

146 FERC ¶ 61,022  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

Hudson Transmission Partners, LLC

v.

Docket No. EL12-98-000

New York Independent System Operator, Inc.

ORDER GRANTING MOTION AND ISSUING PROTECTIVE ORDER AND  
NON-DISCLOSURE CERTIFICATE

(Issued January 14, 2014)

1. On November 21, 2013 the Commission issued an order on a complaint filed by Hudson Transmission Partners, LLC (HTP) against the New York Independent System Operator, Inc. (NYISO) with respect to NYISO's application of its buyer-side market mitigation exemption test to HTP's new 660 MW high voltage, direct current merchant transmission facility.<sup>1</sup> The November 21, 2013 Order granted, in part, and denied, in part, the Complaint and directed a compliance filing. On December 20, 2013, NYISO filed a motion for a Protective Order. As discussed below, the Commission grants NYISO's motion and issues the attached Protective Order and Non-Disclosure Certificate. The Commission directs NYISO to make the confidential information available to the parties to the proceeding who sign a Non-Disclosure Certificate, consistent with the procedure provided in the attached Protective Order.

**Background**

2. The HTP Project is a uni-directional controllable transmission line running between Ridgefield, New Jersey and New York City. In applying the buyer-side market power mitigation exemption test to the HTP Project, NYISO must project auction prices

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<sup>1</sup> *Hudson Transmission Partners, LLC v. New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156 (November 21, 2013 Order).

and Cost of New Entry (CONE) net of energy and ancillary services revenues for the Mitigation Study Period. In calculating HTP's energy revenues, NYISO applied a scaling factor to HTP's projected energy revenues to account for the fact that a merchant transmission project like HTP is unlikely to perfectly arbitrage the day-ahead price differences between the energy markets of NYISO and PJM. In the November 21, 2013 Order, the Commission found that the use of a scaling factor to project HTP's energy revenues is reasonable, but required NYISO to provide the specific scaling factor that it applied to HTP, to explain in detail how such factor was calculated, and to support its methodology by January 21, 2014.<sup>2</sup> On December 20, 2013, NYISO filed a Motion for Protective Order.

### **Summary of NYISO's Motion**

3. NYISO proposes a protective order to govern access to any information that NYISO may designate as "Protected Materials" when it makes its compliance filing in this proceeding. NYISO states that it has determined that compliance with the Commission's directive to provide the specific scaling factor that it applied to HTP, the details on how such factor was calculated, and to support its methodology implicates NYISO's obligation to protect confidential information. NYISO adds that compliance with this directive could require the direct or indirect disclosure of confidential information. NYISO explains that "indirect" disclosure would result if it 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. NYISO adds that such a disclosure could involve confidential information regarding entities that are not parties to this proceeding.

4. NYISO states that its Code of Conduct and Market Monitoring Plan prohibit it from disclosing confidential information unless required to do so by Commission order or by a subpoena or other compulsory process from another authority. NYISO further states that, because the confidential information implicated by the November 21, 2013 Order would be submitted in response to a Commission directive, NYISO is not required to notify the entities whose confidential information would be included in the compliance filing. Instead NYISO states that it must request that the Commission treat the information as confidential and protect it from disclosure. Nevertheless, NYISO states, it is separately serving its filing on certain entities to inform them that their confidential information could be included in the compliance filing.

5. NYISO states that the Commission's adoption of its proposed protective order will advance NYISO's legitimate interest in keeping both competitively sensitive information and NYISO's market monitoring and mitigation processes confidential. NYISO adds that

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<sup>2</sup> November 21, 2013 Order, 145 FERC ¶ 61,156 at PP 82, 90.

its proposed protective order is essentially identical to the one issued by the Commission in Docket No. EL11-50 in late 2011. However, NYISO states that, here, the information would not only be that of the project developer, but also data of other unaffiliated entities. NYISO states that a level of protection similar to that in the Docket No. EL11-50 proceeding<sup>3</sup> is warranted here, given the sensitivity of determinations under the buyer-side mitigation rules and given that confidential information associated with non-parties may be implicated in this case.

6. NYISO also proposes a process through which confidential information can be provided pursuant to the Protective Order and states that these procedures will ensure that the provision of protected materials in this proceeding moves forward in an expeditious and orderly fashion. Specifically, NYISO states that, upon receiving a request that a person be designated a “Reviewing Representative,” NYISO and, if applicable, the source of such materials or data will inform the requesting party whether it objects or consents to such designation. NYISO further provides a summary of the information that the requestor must provide. NYISO adds that 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.

7. NYISO states that it will 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 NYISO designated as (i) Protected Materials or (ii) Highly Sensitive Protected Materials. It states that such lists would specify the grounds under the Protective Order on which each Reviewing Representative was determined to be eligible to receive such materials.

### **Notice of Filing**

8. Notice of the motion was published in the *Federal Register* with the date for filing answers shortened to and including January 2, 2014. No answers were filed.

### **Commission Determination**

9. We grant NYISO’s November 21, 2013 Motion and issue its proposed Protective Order and Non-Disclosure Certificate. We find that the proposed Protective Order and Non-Disclosure Certificate are modeled on the Commission’s Protective Order and Non-Disclosure Certificate issued August 31, 2011 in Docket No. EL11-50-000<sup>4</sup> with

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<sup>3</sup> *Astoria Generating Company, L.P. v. New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,155 (2011).

<sup>4</sup> *Id.*

only ministerial and conforming revisions tailored to NYISO's compliance obligation. In the instant case, as in the prior proceeding, we recognize that NYISO and market participants have a legitimate interest in keeping competitively sensitive information and NYISO's market monitoring and mitigation processes confidential. We find that the proposed Protective Order will meet both the legitimate needs of the parties in this proceeding to obtain the subject information as well as the need to adequately protect those entities whose confidential information may be disclosed.

The Commission orders:

The Commission hereby grants NYISO's November 21, 2013 Motion and issues the attached Protective Order and Non-Disclosure Certificate for use in this proceeding, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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 14, 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
- (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 Stats. & Regs. ¶ 31,140 (2003). 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;
  - 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 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 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 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.

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 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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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: \_\_\_\_\_