145 FERC ¶ 61,156
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

ORDER ON COMPLAINT

(Issued November 21, 2013)

1. On August 3, 2012, Hudson Transmission Partners, LLC (HTP or Complainant) filed a complaint (Complaint) against the New York Independent System Operator, Inc. (NYISO) alleging that NYISO improperly implemented its New York City buyer-side market mitigation exemption test with respect to HTP's new 660 MW high voltage, direct current merchant transmission facility (HTP Project). For the reasons discussed below, the Commission grants, in part, and denies, in part the Complaint and directs a compliance filing.

I. Background

A. The HTP Project

2. The HTP Project is a uni-directional controllable transmission line running between Ridgefield, New Jersey and New York City (NYC) that entered service in June 2013. The HTP Project was the winner of a New York Power Authority (NYPA) request for proposals (RFP) process in 2006 and was in the NYISO interconnection Class Year of 2008. HTP applied for and received negotiated rates authority from the Commission in 2011.[1] In its application in that proceeding, HTP stated that it will recover all of the costs of its Project, including fixed and operating costs, only from customers who voluntarily acquire transmission capacity on the Project.[2] Pursuant to the Firm Transmission

[1] *Hudson Transmission Partners, LLC,* 135 FERC ¶ 61,104 (2011).

[2] *Id.* P 16.

Capacity Purchase Agreement (Capacity Agreement) between HTP and NYPA, NYPA will purchase seventy-five percent of the transmission capacity rights of the line for a term of twenty years for the purpose of importing energy and capacity from PJM into NYISO's NYC capacity zone.[3] Up to 15 percent of the remaining transmission capacity is to be available for purchase in bilateral contracts by anchor customers, and the balance (10-25 percent) is to be allocated by an open season process. The HTP transmission line will be under the control of PJM when it goes into service.[4]

3. HTP states that it has funded, or agreed to fund, approximately $200 million in upgrades on the NYISO and PJM systems to ensure that PJM capacity will be deliverable, on a firm basis, into New York City. HTP continues that, as part of its mitigation exemption determination, NYISO assumed that HTP would spend an additional $193 million for upgrades to provide capacity to NYISO.[5]

B. NYC Buyer-Side Mitigation Rules

4. Referred to as "buyer-side mitigation,"[6] section 23.4.5.7 of NYISO's Services Tariff implements market power mitigation rules for the NYC zone of the installed capacity (ICAP) market for the purpose of inhibiting entry of uneconomic capacity into the NYC ICAP market that artificially depresses NYC ICAP market prices to uneconomic levels. These mitigation rules apply to controllable transmission projects as well as to generation projects."[7] Under the mitigation rules, all new entry (i.e., post-

[3] *Id.*

[4] *Hudson Transmission Partners, LLC*, Docket No. ER11-3017-001, at 1 (Nov. 15, 2012) (delegated letter order). Originally, HTP proposed to turn over control to NYISO. *Id*.

[5] Complaint at 2.

[6] Although originally proposed to apply only to non-Special Case Resources that are net buyers of capacity in the NYC ICAP market that could profit from depressing capacity prices with new uneconomic excess capacity, the approved NYISO tariff rules apply this mitigation to all uneconomic new (post-March 7, 2008) entry into the NYC ICAP market. *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at PP 28, 41 (2008), *order on reh'g and compliance*, 131 FERC ¶ 61,170, at PP 52, 106 (2010).

[7] *See New York Indep. Sys. Operator, Inc*., 122 FERC ¶ 61,211, at P 121 (2008) ("[B]ecause both transmission and generating capacity are paid based on the same principle of making capacity available in-City, there should be no special exemption. Controllable transmission and generating capacity should be subject to the same

(continued …)

March 7, 2008) into the NYC ICAP market is subject to an offer floor unless determined to be exempt. In the case of existing resources, market power mitigation entails applying bid caps to prevent higher prices attributable to economic withholding. Competitive capacity offers from existing resources are expected to be quite low since most existing resources recover their operating costs through participation in energy and ancillary services markets.

5. The mitigation rules provide a two-part exemption test where the resource is exempt if it meets either prong of the test. Under "prong (a)" of the test (Default exemption test), a resource will be exempt from offer floor mitigation if the average of the ICAP Spot Market Auction prices for the two capability periods starting three years from the start of the project's interconnection Class Year[8] is projected to be higher than the net cost of new entry (net CONE) of the proxy peaking unit used to establish the Demand Curve which establishes the ICAP market price for that period (i.e., Default Net CONE). Under "prong (b)" of the test (Unit exemption test), a resource will be exempt if the average of the ICAP Spot Market Auction prices in the six capability periods starting with the capability period three years after the start of the project's Class Year is projected to be higher than the reasonably anticipated Net CONE of the resource (Unit Net CONE). The capability periods that are the subject of this analysis are referred to as the Mitigation Study Period. Projects that fail both prongs of the exemption test are subject to an Offer Floor equal to the lower of (1) 75 percent of Default Net CONE or (2) Unit Net CONE.

6. The mitigation exemption test is aligned with NYISO's project cost allocation for new interconnection facilities.[9] Project cost allocation is a factor in the calculation of the

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mitigation."); *Linden VFT, LLC v. New York Independent System Operator, Inc*., 141 FERC ¶ 61,008, at P 29 (2012) (with respect to the Capacity Resource Interconnection Service process, controllable transmission and generators are to be treated in the same manner).

[8] As explained *infra* P 7, revisions to section 23.4.5.7.2, accepted effective November 27, 2010, require that, for purposes of the mitigation exemption test, the entry date is assumed to occur three years after the start of the Project's interconnection Class Year. Previously, under so-called "Pre-Amendment Rules," section 23.4.5.7.2 provided that the actual expected date of entry of the project (Reasonably Anticipated Entry Date Rule) was to be used.

[9] In a November 26, 2010 order, the Commission accepted, in part, and rejected, in part, proposed revisions to NYISO's market power mitigation measures. *New York Indep. Sys. Operator, Inc*., 133 FERC ¶ 61,178 (2010), *order on compliance*, 134 FERC

(continued …)

Unit Net CONE and in determining the expected capacity prices used in the mitigation determination. As relevant here, pursuant to Attachment S of its Open Access Transmission Tariff (OATT),[10] NYISO estimates and allocates cost responsibility among NYISO transmission owners, load-serving entities (LSEs), and developers of generation and merchant transmission for new interconnection facilities. Under the cost allocation process, NYISO examines the new facilities assigned to a given Class Year to determine what incremental upgrades are necessary to provide deliverability for the interconnection of new projects that want to participate in NYISO's ICAP market. Developers that intend to participate in NYISO's ICAP market are responsible for the costs of the System Upgrade Facilities (SUFs)[11] and System Deliverability Upgrades (SDUs)[12] needed to interconnect their projects in compliance with NYISO's Deliverability Interconnection Standard. As part of the cost allocation process, NYISO performs a number of studies and upon completion of the study process provides each developer in a given Class Year with its initial cost allocation. If any developer rejects its cost allocation, NYISO restudies the remaining projects in a subsequent round to re-determine the cost allocations. The process, in other words, is iterative and continues until all developers either accept their respective cost allocations or drop out of the process.

7. Both prongs of the mitigation exemption determination require NYISO to project auction prices and Net CONE for the Mitigation Study Period with the inclusion of the

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¶ 61,083 (2011), reh'g denied, 136 FERC ¶ 61,077 (2011). The mitigation rules with these accepted revisions are known as the "Post-Amendment Rules." Under the post-amendment rules, NYISO is to examine, as a group, all projects that enter the market in the same Mitigation Study Period. The revisions also established a new "Three-Year Rule" which provides that the entry year will be imputed to be three years from the start of a project's Class Year.

[10] NYISO OATT, § 25 (Attachment S).

[11] NYISO OATT, Attachment S, § 25.1.1.

[12] SUFs are the components of electrical equipment that are used to make the modifications to the existing transmission system that are required to maintain system reliability due to: (i) changes in the system, such as load growth; and (ii) proposed interconnections. SDUs are components of electrical equipment that can be used to make the modifications or additions that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Deliverability Interconnection Standard at the requested level of Capacity Resource Interconnection Service (CRIS). NYISO OATT, Attachment S, § 25.1.2.

new entrant. Under the Pre-Amendment Rules, the Mitigation Study Period begins with the first capability period "that the ICAP Supplier is reasonably anticipated to offer to supply UCAP"; this is the Reasonably Anticipated Entry Date Rule. NYISO's September 27, 2010 filing in Docket No. ER10-3043-000 proposed a "Three-Year Rule," under which a new entrant would be assumed to offer UCAP beginning three years from the start of its Class Year.[13] The November 26, 2010 Order, in response to HTP's concern that the Three-Year Rule was an artificial and incorrect assumption, required NYISO to either file support for the proposal or eliminate the provision. NYISO submitted further support for the Three-Year Rule in a compliance filing and, in a February 2, 2011 order,[14] the Commission accepted NYISO's compliance filing but found that the projects in NYISO's Class Year 2008 should be evaluated under the existing Reasonably Anticipated Entry Date Rule as cost allocations for that Class Year were made prior to the existence of the new Three-Year Rule and had been approved by NYISO's Operating Committee.[15] In addition, the Commission noted that Class Year 2008 projects accepted their cost allocations before NYISO filed to revise its mitigation exemption test.

II. Summary of the Complaint

8. HTP asserts that NYISO has improperly applied the mitigation exemption test to the HTP Project, using methods and assumptions that are unjust, unreasonable, and unduly discriminatory, and that are inconsistent with the requirements of the NYISO OATT and the Services Tariff. HTP further asserts that as a result of the improper analysis, the rates it will receive are unjust and unreasonable, frustrate the Commission's policy of promoting competitive wholesale capacity markets, and will discourage the development of needed transmission infrastructure. According to HTP, NYISO's misapplication of its buyer-side market power rules will deprive HTP of the opportunity to recover the costs of its investment and will fail to achieve the central purpose of the

[13] In a September 27, 2010 filing, NYISO proposed revisions to its mitigation provisions that were accepted in part and rejected in part, effective November 27, 2010 in an order issued November 26, 2010. *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178 (2010), *reh'g denied*, 136 FERC ¶ 61,077 (2011). The rules in place prior to the November 26, 2010 Order, known as the Pre-Amendment Rules, governed determinations for Class Year 2008.

[14] *New York Indep. Sys. Operator, Inc*., 134 FERC ¶ 61,083, at PP 23, 25 (2011) (February 2, 2011 Order).

[15] November 26, 2010 Order, 134 FERC ¶ 61,083 at P 25.

market power mitigation rules, which is to deter uneconomic entry, while providing "a level of compensation to attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating" suppliers.[16] Further, HTP argues that NYISO's application of its buyer-side market power rules is unlawful insofar as NYISO has applied a number of arbitrary, inconsistent and unduly discriminatory assumptions in performing the mitigation test for HTP.

9. Specifically, HTP asserts that: (1) NYISO violated its OATT and Services Tariff by evaluating the HTP Project as part of Class Year 2010 instead of Class Year 2008; (2) NYISO improperly used an arbitrary 50 percent "scaling factor," that is neither in the Services Tariff, nor applied to generators, to reduce HTP's projected energy revenues; (3) NYISO's decision not to exclude sunk costs in HTP's case is arbitrary and unduly discriminatory;[17] (4) NYISO improperly used three-year forward prices from PJM's Base Residual Auctions (BRAs) in order to project future PJM capacity prices; (5) NYISO improperly used the proxy cost of capital from the Demand Curve reset process and should have used HTP's actual capital costs to calculate its Unit Net CONE. In support of the Complaint, HTP attaches, *inter alia*, the affidavit of Consultant Johannes P. Pfeifenberger (Pfeifenberger Affidavit).

10. HTP argues that the Commission should direct NYISO to recalculate HTP's Unit Net CONE (1) using information available as of what it asserts was the "going-forward" date of December 2009 or January 2010; (2) deducting the full amount of HTP's projected energy revenues without applying the 50 percent scaling factor; and (3) projecting PJM capacity prices either by applying an appropriate discount to the BRA clearing prices, or using prices in the incremental auctions that are available as of the going-forward date. Further, HTP asserts that the Commission should direct NYISO to establish a tariff mechanism to compensate HTP for the reliability benefits it will provide if not exempted from mitigation or, in the alternative, clarify that HTP may file a rate schedule under section 205 of the FPA to receive compensation for the reliability benefits provided by the HTP Project.

[16] Complaint at 31 (citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at PP 180-181 (2007)).

[17] HTP later withdrew this element of its Complaint and thus we do not address it further.

III. Notice of Filing and Responsive Pleadings

11. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 47,621 (2012), with interventions and protests due on or before August 23, 2012. The comment period was ultimately extended to and including November 13, 2012.

12. HQ Energy Services (US), Inc.; Exelon Corporation; New York Transmission Owners;[18] PSEG Companies;[19] Linden VFT, LLC; Brookfield Energy Marketing LP; the New York Power Authority (NYPA); NRG Companies;[20] Astoria Generating Company, L.P.; Entergy Nuclear Power Marketing, LLC; Transmission Developers, Inc.; TC Ravenswood, LLC (Ravenswood); City of New York; and Bayonne Energy Center, LLC filed timely motions to intervene.

13. The New York State Public Service Commission filed a notice of intervention.

14. Long Island Power Authority (LIPA), Independent Power Producers of New York (IPPNY), Electric Power Supply Association (EPSA), and the Indicated New York Transmission Owners (indicated NYTOs)[21] filed motions to intervene and protests. The New York City Suppliers[22] filed a protest. National Grid filed a motion to intervene and comments.

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[18] NY Transmission Owners consist of Central Hudson Transmission Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[19] PSEG Companies consist of PSEG Energy Resources & Trade LLC, Public Service Electric and Gas Company, and PSEG Power New York LLC.

[20] NRG Companies consist of NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power.

[21] Indicated NYTOs consist of Central Hudson Transmission Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[22] The New York City Suppliers consist of Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC.

15. On November 13, 2012, NYISO filed an answer to the Complaint. On November 28, 2012, Ravenswood filed an answer to NYISO's answer. On November 30, 2012, HTP filed an answer to NYISO's answer. On December 13, 2012, the Indicated NYTOs filed an answer to Ravenswood's answer. On December 17, 2012, IPPNY filed an answer in opposition to the Commission accepting HTP's answer and NYISO filed an answer to HTP's answer. On January 4, 2013, HTP filed an answer to the December 17, 2012 answers of NYISO and the Indicated NYTOs.

IV. Summary of NYISO's Answer

16. NYISO responds that HTP has not met its burden of proof in showing that NYISO violated or improperly implemented its tariff or otherwise acted unjustly or unreasonably, or in an unduly discriminatory manner. NYISO maintains that it correctly determined that HTP's project would be subject to offer floor mitigation upon entry, and NYISO has made no arbitrary or unreasonable assumptions, or taken any steps that are unreasonable, or unduly discriminatory. NYISO asserts that it properly examined the HTP Project under the Post-Amendment Rules, and it is fully settled that the HTP Project is subject to buyer-side mitigation rules. NYISO contends that the buyer-side mitigation rules fully satisfy the Commission's transparency requirements and that the HTP Project was properly examined concurrently with Class Year 2010 examined facilities. NYISO further contends that it properly applied a scaling factor to determine HTP's projected net energy revenues when establishing Unit Net CONE and that NYISO's methodology for calculating this factor is just and reasonable. NYISO also asserts that it properly estimated the cost of capacity in PJM to be delivered over the HTP Project using costs based on prices in PJM's BRA rather than PJM's incremental auctions.

17. Finally, NYISO responds that HTP's unilateral request for compensation for reliability benefits is procedurally defective in that it is an attempt to circumvent NYISO's shared governance process, and provision of such benefits would contravene the buyer-side mitigation rules and NYISO's market design. NYISO states that HTP has not established that its project will actually provide "substantial and easily quantifiable" reliability benefits to NYISO beyond those reflected in the capacity market price and that providing such non-market based compensation to a new entrant that is properly subject to an offer floor would violate Commission policy and precedent.

V. Summary of Commission Findings

18. With regard to Class Year, the Commission finds that NYISO reasonably interpreted the Services Tariff and appropriately included the Class Years 2009 and 2010 in its mitigation exemption determination for the HTP Project and that NYISO used the

appropriate analysis reference date[23] consistent with previous Commission orders. The Commission finds that use of a scaling factor to project HTP's energy revenues is reasonable, but it grants the Complaint to the extent that it requires 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. Next, the Commission finds that NYISO's use of PJM's BRA market clearing price was reasonable, most closely represents the cost of capacity in PJM relevant for determining whether HTP is economic, and is consistent with the objectives of the mitigation exemption test. Next, with respect to HTP's cost of capital, the Commission finds that it is reasonable to use HTP's actual cost of capital in the mitigation exemption determination. Finally, the Commission finds that, with respect to HTP's proposal for additional compensation for reliability benefits, HTP has not established that the HTP Project will actually provide substantial and quantifiable benefits beyond those reflected in the capacity market price in the ICAP market.

VI. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers to NYISO's initial answer, NYISO's answer to HTP's answer, and the answers filed by the Indicated NYTOs and IPPNY because they have provided information that assisted us in our decision-making process. We are not persuaded to accept HTP's January 4, 2013 answer to the December 17, 2012 answers of NYISO and the Indicated NYTOs and, therefore, reject it.

[23] We note that the date of the information used in the analysis is what we refer to as the "analysis reference date." HTP argues that the analysis reference date should be the "going-forward" date.

B. Substantive Matters

1. Class Year Issue

a. Complaint

21. HTP asserts that NYISO erred insofar as it applied the mitigation exemption test to multiple Class Years at the same time and insofar as it applied section 25.4.5.7.3.3 of the NYISO OATT to allow the Class Year 2009 and 2010 projects to effectively jump ahead of the HTP Project in the queue, i.e., according to HTP, NYISO assumed that Class Year 2009 and 2010 projects will enter service before Class Year 2008 projects.

22. HTP states that NYISO is required to perform the Attachment S interconnection cost allocation process simultaneously for all projects in a particular Class Year and it is to perform the mitigation exemption test concurrently with the Attachment S interconnection cost allocation process, considering only the impact of projects in the current Class Year on the existing system representation, and excluding from consideration projects in future Class Years because they have not accepted their cost allocations. Consequently, according to HTP, NYISO cannot include any proposed facilities in future Class Years in the supply curves used to forecast future ICAP clearing prices and energy revenues.

23. HTP states that it was assigned to Class Year 2008, received its final cost allocation under Attachment S on December 28, 2009 ($16,471,000 for system upgrade facilities) and provided security for this amount on January 11, 2010. HTP also states that in its September 28, 2010 data request NYISO indicated that it would complete HTP's mitigation exemption determination "in advance of the Initial Decision Period for Class Years 2009 and 2010."[24] Moreover, according to HTP, the Commission twice instructed NYISO to evaluate HTP as part of Class Year 2008.[25] HTP adds that NYISO was not permitted to consider these projects from future Class Years for the purposes of projecting energy revenues and forecasting capacity prices.

24. HTP further argues that NYISO's evaluation of HTP as part of the Class Year 2010 is inconsistent with the requirements of section 23 of NYISO's Services Tariff and Attachment S. HTP states that NYISO correctly states in its answer in Docket No. EL11-

[24] Complaint at 33 (citing Attachment 6 to the Complaint, NYISO September 28, 2010 Data Request at 1).

[25] *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,083, at P 25 (2011); *New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,077, at P 38 (2011).

42-000 that the Commission directed it to evaluate HTP using the reasonably anticipated entry date (i.e., 2013) but incorrectly concludes that the Commission meant that NYISO had to evaluate HTP as part of the Class Year 2010 because its anticipated entry was three years after the Class Year 2010. HTP states that Attachment S requires the Class Year allocation process to be conducted sequentially for each Class Year based solely on the existing system representation and on NYISO's evaluation of the deliverability issues created by the addition of projects in the current Class Year. HTP adds that earlier projects are assigned the costs of the upgrades that they trigger, and later Class Year projects are built and allocated costs on the assumption that the earlier Class Year projects (and reliability upgrades) will have been built. Thus, according to HTP, NYISO must complete the cost allocation for the current Class Year before it can move on to the next Class Year.

25. HTP further argues that because NYISO must perform the Class Year cost allocation process sequentially, by Class Year, it cannot calculate the Unit Net CONE for projects in future Class Years until after the completion of the current Class Year. Moreover, according to HTP, in the absence of a Unit Net CONE determination, NYISO cannot determine whether a unit in a future Class Year is exempt under the prong (b) test. Therefore, HTP argues, NYISO would not be able to determine whether projects in future Class Years were exempt or not until it had determined their final Attachment S cost allocation. HTP states that this exemption determination will necessarily have a significant impact on NYISO's forecast of capacity prices. Further, HTP maintains, because the Services Tariff provides that every unit is assumed to be subject to mitigation, unless and until it is exempted,[26] NYISO must project prices based on the assumption that new entrants will be mitigated until such entrant has received its final Attachment S cost allocation and its final mitigation exemption determination.

26. HTP contends that the requirement to conduct the mitigation exemption test and cost allocation processes for all projects in a given Class Year is not a mere legal formality, but is based on sound economic theory and system planning principles. HTP asserts that in proposing its buyer market rules, NYISO recognized the difficulty in predicting which projects would be built, and therefore decided that the mitigation exemption test should be tied to the Attachment S cost allocation process to permit consideration only of those projects that had already accepted their Class Year cost allocations. HTP further asserts that this "bright line" rule allows NYISO to make such determinations based on "objective tariff provisions" that "provide needed certainty to all

[26] Complaint at 42 (citing NYISO, Services Tariff, § 23.4.5.7).

[market] participants" and to ensure that "predictable results will emerge."[27] HTP asserts that NYISO exercised unfettered discretion in applying the mitigation exemption test by impermissibly including projects from future Class Years in its price projections for HTP's mitigation exemption analysis.

27. HTP asserts that NYISO further erred insofar as it not only applied the mitigation exemption test to multiple Class Years at the same time, but also applied section 25.4.5.7.3.3 of OATT Attachment S to allow the Class Year 2009 and 2010 projects to effectively jump ahead of HTP in the queue. HTP notes that this section provides that when NYISO is examining more than one examined facility concurrently, it will project prices based on the assumption that "[g]enerators or [Unforced Capacity Deliverability Rights (UDR)] facilities will clear from lowest to highest, using for each Examined Facility the lower of (i) its Unit Net CONE or (ii) the numerical value equal to 75% of the Mitigation [Default] Net CONE."[28] HTP asserts that NYISO's process effectively assumes that the Class Year 2009 and 2010 projects will enter service before Class Year 2008 projects and makes the Class Year 2008 project pay the price of late entry by being subject to mitigation to which it would not have been subject if NYISO had evaluated the projects in the proper Class Year order.

b. NYISO's November 13, 2012 Answer

28. NYISO responds that even though the HTP Project is in Class Year 2008, the buyer-side mitigation rules and the February 2, 2011 Order required NYISO to examine it based on existing capacity and concurrently with other examined facilities that shared the same starting capability period, i.e., Summer 2013. NYISO contends that the HTP Project is an examined facility whose entry date, for purposes of the buyer-side mitigation rules, according to the February 2, 2011 Order, is to be determined using the Reasonably Anticipated Entry Date Rule instead of the Three-Year Rule.[29] In fact, according to NYISO, this is the exact treatment HTP requested.[30] NYISO asserts that the HTP Project is an Examined Facility under Services Tariff section 23.4.5.7.3 (III)(a)(i) because it is a Class Year 2008 project that has "not commenced commercial operation or

[27] Complaint at 43 (quoting *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at PP 180-181 (2007)).

[28] Services Tariff, § 23.4.5.7.3.2.

[29] NYISO November 13, 2012 Answer at 11 (citing February 2, 2011 Order, 134 FERC ¶ 61,083 at P 15).

[30] *Id*. (citing Complaint at 19-20 and n.47).

been cancelled."[31] NYISO states that, under the Reasonably Anticipated Entry Date Rule, the HTP Project's entry date was May 2013 and HTP had expressly asked NYISO to use its actual projected start date of 2013 under the existing rules instead of applying the new rules using a projected start date of 2011.[32] NYISO adds that HTP is correct that under the Three-Year Rule its project's entry date would have been 2011 (i.e., three years after 2008) but it cannot plausibly argue now that NYISO should have used that entry date given its past arguments and the Commission's acceptance of them.

29. NYISO states that, in accordance with the buyer-side mitigation rules, its examination of the HTP Project was performed concurrently with Class Year 2010 projects, i.e., it included Class Year 2009 Examined Facilities in the ICAP forecast used for the HTP Project analysis. NYISO adds that under the Three-Year Rule, Class Year 2009 projects are deemed to enter in 2012, which is before the HTP Project's 2013 entry date under the Reasonably Anticipated Entry Date Rule. NYISO asserts that its approach was thus fully consistent with its tariff,[33] and the February 2, 2011 Order and did not constitute an unauthorized "effective removal" of the HTP Project from Class Year 2008.

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[31] Section 23.4.5.7.3 (III)(a)(i) reads as follows:

> (III) each proposed ***new Generator*** that (a) is either (i) in the ISO Interconnection Queue, in a Class Year prior to 2009/10, and has not commenced commercial operation or been canceled, and for which the ISO has not made an exemption or Unit Net CONE determination, or (ii) not subject to a deliverability requirement (and therefore, is not in a Class Year) and (b) provides specific written notification to the ISO no later than the date identified by the ISO, that it plans to commence commercial operation and offer UCAP in a month that coincides with a Capability Period of the Mitigation Study Period.

[32] NYISO November 13, 2012 Answer at 11 (citing Hudson Transmission, Protest, Docket No. ER10-3043-001 at 4 (filed Dec. 21, 2010).

[33] Section 23.4.5.7.3.2 of the Services Tariff states:

> [w]hen the ISO is evaluating more than one Examined Facility concurrently, the ISO shall recognize in its computation of the anticipated ICAP Spot Market Auction forecast price that Generators or UDR facilities will clear from lowest to highest, using for each Examined Facility the lower of (i) its Unit Net CONE or (ii) the numerical value equal to 75% of the Mitigation Net CONE.

30. NYISO states that it notified HTP of the facilities that would be considered in the HTP Project analysis starting in November 2010 and identified the list of Examined Facilities in spreadsheets containing the relevant forecast inputs that were posted to its website.[34] NYISO asserts that the Complaint mischaracterizes certain communications from NYISO to imply that NYISO changed its approach to the HTP Project analysis. NYISO states that it never suggested to Complainant that it would complete the exemption determination for the HTP Project before it conducted the analyses for Class Year 2009 and 2010 projects. NYISO adds that the data request referenced by HTP was sent to the HTP Project and to all other Class Year 2009 and 2010 projects to be examined under the buyer-side mitigation rules as part of an expedited information gathering effort that was expressly described in NYISO's September 27, 2010 filing to establish the buyer-side mitigation rules. According to NYISO, the data request reflected section 23.4.5.7.3.3 of the Services Tariff, which requires that an initial informational determination be provided to Examined Facilities "prior to the commencement of the Initial Decision Period."

31. NYISO further states that the NYISO Market Monitoring Unit (MMU) Report concludes that it is appropriate as a substantive matter for NYISO to analyze the HTP Project concurrently with other Class Year 2010 projects.

c. Comments

32. IPPNY reiterates NYISO's argument that the buyer-side mitigation rules require NYISO to conduct the mitigation exemption determination for a given project reflecting the other projects that have the same starting capability period. IPPNY asserts that HTP relies on the Pre-Amendment Rules for its arguments even though NYISO appropriately conducted the subject mitigation exemption test based on the Post-Amendment Rules. IPPNY also states that the HTP Project is an Examined Facility under section 23.4.5.7.3 (III)(a)(i) of the Services Tariff because it is "in the ISO Interconnection Queue, in a Class Year prior to 2009/10," it "has not commenced commercial operation or been canceled," and NYISO has not yet "made an exemption or Unit Net CONE determination" for it. IPPNY asserts that, in conducting the mitigation exemption test, NYISO followed exactly the iterative process that is laid out in section 23.4.5.7.3.3 of the Services Tariff and that it conducted the test for the HTP Project on four separate occasions because it issued four revised project cost allocations associated with the 2010 Class Year cost allocation process. Further, IPPNY states, the Post-Amendment Rules expressly require NYISO to perform the mitigation exemption determinations using the "currently effective" or "most recent" Demand Curves and thus NYISO was required to

[34] NYISO November 13, 2012 Answer at 13 (citing Jerke Aff. ¶ 19).

make its last two determinations for the HTP Project based on the currently effective ICAP Demand Curves at that time, i.e., revised Demand Curves that became effective on September 15, 2011.

33. The New York City Suppliers state that HTP was entitled to request that NYISO conduct the mitigation exemption test for the HTP Project "upon execution of all necessary Interconnection Facilities Study Agreements for the project." They add that, in fact, with the Class Year 2008 cost allocation process having concluded on January 4, 2010, HTP was eligible to request and obtain a final determination under the Pre-Amendment Rules, but it did not. New York City Suppliers assert that under the Pre-Amendment rules, the onus for initiating the mitigation exemption test process was on the developer or interconnection customer, not NYISO.[35] They add that NYISO was required to apply the Post-Amendment Rules to the HTP Project except for the limited exception that the Reasonably Anticipated Entry Rule would be used instead of the Three-Year Entry Rule. Under the Post-Amendment Rules, NYISO is required to make mitigation exemption and offer floor determinations for all examined facilities whose "capability periods of expected entry" fall within a specific Mitigation Study Period.[36] Thus, New York City Suppliers argue, NYISO is required to evaluate a project with a 2013-2014 entry date along with other examined facilities with the same starting capability period, including the projects in Class Year 2010, i.e., using the same Mitigation Study Period used in testing Class Year 2010 projects subject to the Three-Year Rule.

34. New York City Suppliers argue that the requirement to take into account all new entrants when making mitigation exemption and offer floor determinations has been a core part of the buyer-side market power rules since the outset.[37] Further, according to New York City Suppliers, this principle is even more clearly set forth in the Post-Amendment Rules, which provide that NYISO "shall compute the reasonably anticipated ICAP spot market auction forecast price based on expected retirements plus each examined facility in 23.4.5.7.3 (I), (II), and (III)."[38]

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[35] New York City Suppliers November 13, 2012 Protest at 17-18 (citing Pre-Amendment Rules, § 23.4.5.7.2).

[36] New York Suppliers November 13, 2012 Protest at 20-21 (citing Post Amendment Rules, § 23.4.5.7.3).

[37] New York Suppliers November 13, 2012 Protest at 22 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 121 (2008)).

[38] *Id*. at 23 (citing Post Amendment Rules § 23.4.5.7.3.2).

35. EPSA states that HTP commenced construction in May 2011 although it had not yet received its final mitigation exemption test determination, which was completed in December 2011 under the current "Post-Amendment Rules." EPSA asserts that it does not appear that HTP formally requested a mitigation exemption determination after the Class Year 2008 cost allocation process concluded on January 4, 2010. EPSA adds that HTP was actually eligible to obtain a final exemption determination under the "Pre-Amendment Rules" in effect at that time, but was obligated as the developer to submit a determination request to NYISO.[39]

d. HTP's November 30, 2012 Response

36. HTP argues that NYISO and the generators who defend NYISO's decision to evaluate the HTP Project concurrently with Class Year 2010 projects fundamentally mischaracterize the exemption determination process, which requires NYISO to perform the mitigation exemption test sequentially on a Class Year-by-Class Year basis and concurrently with the Attachment S cost allocation process for the Class Year under consideration. HTP points to the three categories of "Examined Facilities" set forth in section 23.4.5.7.3 of the Services Tariff:

> (I) each proposed ***new Generator*** and proposed ***new UDR project***, and each ***existing Generator*** that has [Energy Resource Interconnection Service ("ERIS")] only and no [Capacity Resource Interconnection Service ("CRIS")], ***that is a member of the Class Year*** 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 Facility Study determination is being made (the Capability Periods of expected entry as further described below in this Section, the "Mitigation Study Period"),
>
> (II) (a) each (i) ***existing Generator*** that did not have CRIS rights, and (ii) proposed ***new Generator*** and proposed ***new UDR project***, that (a) is an expected recipient of transferred CRIS rights at the same location regarding which the ISO has been notified by the transferor or the transferee of a transfer pursuant to OATT Attachment S Section 23.9.4 that will be effective on a date within the Mitigation Study Period,

[39] EPSA November 13, 2012 Protest at 6.

> (III) each proposed ***new Generator*** that (a) is either (i) in the ISO Interconnection Queue, in a Class Year prior to 2009/10, and has not commenced commercial operation or been canceled, and for which the ISO has not made an exemption or Unit Net CONE determination, or (ii) not subject to a deliverability requirement (and therefore, is not in a Class Year) and (b) provides specific written notification to the ISO no later than the date identified by the ISO, that it plans to commence commercial operation and offer UCAP in a month that coincides with a Capability Period of the Mitigation Study Period.[40]

37. HTP maintains that the central premise of NYISO's argument is that the HTP Project is in Category III, rather than Category I. HTP argues that, as a new UDR project, it could not be a Category III Examined Facility because Categories I and II include both generators and UDR projects, while Category III is expressly limited to new generators. It further argues that it falls into Category I for Class Year 2008 because it is a new UDR project and it is not the recipient of transferred CRIS rights. HTP asserts that Astoria Energy II (Astoria II) and Bayonne Energy Center, LLC (Bayonne) fall into Category I for Class Years 2009 and 2010, respectively, as neither of these projects satisfy the requirements for Category II or III. HTP contends that even if the Commission were to assume that NYISO had correctly treated HTP as a Category I project, NYISO's approach of evaluating Class Years 2008 and 2010 concurrently would still violate section 23.4.5.7.3. HTP argues that Category I Examined Facilities include each generator and UDR project "that is a member of the Class Year that requested CRIS … in the Class Year Facilities Study commencing in the calendar year in which the Class Year Facility Study determination is being made." HTP asserts that the use of the singular clearly indicates that the intent was to include in Category I Examined Facilities from a single Class Year at a time. Further, according to HTP, the structure of the surrounding mitigation exemption test provisions indicate that Category I examined facilities may include projects from only a single Class Year; Category II and III Examined Facilities are limited exceptions that permit NYISO to include projects from a previous Class Year (or no Class Year at all) but only to the extent the entry date for these latter projects overlaps with the Mitigation Study Period for the Category I project(s).

38. HTP argues that further support for its interpretation can be found in section 23.4.5.7.3.3, which provides that, if a Category I Examined Facility rejects its cost allocation and drops out of the current Class Year, NYISO will revise its price

[40] Services Tariff § 23.4.5.7.3.

forecasts "based on the Examined Facilities in the Class Year for CRIS and the Examined Facilities that meet 23.4.5.7.3 (II) or (III)."[41] Thus, according to HTP, Category I includes only the remaining projects in the Class Year being evaluated for CRIS, while Categories II and III may include facilities from previous Class Years (or no Class Year) because Category II and III projects are not being evaluated as part of the current Class Year cost allocation process and do not have to accept or reject their project cost allocation to continue in the exemption testing process.

39. HTP also points to NYISO statements in the ER10-3043 proceeding where NYISO uses the "particular Class Year" as a further demonstration that Category I may include projects only from a single Class Year. For example, HTP states that NYISO explained that one of the purposes of the proposed amendments was to ensure that it would perform the exemption analysis for all proposed capacity projects *in a particular interconnection Class Year* before the deadline for accepting the Attachment S cost allocation (emphasis added by HTP).[42]

40. Finally HTP asserts that NYISO and the generators base their arguments on two unsupported assertions. First, the assumption that there may be one "Class Year" for Attachment S purposes and a different "Class Year" for mitigation exemption determinations is without merit, according to HTP. HTP asserts that there is a single "Class Year," which is the one defined in Attachment S. Second, HTP argues that the Commission's directive to use HTP's reasonably anticipated entry date rather than the Three-Year Rule does not authorize NYISO to ignore the explicit language of section 23.4.5.7.3 by expanding the scope of Examined Facilities under the Tariff.

41. HTP further contends that NYISO must exclude Astoria II and Bayonne and any expected retirements from its ICAP price projections for HTP's mitigation exemption determination and it responds to the argument of New York Suppliers and others that it was not required to request that NYISO make a mitigation exemption determination under either the Pre-Amendment Rules or the Post-Amendment Rules.

e. NYISO's December 17, 2012 Answer

42. NYISO responds that HTP's argument that section 23.4.5.7.3 of the Services Tariff does not permit NYISO to treat the HTP Project as a Category III Examined Facility is a new claim. NYISO asserts that HTP is, and was always intended to be, a

[41] HTP November 30, 2012 Answer at 16 (citing Services Tariff § 23.4.5.7.3).

[42] HTP November 30, 2012 Answer at 16-17 (citing NYISO, Transmittal Letter, Docket No. ER10-3043-000 at 14 (filed Sept. 27, 2010)).

Category III facility, and it has all of the substantive characteristics of a Category III(a)(i) project. NYISO states that, at the time it filed the buyer-side mitigation rules, the HTP Project was "in the ISO Interconnection Queue, in a Class Year prior to 2009/10," had not yet "commenced commercial operations or been canceled" and NYISO had not previously made "an exemption or Unit Net CONE determination" for it. According to NYISO, it was the only project covered by the Category III(a)(i) definition and NYISO did not communicate to its stakeholders or in its filing proposing the buyer-side mitigation rules any reason why the HTP Project would be outside the scope of Category III. NYISO notes that other parties in the instant proceeding have indicated that they understood the intended scope of the Category III definition to include the HTP Project.

43. NYISO further argues that the fact that the Services Tariff definition of Category III facilities does not expressly reference "UDR projects" like the Category I and II definitions does not mean that the Category III definition is inapplicable to the HTP Project. NYISO states that the Services Tariff definition of "Generator" encompasses any "facility capable of supplying Energy, Capacity and/or Ancillary Services that is accessible to the NYCA," and, by contrast, "UDR project" is not a defined term in the Services Tariff. NYISO also states that the UDR rules permit unforced capacity outside of a locality to be treated the same as generators electrically located within a locality. NYISO adds that the Commission has previously held that NYISO buyer-side mitigation measures apply to merchant transmission facilities, including specifically, the HTP Project, and it has been understood that controllable transmission generation capacity "should be subject to the same mitigation" since the issuance of the Commission's March 2008 order.[43]

44. According to NYISO, any claim of detrimental reliance by HTP belies its position in earlier pleadings that its going-forward date was nearly a year before NYISO filed the buyer-side mitigation rules. NYISO further argues that adopting HTP's interpretation would have illogical and perverse unintended consequences. NYISO states that excluding the HTP Project from Category III would effectively remove HTP's Project from the definition of "Examined Facilities" because it cannot properly be included in Category I or II. NYISO adds that such a result would contradict both the intent of the buyer-side mitigation rules and the canon of construction that the Services Tariff must not be read so as to render the Category III(a)(i) definition superfluous or inoperative.

[43] NYISO December 17, 2012 Answer at 10 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 121 (2008)).

45. NYISO argues that, for the first examinations under the new buyer-side mitigation rules, it was Astoria II and Bayonne that belonged in Category I; the HTP Project, as a member of Class Year 2008, did not.

Commission Determination

46. For the reasons discussed below, the Commission finds that NYISO appropriately included the 2009 and 2010 Class Years in its mitigation exemption determination for the HTP Project and that NYISO used the appropriate analysis reference date.

47. HTP and NYISO agree both that HTP is a Class Year 2008 project and that the Commission ruled (at HTP's request) that, for purposes of the mitigation exemption determination for HTP, NYISO should use the Reasonably Anticipated Entry Date Rule instead of the Three-Year Rule.[44] Thus HTP's entry date for purposes of the mitigation exemption test was 2013 instead of the 2011 date that would have applied under the Three-Year Rule. On this, the parties agree.

48. They disagree, however, on what exactly this ruling means for the mitigation exemption determination process, both with respect to the inclusion of Class Years 2009 and 2010 projects in the analysis and with respect to the analysis reference date, that is, the date associated with the information that is entered into the calculation of the mitigation exemption determination.

49. Specifically, the parties disagree on whether the HTP Project should be evaluated along with projects in Class Years 2009 and 2010 or under the assumption that these latter projects are not in the market. The impact of including Class Years 2009 and 2010 is twofold: (1) the projects are included in the supply curve used to forecast future ICAP clearing prices and energy revenues and (2) their inclusion changes the project's cost allocation and thus, the Unit Net CONE, which includes the allocated interconnection costs. HTP argues that the class year cost allocation process should be conducted sequentially for each class year, based solely on the existing system representation and NYISO's evaluation of deliverability issues created by projects in that class year. HTP argues that later projects are to be assigned costs based on the assumption that earlier class years will have built, and will have funded, the necessary upgrades. Therefore, according to HTP, Unit Net CONE calculations must be done sequentially. In further support of its position, HTP argues that it falls under Category I of the Examined Facilities definition and thus must be examined solely with Class Year 2008 projects.

[44] *See* Complaint at 33, n. 90 (citing February 2, 2011 Order, 134 FERC ¶ 61,083 at P 38); NYISO November 13, 2012 Answer at 11 (citing February 2, 2011 Order, 134 FERC ¶ 61,083 at P 25).

50. We begin with the fact that the Commission granted a limited exception in the February 2, 2011 Order when it held that the Reasonably Anticipated Entry Date Rule would apply to HTP's mitigation exemption determination.[45] Apart from that limited exception, NYISO was to evaluate the HTP Project under the Post-Amendment Rules as approved by the Commission before HTP's initial mitigation exemption determination. Accordingly, with the one limited exception that the starting date for its Mitigation Study Period would be 2013, the HTP Project was to be examined under the Post-Amendment Rules.[46]

51. Section 23.4.5.7.3 of the Post-Amendment Rules provides that NYISO shall make exemption determinations for Examined Facilities that expect to enter during a specific Mitigation Study Period. Thus, as discussed in more detail below, we find that section 23.4.5.7.3 of the Services Tariff identifies three separate categories of projects that will be examined together as a group. Category (I) includes those projects that have requested CRIS and would be considered "typical" because they fall into the Class Year Facilities Study "commencing in the calendar year in which the Class Year Facility Study determination is being made." Categories (II) and (III) can be seen as exceptions to the "typical" project definition. Category (II) refers to recipients of transferred CRIS rights, or those projects that do not fall into any Class Year. Category (III) is for projects from prior Class Years (those who have already completed the cost allocation process), but have yet to have a mitigation exemption determination made.[47]

52. We conclude that the HTP Project falls under the Category (III) definition of Examined Facilities. While the definition of Category (III) does not specifically include Controllable Lines (referred to here as UDR Projects), NYISO previously clarified, and the Commission agreed,[48] that the NYISO tariff's references to generators are intended to include Controllable Lines. That clarification coupled with the fact that NYISO's tariff defines generator as "any facility capable of supplying Energy, Capacity and/or Ancillary

[45] February 2, 2011 Order, 134 FERC ¶ 61,083 at P 25.

[46] The Commission approved proposed tariff revisions amending the buyer-side market power rules, effective November 27, 2010, subject to limited conditions, including HTP's exemption from the Three Year Rule. *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,178, at Ordering Paragraph (A) (2010).

[47] *See supra* P 36.

[48] *See Linden VFT, LLC v. New York Indep. Sys. Operator, Inc*., 141 FERC ¶ 61,008, at P 29 (2012).

Services that is accessible to the NYCA"[49] would appear to include HTP's controllable transmission line project. Considering, as a whole, the definition of Examined Facilities, and its three constituent categories, we find NYISO's arguments persuasive. HTP was a Class Year 2008 Project that had not yet received a mitigation exemption determination. It requested, and was granted, an exemption from the Three Year Rule and instead was to use the Reasonably Anticipated Entry Date Rule in determining the Mitigation Study Period. HTP agrees that its reasonably-anticipated entry date was summer 2013. Thus, HTP is, as designated in Category III:

> [a] proposed new Generator [or controllable line] . . . in the ISO Interconnection Queue, in a Class Year prior to 2009/10, and has not commenced commercial operation or been canceled, and for which the ISO has not made an exemption or Unit Net CONE determination . . . and provides specific written notification to the ISO . . . that it plans to commence commercial operation and offer UCAP in a month that coincides with a Capability Period of the Mitigation Study Period.[50]

HTP therefore meets the definition of a Category III Examined Facility.

53. In contrast to HTP, Class Years 2009 and 2010 were subject to the new Three Year Rule. This new rule dictated that the start date of the Mitigation Study Period for these other Class Year projects would also be summer 2013, the same as the HTP Project. The issue thus becomes whether all of these projects actually entering or deemed to be entering the market in the same Mitigation Study Period should be considered concurrently or sequentially. We agree with NYISO that they should be studied concurrently. The mitigation exemption analysis is based upon the applicable Mitigation Study Period, *i.e.*, facilities that enter the market in the same Mitigation Study Period are analyzed together. This is a reasonable approach. The mitigation exemption determination is not based upon the hypothesis that any particular entrant will be the only entrant. Rather, it is a factual one, based upon the most accurate projections of prices and costs during the Mitigation Study Period that can be made at the time the analysis is performed. Those projected prices are influenced by the capacity expected to be added by suppliers that NYISO assumes will enter the market during the forecast period, i.e., during the Mitigation Study Period. Thus, it follows that, in HTP's case, NYISO would

[49] NYISO, Services Tariff § 2.7.

[50] NYISO, Services Tariff § 23.4.5.7.3.

include in its calculations those projects to which it attributes an entry date in the same Mitigation Study Period as that of the HTP Project.

54. HTP argues that the inclusion of the Class Year 2009 and 2010 Projects in the analysis of the HTP Project violates Attachment S to NYISO's OATT, which HTP claims requires NYISO to perform the Class Year cost allocation process sequentially, by Class Year, and that NYISO cannot calculate the Unit Net CONE for projects in future Class Years until after the completion of the current Class Year. We find nothing in Attachment S that dictates the sequential analysis that HTP contends is required. Attachment S concerns identifying the cost impact of facilities entering the market in the same year. Accordingly, NYISO may choose to combine Class Years for the purpose of allocating costs. As such, it is consistent with Attachment S to include the HTP Project along with the Class Year 2009 and 2010 projects in the mitigation exemption determination analysis. Accordingly, we reject HTP's assertion that NYISO has violated Attachment S.

55. Accordingly, we deny the Complaint with respect to the issues related to Class Year.

2. Analysis Reference Date

a. Complaint

56. HTP asserts that NYISO was required to evaluate it based on a "going-forward" date of December 2009 or January 2010. HTP states that NYISO is to apply the mitigation exemption test based on the information (in particular, the natural gas prices, ICAP Demand Curves, and load forecasts) available as of the going-forward date of the project. HTP asserts that, under both the Pre-Amendment and Post-Amendment Rules, the going-forward date is the date when the customer accepts its Class Year interconnection cost allocation under Attachment S and provides the required security.[51] HTP further asserts that, to ensure that a developer has sufficient information to decide whether to go forward with its project at the time it begins to incur significant costs, NYISO is to provide the mitigation exemption test results (or revised test results) at the time it provides the project cost allocation (or revised project cost allocation), based on information as of the going-forward date. HTP states that in the Docket No. ER10-3043 proceeding, the Commission agreed with this because it provided an objective standard for identifying the going-forward date, and avoided the subjective element inherent in

[51] Complaint at 34 (citing NYISO Compliance Filing, Docket No. EL07-39-000, Attachment 1, Patton Aff. ¶ 70 (filed Oct. 4, 2007)).

other proposed milestones.[52] HTP asserts that it received its final Class Year 2008 interconnection cost allocation on December 28, 2009, and provided security for its assigned upgrades on January 11, 2010, and, therefore, NYISO was required to conduct the mitigation exemption test based on information available as of a going-forward date of December 2009 or January 2010.

57. HTP contends that it appears NYISO instead performed the mitigation exemption test for HTP at a much later time, most recently in December 2011 (almost two years after HTP's going-forward date). HTP states that NYISO acknowledged in the EL11-42 Complaint case that it used a different and inconsistent set of ICAP Demand Curves for different parts of the mitigation exemption test it applied to HTP and that it used ICAP Demand Curves for the 2011-2014 period that had not yet been approved by the Commission.[53] HTP adds that it appears that NYISO used historical natural gas prices and energy revenues for the prong (a) test and forward natural gas prices for the prong (b) test[54] based on information that was available in 2011 rather than in December 2009 or January 2010. HTP asserts that the Commission should direct NYISO to perform a new mitigation exemption determination for HTP using the going-forward date of December 2009 or January 2010 and only using information available as of that date, including the relevant ICAP Demand Curves, load forecasts, and historical and forward natural gas prices.

58. HTP states that NYISO's use of the improper going-forward date caused NYISO to significantly underestimate HTP's energy revenues. HTP maintains that, as detailed in the Pfeifenberger Affidavit, the natural gas futures prices NYISO used to project energy revenues for the Mitigation Study Period were significantly higher in December 2009 than in December 2011.[55] The Pfeifenberger Affidavit asserts that energy revenues projected using the forward natural gas curves as of December 2011 were roughly half of those projected using the forward natural gas curves as of December 2009.[56] HTP also

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[52] Complaint at 35 (citing *New York Indep. Sys. Operator, Inc*., 134 FERC ¶ 61,083, at P 22 (2011)).

[53] Complaint at 36 (citing *New York Indep. Sys. Operator, Inc*., 139 FERC ¶ 61,244, at PP 61-62 and 85-87 (2012) (June 22, 2012 Order)).

[54] Complaint at 36 (citing *New York Indep. Sys. Operator, Inc*., 139 FERC ¶ 61,244 at PP 99, 108).

[55] Complaint at 37, Pfeifenberger Aff. ¶ 34 & Table 2.

[56] Complaint at 37-38, Pfeifenberger Aff. ¶¶ 34-35, Table 2, and Figure 2.

states that its offer floor increased by nearly 50 percent when NYISO switched from the 2008-2011 ICAP Demand Curves to the 2011-2014 ICAP Demand Curves by using data from December 2011, rather than from December 2009 or January 2010.

b. NYISO's Response

59. NYISO states that HTP is trying to apply a ruling in Docket No. ER11-42 that was confined to a single project (i.e., Astoria Energy II) that was evaluated under the Pre-Amendment Rules, and which is differently situated than the HTP Project. NYISO asserts that the Post-Amendment Rules make it absolutely clear that exemption analyses must be based upon the applicable Mitigation Study Period for each Examined Facility, which NYISO asserts is May 2013 to April 2016. NYISO therefore asserts that HTP is wrong to contend that it was entitled to an earlier determination under the Pre-Amendment Rules. NYISO further states that it correctly made its initial exemption determination for the HTP Project in December 2011, it correctly used data and other inputs available at that time, and the timing of the determination was not the product of a discretionary "delay" by NYISO. NYISO asserts that HTP 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.[57] Further, according to NYISO, HTP has previously made multiple admissions that the HTP Project had to be analyzed under the Post-Amendment Rules.[58]

c. Comments

60. New York City Suppliers argue that the Commission's September 10, 2012 order rejected the notion that NYISO should base its mitigation exemption analysis on the data available as of the date when the project developer supposedly made the decision to go forward with its project concluding instead that "the projection of capacity prices for the Unit exemption test should be made based on the most up-to-date information available during the period when NYISO was evaluating" the projects.[59] New York City Suppliers

[57] Attachment H of NYISO's Services Tariff gives "Initial Decision Period" the meaning specified in Attachment S of the OATT, which is "[t]he 30 Calendar day period within which a Developer must provide an Acceptance Notice or Non-Acceptance Notice to the NYISO in response to the first Project Cost Allocation issued by the NYISO to the Developer." NYISO OATT § 25.1.2 Definitions.

[58] NYISO December 17, 2012 Answer at 14-16.

[59] New York City Suppliers Protest at 12 (citing *Astoria Generating Company L.P v. New York Indep. Sys. Operator, Inc.*140 FERC ¶ 61,189, at P 78 (2012) (September 10,

(continued …)

also assert that in the June 22, 2012 Order, the Commission confirmed that if it "has accepted and made effective updated demand curves at the time of the mitigation determination, . . . [the] NYISO should use such demand curve values in making the mitigation exemption and offer floor determinations."[60]

61. IPPNY argues that, in the September 10, 2012 Order requiring NYISO to redo the mitigation exemption determinations for two other suppliers seeking to sell ICAP into the New York City market, the Commission made clear that the Pre-Amendment Rules must be interpreted to require that all cost, price, and revenue projections must be based on the most up-to-date data and information as of the same time frame as the final cost allocation.[61] Thus, they assert that NYISO was required to study the HTP Project using the ICAP forecasts associated with projects in the 2010 Class Year.

Commission Determination

62. The analysis reference date is the "as of" date associated with the information that is entered into the calculations of the exemption determination. Was NYISO required to use the cost data it had as of December 2009/January 2010, HTP's "going-forward" date (i.e., the date it accepted its cost allocation), or the information available on the dates on which NYISO conducted the exemption determination (i.e., 2011)? The choice of analysis reference date has a significant impact here, in part, because a different set of Demand Curves was available by 2011 and also natural gas futures prices, used to project energy revenues, were significantly lower in 2011. For the reasons explained below, we find that NYISO appropriately used the data available at the time it did its exemption determination, i.e., 2011.

63. Our determination here is controlled by a decision that the Commission issued soon after the filing of the instant Complaint. In a September 10, 2012 order in the complaint proceeding in Docket No. EL11-50-000, the Commission stated that the mitigation exemption analysis must be "based on the most up-to-date data information available during the period when NYISO was evaluating" the project.[62] The Commission found "that the decision to move forward with a project is not generally tied to a single

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2012 Order)).

[60] *Id*. at 25 (quoting June 22, 2012 Order, 140 FERC ¶ 61,189 at P 86).

[61] IPPNY November 13, 2012 Protest at 14.

[62] September 10, 2012 Order, 140 FERC ¶ 61,189 at P 78.

date, but is, instead, a series of decision points over an extended period of time."[63] Likewise, in the June 22, 2012 Order in Docket No. EL11-42-000, the Commission stated that NYISO is to use the "accepted and made effective updated Demand Curves at the time of the mitigation determination."[64] These orders control here. Accordingly, any inputs used in mitigation exemption testing should use the most up-to-date information available when the exemption test is performed. Thus, while it acted prior to the issuance of the orders in Docket Nos. EL11-42-000 and EL11-50-000, NYISO acted consistent with the holdings in those proceedings, and we find that it did not err in performing the exemption test for HTP using the most up-to-date information available at the time it conducted the test.

3. NYISO's Estimate of HTP's Energy Revenues

a. Complaint

64. HTP states that, without any basis in the NYISO OATT, Services Tariff, manuals or any other NYISO document, NYISO applied a "scaling factor" to reduce HTP's projected energy revenues by approximately 50 percent in calculating the HTP Project's Unit Net CONE. HTP states that NYISO's analysis assumes that HTP would earn only 10 percent of potential real-time revenues. HTP asserts that, in contrast, the only reasonable interpretation of the Services Tariff definition of Unit Net CONE (i.e., "localized levelized embedded costs of a specified Installed Capacity Supplier . . . net of likely projected annual Energy and Ancillary Services revenues")[65] is that NYISO is to deduct the full 100 percent of projected energy and ancillary services revenues, not 50 percent. HTP asserts that the plain meaning of this tariff provision forecloses NYISO's use of the proposed scaling factor. HTP adds that, if NYISO had intended to apply a different interpretation than that suggested by the plain meaning, it could have filed such language with the Commission and, because it did not, it is barred from applying this deduction to HTP.

65. HTP further argues that the Commission's "rule of reason" doctrine requires a public utility to file with the Commission those "practices that affect rates and service significantly, that are realistically susceptible of specification, and that are not so

[63] *Id*. P 84.

[64] *Astoria Generating Company L.P v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244, at P 86 (2012) (June 22, 2012 Order).

[65] Complaint at 44 (citing NYISO, Services Tariff § 23.2.1).

generally understood in any contractual arrangement as to render recitation superfluous."[66] HTP contends that NYISO's arbitrary cutting of HTP's projected energy revenues inflated its Unit Net CONE and significantly increased the likelihood that it would fail the mitigation exemption test; consequently violating the Services Tariff, the filed rate doctrine, and the rule of reason. Moreover, according to HTP, the scaling factor unduly discriminates against merchant transmission facilities insofar as it: (1) assumes, without basis, that a merchant transmission line would not be able to capture 50 percent of available energy revenues; and (2) does not apply a comparable assumption to generator new entrants. HTP adds that, as a result of these assumptions, the Unit Net CONE calculated for a merchant transmission facility under the mitigation exemption test will be substantially higher than that for a new generator that would otherwise be projected to earn the same amount of energy revenues.

66. In addition, HTP argues, NYISO's assumption that a merchant transmission line would be unable to capture 50 percent of available revenues is inconsistent with HTP's business model and its agreement with NYPA, which are structured such that the HTP Project will be managed to optimize energy revenues. HTP states that its business model and agreement with NYPA are structured so that the HTP Project will optimize energy revenues by taking advantage of any positive spread between PJM and NYISO Zone J in the day-ahead market. HTP argues that there is no basis for NYISO to assume that HTP will not be able to fully capture this spread. HTP asserts that NYISO's approach effectively, and erroneously, assumes that the HTP Project will sit idle for roughly 50 percent of the time when energy prices in PJM are lower than in NYISO Zone J. Therefore, HTP argues, the Commission should direct NYISO to recalculate HTP's energy revenues without applying the scaling factor.

67. As discussed further below, HTP also argues that NYISO's estimate of HTP's energy revenues assumes that HTP will earn only 50 percent of available revenues in the day-ahead energy market and essentially ignores the significant revenues available in the real-time energy market. HTP attaches to its filing an email attachment it received from NYISO indicating that NYISO assumed that ten percent of the real-time net energy revenues could be obtained by a controllable line entering the market in 2013.[67] HTP responds that it would be able to capture approximately 40-60 percent of potential real-time energy revenues, which exceeds 100 percent of available day-ahead revenues.

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[66] Complaint at 45 (citing *City of Cleveland v. FERC*, 733 F.2d 1368, 1376 (D.C. Cir. 1985)).

[67] HTP November 30, 2012 Answer at 34 and Attachment 4.

68. HTP also argues that in projecting HTP's energy revenues, NYISO must be directed to exclude any generation units that NYISO expects to have retired or to be mothballed during all or part of HTP's Mitigation Study Period.

b. NYISO's Answer

69. NYISO responds that HTP's assertions are without merit and that a scaling factor is essential to prevent the deduction of revenues that a merchant transmission project like HTP is unlikely to collect because of the imperfect coordination between the separate energy markets of NYISO and PJM. NYISO therefore asserts that the use of a scaling factor is necessary to properly implement the Services Tariff's express requirement that NYISO reasonably estimate the projected net Energy revenues. NYISO argues that, in order to properly account for the likely projected net energy and ancillary services revenues of a merchant transmission project, NYISO must account for interregional price differences and scheduling uncertainty. NYISO states that its approach to estimating the forecasted energy and ancillary services net revenue for the HTP Project, including NYISO's use of the scaling factor, is supported by the MMU Report,[68] and without the application of a scaling factor, NYISO asserts the assumption would be that the transmission owner could perfectly arbitrage interregional price differences, leading to the overstatement of net energy revenues and the understatement of HTP's Unit Net CONE.

70. NYISO offers the affidavit of Daniel Jerke (Jerke Affidavit), explaining the basis for the scaling factor and its application to the HTP Project. Mr. Jerke states that the net energy revenues for UDR Projects that interconnect NYISO with another organized market are calculated as the sum of the projected positive net price spread between the source and sink locations, over the three years of the Mitigation Study Period, multiplied by a scaling factor to account for the fact that perfect arbitrage is impossible. He adds that in the case of the HTP Project, the positive net price spread represents the difference between the PJM Bergen node and Zone J prices, less related fees and charges, summed over all hours in which the net difference is positive.[69] Mr. Jerke states that NERA Economic Consulting (NERA) performed the net energy revenue estimates for the HTP Project by comparing historical day-ahead prices at PJM Bergen over a three-year period to the Zone J day-ahead prices produced by its econometric model, controlling for the level of excess in the forecast. But, according to Mr. Jerke, the NERA model assumed

[68] NYISO November 13, 2012 Answer at 19 (citing MMU Report at 7).

[69] Mr. Jerke states that the calculation reasonably assumes that HTP would not import energy into New York at a loss when the price spread, less a fee, is negative.

perfect arbitrage of day-ahead prices, when, in practice, because of the absence of perfect information, which is only available after the decision to import has been made, there will be times when the price spreads cannot be perfectly arbitraged. Mr. Jerke also states that the NERA model used day-ahead prices to calculate net energy revenue because there are typically more energy imports in the day-ahead market than in the real-time market. Further, according to Mr. Jerke, modeling of day-ahead energy prices is also consistent with the methodology utilized to establish the current ICAP Demand Curve.[70]

71. Mr. Jerke states that the scaling factor was computed as the ratio of (a) historical 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 historical time period. Mr. Jerke also explains that at the time of the retest of the HTP Project, NYISO revised the pricing and scheduling inputs used to calculate the scaling factor and adjusted net energy revenues at the 345 kV level. According to Mr. Jerke, those revisions resulted in a lower scaling factor adjustment than the 50 percent stated in the Complaint. Mr. Jerke also contends that the use of the initial or revised scaling factor result in considerably less than a 50 percent increase to the annual net CONE.

c. Comments

72. New York City Suppliers and IPPNY argue that NYISO properly applied a scaling factor in calculating HTP's projected revenues for purposes of calculating the HTP Project's Unit Net CONE, and that HTP misinterprets the Services Tariff in that the Services Tariff requires NYISO to estimate the HTP Project's "likely" projected annual energy and ancillary services revenue. They argue that a scaling factor is essential to prevent the deduction of energy and ancillary services revenues that a project, such as the HTP Project is *unlikely* to collect because of the imperfect coordination between the NYISO and PJM.

73. New York City Suppliers attach the affidavit of Mark D. Younger (Younger Affidavit) and the MMU's statement in NYISO's mitigation exemption re-evaluation of the HTP Project (MMU Report). Both attest to the need for a scaling factor. Mr. Younger states that the scaling factor is appropriate because the NYISO and PJM markets are not jointly optimized with respect to the scheduling of energy from one market to the other, and without such optimization "there necessarily will be instances when economic deliveries across the line will not be scheduled and other instances when uneconomic deliveries will be scheduled."[71] Mr. Younger points to a series of State of

[70] NYISO November 13, 2012 Answer, Jerke Aff. ¶¶ 43-44.

[71] New York City Suppliers November 13, 2012 Protest at Younger Aff. ¶ 41.

the Market Reports by NYISO's MMU that, according to Mr. Younger, document "substantial inefficiencies in the scheduling of transactions between the NYISO and PJM and the other neighboring ISOs for years."[72] The MMU Report also notes that the full potential net revenue cannot reasonably be captured because the transactions must be scheduled based on forecasted prices in PJM and New York City well in advance of the markets clearing and producing actual prices.[73] The MMU Report states that the scaling factor was based on actual confidential historical market data to determine the net revenues that could theoretically be earned from perfect arbitrage between PJM and NYISO and this data provides a reasonable basis for projecting the likely performance of the HTP Project.[74]

74. IPPNY adds that HTP's witness Pfeifenberger referenced the fact that PJM and New York currently are investigating ways to further improve coordination between their markets, thus, according to IPPNY, implicitly acknowledging that such coordination is not perfect today.[75] IPPNY also references NYISO's response to HTP's questions about its mitigation exemption determinations where NYISO explains that the fifty percent scaling factor was determined by analyzing the historical results of other similar merchant transmission lines.[76]

75. In response to HTP's allegation that it is unduly discriminatory to apply a scaling factor only to merchant transmission facilities, New York City Suppliers point out that, in direct contrast to the HTP Project, a scaling factor is not necessary for new generator entrants because the bus bar, or location where power is generated and injected into the system, is also the location where it is sold. In the case of merchant transmission at the ISO interface, power is effectively bought in one market and sold into another.[77]

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[72] *Id*. at Younger Aff. ¶ 43.

[73] New York City Suppliers November 13, 2012 Protest, Exhibit 2, MMU HTP Report at 8.

[74] *Id.* MMU HTP Report at 8-9.

[75] *IPPNY* November 13, 2012 Protest at 18 (citing Complaint, Attachment 1, Pfeifenberger Aff. ¶ 33).

[76] *Id*. at 19 (citing Complaint at Attachment 11 (NYISO's July 25, 2011 Email to HTP)).

[77] New York City Suppliers November 13, 2012 Protest, Younger Aff. ¶¶ 41-42.

d. HTP's November 30, 2012 Answer

76. HTP responds that there is no basis in the Services Tariff or the OATT for NYISO's assumption that 50 percent, or less, is the appropriate amount by which to reduce HTP's forecasted energy revenues to account for imperfect coordination between the NYISO and PJM markets. HTP asserts that the NYISO methodology is fundamentally flawed because NYISO effectively assumes that HTP must earn all of its revenues from the day-ahead market and that day-ahead spreads represent the theoretical maximum energy revenues that HTP could earn, while ignoring the larger revenues available in the real-time market.

77. HTP asserts that its attached supplemental affidavit of Johannes P. Pfeifenberger (Pfeifenberger Supplemental Affidavit) shows that the revenues available in the real-time market are roughly twice as large as those in the day-ahead market for 2007 and 2008 and three to five times larger for 2009-2011. HTP states that it recognizes that perfect arbitrage is not possible in the real-time market and accordingly, presents the results using a "T-1" strategy which, according to Mr. Pfeifenberger is a reasonably conservative approach to estimating net energy revenues of a merchant line operator or trader that is attempting to maximize net energy margins based on hourly import schedules.[78] According to HTP, under this strategy, a merchant transmission line would capture 50 percent of the potential real-time energy revenues assuming perfect arbitrage and accounting for losses and transaction costs. HTP concludes that, in any case, the availability of significantly larger revenues in the real-time market than in the day-ahead market means that if HTP were to capture only 50 percent of potential real-time energy revenues, its energy revenues would be greater than 100 percent of the theoretical maximum day-ahead revenues. In fact, according to HTP, it has confirmed that a market participant with capacity on another merchant transmission line into New York has, over a 12-month period, earned energy revenues well in excess of 100 percent of the theoretical maximum in the day-ahead market.[79]

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[78] HTP November 30, 2012 Answer at Pfeifenberger Supplemental Aff. ¶ 3.

[79] HTP contends that while NYISO asserts that HTP's discussions with energy traders "should be given no evidentiary weight," NYISO refused to disclose any of the information on which its energy revenue forecast was based. Presumably, according to HTP, NYISO relied on data from other merchant transmission lines into New York and there may be significant differences between those lines and the HTP Project with respect to location, operational characteristics, and business model that could significantly impact the ability and incentive to capture day-ahead price spreads over those other merchant lines. HTP November 30, 2012 Answer at P 33, n. 83.

78. HTP argues that NYISO's ten percent scaling factor for real-time energy revenues is also unreasonable. It adds that NYISO only recognizes real-time revenues in the numerator of the scaling factor ratio in that NYISO describes its formula as being 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 for the same historic period."[80] HTP asserts that this description is not consistent with the formula NYISO described in previous communications with HTP, wherein NYISO stated that the numerator of the scaling factor included "estimated net revenues reasonably anticipated [by the NYISO] to be received in the [real time market]" and that the real-time energy revenues estimated by NYISO "are based on perfect arbitrage and assume that 10 percent of the real time net energy revenues could be obtained by a controllable line entering the market in 2013."[81] HTP contends that NYISO provides no support for the ten percent figure and that the Commission should direct NYISO to calculate HTP's likely projected energy revenues based on reasonable assumptions about HTP's ability to capture price spreads in both the day-ahead and real-time market. HTP adds that based on Mr. Pfeifenberger's analysis it is reasonable to assume approximately 50 percent of potential real-time energy revenues.

e. NYISO's December 17, 2012 Answer

79. NYISO responds that HTP has failed to show that NYISO's scaling factor adjustment was inappropriate or unreasonable. NYISO states that its application of the scaling factor meets the Services Tariff's requirement that it reasonably estimate net energy revenues. NYISO states that contrary to HTP's assertion that NYISO assumed the HTP revenues would all come from the day-ahead market, the analysis considered revenues from both the day-ahead and real-time markets.[82] NYISO states that the real time revenues included in its calculation were far greater than zero or the *de minimis* amounts claimed by HTP. NYISO states that HTP's erroneous assumptions appear to have resulted from the fact that NYISO, after further review and MMU input, and prior to the December 2011 Offer Floor determination, revised the approach indicated in the email attachment cited by HTP and adopted the calculation method explained above. NYISO states that it also used this revised approach for the HTP Project's 2012 redetermination.

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[80] HTP November 30, 2012 Answer at 34 (citing NYISO November 13, 2012 Answer at 17).

[81] *Id*. at 34 and Attachment 4 (NYISO Scaling Factor Formula).

[82] NYISO December 17, 2012 Answer at 5.

80. NYISO attaches to its filing the supplemental affidavit of Daniel Jerke (Supplemental Jerke Affidavit) in support of the contention that the scaling factor appropriately accounts for revenues from both the day-ahead and real-time markets. Mr. Jerke notes that NYISO's revised approach accounted for observed historical real-time net revenues, not 10 percent of theoretical real-time net revenues.[83] Mr. Jerke also states that contrary to HTP's claims, the scaling factor could be greater than one, to the extent that significant revenues were earned in the real-time market in the historical sample data set. Thus, according to Mr. Jerke, 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 historical data showed that such an estimate was reasonable.

81. NYISO also responds that HTP's claim that NYISO wrongly included mothballed units in its energy revenue projections is erroneous. NYISO states that when it 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. NYISO contends that under the Services Tariff, a resource should only be removed from the ICAP forecast used in the mitigation exemption determination if it has filed a notice of retirement with the New York State Public Service Commission.[84] NYISO states that 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 and, therefore, it would have been inappropriate to remove any MW from the ICAP forecast used in the December 2011 exemption determination. NYISO states likewise, there was no basis for any adjustment to be made in the November 2012 determination.

Commission Determination

82. For the reasons stated below we deny the Complaint to the extent that we find the use of a scaling factor to project HTP's energy revenues is reasonable, but we grant the Complaint to the extent that we require 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. We also require NYISO to file a proposed tariff provision to incorporate the scaling methodology into its tariff.

83. NYISO's Services Tariff requires it to project likely energy revenues in order to calculate net CONE.[85] The parties agree that traders do not have perfect foresight of

[83] Supplemental Jerke Aff. ¶ 7 and n.2.

[84] NYISO December 17, 2012 Answer at 6 (citing Services Tariff § 23.4.5.7.3.2).

[85] *See* Services Tariff § 23.2.1.

market prices and thus, would be unable to perfectly arbitrage day-ahead price differences between the PJM and the NYISO markets.[86] The manner in which HTP's witness Pfeifenberger and NYISO account for this inability to perfectly arbitrage differs, but both agree that it is important to reflect some such factor in the estimate for energy revenues.[87] The different approaches may lead to different estimates, but that does not mean that NYISO's using a scaling factor was not just and reasonable.

84. NYISO's approach to estimating energy revenues had two steps. First, NYISO contracted with NERA to use the econometric models it developed for the Demand Curve reset process to estimate net energy revenues over the first three years of HTP's operation (i.e., for 2013-2016). This model-based estimate assumes perfect arbitrage and requires further adjustment described as a scaling factor. We agree with NYISO and the MMU that, because the NERA model-based revenue projections for 2013-2016 reflect perfect arbitrage, an adjustment to the NERA model-based estimate of projected likely energy revenues must be made to comply with the tariff. NYISO's approach assumes that arbitrage over the HTP Project will be comparable to that experienced historically by other Controllable Lines, and the Commission concludes that this is a reasonable assumption. To account for imperfect arbitrage, NYISO calculates a ratio of (a) historical 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 historical time period for Controllable Lines excluding HTP.

85. We reject HTP's assertion that NYISO should use the NERA model-based estimate of energy revenues that does not account for imperfect arbitrage. The Services Tariff directs NYISO to account for the "likely" projected energy revenues and even HTP agrees that perfect arbitrage is not possible; therefore, 100 percent of NERA's model-based projected revenues for 2013-2016 is not a "likely" figure. Further, we reject HTP's argument that the use of a scaling factor is foreclosed by the plain meaning of the tariff. The word "likely" requires NYISO to make a reasonable approximation of the energy revenues and because, as the parties agree, perfect arbitrage is not possible, some adjustment to the NERA model-based projected revenues is reasonable.

86. We also reject HTP's claim that the use of a scaling factor in the calculation of net energy revenues of transmission lines but not for generators is discriminatory. As New York City Suppliers point out, such a scaling factor is unnecessary for new generator

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[86] *See* HTP November 30, 2012 Answer at 31.

[87] *See* Complaint, Pfeifenberger Aff. ¶ 33.

entrants because they are not attempting to arbitrage a price difference between two markets; instead, power is sold in only one location, so there is no price spread.[88]

87. With respect to the inclusion of mothballed units in the projection of energy revenues, the Services Tariff section 23.4.5.7.3.2 provides

> [NYISO] shall compute the reasonably anticipated ICAP spot market auction price based on expected retirements plus each Examined Facility in 23.4.5.7.3(I), (II), and (III). Expected Retirements [are] determined based on any Generator that provided written notice to the New York State Public Service Commission that it intends to retire, plus any UDR facility or Generator 2 MW or less that provided written notice to the ISO that it intends to retire.

88. We find the Services Tariff to be clear that NYISO is to eliminate from its analysis only those units that have provided the New York State Public Service Commission their intent to retire. The provision does not refer to mothballed units; it only refers to Expected Retirements. Further, there may be situations in which mothballed capacity may return to service and be offered in the capacity market and therefore should be included in the available supply (and not included as a retirement). Accordingly, we reject HTP's claim that NYISO should exclude any units that it expects to be mothballed during the Mitigation Study Period. We find that NYISO has appropriately treated both retirements and mothballed units as provided in the Services Tariff.

89. Although we find that it is reasonable for NYISO to project HTP's energy revenues by accounting for imperfect arbitrage using a scaling factor, we agree with HTP's argument that NYISO's approach is based on undisclosed assumptions and is lacking in transparency. Further, NYISO does not adequately support its choice of methodology. Moreover, although NYISO has explained that the scaling factor resulted in considerably less than a 50 percent increase in annual Net CONE,[89] it has not provided the actual scaling factor that it used.

90. Accordingly, we direct NYISO, within sixty days of the date of this order, to provide the Commission with the specific scaling factor used, to explain in detail how it was calculated, and to support the methodology. In addition, we direct NYISO to file, within sixty days of the date of this order, proposed tariff provisions to include a detailed description of the methodology that it intends to use in order to project the likely energy

[88] *See supra* P 71.

[89] NYISO November 13, 2012 Answer, Jerke Aff. ¶ 37.

and ancillary services revenues for merchant transmission lines. Such a description will provide certainty and transparency for future projects that are similarly situated.

4. Use of Three-Year Forward Base Residual Auction Prices

a. HTP's Complaint

91. To calculate Unit Net CONE for the HTP Project, in addition to evaluating the net cost of the new transmission line, NYISO must evaluate the cost of purchasing generation capacity in PJM to establish the net revenue (if any) that could be obtained from re-selling the capacity in NYISO's ICAP market. HTP states that NYISO has used the prices in PJM's Base Residual Auction (BRA), which is conducted more than three years in advance of the applicable PJM delivery year, to estimate prices of PJM capacity that will be offered into NYISO's ICAP auctions, which capacity is procured by LSEs in NYISO auctions for a maximum forward period of six months (and less than one month in NYISO's Spot Market Auctions). HTP asserts that because of these timing differences, the three-year forward prices in the BRA are thus not representative of the prices for PJM capacity that would be available to offer into the NYISO's ICAP auctions. HTP further asserts that it is improper, in principle, for NYISO to use prices for such inconsistent forward time periods and that this use introduces a significant bias into the mitigation exemption test. HTP contends that the prices in the BRA have been consistently and significantly in excess of those set in PJM's incremental auction, which are more closely aligned with NYISO's forward capacity auction.[90] HTP argues that these overstated prices contribute to "false positives" for the mitigation exemption test and overstate the resulting Unit Net CONE. HTP suggests discounting the three-year forward BRA prices to reflect the recent historical relationship between three-year forward auction prices and third incremental auction prices in PJM or utilizing the prices in the appropriate PJM incremental auctions that are available as of the appropriate going-forward date.

[90] HTP states that for the purposes of projecting prices used in HTP's mitigation exemption test, NYISO used PJM's three-year forward BRA price for the PSEG-North zone for 2013/2014 and 2014/2015 delivery years. HTP states that for the 2012/2013 delivery year, the BRA clearing price for this zone was $185/MW-day compared to $48.91/MW-day in the one-year forward PJM incremental auction and the final incremental auction cleared at $2.51/MW-day. HTP states that there have been similar price declines between the BRA and incremental auctions for other delivery years as well.

b. NYISO's Answer

92. NYISO responds that HTP puts too much emphasis on the apparent similarity in timing between NYISO's capacity auctions and PJM's incremental auctions, but neglects to consider a number of more salient factors that make NYISO's auctions more similar to PJM's BRAs.[91] In particular, according to NYISO, both the PJM BRAs and NYISO's auctions are driven by Demand Curves based on transparent net CONE values, the planning requirement, and the level of supply.[92] NYISO adds that, as is the case with NYISO's auctions, the large majority of capacity transactions in PJM take place in the BRAs.[93] By contrast, according to NYISO, PJM's incremental auctions are thinly-traded and prices in them are set by the interaction of a relatively small number of bids and offers.[94] NYISO asserts that because capacity cannot be reliably procured from the incremental auctions, the apparent price difference between them and the BRAs is not meaningful; nor, according to NYISO, is it necessarily the case that even the apparent difference in prices will persist into the future given that prices tend to converge in the long run.

93. NYISO also asserts that the alternative pricing proposals offered by HTP are without merit. NYISO argues that discounting BRA prices based on the historical relationship between BRA and incremental auction prices would be unreasonable given the differences between the two auctions, including the inability to count on being able to obtain capacity in the incremental auctions.[95] Further, according to NYISO, any PJM resource seeking to export capacity to New York would only do so if it could obtain at least the BRA prices, which weighs in favor of NYISO's use of BRA prices. NYISO adds that, as explained in the attached affidavit of Daniel A. Jerke, trying to use appropriate incremental auction prices from the appropriate going-forward date would be unreasonable and impracticable because of the absence of certainty that capacity can be procured in the incremental auctions and because it is unclear how the proposal would be applied.[96]

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[91] NYISO November 11, 2013 Answer at 22 (citing Jerke Aff. ¶¶ 51-57).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id*. at 23.

[96] *Id*. (citing Jerke Aff. ¶¶ 58-61).

94. NYISO further cites to the MMU's conclusion that it is "generally reasonable" for NYISO to look to BRA clearing prices, notwithstanding the timing difference between them and the NYISO's auctions. NYISO states that the MMU provides the following reasons: (1) the BRAs are extremely liquid and almost all capacity that is traded in PJM is traded through them; (2) it is not reasonable to assume PJM capacity to be available after the BRA because all PJM supply must normally be offered into it; (3) PJM's incremental auctions are conducted much closer to the delivery timeframe than is the case in NYISO, are generally illiquid, and lack sufficient supply to support capacity exports over controllable lines to New York City; and (4) given the lack of liquidity in the incremental auctions, attempts by the HTP Project to purchase substantial amounts of capacity in them to support exports to New York City would likely result in sharply higher prices.[97]

c. Comments

95. New York City Suppliers assert that HTP's arguments are devoid of merit, unreasonable, and would introduce a significant bias into the mitigation exemption test. Both the New York City Suppliers and IPPNY cite to the Younger Affidavit which states that because the BRA procures 97.5 percent of PJM's projected capacity requirements, it is far more reflective of the price paid for capacity in PJM.[98] New York City Suppliers and IPPNY assert that, by contrast, the incremental auctions are adjustment auctions intended to permit market sellers to procure replacement capacity and for PJM to purchase or sell capacity in order to reflect changed load forecasts and thus, are thinly traded and subject to changes in assumptions which could cause the prices to fluctuate wildly.[99]

96. New York City Suppliers further argue that HTP makes no effort to explain how the incremental auctions would provide a reliable proxy for such prices or why some discount based on such prices should be applied. Further, according to New York City Suppliers, HTP fails to account for the impact of the 660 MW of additional capacity that HTP claims could be purchased from such thinly-traded auctions.

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[97] *Id.* (citing MMU Report at 14).

[98] New York City Suppliers November 13, 2012 Answer at 31-32 (citing Younger Aff. ¶ 61).

[99] New York City Suppliers November 13, 2012 Answer at 31-32 (citing Younger Aff. ¶ 62).

97. New York City Suppliers also cite to a 2011 study prepared for PJM, which stated that clearing prices in the incremental auctions have been persistently below BRA prices and note that clearing prices and supply curves during the first few incremental auctions were disconnected from market fundamentals and BRA prices due to deficiencies in the initial auction design.[100] They note that the study further finds insufficient evidence to fully evaluate the new incremental auction design.[101] In addition, New York City Suppliers state that recent incremental auction results, in which the clearing price in the incremental auction for the PS North zone was substantially higher than that in the BRA, underscore the risk of relying on the results of the incremental auctions, either as the proxy for prices at which HTP could purchase capacity or as the basis for any discount to BRA prices.[102]

d. Answers

98. HTP reiterates its argument that the BRA prices have been consistently and significantly in excess of those set in PJM's incremental auction. HTP further argues that, as a practical matter, it is unlikely that generators in PJM would have contracted with an HTP customer in May 2010 in the hopes of selling its capacity into New York in an auction taking place three years later, particularly when the PJM generator would be subject to the risks that HTP would not enter service in 2013 or the necessary PJM upgrades would not be completed on time. HTP adds that the timing issues are such that the only reasonable market in which an HTP customer would seek to procure PJM capacity for the Mitigation Study Period of 2013/2014 and the 2014/2015 Capability Years would have been through a PJM incremental auction.[103]

99. NYISO responds that HTP has not shown that it would be reasonable for NYISO to use capacity prices from PJM's incremental auctions in its analyses or that it was unreasonable for NYISO to have used PJM's BRA prices. NYISO asserts that HTP's example does not support HTP's case and is simply indicative of the difficulties likely to be associated with contracting for capacity in the early years of the HTP Project's

[100] New York City Suppliers November 13, 2012 Answer at 33 (citing Pfeifenberger Group, *Second Performance Assessment of PJM's Reliability Pricing Model* at iv (Aug. 26, 2011)).

[101] *Id*. (citing Brattle Group, *Second Performance Assessment of PJM's Reliability Pricing Model* at 24 (August 26, 2011)).

[102] *Id*. (citing Younger Aff. ¶ 68).

[103] HTP November 30, 2012 Answer at 36-37.

operation. According to NYISO, HTP's argument, at best, suggests that HTP's projected revenues should be adjusted to a lower level than what NYISO actually used in its analysis.[104] In addition, NYISO states that HTP's new argument does not alter the reality that the differences between the incremental auctions and NYISO's auctions are far greater than the comparatively minor ones between the BRAs and NYISO spot auctions.

Commission Determination

100. We deny HTP's complaint that NYISO erred in using the BRA market clearing price to estimate prices of PJM capacity for the reasons discussed below. We agree with NYISO that the BRA market clearing price reasonably represents the cost of capacity in PJM relevant for determining whether HTP is economic, the objective of NYISO's mitigation exemption test. HTP provides UDRs that may be used to import PJM capacity into NYC. In judging whether HTP is economic, both the cost of HTP's transmission capacity and the cost of PJM generation capacity must be considered. PJM conducts several forward capacity auctions that yield market clearing capacity prices, and all parties agree that a PJM capacity auction price is a reasonable basis for representing the cost of generation capacity imported over the HTP Project. The controversy concerns which auction price is the most reasonable—that determined in the three-year forward BRA, favored by NYISO, the MMU, New York City Suppliers, and IPPNY, or that determined in one of the several forward incremental auctions, favored by HTP.

101. HTP favors using the price determined in PJM's third incremental auction as the measure for PJM capacity cost to be combined with HTP's transmission cost to evaluate whether HTP's capacity is economic and should be exempt from a bid floor. HTP emphasizes that the third incremental auction, conducted a few months ahead of the PJM delivery year, more closely corresponds to the timeframe of NYISO's monthly spot market auction. However, the price determined in the third (or any) incremental auction is not the capacity price received by most capacity suppliers in PJM in the delivery year.

102. In the BRA, PJM uses a downward sloping demand curve, similar in concept to NYISO's ICAP Demand Curves, to acquire capacity to meet its reliability needs. Existing and planned resources that clear in the BRA are committed to provide capacity in the delivery year and receive the market clearing BRA price in the delivery year, not the price determined in an incremental auction. Since most capacity resources are committed in the BRA, we conclude that the BRA price reasonably reflects the opportunity cost of importing capacity from PJM into NYISO.

[104] NYISO December 17, 2012 Answer Jerke Supplemental Aff. ¶¶ 16-18.

103. Incremental auctions principally provide a means for capacity suppliers to buy or sell replacement capacity, and a cleared purchase may be used to cover a delivery year commitment. The downward sloping demand curve used in the BRA is not used to determine prices in the incremental auctions where relatively small amounts of capacity are traded between suppliers. Thus, incremental auction prices are not related to the cost of entry as are BRA prices and NYISO's ICAP prices, both of which are determined by demand curves. Moreover, prices determined in incremental auctions do not affect the BRA price received by capacity suppliers in the delivery year. Thus, in evaluating whether transmission capacity provided by HTP is economic, we conclude that a relevant measure for PJM capacity cost is reasonably reflected by the BRA price, not the price of an incremental auction.

104. Finally, the fact that BRA prices are generally higher than incremental prices is not a basis for choosing an incremental price. The objective in evaluating the economic merits of HTP is to choose a price that reasonably reflects the opportunity cost of importing PJM capacity into NYC. A higher or lower incremental price that applies to relatively small amounts of replacement capacity is a less reliable measure of such cost than a BRA price determined three years forward and paid in the delivery year.

105. Accordingly, we deny HTP's complaint that NYISO was unreasonable when it used BRA market clearing prices to estimate the price of capacity in the PJM market that would be sold into the NYISO ICAP market.

5. Cost of Capital

106. In its September 10, 2012 Order, with respect to the mitigation exemption determination for the Astoria II facility, the Commission found that the NYPA RFP process that resulted in a power purchase agreement between Astoria II and NYPA was discriminatory because the process was limited to new resources and, thus, resulted in "irregular or anomalous" cost advantages.[105] The Commission directed NYISO re-determine Astoria Energy II's Unit Net CONE using a proxy cost of capital from the Demand Curve process, rather than using the unit's actual cost of capital.[106] NYISO states that, on that basis, in its November 13, 2012 Answer, which reflected the results of NYISO's redetermination of the HTP exemption, NYISO states that it re-determined HTP's Unit Net CONE using the cost of capital of the proxy unit.

[105] September 10, 2012 Order, 140 FERC ¶ 61,189 at P 135.

[106] *Id*.

107. In its November 30, 2012 Answer to NYISO's answer, HTP argues that NYISO improperly assumes that the procurement process that NYPA used to select the Hudson Transmission Project (2005 NYPA RFP) was unduly discriminatory and thus improperly used a "proxy" cost of capital from the Demand Curve reset process rather than HTP's actual financing cost figure secured by the project to calculate Unit Net CONE. HTP asserts that NYISO must, instead, use HTP's actual capital costs to calculate its Unit Net CONE.

108. HTP argues that NYISO simply assumes, without providing any support, that the 2005 NYPA RFP was unduly discriminatory. HTP argues that NYISO is not permitted to presume that the NYPA 2005 RFP was unduly discriminatory simply because it was conducted by NYPA. HTP differentiates the 2005 NYPA RFP process from the NYPA RFP process at issue in the September 20, 2012 Order, which the Commission found to be unduly discriminatory. In contrast, according to HTP, the 2005 NYPA RFP clearly states that it is open to participation by both new and existing resources, including generation, transmission, or a combination of the two.[107] Moreover, HTP asserts that the Commission has already considered the 2005 NYPA RFP in another proceeding, where it found the RFP to have been open, transparent, nondiscriminatory, and competitive because the RFP was open to all parties, and considered both generation and transmission alternatives.[108] According to HTP, the Commission further found that, like previous RFPs for merchant transmission sponsored by a governmental entity, the 2005 NYPA RFP was "designed to be non-discriminatory, fair and transparent."[109] HTP asserts that NYISO's presumption here constitutes a collateral attack on the Commission's prior decision.

109. NYISO responds that it reasonably concluded that the September 10, 2012 Order required it to use a proxy cost of capital in HTP's exemption redetermination analysis. NYISO states that its interpretation was based on its post-September 10, 2012 Order review and comparison of the RFPs that resulted in contracts being awarded to Astoria II and the HTP Project, respectively. NYISO states that it obtained additional information from HTP concerning the HTP Project's cost of capital, and the impact of the contract with NYPA on its financing. NYISO states that it concluded that there were differences

[107] HTP November 13, 2012 Answer, Attachment 3, 2005 All Sources RFP, Section I.

[108] HTP November 30, 2012 Answer at 38 (citing *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104, at P 28 (2011) (2011 HTP Negotiated Rates Order)).

[109] *Id.*

between the two RFPs but that the NYPA 2005 RFP contained evaluation criteria similar to that which the September 20, 2012 Order determined favored new projects over existing facilities. NYISO states that the MMU concurred that the use of the default financing assumptions is consistent with the Commission's policy articulated in the September 10, 2012 Order. NYISO also denies that it has adopted a presumption that NYPA RFPs are unduly discriminatory and states that it administers the buyer-side mitigation rules impartially. Finally, NYISO, contrary to HTP's assertion, argues that the Commission's 2011 ruling in the 2011 HTP Negotiated Rates Order, authorizing HTP to charge negotiated rates, is not relevant to, let alone dispositive in, the instant proceeding because the finding that HTP had not acted in a discriminatory manner with regard to the allocation of capacity to NYPA 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 20, 2012 Order.

110. HTP responds that the evaluation criteria for the 2005 NYPA RFP were not biased in favor of new resources. It argues that the New York City Suppliers neglected to mention that other criteria in the NYPA RFP process appear to favor existing resources over new resources. HTP points to the following selection criteria: evaluated price of bidder's proposal; extent to which offered pricing is economical, stable and predictable over the offered contract term; overall portfolio cost and risk, including project and financing risk; construction and performance guarantees.[110] According to HTP, the diverse selection criteria in many ways favor existing resources, certainly did not discriminate against them, and allowed both new and existing generation and transmission facilities to compete on an equal footing.

Commission Determination

111. Although we continue to believe that, in the circumstances where an RFP has been shown to be unduly discriminatory resulting in a non-competitive cost of capital, NYISO may substitute a proxy cost of capital for the new entrant's actual cost of capital, in this instance, it is reasonable to use HTP's actual cost of capital.

112. We agree with NYISO that the 2005 NYPA RFP at issue here was similarly limited to new capacity as the NYPA RFP that awarded a contract to Astoria II. However, under the terms of the NYISO Tariff, existing capacity owned by Divested Generation Owners (DGOs) in New York City was prohibited from participating in the

[110] *Id.* at 41 (citing 2005 All Sources RFP, Section 7.B).

RFP when the RFP was held in 2005.[111] Because the DGOs were barred from participating in any RFP, no capacity that could participate in the RFP and which might otherwise have won the contract was excluded from participation in the RFP. Thus, we would not expect the results of the RFP to have been different had it not limited the resources that could participate to new resources. So, although the RFP design limited participation in that respect, the design did not have a discriminatory effect. Since HTP could have been awarded a contract as a result of the RFP even if the RFP was not so limited, we conclude that it is reasonable to use HTP's actual cost of capital in the mitigation exemption determination. Accordingly, we direct NYISO to redo the exemption determination using HTP's actual cost of capital.

6. Compensation for Reliability Benefits Issue

a. Complaint

113. HTP states that it and its investors agreed to invest approximately $900 million to construct the HTP Project and significantly expand the limited transmission capacity into the NYC zone. However, HTP asserts that any of its UDRs that cannot be used because it is subject to an Offer Floor will be used by NYISO to reduce the Installed Reserve Margin (IRM) for NYISO as a whole, as well as the Minimum Locational Unforced Capacity Requirement (MLCR) for the New York City and Long Island capacity zones, thereby saving NYISO LSEs and their ratepayers the cost of procuring this capacity. In that event, HTP argues that it should receive just and reasonable compensation for the reliability benefits that it provides. HTP claims that in the event it is mitigated and is not able to sell capacity, it will still provide substantial and easily quantifiable reliability benefits to the NYISO system and to its ratepayers as emergency support capability. [112]

[111] As a part of the formation of the wholesale electricity market in New York City, the New York PSC required Con Edison to divest at least 50 percent of its in-city generating capacity to unaffiliated third parties. Con Edison elected, with the approval of the New York PSC, to auction off the majority of its in-city generation in three bundles of assets, which would be sold to three individual entities, known collectively as the Divested Generation Owners. In 1998, the Commission accepted market power mitigation measures for the DGOs. Among those measures was a prohibition of DGOs entering into bilateral contracts for ICAP. *See Keyspan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,252, at 62,098 (2002)*; see also Consolidated Edison Company of New York, Inc*., 84 FERC ¶ 61,287 (1998).

[112] Complaint at 53 (citing NYISO ICAP Manual at 4-79 (the transportation import capability associated with such external UDRs will be considered emergency

(continued …)

However, HTP states that under the NYISO rules it will not receive any compensation for these reliability benefits, an outcome that it asserts is unjust, unreasonable and unduly discriminatory.[113] HTP contends that NYISO's rules in this respect conflict with the fundamental principles underlying the FPA, specifically, that a public utility must receive just compensation for the use of its property from the beneficiaries thereof. Therefore, according to HTP, the Commission should direct NYISO to develop a mechanism to compensate HTP for the value of the reliability benefits it would provide, or, in the alternative, clarify that HTP may file, under section 205 of the FPA, a rate schedule to receive just and reasonable compensation for these benefits.

114. HTP asserts that NYISO and the New York State Reliability Council have benefited from the 660 MW Neptune Transmission Project[114] and they would benefit to a similar magnitude from the HTP Project, given the similarities of the two projects. HTP contends that NYISO's current rules will result in the unlawful appropriation of the reliability benefits that its project will provide. HTP argues that the courts and the Commission have both found that merchant projects, which do not have guaranteed cost recovery from captive customers, must still have a reasonable opportunity to recover the costs of their investment.[115] HTP states that deterrence of uneconomic entry was deemed necessary to satisfy the Commission's mandate under the FPA to "ensure that rates are just and reasonable," which necessarily "involves a balancing of consumer and investor

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support capability in these reliability studies to benefit all LSEs when determining the NYCA IRM and the MLCR for the New York City and Long Island capacity zones)).

[113] HTP states that, under the purchase agreement between HTP and NYPA, the price of NYPA's purchase option at the end of the contract will be decreased by the total amount of foregone capacity revenues over the term of the agreement.

[114] HTP asserts that the Neptune Transmission Project reduced NYISO's system-wide IRM requirements in the 2008 capability year by roughly 2.6 percent and the MLCR for the NYC and Long Island zones by about two percentage points. HTP asserts that the resulting customer savings from the Neptune Project's UDRs for the 2008 capability year exceeded $30 million across NYISO as a whole, and were nearly $12 million in the NYC capacity zone. Complaint at 54, Pfeifenberger Aff. ¶ 20 & Table 1.

[115] Complaint at 56 (citing generally, *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at PP 103-104 (2006), *order on reh'g and clarification and compliance*, 119 FERC ¶ 61,318, *order on reh'g,* 121 FERC ¶ 61,173 (2007); *Devon Power LLC*, 115 FERC ¶ 61,340, at PP 109-115 (2006), *reh'g denied*, 117 FERC ¶ 61,133 (2006)).

interests."[116] HTP adds that here, too, the setting of just and reasonable rates requires a reasonable balancing of the consumer and investor interests and that a "balance" where consumers receive all of the reliability benefits created by HTP for free, while HTP invests hundreds of millions of dollars, and receives nothing in return, is not just and reasonable.

115. Further, according to HTP, NYISO's rules permitting such free riding by LSEs are also inconsistent with the principle of "cost causation," particularly, with respect to benefits, i.e., "[t]o the extent that a utility benefits from the costs of new facilities, it [can] be said to have 'caused' a part of [the] costs. . . incurred."[117] HTP further argues that the emphasis on this principle is not limited to the reliability projects addressed in Order No. 1000, but, instead forms the foundation of the Commission's ratemaking and, in particular, has been applied to compensation for loop flows in cases such as *American Electric Power Service Corp.*[118] There, HTP states, the Commission held that if the utility affected by the loop flows could demonstrate that the transactions giving rise to the loop flows were "a burden on its system," then it could file, under section 205 of the FPA, a transmission service rate schedule to receive compensation for the loop flows. HTP adds that, while NYISO's use of the HTP Project's capacity does not involve unauthorized loop flows, *AEP* suggests the appropriate way forward, i.e., HTP should be permitted to file, under section 205 of the FPA, a rate schedule to provide just and reasonable compensation for the reliability benefits it provides.[119]

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[116] Complaint at 57 (citing *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)).

[117] Complaint at 57 (citing, *inter alia*, *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009); *Western Massachusetts Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)).

[118] 49 FERC ¶ 61,377 (1989) (*AEP*).

[119] HTP cites the Pfeifenberger affidavit as providing a methodology for determining the reliability benefits provided by HTP for lowering the IRM or MLCR. Complaint at 61.

b. NYISO's Answer

116. NYISO responds that HTP's request for compensation for reliability benefits is procedurally defective in that it is an inappropriate attempt to circumvent NYISO's shared governance process under which NYISO tariffs may only be revised under section 205 of the FPA if the revision has been approved by a super-majority of the stakeholder Management Committee and by the independent Board of Directors.[120] NYISO asserts that, while interested parties may ask that such changes be imposed under FPA section 206, the Commission has been clear that such filings are disfavored.[121] Further, NYISO argues that if HTP wanted the Commission to provide declaratory guidance regarding its section 205 filing rights, it should have filed a petition for a declaratory order. With respect to the governance process, NYISO states that HTP's proposed reliability benefits compensation would be a radical departure from the existing NYISO tariff structure, market design, and market power mitigation measures, and the Services Tariff should not be permanently revised to include such a major change without stakeholder review. With respect to a petition for a declaratory order, NYISO adds that even if the Commission does not believe that such a petition is necessary, there is no reason to effectively "pre-approve" a future section 205 filing, and NYISO notes that the Commission recently denied a similar request.[122]

117. NYISO also argues that providing non-market based compensation to the HTP Project would contravene the design of the buyer-side market mitigation rules and of NYISO's market. NYISO asserts that HTP, in expectation that its capacity will not clear if subject to an Offer Floor, is attempting to require customers to wholly or partially offset the capacity revenues that it might not obtain because of its own investment decisions. NYISO argues that it is appropriate that projects be at risk of receiving reduced capacity revenues if they are uneconomic, regardless of whether they might confer reliability benefits, and permitting them to avoid this risk by showing that they increase reliability would insulate them from the effects of Offer Floor mitigation.

118. NYISO also argues that reliability benefits are not separately priced; instead, compensation for providing such benefits is a component of the tariff-derived prices for market products paid to suppliers. NYISO adds that paying non-market based

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[120] NYISO November 13, 2012 Answer at 24 (citing ISO Agreement § 7.01).

[121] *Id*. at 24-25 (citing *Niagara Mohawk Power Corp. v. New York State Reliability Council and New York Indep. Sys. Operator, Inc.*, 114 FERC ¶ 61,098, at P 1 (2006)).

[122] *Id*. at 26 (citing *New York Indep. Sys. Operator, Inc.*, 141 FERC ¶ 61,081 (2012)).

compensation for reliability benefits would be a fundamental departure from the basic design of organized markets such as NYISO's. Further, according to NYISO, while the Commission has allowed non-market based compensation in limited circumstances specified in its Reliability-Must-Run precedents, HTP's proposal would expand the use of non-market based compensation rules far beyond what the Commission has accepted in the past. NYISO is concerned that moving in this direction would reduce the efficiency of competitive markets and ultimately diminish the benefits that they bring to consumers. NYISO adds that the Commission has rejected claims, similar to HTP's, by capacity market participants in other markets that they should be guaranteed cost recovery.[123] NYISO argues that the Commission's policy is to allow capacity suppliers to recover their costs through market-based rates in competitive markets and fluctuation of prices in a competitive market is not sufficient to establish that an entity lacks opportunity to recover its costs.[124] NYISO argues that HTP's assertion that the purpose of ICAP is to compensate for reliability is overly simplistic in that the purpose is to attract new and retain existing economic capacity.[125]

119. NYISO further contends that HTP has not established that the HTP Project will actually provide substantial and easily quantifiable reliability benefits to NYISO beyond those reflected in the capacity market price. According to NYISO, HTP has neither shown that any reliability benefits attributable to the HTP Project are needed; nor has it shown that reliability benefits attributable to individual transmission facilities are practicably quantifiable. NYISO asserts that the mere fact that the HTP Project might be available to provide "emergency assistance" or might contribute to a near-term IRM or MLCR reductions does not equate to "substantial" reliability benefits; nor does it mean that the NYISO system has any need for such incremental reliability benefits. NYISO adds that the two most recent Reliability Needs Assessments completed before the Complaint was filed both indicated that New York's bulk power system had no need for additional reliability benefits. Furthermore, according to NYISO, the Commission-accepted ICAP Demand Curves define the level of excess capacity above the minimum needed to satisfy the IRM and LCRs that is beneficial. With respect to quantification of reliability benefits, NYISO states that given the networked nature of the bulk power system, the reliability benefit produced by any single transmission project is contingent on, and interdependent with, the relative contribution that all other transmission lines,

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[123] *Id.* at 30 (citing *ISO New England*, 135 FERC ¶ 61,029, at P 252 (2011)).

[124] *Id*. (citing *ISO New England*, 135 FERC ¶ 61,029, at P 254 (2011)).

[125] NYISO November 13, 2012 Answer at 30 (citing *New York Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,117, at P 25 (2005)).

generators, and demand side resources make to reliability. Finally, NYISO states, HTP's proposed formula for calculating reliability benefits rests on the erroneous premise that a change in the IRM must change the level of UCAP purchased. NYISO states that the IRM is a measure of existing resources needed to provide a certain level of UCAP with the system under stress, and therefore does not necessarily correspond to a change in the amount of UCAP purchased.

120. Accordingly, NYISO asserts that providing non-market-based compensation to a new entrant that is properly subject to an Offer Floor would violate Commission policy and precedent.

c. Comments

121. Indicated NYTOs object to HTP's statement that, if mitigated, it may file a rate schedule to receive just and reasonable compensation for the value of the reliability benefits it would provide. Indicated NYTOs state that the Commission should not allow duplicative rate schedules for the same service already governed exclusively by the NYISO Services Tariff. Moreover, they state that NYISO already has capacity and reserve markets that are designed to compensate for any needed reliability benefit provided by HTP or any other facility and the need for additional reliability products has not been demonstrated. Indicated NYTOs assert that HTP's request should be dismissed but if it is not, the request and associated changes should be considered through a stakeholder process.

122. IPPNY states that the NYISO tariff already provides a mechanism that adequately compensates controllable transmission line developers for the project's reliability benefits, i.e., the tariff allows for the assignment of UDRs, which it states provide property rights to a developer for the incremental capacity benefit of the controllable transmission line facilities, thus providing the correct economic incentives for their development.[126] IPPNY adds that the HTP Project is uneconomic and thus, HTP asserts that it will be unable to receive compensation associated with its UDRs. IPPNY states that this is the result of the proper and effective functioning of the UDR system combined with the buyer-side mitigation measures, not evidence of the need for some additional revenue stream. IPPNY argues that HTP elected to continue with the development of its project being fully aware that it was uneconomic and would be mitigated.

123. IPPNY also asserts that NYPA expected to lose between $291 and $676 million during the life of its contract with HTP but went ahead with the project because of the

[126] IPPNY November 13, 2012 Answer at 23 (citing NYISO November 13, 2012 Answer, Younger Aff. ¶¶ 70-71).

price suppression impacts the project would have on energy prices and the resultant economic savings to New York consumers.[127] EPSA supports the protests filed by IPPNY and the New York City Suppliers and also asserts that HTP proceeded with its project even though it was known to be uneconomic. EPSA contends that clearly inefficient projects should not be allowed to enter the market with another "back door" opportunity for payment. IPPNY and EPSA each add that HTP's claim that failure to compensate transmission projects under these circumstances will discourage new investment in these projects is the very purpose of the buyer-side mitigation measures in that they were created to discourage uneconomic investment in unneeded resources. Further, according to IPPNY, HTP's claims as to the benefits of its project are inaccurate. IPPNY states that, as the Younger Affidavit demonstrates, when the HTP Project becomes operational, it may actually increase the IRM as well as, possibly, the LCRs.[128] Finally, IPPNY states, HTP's proposal is procedurally defective insofar as it attempts to circumvent the NYISO's stakeholder process to create this additional compensation mechanism, a mechanism which has an impact on a substantial number of other aspects of the NYISO market design.

124. LIPA states that it has entered into long term transmission service offtake contracts[129] with each of the Neptune and Cross Sound Cable Projects, controllable transmission projects that interconnect LIPA directly with PJM and ISO-New England. LIPA states that it recognizes that controllable transmission facilities do provide reliability benefits to the interconnected balancing areas. LIPA adds that its facilities are not directly interconnected with the HTP Project, it derives no benefit from this project, and would not support the application of any rates that HTP might propose. Nonetheless, if the Commission finds merit in HTP's request, LIPA asks the Commission, to recognize that similarly situated merchant transmission facilities may be eligible for treatment comparable to any approval that the Commission might provide to HTP in this proceeding. Specifically, LIPA requests that, if the Commission decides to give HTP the ability to propose a rate schedule to recover the costs of providing such reliability benefits, the Commission make such opportunity available to Neptune and Cross Sound Cable as well.

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[127] IPPNY November 13, 2012 Answer at 24-25 (citing NYPA April Minutes of the Board of Trustees at 17).

[128] *Id.* at 26 (citing Younger Aff. ¶ 82).

[129] An offtake contract is an agreement to buy/sell a certain amount of future production.

d. HTP's Response

125. In its November 30, 2012 Answer, HTP responds that the Services Tariff does not require it to return to NYISO any UDRs not used to sell or import capacity. HTP asserts that the Services Tariff permits a UDR holder to either (1) use its UDRs to offer generation from outside the NYISO footprint into the NYISO ICAP auctions and to satisfy the MLCR or (2) elect to return its UDRs to NYISO for a given year by informing NYISO of such decision no later than August 1 of the year preceding the Capability Year in question. HTP further asserts that it appears that UDR holders have a third option, namely to retain the rights. HTP states that there is no indication either in the Services Tariff or in the NYISO Installed Capacity Manual that a UDR holder must return its rights, much less that it must do so without receiving any compensation.[130] HTP thus requests that the Commission find that the Services Tariff does not require a UDR holder to return to NYISO any UDRs that the UDR holder is not using, or cannot use, to sell capacity. HTP adds that, if the Commission makes such a finding, then there will be no need to establish a compensation mechanism and UDR holders would be free to negotiate with LSEs or other interested parties to sell their rights.

126. HTP contends that if, however, NYISO requires a UDR holder, such as HTP, to return its UDRs to NYISO and NYISO takes the benefits that HTP created and uses them to create quantifiable benefits that are then given to other parties, free of charge, then HTP must be fairly compensated for the regulatory taking.[131] HTP responds that it is not, as NYISO claims, asserting that it should be guaranteed cost recovery through the NYISO capacity markets, nor is it claiming that the imposition of Offer Floor mitigation, in and of itself, would deprive HTP of the opportunity to recover its costs. HTP argues that while the Commission has held that generators in competitive markets are assured only the *opportunity* to recover costs, the Commission has emphasized that resulting rates

[130] HTP November 30, 2012 Answer at 42-43 (citing NYISO Manual 4, Installed Capacity Manual at 4-79 (Jan. 2012) (stating the holder of External UDRs "may return" such rights to NYISO to be considered as emergency support to reduce the IRM and the MLCR)).

[131] HTP asserts that NYISO does not claim that the reliability benefits are not real or not quantifiable, but simply questions their magnitude.

were lawful because the generator in question had the opportunity to earn revenues from other sources.[132]

Commission Determination

127. We reject HTP's arguments for an additional cost-based compensation mechanism for reliability benefits. HTP argues, in effect, that capacity suppliers using UDRs provided by HTP may not clear in NYISO's capacity market if mitigated. In HTP's view, such mitigated capacity that does not clear should, nevertheless, receive some cost-based compensation for a reliability benefit it inevitably provides. Thus, HTP's position is that NYISO's rules that compensate all cleared resources at a uniform market clearing price is unjust, unreasonable, and unduly discriminatory. We disagree.

128. The HTP Project's UDRs give it the right to be treated as if the resource were located in the NYC locality, thereby allowing it to contribute to the locational minimum ICAP requirement. HTP has the right to sell its capacity in the NYISO spot market auctions. The fact that it is assigned an Offer Floor does not deprive HTP of its UDRs. It can still offer into the capacity market but it must do so at a price no lower than its Offer Floor. For-profit entities, like HTP, assume risk in exchange for an opportunity to recover the cost of their projects and a return in a competitive market on the same basis as other NYC generation capacity. Mitigation, if it applies to HTP, helps ensure that capacity suppliers using UDRs offer into the ICAP market competitively as determined by the offer floor. If HTP is unable to sell its capacity at that Offer Floor, it simply means that HTP's capacity is uneconomic. A competitive market that is able to meet specified reliability requirements does not allow for separate, cost-based compensation for a reliability (or other) benefit provided by a non-cleared capacity resource, including non-cleared capacity resources that are subject to mitigation.

129. HTP claims that the import capability provided by its transmission facilities will be reflected in NYISO's IRM and MLCR calculations, and that this fact alone warrants compensation if mitigation applies. HTP also claims that compensation would not be required if a UDR holder that cannot use its UDRs to import capacity is not required to return the UDRs to NYISO. As NYISO answers, the determination of IRM and MLCR is based on system-wide facilities and does not translate into any specific benefit attributable to any particular facility. We agree with NYISO that HTP has not established that the HTP Project will actually provide substantial and quantifiable

[132] HTP November 30, 2012 Answer at 46 (citing *ISO New England Inc*., 132 FERC ¶ 61,044, at P 28 (2010); *see also ISO New England Inc*., 128 FERC ¶ 61,023, at P 33 (2009)).

benefits beyond those reflected in the capacity market price in the ICAP market. Also, as NYISO answers, the NYISO ICAP manual states that the holder of External UDRs "may return" such rights to the NYISO to be considered as emergency support.[133]

130. Accordingly, for the above reasons, we deny HTP's request for clarification that it may file, under section 205 of the FPA, a rate schedule to receive compensation for these claimed reliability benefits.

The Commission orders:

(A) HTP's Complaint is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) NYISO is hereby directed to submit a compliance filing within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[133] HTP November 30, 2012 Answer at 42-43 (citing NYISO Installed Capacity Manual at 4-79 (Jan. 2012)).