

136 FERC ¶ 61,155  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Astoria Generating Company, L.P. and TC  
Ravenswood, LLC

Docket No. EL11-50-000

v.

New York Independent System Operator, Inc.

ORDER DIRECTING SUBMISSION OF SUPPLEMENTAL INFORMATION AND  
ISSUING PROTECTIVE ORDER

(Issued August 31, 2011)

1. On July 12, 2011, Astoria Generating Company, L.P. (Astoria) and TC Ravenswood (Ravenswood) (collectively, Complainants) filed a complaint against the New York Independent System Operator, Inc. (NYISO) alleging that NYISO improperly implemented its buyer-side market power mitigation rules in the New York City installed capacity (ICAP) market with respect to the new 575 MW generating facility owned by Astoria Energy II LLC (Astoria II),<sup>1</sup> and potentially, other new facilities, including, but not limited to, the approximately 512 MW generating facility being developed by Bayonne Energy Center, LLC (Bayonne). In its answer to the complaint, NYISO states that it has prepared a confidential supplement to its answer, which it asserts describes in detail its analyses for the mitigation exemption determination of the Astoria II and Bayonne projects, but has not submitted it to the Commission to protect the confidentiality of the information.<sup>2</sup> As discussed below, the Commission directs NYISO to submit its supplemental information and to make such information available to the parties to the proceeding who sign a Non-Disclosure Certificate, consistent with the procedure provided in the attached Protective Order.

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<sup>1</sup> Despite the similarity of names, Astoria (Astoria Generating Company, L.P.) is not affiliated with Astoria II (Astoria Energy II LLC) or its 575 MW generating facility.

<sup>2</sup> NYISO August 3, 2011 Answer at 2, 27.

## **Background**

2. Section 23 of NYISO's Market Administration and Control Area Services Tariff (Services Tariff) establishes, among other things, market power mitigation measures that are applicable to the New York City (in-City) ICAP market that NYISO administers. One of the purposes of the mitigation measures is to guard against the exercise of market power by those who buy ICAP and who thus benefit from a low price. This is commonly referred to as "buyer side mitigation." The in-City buyer-side mitigation measures provide that, unless exempt from this mitigation, in-City ICAP suppliers that enter the capacity market must do so at a price no lower than the applicable offer floor.<sup>3</sup> NYISO determines whether or not a supplier is exempt from mitigation pursuant to the process provided in section 23.4.5.7.2 of NYISO's Services Tariff.

## **Summary of the Complaint**

3. Complainants assert that NYISO permitted the Astoria II project to offer into the July 2011 ICAP auction at a price that was below competitive levels and below its estimated cost, in violation of the requirements of the Services Tariff and prior Commission orders regarding implementation of the buyer-side market power mitigation rules. Complainants state that the results of the July auction, released on July 29, 2011, permitted Complainants to confirm that mitigation determinations must have been made for the Astoria II project and that the filing of the Bayonne protest in Docket No. EL11-42-000<sup>4</sup> alerted them that such a determination had also been made for the Bayonne project. Complainants add that they are not aware of when either determination was made, the precise nature of the determinations, or if any other project has also received a mitigation determination.

4. Complainants request that the Commission promptly and summarily require NYISO to re-test and recalculate offer floors for the Astoria II and Bayonne projects, as well as any other project for which mitigation determinations were made prior to November 27, 2010 (the date when the currently-effective buyer-side market power rules took effect), and that the Commission ensure that any re-testing and re-calculations are done correctly. To the extent that additional information is required in order to grant Complainants' requested relief, Complainants request hearing and settlement procedures.

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<sup>3</sup> *Id.* at section 23.4.5.7.

<sup>4</sup> Docket No. EL11-42-000, concerns a complaint filed by Astoria, Ravenswood, and other New York City suppliers alleging that NYISO is implementing the currently-effective buyer-side market power rules in a manner contrary to the requirements of NYISO's tariff and Commission orders.

Complainants also request that the Commission establish the earliest possible refund effective date.

5. Complainants submit the affidavit of consultant Mark D. Younger, who reasons that, because NYISO has not yet completed the 2009 and 2010 Class Year Cost Allocation Process, of which the Astoria II project is a member, NYISO must have granted a market mitigation exemption under the 2008 mitigation exemption test rules and that such evaluation must have taken place before November 27, 2010, when the currently-effective buyer-side market power tariff rules took effect.<sup>5</sup> Complainants state that the then-effective section 23.4.5.7.2 of the Services Tariff (Pre-Amendment Rules) provides a two-pronged test. Complainants state that, under those rules, a supplier would be exempt from mitigation if:

[1] any ICAP Spot Market Auction price for the two Capability Periods beginning with the first Capability Period for any part of which the Installed Capacity Supplier is reasonably anticipated to offer to supply UCAP (the "Starting Capability Period") is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than the highest Offer Floor based on Net CONE that would be applicable to such supplier in such Capability Periods, or [2] the average of the ICAP Spot Market Auction prices in the six Capability Periods beginning with the Starting Capability Period is projected by the ISO to be higher, with the inclusion of the Installed Capacity Supplier, than the reasonably anticipated Unit Net CONE of the Installed Capacity Supplier.

6. Mr. Younger states that he applied the Mitigation Exemption Test under conservative assumptions and based on certain data released by NYISO, and the Astoria II project clearly failed to meet either the first or the second prongs of the test.

### **Notice of Filing and Responsive Pleadings**

7. Notice of the Complaint was published in the *Federal Register*, 76 Fed. Reg. 44,899 (2011), with interventions and protests due on or before August 3, 2011. On July 29, 2011, Complainants filed a motion to lodge additional information which Complainants state became available after the filing of the Complaint.

8. Hudson Transmission Partners, LLC; Consolidated Edison Energy, Inc. and Consolidated Edison Solutions, Inc.; Energy Curtailment Specialists; New York Association of Public Power; Exelon Corporation; PSEG Energy Resources & Trade

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<sup>5</sup> See *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010), *order on compliance*, 134 FERC ¶ 61,083 (2011), *order on reh'g*, 136 FERC ¶ 61,077 (2011).

LLC and PSEG Power New York LLC; Dynegy Power Marketing, Inc., Dynegy Northeast Generation, Inc. and Sithe/Independence Power Partners, L.P.; Entergy Nuclear Power Marketing, LLC; Astoria Energy LLC and Astoria Energy II LLC; the PPL Companies;<sup>6</sup> Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Cargill Power Markets, LLC; Edison Mission Energy; and Linden VFT, LLC filed motions to intervene.

9. NRG Companies<sup>7</sup> (NRG); GenOn Energy Management, LLC and GenOn Bowline, LLC (collectively, GenOn); Electric Power Supply Association (EPSA); Independent Power Producers of New York, Inc. (IPPNY); Calpine Corporation (Calpine); and Brookfield Energy Marketing LP (Brookfield) filed motions to intervene and comments in support of the Complaint. The New York State Public Service Commission filed a notice of intervention and comments.

10. The New York Power Authority (NYPA), the City of New York, the 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 (collectively, Governmental Customers); the American Public Power Association (APPA); Bayonne Energy Center, LLC (Bayonne); and Consolidated Edison Company of New York, Inc. (Con Edison), Orange and Rockland Utilities, Inc., and the Long Island Power Authority (collectively, Indicated Downstate Load-Serving Entities) filed motions to intervene and protests.

11. On August 3, 2011, NYISO filed an answer to the Complaint. On August 11, 2011, NYISO filed an answer to the comments and protests. On August 15, 2011, NYPA and the City of New York filed an answer in opposition to Complainants' motion to lodge. On August 9, 2011, Potomac Economics, NYISO's Market Monitoring Unit (MMU) filed a motion to intervene out-of-time, and an answer to NYISO's August 3, 2011 Answer.

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<sup>6</sup> The PPL Companies are PPL Electric Utilities Corporation; PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC.

<sup>7</sup> For purposes of this filing, the NRG Companies are NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

**NYISO's Request Concerning Supplemental Data**

12. In its August 3, 2011 Answer, NYISO responded to the Complaint but did not provide the details of its analyses. NYISO argues that Complainants bear the burden of proof under Rule 206 of the Commission's Rules of Practice and Procedure and that they must offer "clear and convincing" evidence to support their requests for relief. NYISO adds that the evidentiary bar should be high for challenges to ISO/RTO mitigation determinations that are made with the involvement of an independent market monitoring unit (MMU), when, as here, the MMU has not raised any concerns about the ISO/RTO's adherence to its tariff. NYISO asserts that, because the impacts of each mitigation determination can be substantial, especially in a relatively small market like New York City, other market participants have strong economic incentives to challenge them and if the Commission is overly permissive in allowing such challenges to proceed to litigation, there is likely to be a proliferation of litigated disputes over all new entry mitigation determinations.

13. NYISO asserts that Complainants have not met their burden of showing that a NYISO determination to exempt any new entrant was contrary to the tariff or otherwise unjust and unreasonable. In response to Complainants' assertions, NYISO states that it acted independently at all times; that lower capacity prices are not evidence that it has violated its tariff; that Pre-Amendment Rules were never intended to provide a blanket guarantee that new entry would never substantially reduce prices; that it is not unreasonable that economic new entry could reduce prices; and that NYISO has neither treated any new entrant as an "existing facility" nor made mitigation determinations under the post November 27, 2010 in-City buyer mitigation measures. NYISO further contends that Complainants' showing that the Astoria II and Bayonne projects could not reasonably have been exempted from mitigation under the Pre-Amendment Rules is a product of their own assumptions, which are either incorrect or differ from those employed by NYISO. NYISO adds that Mr. Younger's analysis is necessarily based on publicly available information, since Mr. Younger did not, and should not, have access to the same material as NYISO.

14. NYISO argues that its tariffs require that it treat as confidential and not disclose information regarding exemption determinations, including the existence or outcome of determinations, and asserts that it has been as transparent as possible in light of these confidentiality restrictions. NYISO states that it has obtained authorization to disclose that buyer-side exemption determinations under the Pre-Amendment Rules were requested for the Astoria II and the Bayonne projects and that NYISO separately informed both projects that it determined that the projects were exempt from offer floor mitigation. NYISO further states that it is not authorized to disclose any other information regarding the Astoria II and Bayonne projects, including any protected cost information, or to state whether any other exemption requests were received, or any mitigation determinations were made, under the Pre-Amendment Rules.

15. NYISO requests that the Complaint be dismissed based solely on the pleadings but states that if the Commission concludes, however, that it cannot resolve the issues in this proceeding without first reviewing the NYISO's actions to date, the NYISO respectfully requests that the Commission conduct a confidential examination of them, and, if it deems necessary, initiate a confidential investigation under Part 1b of its Rules.<sup>8</sup> Alternatively, NYISO states that the Commission could direct NYISO to file its confidential supplement and then address any or all of the Complaint's allegations through whatever non-investigatory procedure it deems appropriate, e.g., an expedited "paper hearing" or technical conference.<sup>9</sup>

16. NYISO states that its approach would best balance the need to protect the extraordinarily sensitive information used to make exemption determinations against the interests of the Complainants, other parties, and potential future entrants into the in-City ICAP market. Further, according to NYISO, it would be consistent with representations by Complainants and NRG that they do not seek the confidential cost information or other data that NYISO has received regarding any other supplier. NYISO adds that there must be reasonable limits on the disclosure of market power mitigation related information in order to protect sensitive market participant information, to prevent collusive bidding behavior, and to avoid enabling market participants to inappropriately evade mitigation when it is warranted.

17. NYISO states that, to its knowledge, the Commission has never before initiated a review of an ISO/RTO's buyer-side mitigation determination, and, if the Commission were to do so, it would have to establish rules governing such proceedings. According to NYISO, the Commission would need to determine the role of the parties, including direct competitors of the entities for which determinations were made and, to the extent that they were involved in reviewing data and analyses, how much access they should have to confidential information. NYISO states that the Commission would also need to consider the implications of its choices on potential future developers and project investors, as well as for future proceedings in NYISO and other organized markets. NYISO also cautions the Commission against amplifying the economic incentives for market participants to litigate, an outcome which could discourage new investment.

18. NYISO argues that information regarding buyer-side market mitigation determinations is highly sensitive and its disclosure has the potential to undermine competition. Its disclosure, according to NYISO, would be at least as damaging to the entity in question, and to the market as a whole, as the disclosure of energy reference

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<sup>8</sup> NYISO August 3, 2011 Answer at 1; *see* 18 C.F.R. Part 1b (2011).

<sup>9</sup> *Id.* at 2.

level data such as heat rates or variable operating and maintenance information.<sup>10</sup> NYISO states that the greater the amount of information circulated under protective agreements over time, the greater the risk that confidential information would be disclosed in violation of the protective agreements, inadvertently or otherwise. NYISO adds that, even absent impermissible disclosures, employees and representatives that have access to the information would have the knowledge and it is unreasonable to believe that it would not influence their decisions, actions, input, or advice other than in the proceeding in which the information was received.

19. NYISO argues that a confidential examination by the Commission would avoid these dangers and at the end of its examination the Commission could issue an order accepting NYISO's determinations, requiring changes, or directing additional proceedings, which could, in turn, be more tightly controlled, since the Commission would be able to use the information gained from its confidential inquiry.

### **Commission Determination**

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant the MMU's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. The Commission will otherwise defer action on the various pleadings filed in this proceeding until it rules on the merits of the Complaint.

21. Based on the pleadings alone, the Commission does not have sufficient information to grant or deny the complaint at this time. Complainants assert that buyer-side market power is being exercised, in violation of NYISO's tariff. They offer circumstantial evidence and explain that NYISO's process is not transparent and, thus, they cannot access information on how specific determinations related to the exemption test were made. NYISO denies all of the allegations but provides no supportive details because of the confidentiality of the information involved. We find that the details of NYISO's analyses are relevant and necessary to determine whether or not NYISO followed its tariff in granting an exemption from mitigation for the subject generators. Further, we reject NYISO's request to limit access to this information to Commission staff or establish an investigation for the reasons discussed below. In this regard, because of the Complainants' apparent inability to otherwise obtain this information, thereby causing them to resort to use of circumstantial evidence to support their Complaint, we

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<sup>10</sup> *Id.* (citing *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,103, at P 30 (2009)).

find that they and the other parties should be given the opportunity to access this information and submit responses as well, provided that protective measures are taken to maintain the confidentiality of the information and prevent public disclosure.

22. As the Commission stated in its recent decision on the disclosure of information related to mitigation in the PJM capacity market “[f]airness requires that in a Commission adjudicatory proceeding, entities which have intervened properly in a proceeding and are parties to that proceeding be permitted to participate meaningfully in that proceeding.”<sup>11</sup> In *West Deptford*, “meaningful participation” included access to competitors’ confidential cost data, even in the face of potential competitive harm.

23. In the instant case, as in *West Deptford*, the outcome of the proceeding could have a significant impact on the capacity suppliers that participate in the in-City auctions as well as customers who pay the price that the auction sets for capacity. All parties have an economic interest in the question of whether or not the Astoria II and Bayonne projects were appropriately exempted from mitigation. We recognize that NYISO and market participants also have a legitimate interest in keeping both competitively sensitive information and NYISO’s market monitoring and mitigation processes confidential. In *West Deptford*, however, the Commission noted that a party objecting to discovery of particular material has the burden of demonstrating that the discovery request should be denied or limited. The Commission also stated:

since in most instances a protective order can protect against harmful disclosure, a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record.<sup>12</sup>

24. NYISO has convinced us that the nature of the information in its supplement is so sensitive and confidential as to require protection. However, NYISO has not shown why some variant of the Commission’s procedure in a complaint proceeding of requiring such information to be disclosed to parties pursuant to a protective agreement that requires disclosure only to parties who sign the agreement<sup>13</sup> does not appropriately balance those

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<sup>11</sup> *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 25 (2011) (*West Deptford*).

<sup>12</sup> *Id.* P 27 (citing *Mojave Pipeline Co.*, 38 FERC ¶ 61,249, at 61,842 (1987)).

<sup>13</sup> Rule 213(c)(5) of the Commission’s Rules of Practice and Procedure provides the procedure for a respondent to submit with its answer requests for privileged treatment of information and a proposed form of protective agreement. 18 C.F.R. § 385.213(c)(5) (2011).

competing concerns. We find that the Commission's Model Protective Order<sup>14</sup> with the addition of language designed to provide protection of the highly sensitive materials at issue here will meet the legitimate needs of the parties who should be able to view NYISO's supplemental information in order to be able to respond, as well as safeguard the interests of NYISO and market participants in maintaining confidentiality of sensitive proprietary information.

25. Accordingly, we adopt that model, as modified, for use in this proceeding and we direct NYISO to file with the Commission the confidential supplemental answer referenced in its August 3, 2011 Answer on or before seven days from the date of this order and to simultaneously release the information to parties who sign the attached Non-Disclosure Certificate.<sup>15</sup> Alternatively, within five days from the date of this order, NYISO may choose to submit for Commission approval a protective agreement that is mutually agreeable to the parties in the proceeding. In either case, the confidential information that NYISO files with the Commission will be held in a non-public file at the Commission. NYISO should provide for electronic provision of the confidential materials. Parties will have fifteen days from the date NYISO files its supplemental answer to submit answers to NYISO's filing. To the extent the parties' answers contain confidential information, a public version should be filed in redacted form for the public file along with a confidential, unredacted version for the nonpublic file.

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<sup>14</sup> See Model Protective Order, available at <http://www.ferc.gov/legal/admin-lit.asp>.

<sup>15</sup> The Protective Order is based on the Model Protective Order, as it was modified in Docket No. EL09-61-001 for the protection of "highly sensitive material" (in particular with the addition of 5(b) and 9(b)). See Presiding Administrative Law Judge's (ALJ) Order Granting Motion For Protective Order, *Louisiana Pub. Serv. Comm. v. Entergy Corp., et al.*, Docket No. EL09-61-001 (unpublished order issued February 12, 2010). It was further modified to remove references to the ALJ and Commission Litigation Staff, and other conforming changes, and to modify P 20 and P 27 to afford different time frames for action before the Commission and courts. Commission Staff is removed from the list of those who must sign a Non-Disclosure Certificate, consistent with *West Deptford*. The Protective Order and Non-Disclosure Certificate attached to this order are designed to accommodate the unique issues of this case and may not be appropriate in other cases.

The Commission orders:

(A) NYISO is hereby directed to submit its confidential supplement to its August 3, 2011 Answer on or before seven days from the date of this order as discussed in the body of this order. Parties are permitted to submit answers to the supplemental information as provided in the discussion above.

(B) The Commission hereby 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 )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P. and TC  
Ravenswood, LLC

Docket No. EL11-50-000

v.

New York Independent System Operator, Inc.

PROTECTIVE ORDER

(Issued August 31, 2011)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Federal Energy Regulatory Commission (Commission).
2. This Protective Order applies to the following two categories of materials: (A) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 C.F.R. § 388.113(c)(1) ("Critical Energy Infrastructure Information").
3. Definitions -- For purposes of this Protective Order:
4. The term "Participant" shall mean a Participant as defined in 18 C.F.R. § 385.102(b) in the above dockets.
5. The term "Protected Materials" means (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected; (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. EL11-50-000**" or with words

of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials. In addition:

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

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

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

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

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

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

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

direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm;

- (5) If, after a good faith effort, parties fail to agree on designating a specifically-named inside employee(s) of a non-governmental Participant as a Reviewing Representative for the review of specific Highly Sensitive Protected Material(s) or all Highly Sensitive Protected Material(s), a party may request that the Commission so-designate such a specifically-named inside employee(s) who, for example, is not directly involved in, or having direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Protected Materials may present an unreasonable risk of harm; or
- (6) 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 provided in P 25 of the order to which this Protective Agreement is attached, all copies of all documents reflecting Protected Materials, including the portion of other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "**PROTECTED MATERIALS PROVIDED PURSUANT TO PROTECTIVE ORDER IN FERC DOCKET NO. EL11-50-000**" 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 as provided in P 25 of the order to which this Protective Agreement is attached, all Protected Materials filed with the Commission, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other

appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order and with the appropriate designation (as relevant) under Paragraph 5. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release".

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

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.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Astoria Generating Company, L.P. and TC  
Ravenswood, LLC

Docket No. EL11-50-000

v.

New York Independent System Operator, Inc.

NON-DISCLOSURE CERTIFICATE

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

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

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

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

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