer at 26-27.

[48] *See* NYISO Answer at 10-14.

"analysis reference date."[49] Complainant is attempting to apply a ruling that was confined to a single project (*i.e.,* AEII) that was evaluated under the Pre-Amendment Rules, and which is differently situated than the HTP Project. The HTP Project exemption determination is being conducted under the BSM Rules, which, unlike the less- detailed Pre-Amendment Rules, make it absolutely clear that exemption analyses must be based upon the applicable Mitigation Study Period for each Examined Facility. Complainant is wrong to suggest that this clear tariff language should be overridden in order to achieve consistency with an inapplicable precedent.

Complainant is also wrong to contend that it was entitled to an earlier determination under the Pre-Amendment Rules.[50] Contrary to the HTP Answer's claims, the NYISO correctly made its initial exemption determination for the HTP Project in December 2011 and correctly used data and other inputs available at that time. This timing of the determination was not the product of a discretionary "delay" by the NYISO.[51] Complainant did not request an exemption determination under the Pre-Amendment Rules and did not provide all of the information required to calculate its Unit Net CONE at least 60 days prior to the commencement of the Initial Decision Period, as specified under the Pre-Amendment Rules.[52] Adding specificity to the timing of the NYISO's exemption determinations was a principal reason why the NYISO introduced the BSM Rules in the first place.[53] Complainant itself has previously made multiple

[49] HTP Answers at 5; *citing* September Order at P 79.

[50] *See* HTP Answer at 20-22, n.14.

[51] *Id*. at 25-26.

[52] *See* Pre-Amendment Rules at § 4.5 (g)(ii).

[53] *See New York Independent System Operator, Inc.*, 133 FERC ¶61,178 at P 71 (2010) (finding "it reasonable that under the proposed revisions, NYISO will make exemption determinations regardless of whether or not an exemption test is requested"); *see also* BSM Rules Filing at 9 (stating that the existing language did "not expressly address the NYISO's responsibilities if it does not receive a request for an exemption …").

admissions that the HTP Project had to be analyzed under the BSM Rules.[54] There is thus no merit to Complainant's assertion that the NYISO should have looked to an earlier "analysis reference date," and thus to earlier data and other inputs, in its exemption determinations for the HTP Project.

E. The NYISO Reasonably Concluded that the September Order Required it to Use a Proxy Cost of Capital in the HTP Project's Exemption Redetermination Analysis

The Commission's September Order held that the NYISO must use the ICAP Demand Curve proxy unit's cost of capital in its exemption analysis for AEII. According to the September Order, AEII's financing costs were lower because it was selected through a "discriminatory" RFP process that gave it an "irregular and anomalous" advantage.[55] On rehearing, the NYISO challenged the holding as applied to AEII and sought clarification regarding its applicability to other exemption analyses. The Commission has not yet responded to this request.[56]

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[54] *See, e.g.*, *Motion to Withdraw of the Hudson Transmission Partners, LLC* at 2, Docket No. EL11-42-000 (filed July 29, 2011) (acknowledging that the HTP Project was subject to the BSM Rules, that it was the sole member of Class Year 2008, and that Class Year 2008 was the first Class Year subject to the BSM Rules); *Comments of the Hudson Transmission Partners, LLC* at 7, 11-12, Docket No. EL11-42-000 (filed July 7, 2011) ("As a new controllable merchant transmission line into NYISO's Zone J starting with Class Year 2008 that has Capacity Resource Interconnection Service, the Hudson Transmission project is subject to the proposed MET process being performed by the NYISO" and that "Class Year 2008 is also subject to the NYISO's proposed new MET methodology. …HTP is the only new entrant in Zone J in Class Year 2008. HTP faces exactly the same stakes associated with the NYISO's 'potentially binding mitigation determinations based on the current rules for the first time in the pending Class Year interconnection process'").

[55] September Order at P 135.

[56] *See Request for Rehearing, and Request for Expedited Clarification and Request for Shortened Notice and Comment Period on Request for Clarification, of the New York Independent System Operator, Inc.*, Docket No. EL11-50-001 at 19-20 (October 10, 2012) (seeking confirmation that to the extent that other power purchase agreements have been, or may in the future be, awarded to projects under RFP processes that are "limited to new resources" the NYISO would use an appropriate proxy cost of capital in its analysis).

The NYISO Answer stated that the NYISO interpreted the Commission's September Order as requiring it to apply the financing assumptions for the proxy unit used to establish the New York City ICAP Demand Curve to the HTP Project.[57] This interpretation was based on the NYISO's post-September Order review and comparison of the RFPs that resulted in contracts being awarded to AEII ("AEII RFP") and the HTP Project ("HTP RFP"), respectively. After the Commission's issuance of the September Order, and in relation to the re-test of the HTP Project required by the June Order, the NYISO obtained additional information from Complainant concerning the HTP Project's cost of capital, and the impact of the contract with NYPA on its financing.[58] The NYISO concluded that there were differences between the two RFPs but that the HTP RFP contained evaluation criteria similar to that which the September Order determined favored new projects over existing facilities. A number of the HTP RFP's features that appear to be preferential are identified in the *Protest of the New York City Suppliers.*[59] The MMU concurred that "the use of the default financing assumptions is consistent with FERC's policy articulated in the September Order."[60] Complainant has argued that the HTP RFP was not preferential. There is nothing further for the NYISO to add to the factual record on this issue.

The NYISO would emphasize, however, that Complainant is wrong to suggest that the NYISO has adopted a "presumption" that "any RFP conducted by NYPA, regardless of its actual terms must be unduly discriminatory because NYPA conducted it."[61] No such presumption has been adopted. The NYISO has administered and will continue to administer the BSM Rules

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[57] *See* NYISO Answer at 3.

[58] *See* Supplemental Affidavit at PP 20-26.

[59] *See Protest of the New York City Suppliers* at n.9*,* Docket No. EL12-98-000 (filed November 13, 2012).

[60] *See* MMU Report at 6-7.

[61] HTP Answer at 41 (original formatting deleted).

impartially. It has no bias against (or in favor of) NYPA or any other Market Participant. The NYISO has challenged the application of the "irregular and anomalous financial advantages" rule to AEII. Nevertheless, the NYISO has attempted to comply with the September Order in good faith and believes that it is most reasonably read as requiring the use of proxy unit financing assumptions in its BSM Rule analysis of the HTP Project.

Finally, the NYISO disagrees that the Commission's 2011 ruling in *Hudson Transmission* is relevant to, let alone dispositive, in this proceeding. In that case, the Commission found that the "use of an open, competitive, and government-entity led RFP process to initially allocate 75 percent of the transmission capacity" ensured that "Hudson Transmission has not acted in an unduly discriminatory manner with regard to the allocation of capacity to NYPA . . . ."[62] This is irrelevant to the question of whether NYPA's selection of the HTP Project conferred "irregular and anomalous" financing advantages for purposes of the application of the September Order's ruling.

F. The HTP Answer Appears to Moot the August Complaint's Claim for Non-Market Based "Reliability Benefits" Compensation, But to the Extent that the Commission Considers that Claim It Should Be Rejected

The August Complaint advanced the radical theory that merchant transmission projects that were subject to market power mitigation should receive supplemental non-market-based compensation to the extent that they might provide "reliability benefits."[63] The NYISO Answer demonstrated in detail that Complainant's request was inappropriate and unlawful. Among other things, Complainant's theory was procedurally defective, inconsistent with Commission policy and precedent, incompatible with the NYISO's market design, and impracticable to implement.

[62] *Hudson Transmission Partners, LLC*, 135 FERC ¶61,104 at P 28 (2011).

[63] August Complaint at 51-61.

It also threatened to defeat the purpose of the BSM Rules by seriously undermining their ability to deter uneconomic entry.[64]

The HTP Answer tries a different approach. It asks the Commission to find that the Services Tariff does not require a UDR holder to return UDRs to the NYISO if they are not used to sell or import capacity to the NYISO.[65] Complainant suggests that if this interpretation were confirmed then there would be no need for the Commission to reach the question of whether a non-market based compensation mechanism to support uneconomic entrants is needed.

Complainant's revised argument appears to moot the August Complaint's claim for "reliability benefits" compensation. The Commission has required that the UDR rights associated with the HTP Project be transferred to NYPA, "anchor" customers, and other rightsholders selected through an open season process.[66] The NYISO's tariffs and manuals are fully consistent with that Commission directive to HTP. The tariffs and manuals do not compel the UDR rightsholders that are ICAP Suppliers to offer capacity (*i.e.*, use the rights) except for certain instances where they are Pivotal Suppliers or are subject to other anti-market manipulation related requirements.

The HTP Answer's reference to the transfer of UDR rights to third parties is not wholly clear. UDRs are granted to projects. Consistent with the Commission's orders requiring that the rights to use UDRs associated with the HTP Project be transferred to third party rightsholders, the NYISO's tariffs and manuals accommodate transfers to rightsholders. There is no prohibition in the NYISO's tariffs and manuals on an assignment of such rights to a third party (provided the third party agrees to adhere to rules). The tariffs and manuals also do not force

[64] NYISO Answer at 28-31.

[65] HTP Answer at 42.

[66] *Hudson Transmission Partners, LLC,* 135 FERC ¶ 61,104 at P 29 (2011).

UDR rightsholders to take any action. They are free to voluntarily choose each auction to use or not use their UDR rights to support offers of capacity,[67] or notify the NYISO that they elect to return them for the next following Capability Year.

Because the NYISO's tariffs and manuals do not require UDR rightsholders to return their rights if they are not used, it appears, given the way Complainant has framed its revised argument, that there is no need for the Commission to address the "reliability benefits" question. If, however, the Commission chooses to take up the issue it should reject Complainant's theory for the reasons specified in the NYISO Answer.

The HTP Answer fails to address, let alone counter, the arguments set forth in the NYISO Answer. It acknowledges that various Commission precedents that the August Complaint relied upon its "reliability benefits" claim, and that the NYISO Answer showed were inapplicable, are in fact not on point.[68]

In addition, the HTP Answer mischaracterizes the NYISO Answer when it inaccurately suggests that the NYISO has conceded that the HTP Project will create real and quantifiable reliability benefits and "simply questions the magnitude of the benefits."[69] The NYISO has made no such concession. The NYISO Answer was quite clear that although it was possible that the HTP Project might provide incremental reliability benefits it was also far from certain that it would provide any that the NYISO system actually needed.[70]

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[67] As stated above, the only exceptions to this principle apply to resources that are subject to the Pivotal Supplier rule or to other anti-market manipulation related requirements.

[68] *See* HTP Answer at 45 ("Hudson Transmission acknowledges that this is an issue of first impression that is not squarely addressed by Order No. 1000 or the precedent on "cost causation" and the "beneficiary pays" principles discussed in the Complaint").

[69] *See* HTP Answer at n.110.

[70] *See* NYISO Answer at 33.

Finally, Complainant's assertion that the NYISO would engage in a "regulatory taking" by "taking" the benefits associated with the HTP Project and "giving" them to other parties is a misleading distortion of both the facts and the law.[71] As a factual matter, the NYISO will not, either on its own initiative or through its non-discretionary application of the BSM Rules, "take" anything from the HTP Project. This would be the case even if it were shown that the HTP Project would provide reliability benefits, which Complainant has not done, and even if trying to define the value such benefits were appropriate and practicable. The fact that the HTP Project is properly subject to Offer Floor mitigation, and that this may reduce its capacity revenues, does not mean that the NYISO is "taking" any reliability benefits associated with the HTP Project from any party. As a legal matter, even if the application of Commission-accepted market power mitigation rules could reasonably be construed as a form of "taking," nothing in the record suggests that Complainant would experience a deprivation "tantamount to a direct appropriation or ouster" which there must be before a compensable "regulatory taking" can exist.[72]

[71] *See* HTP Answer at 7.

[72] *See* NYISO Answer at 41-43.

III. CONCLUSION

For the reasons set forth above, the NYISO respectfully renews its request that the Commission deny the August Complaint, and the new and restated arguments in the HTP Answer, in their entirety.

Respectfully submitted,

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

December 17, 2012

cc: Travis Allen
Michael A. Bardee
Gregory Berson
Anna Cochrane
Jignasa Gadani
Morris Margolis
Michael McLaughlin
Joseph McClelland
Daniel Nowak

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 (2012).

Dated at Washington, D.C. this 17th day of December, 2012.

/s/ Catherine Karimi
Catherine Karimi
Sr. Professional Assistant
Hunton & Williams LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
Tel: (202) 955-1500
Fax: (202) 778-2201

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

SUPPLEMENTAL AFFIDAVIT OF DANIEL A. JERKE

Mr. Daniel A. Jerke declares:

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

I. Purpose of this Affidavit:

2. I submit this affidavit in support of the Answer of the New York Independent System Operator, Inc. ("NYISO") to the Answer filed by Hudson Transmission Partners, LLC ("HTP") ("HTP Answer") on November 30, 2012.

3. I prepared an affidavit in support of the NYISO Answer filed on November 13, 2012 ("NYISO Answer"). In the affidavit I responded to each of the four issues in HTP's August Complaint pertaining to the NYISO's evaluation of the HTP Project under the BSM Rules.[1]

4. The HTP Answer modifies three of the bases of the August Complaint, withdraws one (*i.e.*, the "sunk costs" issue), and asserts a new argument opposing the NYISO's application of the Demand Curve proxy unit's cost of capital to the HTP Project in

[1] Terms with initial capitalization that are not otherwise defined herein have the meaning set forth in the Answer, and if not defined therein, then the NYISO's Market Administration and Control Area Services Tariff (Services Tariff), as modified by Commission's June 22, 2012 Order (*Astoria Generating Company, L.P., et al. v. New York Independent System Operator, Inc.*, 139 FERC ¶ 61,244 (2012)), and accordingly as described in the NYISO's August 6, 2012 compliance filing in ER12-2414.

conformance with the September Order.[2] This supplemental affidavit addresses two of the HTP Answer's modified arguments and further explains the NYISO's application of the proxy unit's cost of capital. All of the arguments in my initial affidavit were and remain valid, and are not undermined or altered by the HTP Answer's evident misunderstanding, mischaracterizing, or ignoring of several of them.

II. The NYISO's Buyer-Side Mitigation Analysis of the HTP Project

A. Estimation of Net Energy Revenues for the HTP Project

5. HTP continues to argue that the NYISO's application of a scaling factor in the calculation of net energy revenues for the HTP Project has no basis in the Services Tariff. HTP recognizes that the Services Tariff requires the NYISO to project "likely" energy revenues, but appears to be unwilling to accept any approach that would actually allow the NYISO to do so.

6. The NYISO Answer explained that the NYISO's net energy revenue methodology has a clear basis in the Services Tariff requirement that the NYISO project reasonably anticipated net energy revenues.[3] My initial affidavit described the necessity for applying a scaling factor to the HTP Project's net energy revenues to account for the fact that, in practice, energy price spreads cannot be perfectly arbitraged.[4] It also explained how the NYISO made the scaling factor adjustment and why its approach was reasonable. The MMU supported the NYISO's actions and stated in its report, "the NYISO adapted the

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[2] *Astoria Generating Co., et al. v. New York Independent System Operator, Inc.,* 140 FERC ¶ 61,189 at PP 134-137 (2012) ("September Order").

[3] NYISO Answer at 14.

[4] Jerke Affidavit at P 31-32.

methodology in a manner that was reasonable and consistent with the NYISO's Tariff."[5] The methodology conformed to the requirements of the Services Tariff.

7. HTP alleges that the NYISO's methodology is "fundamentally flawed because the NYISO effectively assumes that Hudson Transmission must earn all of its revenues from the day-ahead market."[6] This claim is based on a misunderstanding of the scaling factor calculation, which appropriately accounts for revenues from both the day-ahead and real-time markets.[7] The scaling factor was computed as the ratio of (a) historic net energy revenues from the day-ahead and real-time markets to (b) theoretical net energy revenues from the day-ahead market over the same historic time period, calculated from historical data of Controllable Lines.[8] Contrary to HTP's claims, the NYISO's approach could produce a high scaling factor, or even a scaling factor greater than 1.0, to the extent that significant revenues were earned in the real-time market in the historic sample data set. Thus the NYISO's method would allow for a Scheduled Line's projected total of day-ahead and real-time market revenues to be higher than its theoretical maximum day-ahead revenues, provided that historic data showed that such an estimate was reasonable.

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[5] MMU Report at 9.

[6] HTP Answer at 30.

[7] The scaling factor formula that HTP included as Attachment 4 to its November 30 Answer was the first version of the scaling factor formula that the NYISO shared with HTP. The NYISO subsequently revised it after further analysis and at the recommendation of the MMU. The version that was discussed with HTP included 10 percent of theoretical real-time net revenues. The revised approach, which was the one actually used in the BSM Rule analysis for the December 2011 determination for the HTP project accounted for observed historic real-time net revenues, as described in my initial affidavit and herein.

[8] Detailed descriptions of the "scaling factor" calculation can be found in my initial affidavit at P 28-38 and in the report prepared by the MMU on the NYISO's BSM redetermination of HTP at pp. 8-9, issued Nov. 6, 2012, *available at*: <http://www.nyiso.com/public/webdocs/markets_operations/market_data/icap/In-City%20Mitigation%20Documents/In-City%20Mitigation%20Documents/BSM_Narrative_and_Numerical_Example.pdf>.

8. This point can be demonstrated using the data presented in Table 1 of the Supplemental Affidavit of Johannes P. Pfeifenberger ("Supplemental Pfeifenberger Affidavit"). Mr. Pfeifenberger performed three computations of theoretical arbitrage values between the PJM Bergen node and NYC zonal price: day-ahead perfect arbitrage, real-time perfect arbitrage, and real-time arbitrage bidding the PJM price from the previous hour. The values for these computations for 2011 were $13 million, $43 million, and $20 million, respectively.[9]

9. Consider a Scheduled Line that earned $20 million in net energy revenues by scheduling real-time energy between PJM and NYC, and none in the day-ahead market, over a one-year period. Over that same one-year period, the theoretical day-ahead perfect arbitrage profits were $13 million. A scaling factor would be calculated as the $20 million sum of actual day-ahead ($0) and real-time net revenues ($20 million), to the $13 million day-ahead perfect arbitrage profits. This produces a ratio of 1.61, using the values from Table 1 of the Supplemental Pfeifenberger Affidavit. The scaling factor of 1.61 would then be multiplied by the perfect day-ahead arbitrage net revenues from the NERA econometric model, to produce an estimate of the adjusted net revenues for the UDR project.

10. The scaling factor appropriately accounts for day-ahead and real-time net revenues to the extent that net revenues are observed in the historic data set. In this example, the scaling factor was greater than one, so the real-time net revenues will be reflected as the amount above the theoretical day-ahead net revenues from the NERA model. Likewise, a low

[9] Supplemental Pfeifenberger Affidavit at P 3, Table 1.

scaling factor would reflect a scenario of day-ahead and real-time net revenues significantly less than the theoretical day-ahead net revenues.

11. Both my initial affidavit and the MMU Report clearly and correctly stated that the scaling factor calculation accounted for day-ahead and real-time net revenues. My initial affidavit stated that the scaling factor accounts for the "value derived from real-time scheduling,"[10] and the MMU Report clearly shows the calculation of real-time price spreads in the numerator of the scaling factor "formula."[11]

12. Finally, HTP argues that the NYISO should have excluded any mothballed units from the energy revenue forecast if, at the time of the analysis reference date, the generation owner(s) had provided notice that they had intended to mothball the units.[12] The excess level used in the energy forecast is largely based on the amount of capacity modeled in the ICAP forecast. The Services Tariff's criterion for removing a resource from the ICAP forecast is that the generation owner must have given notice to the New York State Public Service Commission ("NYPSC") of its intent to "retire" the resource.[13] As of November 2011, the HTP Project's correct "analysis reference date," no New York City resources had filed a retirement notice with the NYPSC since the April 2011 publication of the 2011 Load and Capacity Data Report (*i.e.*, the "Gold Book"). Therefore, none were excluded from the forecasted level of excess.

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[10] Jerke Affidavit at P 38.

[11] MMU Report at 9.

[12] HTP Answer at 35-36. The HTP Answer addresses the only one of the MMU's four recommendations that would tend to increase the net revenues calculated for the HTP Project. The MMU Report's three recommendations not acknowledged in the HTP Answer all would decrease net energy revenues and, as the MMU stated, "largely offset" the effects of the first recommendation. MMU Report at 9-12.

[13] MST, Attachment H, Section 23.4.5.7.3.2 at definition of "Expected Retirements."

B. Use of PJM Base Residual Auction Prices as the Cost of Capacity in PJM

13. The HTP Answer reiterates the Complaint's argument that the cost of procuring capacity in PJM used in the exemption analysis should be based on prices in the Incremental Auctions rather than prices from the Base Residual Auction (BRA). HTP continues to focus on the comparatively superficial timing similarities between the PJM Incremental Auctions and the NYISO's auctions. It does not address or respond to any of the substantive support for the NYISO's use of the BRA, or the infirmity in using the Incremental Auctions, raised in the NYISO's November 13 Answer.

14. In my initial affidavit, I described that the NYISO's ICAP Spot Market Auction shares many important similarities with the PJM BRA. Namely, both serve the purpose of procuring a region's capacity obligations, both are based on an administratively-determined demand curve for capacity, and both reflect the supply and demand conditions in each capacity market.

15. The Incremental Auctions have no compelling similarities to the NYISO's auctions. The purpose of the Incremental Auctions is to "procure additional resource commitments needed to satisfy potential changes in market dynamics that are known prior to the beginning of the Delivery Year."[14] Due to the residual nature of the Incremental Auctions, relatively few MW of capacity are transacted in them. Moreover, and consistent with the concerns noted in the NYISO Answer, the historic discount of the Incremental Auction relative to the BRA was contradicted by recent auction results, in which the $410.95/MW-day ($150/kW-year) Resource Clearing Price for Annual

[14] *PJM Manual 18: Capacity Market* at 77, Revision: 16 (September 27, 2012) *available at* <http://www.pjm.com/~/media/documents/manuals/m18.ashx>.

Resources in the first Incremental Auction was nearly double the $225.00/MW-day ($82.25/kW-year) price in the BRA.[15]

16. The HTP Answer makes a new argument to try to bolster the case for using Incremental Auction prices. It claims that it is unlikely that a generator in PJM would forgo the BRA revenues for an opportunity to sell into the New York capacity market three years later.[16] In doing so, the generator would be subject to the risks that the HTP Project would not enter service on time or the PJM system upgrades would not be completed. Consequently, the generator would likely opt to sell into the BRA as it is "a more attractive and safer option."[17]

17. It is not clear how this argument supports HTP's case. HTP's example shows that, in order for a generator to sell into New York it would require at least the BRA price and the future revenue certainty provided by a forward sale in PJM. This is the generator's competing opportunity cost, which sets the floor for the amount and terms that the generator would need to receive to sell, or contract for the sale of, its capacity into New York.

18. Instead, HTP's argument is simply indicative of the difficulties likely to be associated with contracting for capacity in the early years of the HTP Project's operation. At best, HTP's argument seems to provide a basis for reducing the capacity revenues modeled in the initial years to reflect the difficulties of procuring capacity in PJM.

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[15] *See* 2014/2015 RPM First Incremental Auction Results at 1, *available at*, <http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2014-2015-first-incremental-auction-report.ashx> and 2014/2015 RPM Base Residual Auction Results at 1, *available at*, <http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/20110513-2014-15-base-residual-auction-report.ashx>.

[16] HTP Answer at 36.

[17] *Id.* at 37.

19. In addition to the risks that HTP has listed, an entity that sells forward into the PJM BRA and subsequently exports to an external control area faces risk of substantial "buy-back" costs. If the entity has not met its obligation through use of other resources, PJM will cover its sale with buy bids in the Incremental Auction. The entity could incur a loss if the price in the Incremental Auction is higher than the BRA price. This strategy can be expected to become increasingly risky in the future to the extent that the Incremental Auctions prices begin to converge to the prices of the BRAs.

C. Application of ICAP Demand Curve Proxy Financing to the HTP Project

20. The Commission's September Order directed the NYISO to replace the financing parameters for Astoria Energy II ("AEII") with those of the ICAP Demand Curve proxy unit. The Commission held that:

> Because the contracting process was discriminatory, the lower financing costs associated with the power purchase agreement fall into the category of 'irregular or anomalous' cost advantages that are 'not in the ordinary course of business'; so, consistent with PJM, we find that NYISO should use the proxy cost of capital. Accordingly, ...we will require NYISO to use the proxy reference unit's cost of capital ....[18]

21. The NYISO sought clarification on the September Order to confirm that, if the measure is to be applied in New York, it should be applied to all subsequent BSM evaluations and not just those under the Pre-Amendment Rules. The NYISO reasoned that there did not appear to be any justification for not applying the same principle to subsequent determinations.[19]

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[18] September Order at P 135.

[19] *See Request for Rehearing, and Request for Expedited Clarification, and Request for Shortened Notice and Comment Period on Request for of the New York Independent System Operator, Inc.* at 19-20, Docket No. EL11-50-001 (filed October 10, 2012).

22. Accordingly, the NYISO evaluated whether it was appropriate to use HTP's own financing or the proxy unit's financing for the HTP Project, the latter in a manner consistent with the September Order and the November 2011 MOPR Order. The NYISO determined that it was appropriate because the RFP that the HTP Project was awarded ("HTP RFP") was similar in many ways to the RFP that resulted in NYPA's award of a contract to AEII ("AEII RFP") that the Commission deemed to be discriminatory.

23. These two RFPs were issued by the same buyer and contained many similar provisions. The evaluation criteria enumerated in the RFPs were nearly identical. Of the 13 evaluation criteria in the HTP RFP, all but one was identical to or a slight rephrase of the 12 evaluation criteria in the AEII RFP. The mere absence of a statement precluding existing resources does not mean that the process was conducted in a significantly different manner.

24. While the HTP RFP does not contain an explicit statement barring existing resources, it does contain a number of elements that favor new UDR or generation projects. Two of the evaluation criteria, which were identical to those in the AEII RFP, demonstrate that proposals were to be evaluated on their ability to lower prices, a function that existing resources cannot fulfill.

> "Evaluation criteria will include, but not be limited to, ...
> - Contribution to the overall reduction of electricity costs Citywide
> - Contribution to increase electric in-City capacity"[20]

[20] *See Protest of the New York City Suppliers* at Attachment C – New York Power Authority Request for Proposals Long-Term Supply of In-City Unforced Capacity and Optional Energy at 8, Docket No. EL12-98-000 (filed November 13, 2012); *Motion to Intervene and Protest of the New York Power Authority, City of New York, Metropolitan Transportation Authority, The Port Authority of New York and New Jersey, New York State Office of General Services, and New York City Housing Authority* at

25. Accordingly, the NYISO determined that the HTP Project's actual financing costs reflected advantages that were conferred to the HTP Project through the presence of the contract that resulted from a process which the Commission determined in its September Order should not influence the BSM evaluation. Reflecting such irregular and anomalous cost advantages in the exemption test and Offer Floor determination would be inconsistent with the Commission's findings under substantially similar circumstances.

26. The rationale for applying the ICAP Demand Curve proxy unit's financing to the HTP Project was reviewed with the MMU in advance of the November 6 redetermination. The MMU Report noted that the HTP RFP was very similar to the AEII RFP, and stated: "[W]e conclude that the use of the default financing assumptions is consistent with FERC's policy articulated in the September Order."[21]

This concludes my supplemental affidavit.

Appendix D – Request for Proposals RFP LTS# 5 To Provide Long-Term Supply of In-City Unforced Capacity and Optional Energy, Docket No. EL11-50-000 (filed August 3, 2011).

[21] MMU Report at 7.

ATTESTATION

I am the witness identified in the foregoing Affidavit of Daniel A. Jerke dated December 17, 2012 (the "Affidavit"). I have read the Affidavit and am familiar with its contents. The facts set forth therein are true to the best of my knowledge, information, and belief.

Daniel A. Jerke
Supervisor, Market Mitigation and Analysis
New York Independent System Operator, Inc.
December 17, 2012

Subscribed and sworn to before me
this 17th day of December.

LINDA SLOAN
Notary Public - State of New York
No. 01SL6198599
Qualified in Schenectady County
My Commission Expires December 29, 2012