

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Consolidated Edison Company of New York, Inc.,)	
Orange and Rockland Utilities, Inc.,)	
New York State Electric and Gas Corp.,)	
Rochester Gas and Electric Corp., and)	
Central Hudson Gas and Electric Corp.)	Docket No. EL15-26-000
)	
v.)	
)	
New York Independent System Operator, Inc.)	

**PROTEST OF INDEPENDENT POWER PRODUCERS OF
NEW YORK, INC. AND ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ Independent Power Producers of New York, Inc. (“IPPNY”)² and Electric Power Supply Association (“EPSA”)³ hereby protest the complaint filed by Consolidated Edison of New York, Inc. (“Con Edison”), Orange and Rockland Utilities, Inc., New York State Electric and Gas Corporation, Rochester Gas and Electric Corporation, and Central Hudson Gas and Electric Corporation (collectively, “TOs” or “Complainants”) on December 4, 2014, in the above-captioned docket (the “Complaint”). In the Complaint, the TOs

¹ 18 C.F.R. § 385.211 (2014).

² IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York. IPPNY’s members include suppliers and marketers that participate in the New York Independent System Operator Inc.’s capacity markets. This pleading represents the position of IPPNY as an organization, but not necessarily the views of any particular member with respect to any issue. IPPNY filed a doc-less Motion to Intervene in this proceeding on December 6, 2014.

³ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40% of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA filed a doc-less Motion to Intervene in this proceeding on January 5, 2015.

argued that the buyer-side market power mitigation measures (“BSM Measures”) currently in place as Attachment H to the New York Independent System Operator, Inc.’s (“NYISO”) Market Administration and Control Area Services Tariff (“Services Tariff”) are “unjust, unreasonable, unduly discriminatory and preferential” in the absence of a competitive entry exemption.⁴ Asserting that “purely private investment” should be able to invest based on their own expectations of future retirements, the TOs requested that the Commission direct the NYISO to add this exemption to its Services Tariff.⁵ As demonstrated herein and in the attached affidavit of Mr. Mark D. Younger of Hudson Energy Economics, LLC,⁶ the TOs have failed to meet their burden under Section 206 of the Federal Power Act (“FPA”) to demonstrate that the NYISO’s existing BSM Measures are unjust and unreasonable. Contrary to the TOs’ position, the BSM Measures do not prevent a new entrant from betting its own (or any of its private or public investors’) money on its own project assumptions. As Mr. Younger establishes, the BSM Measures simply protect the market if the new entrant turns out to be wrong. The Commission approved the BSM Measures to achieve this very result.⁷

Moreover, the TOs have proposed a competitive entry exemption that mirrors the NYISO’s proposal with two material modifications. However, as further demonstrated herein, the NYISO’s proposal, which was soundly rejected in the stakeholder process as part of a package of exemptions last year, is fatally flawed, and those flaws alone render it unjust and

⁴ Complaint at 2.

⁵ *Id.*

⁶ Docket No. ER15-26-000, *Consolidated Edison Co. of N.Y., Inc. et al. v. New York Indep. Sys. Operator, Inc.*, Protest of Independent Power Producers of New York, Inc. and Electric Power Supply Association (Jan. 15, 2014), Affidavit of Mark D. Younger (“Younger Affidavit”), attached hereto as Exhibit A.

⁷ See *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at PP 28–29 (2008) (characterizing the protection that the BSM Measures would afford against artificial price suppression as “the key element”).

unreasonable. Finally, the TOs' two changes to the NYISO's competitive entry exemption would only weaken it further. The Commission should, therefore, reject the TOs' complaint.

I. BACKGROUND

As the NYISO established in 2008, when these rules were first implemented, the BSM Measures were designed to replicate competitive outcomes. In their Complaint, the TOs challenge a core principle established early on by the Commission that the BSM Measures must be applied to all new entrants, without exception, to ensure that uneconomic projects are not allowed to evade the application of the BSM Measures and thereby artificially suppress installed capacity ("ICAP") prices. To understand the scope and importance of the standard as applied in New York, it is necessary to review the history of the Commission's requirement for, and development of, the existing BSM Measures.

The NYISO market participants began examining the need to revise market power mitigation rules in the New York City ICAP market in 2006. Over the course of the discussions that ensued, some market participants noted that the majority of issues in the New York City ICAP market did not involve the exercise of supplier-side market power by existing suppliers (which were already subject to market power mitigation measures), but rather the exercise of buyer-side market power through new, uneconomic entry to the market (which was not subject to any market power mitigation measures). Nevertheless, in September 2006, the NYISO's Management Committee ("MC") voted to make the market power mitigation rules that applied to existing suppliers more stringent but did not address the myriad issues related to uneconomic entry.

After a stakeholder process and appeal to the NYISO Board of Directors, on December 22, 2006, the NYISO filed a one-sided proposal with the Commission to revise its Services

Tariff in accordance with the MC's vote.⁸ In their protests, IPPNY, along with other market participants, demonstrated that the NYISO Initial In-City Filing was flawed because it failed to institute the protections against buyer-side market power necessary to prevent uneconomic, new entry from harming the New York City ICAP market. Finding that the supplier-side revisions were not just and reasonable, the Commission ultimately rejected the NYISO's Initial In-City Filing,⁹ and, on its own motion, determined that significant issues had been raised concerning the ability of the New York City capacity market to attract and retain adequate resources and—when settlement efforts failed—directed the NYISO to propose a comprehensive revision of the In-City ICAP markets.¹⁰

On October 4, 2007, in response to the Commission's In-City Order, the NYISO proposed a set of more comprehensively restructured In-City ICAP market rules.¹¹ The mitigation rules in the NYISO's In-City Compliance Filing properly included BSM Measures to prevent artificial ICAP price suppression by new, uneconomic entrants. Several parties, including Con Edison and the New York Power Authority ("NYPA"), protested the In-City Compliance Filing. Those protests did not take issue with how the BSM Measures would be implemented, but rather argued only that, generally, the BSM Measures were unnecessary.

The Commission approved the BSM Measures "to prevent uneconomic entry that would reduce prices in the NYC capacity market below just and reasonable levels."¹² Absent adequate prices signaling a need for new entry, the Commission found a market that seems to benefit

⁸ See Docket No. ER07-360-000, *New York Indep. Sys. Operator, Inc.*, Tariff Revisions to Modify Installed Capacity Market Mitigation Measures Applicable to Certain In-City Generating Units (Dec. 22, 2006) ("NYISO Initial In-City Filing").

⁹ See *New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182, at P 17 (2007).

¹⁰ See *New York Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,024, at P 15 (2007) ("In-City Order").

¹¹ Docket No. EL07-39-000, *supra*, Compliance Filing (Oct. 4, 2007), at 1 ("In-City Compliance Filing").

¹² *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 100 (2008).

consumers by providing low cost capacity in the short term ultimately harms consumers by permanently depressing capacity prices below the net cost of new entry (“Net CONE”), thereby discouraging investment, driving up prices, and threatening reliability in the long term.¹³ The Commission further found that it had the statutory obligation to prevent such suppression and ensure prices were just and reasonable.¹⁴ To prevent this means of artificial price suppression, the NYISO’s revised Services Tariff imposed an offer floor on the ICAP offers of new entrants equal to the lesser of 75% of Mitigated Net CONE (the “Default Offer Floor”) or the new entrant’s own Net CONE, unless the NYISO determined that the new entrant would be economic, and, thus, exempt from mitigation. The NYISO makes this determination by performing a Mitigation Exemption Test (“MET”), which has two separate parts collectively designed to replicate competitive pricing. Under Part A of the MET, the new entrant is exempt from offer floor mitigation if the NYISO determines that the ICAP clearing price three years out is expected to be above the Default Offer Floor. Under Part B of the MET, the new entrant is exempt if, starting three years out, the NYISO determines that the average expected clearing price in the first three years of its operation is expected to be higher than the new entrant’s own Net CONE. The Commission approved the BSM Measures, noting that “while this mitigation applies to all new entry into the in-City market, this mitigation is aimed at preventing uneconomic entry by net buyers of capacity, the only market participants with an incentive to sell their capacity for less than its cost.”¹⁵

Several stakeholders, including IPPNY and the NYISO itself, requested rehearing of the Commission’s In-City Compliance Filing to address the Commission’s misapprehension that the

¹³ *Id.* at PP 102–103.

¹⁴ *Id.* at P 103.

BSM Measures should only apply to net buyers. The NYISO's request for rehearing demonstrated at length why the net buyer limitation must be removed. Specifically, the NYISO stated that:

Limiting the application of these measures “only to net buyers bringing uneconomic capacity into the market” could undermine enforcement because such a limitation could necessarily give rise to opportunities to avoid application of the measures. New “uneconomic” generation may be developed and brought on line by a developer with no apparent connection to a “net buyer.” Nevertheless, that developer could have entered into a financial agreement, such as a “contract for differences,” with another entity that would have the effect of providing an out of-market subsidy and may enable the “uneconomic entry” by the developer. The NYISO would have no knowledge of such private contractual arrangements; all it would see is entry by an entity that is not itself a “net buyer.”¹⁶

In this regard, the NYISO further stated that it “does not have access to the full range of contractual arrangements that may be applicable to a new generator, would have no way of verifying that any set of contracts that might be provided to the NYISO constituted all of the relevant agreements, and may not be in a position to fully assess the significance of such documents even if they were furnished to the NYISO.”¹⁷ Moreover, the NYISO stated that increasing its access to contracts and agreements would not resolve this concern because “contracts that provide a subsidy to the developer would not have to be specific to a particular unit. Financial contracts that are not explicitly linked to the new unit could, nonetheless, be fully effective in subsidizing uneconomic entry, as long as a sufficient subsidy flowed to the developer.”¹⁸ Thus, the NYISO properly reasoned that limiting the application of the uneconomic entry provisions solely to net buyers would allow uneconomic entrants to avoid

¹⁶ See Docket No. EL07-39-000, *supra*, Request for Clarification (Apr. 7, 2008), at 3 (“NYISO Rehearing Request”) (citations omitted).

¹⁷ *Id.* at 3–4.

¹⁸ *Id.* at 4.

mitigation, severely undermining the effectiveness of the BSM Measures.

In addition to its concerns that it could not effectively detect these arrangements, the NYISO emphasized that the reasons uneconomic generation was being built were secondary to the core issue of its adverse effects on the markets.¹⁹ The Commission ultimately granted rehearing and ruled that the BSM Measures should be applied to all new entry to meet the core purpose of these rules, holding:

We find that *all* uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address. Parties requesting rehearing have convinced us that *defining net buyers raises significant complications and provides undesirable incentives for parties to evade mitigation measures.*²⁰

In 2012, the NYISO's Market Monitoring Unit ("MMU") became concerned that the price forecast used to test whether an entrant to the market is uneconomic might understate future unit retirements and, therefore, inaccurately understate forecast prices. The MMU recommended that the NYISO "grant exemptions to suppliers engaged in purely private investment,"²¹ thereby allowing pure merchant investors to make independent determinations of the likely ICAP price based on their own data regarding potential retirements. The MMU made the same recommendation in 2013. Contrary to the TOs' characterization, the MMU did not

¹⁹ *Id.* at 3.

²⁰ *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008) (emphasis added) ("Order on Rehearing").

²¹ David B. Patton et al., NYISO, 2012 State of the Market Report for the New York ISO Markets 24 (2013), available at http://www.nyiso.com/public/webdocs/markets_operations/documents/Studies_and_Reports/Reports/Market_Monitoring_Unit_Reports/2012/NYISO2012StateofMarketReport.pdf ("2012 SOM Report").

state that this rule change was necessary.²² Rather, the MMU has simply characterized this rule change as a potential improvement to the market design.²³

Responding to the MMU's recommendations, the NYISO proposed a competitive entry exemption to its BSM Measures at the ICAP Working Group meeting held on December 3, 2012.²⁴ The proposal would exempt from offer floor mitigation a project that "has no contracts (direct or indirect) with any NY distribution company, Municipal Utility, or any governmental entity including but not limited to Public Authorities."²⁵ For enforcement, the NYISO proposal relied solely on a project self-certifying that it had no such contracts only up until it first began producing energy.²⁶

NYISO stakeholders roundly rejected the NYISO's proposed competitive entry exemption as part of a package motion through the NYISO's stakeholder process. At its meeting on May 12, 2014, the NYISO's Business Issues Committee ("BIC") voted on the NYISO's proposal in a motion that also included additional proposed exemptions.²⁷ Only 18.6% of the committee members approved of the measure.²⁸ The NYISO presented the proposal, unchanged,

²² See Aff. of Richard B. Miller on Behalf of the Complainants ¶ 33 (Dec. 4, 2014).

²³ See, e.g., 2012 SOM Report at 23-24 (listing the competitive entry exemption concept as part of a list of potential improvements to the buyer-side mitigation measures).

²⁴ See Nicole Bouchez et al., NYISO, Proposed ICAP Buyer Side Mitigation Competitive Entry Exemption (2012), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2012-12-03/Competitive_EntryExemptionFINAL12042012.pdf (emphasis added).

²⁵ *Id.* at 6.

²⁶ *Id.* at 8.

²⁷ *Business Issues Committee Meeting Final Motions*, NYISO 2 (May 12, 2014), http://www.nyiso.com/public/webdocs/markets_operations/committees/bic/meeting_materials/2014-05-12/051214%20BIC%20Final%20Motions.pdf.

²⁸ *Id.*

at the MC meeting on May 28, 2014.²⁹ With only 32.5% approval, the proposal fell far short of the 58% needed to survive the stakeholder process and be filed with the Commission under Section 205 of the FPA.³⁰

The Complainants now seek to add a competitive entry exemption to the BSM Measures in the Services Tariff, pursuant to Section 206 of the FPA, with two material modifications. First, the Complainants would allow an even greater threshold of contracts with Non-Qualifying Entry Sponsors³¹ before disqualifying entrants as uneconomic. Second, the Complainants would revise the self-certification form and associated tariff language that proposed new entrants would be required to present to the NYISO to demonstrate that they are eligible for the competitive entry exemption because they are not party to any direct or indirect non-qualifying contractual relationships³² with Non-Qualifying Entry Sponsors.

As discussed below, the Commission should deny the Complaint. First, the Complainants have not met their burden under Section 206 of the FPA to demonstrate that the existing BSM Measures are unjust and unreasonable. Despite their bald assertions to the contrary, the Complainants have failed to adduce any evidence that the BSM Measures impose an impediment to economic facilities entering into the NYISO market. Thus, as a threshold matter, the Complaint must be dismissed. Second, even if, *arguendo*, Complainants had met

²⁹ *Management Committee Meeting Final Motions*, NYISO 1 (May 28, 2014), http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-05-28/052814_MC_Final_Motions.pdf.

³⁰ *Id.*

³¹ Non-Qualifying Entry Sponsors are defined in the NYISO's proposal as a Transmission Owner, a Public Power Entity, or any other entity with a Transmission District in the NYCA or an agency or instrumentality of New York State or a political subdivision thereof.

³² Non-qualifying contractual relationships are defined in the NYISO's proposal as including, "but not limited to, any contract, agreement, arrangement, or relationship (for the purposes of this Section 23.4.5.7.6, a 'contract') that: (a) directly relates to the planning, siting, interconnection, operation, or construction of the Generator or UDR project that is the subject of the request for the Competitive Entry Exemption; (b) is for the energy or capacity produced by or delivered from or by the Generator or UDR project, including an agreement for rights to schedule or use a UDR; or (c) provides services, financial support, or tangible goods to a Generator or UDR project."

their burden in this case, which they have not, the competitive entry exemption as originally proposed by the NYISO in the stakeholder process is flawed. Third, the changes that the Complainants offer to the NYISO's proposed competitive entry exemption would only further weaken that proposal, creating an even more unjust and unreasonable result.

II. THE COMPLAINANTS HAVE FAILED TO MEET THEIR BURDEN UNDER SECTION 206 OF THE FPA TO DEMONSTRATE THAT THE EXISTING BSM MEASURES ARE UNJUST AND UNREASONABLE.

Under Section 206 of the FPA, Complainants bear the burden of demonstrating that the existing tariff provisions they complain of are “unjust, unreasonable, unduly discriminatory, or preferential.”³³ Complainants further bear the burden of “[e]xplain[ing] how the action or inaction violates applicable statutory standards or regulatory requirements,”³⁴ and must, among other things, “[m]ake a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction.”³⁵ The TOs fail to meet their burden under Section 206. Rather, by arguing that the BSM Measures should not apply to all new entrants, Complainants seem to seek a second or third bite at the apple. The Commission exhaustively addressed whether to limit the applicability of BSM Measures to certain types of entrants in the lengthy procedures involved in implementing those measures.

As discussed in Section I, the Commission initially limited the BSM Measures to net buyers, but refined its determination on rehearing in response to the demonstration made by the NYISO and others that the effect of uneconomic entry on the market was the key element and such a limitation “could undermine enforcement because [it] could necessarily give rise to

³³ 16 U.S.C. § 824e(b) (2014); *see also Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578–79 (D.C. Cir. 1993).

³⁴ 18 C.F.R. § 385.206(b)(2).

³⁵ *Id.* § 385.206(b)(4).

opportunities to avoid application of the measures.”³⁶ In other words, the adoption of a competitive entry exemption would allow new entrants that are, in fact, uneconomic to evade the BSM Measures. The Commission, therefore, properly found that “*all* uneconomic entry has the effect of depressing prices below the competitive level,” that “this [was] the key element that mitigation of uneconomic entry should address,” and that attempting to limit the application of BSM Measures only to certain types of entrants “raises significant complications and provides undesirable incentives for parties to evade mitigation measures.”³⁷

In their Complaint, the TOs seek to relitigate a settled matter—the limitation of new entry mitigation to a defined subset of entrants—rather than demonstrate that the existing BSM Measures, as implemented, are unjust and unreasonable. The only assertion the TOs make as to the unjustness of the existing measures is a summary assertion that those measures somehow impede economic new entry. As discussed below and in Mr. Younger’s attached affidavit, the TOs’ assertions fail to rise to the level of demonstration necessary to meet their burden under FPA Section 206 and the actual facts related to new entry contradict the TOs’ unsupported claims.

A. The Complainants Have Failed To Demonstrate That The BSM Measures Impede Economic New Entry.

Central to the TOs’ argument is the notion that the existing BSM measures “can apply to all new entry, even if it is merchant supply, creating an unnecessary and unreasonable barrier for such new entry that prevents competitive investment from entering the market.”³⁸ Presumably, the barrier to which the TOs refer is the under-compensation of a new entrant caused by the NYISO’s erroneous imposition of offer floor mitigation on the new entrant. The TOs claim that

³⁶ NYISO Rehearing Request at 3.

³⁷ *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008) (emphasis added).

³⁸ Complaint at 3.

the NYISO's performance of its MET can lead to over-mitigation due to the NYISO's underestimation of future generator retirements. The TOs, however, fail to offer any evidence that the NYISO's application of offer floor mitigation under the BSM Measures actually under-compensates generators or prevents any potential investors from entering the market. Rather, the TOs merely speculate, without any demonstrations of the harm imposed on these potential investors, that the existing measures might act as a barrier to economic entry.

As Mr. Younger addresses in his affidavit, the evidence proves to the contrary: the NYISO's application of the BSM Measures has not impeded economic new entry. Since the BSM Measures went into effect, the NYISO has completed the MET for eight projects, five of which did not have any apparent contracts.³⁹ Based on the NYISO's published reports, two of the merchant projects, the 512 MW Bayonne Energy Center ("BEC") and the proposed 650 MW CPV Valley Energy Center ("CPV"), were determined to be economic and, therefore, exempt under the MET.⁴⁰ BEC has been built and is operating, and CPV committed over \$22 million by accepting its interconnection Class Year cost allocation.⁴¹ A third project, the Linden VFT transmission upgrade, was tested under the MET before the NYISO began publishing MET determinations, but it is evident from spot market prices at the time of its entry that the project either received an exemption or its offer floor was low enough that it did not prevent the project's ICAP offers from clearing in the market.⁴² The NYISO determined that a fourth merchant project, NRG's 200 MW Berrians GT I and 50 MW Berrians GT II project, was subject to offer floor mitigation, but NRG accepted its Class Year cost allocation and committed

³⁹ Younger Affidavit ¶ 33.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

to pay a total of \$2,268,000 in interconnection costs for the combined Berrians GT and GT II project.⁴³ With respect to the fifth merchant project, the NYISO determined that NRG's 250 MW Berrians GT III project was subject to offer floor mitigation, but NRG accepted its Class Year cost allocation, committing to pay a total of \$11,818,563.⁴⁴ As Mr. Younger explains, the fact that these projects have accepted their Class Year cost allocations illustrates that the BSM Measures do not prevent a new entrant from being able to go forward based on its own pro forma expectations.⁴⁵ Thus, the evidence contradicts Complainants' speculation and demonstrates that unsubsidized new entry has occurred under the existing BSM Measures.

Meanwhile, as the MMU has found, the BSM Measures have worked as intended. For example, reviewing the results of Class Year 2011, the MMU found that these rules "limit[ed] the effects of uneconomic new entry as two projects were subject to Offer Floor mitigation."⁴⁶

Perhaps most critically, the Complainants' argument that the BSM Measures, applied equally to all new entrants, will hinder economic entry is neither economically rational nor is it logically sound. The Complainants argue that an otherwise economic generator would not enter the market if subject to an offer floor under the BSM Measures. But, as Mr. Younger states in his affidavit,

[a]n offer floor prevents a project from selling ICAP when it is uneconomic. If an investor's own forecasts concerning projected retirements (or any other factors, for that matter) and associated higher ICAP clearing prices are correct and its new project is economic, there is no harm in applying the offer floor to the

⁴³ *Id.* ¶ 34.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See* David B. Patton et al., NYISO, 2013 State of the Market Report for the New York ISO Markets iii (2014), available at http://www.nyiso.com/public/webdocs/markets_operations/documents/Studies_and_Reports/Reports/Market_Monitoring_Unit_Reports/2013/2013%20State%20of%20the%20Market%20Report.pdf .

project. Its offers will clear the market anyway because the market price will be above its offer floor.⁴⁷

In addressing the complaint in the HTP proceeding just over a year ago, the Commission emphasized this same point.⁴⁸ An offer floor does not affect whether a new entrant can offer its capacity into the New York markets. It simply mandates that the new entrant must do so at a competitive bid. If, for example, the new entrant's retirement assumptions are sound, its project will be economic and it will clear the market.⁴⁹

The Complainants' argument also fails to account for the presence in the existing BSM measures of the phase-out of the offer floor once a new entrant has cleared its MWs in the market for any twelve months, whether consecutive or not.⁵⁰ If, as Mr. Younger demonstrates, a new entrant's project is truly economic, "its offer floor requirement will be eliminated just twelve months after it enters the market."⁵¹ Truly economic projects should not, therefore, be deterred by the presence of an offer floor, but rather—as the Commission previously has determined—given efficient incentives to invest in the market based on the assurances that the

⁴⁷ Younger Affidavit ¶ 37.

⁴⁸ See *Hudson Transmission Partners, LLC v. New York Independent System Operator, Inc.*, 145 FERC ¶ 61,156, at P 128 (2013).

⁴⁹ With respect to the MMU's concern that the price forecast used to test whether an entrant to the market is uneconomic might understate future unit retirements, and, therefore, inaccurately understate forecast prices, the NYISO stakeholder process has begun to address potential enhancements to the market rules for forecasting retirements and mothballing. See Younger Affidavit ¶ 22. These enhancements could be a more narrowly tailored and balanced way to address the MMU's concern without unduly exposing the market to under-mitigation with the adoption of a competitive entry exemption.

⁵⁰ This has been demonstrated by the experience of the 575 MW facility owned by Astoria Energy II ("AE II"), which is no longer subject to offer floor mitigation because it was able to clear its ICAP for 12 months over the past two years. See *id.* ¶ 37 n.54.

⁵¹ *Id.* ¶ 37.

BSM Measures keep uneconomic entry from artificially suppressing market prices and distorting market signals.⁵²

Nor does the Complainants' claim that the existing BSM Measures may jeopardize the development of necessary reliability projects follow rational economic principles. Mr. Younger demonstrates that if the market reaches a capacity shortage that would warrant such a project, that shortage would cause prices to rise above the default offer floor and allow the new entrant to earn revenues immediately.⁵³ Mr. Younger explains that the Default Offer Floor is set sufficiently below the price on the demand curve corresponding to the minimum level of capacity that is required to meet reliability requirements that a new entrant subject to an offer floor "would clear the market well before the NYISO ran short of capacity."⁵⁴ Further, even if reliability was threatened by the retirement of a generator, the generator could be retained in service through a reliability agreement until the reliability threat was addressed.⁵⁵

Furthermore, Mr. Younger demonstrates that the Complainants mistakenly represent the correlation between having the existing BSM Measures and the need for out-of-market contracts in the ICAP market. In fact, the effect is just the opposite: whereas a universally applied offer floor reduces risk for economic entrants and thereby lowers their capital costs, increasing the risk of oversupply in the market by allowing uneconomic entry through under-mitigation makes it "more likely that the NYISO has to rely upon out-of-market contracts to induce new entry."⁵⁶ As Mr. Younger establishes, preserving the current balance between the supplier-side and buyer-

⁵² See *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211, at P 105 (2008) (holding that the competitive markets will foster efficient levels of investment "only if market participants can expect prices that provide a reasonable opportunity to recover the costs of needed investment.").

⁵³ See *id.* ¶ 38.

⁵⁴ *Id.* ¶ 39.

⁵⁵ *Id.* ¶ 41.

⁵⁶ *Id.* ¶ 42.

side rules is critical; the real world impact of having failed to apply the BSM Measures as designed proved devastating.⁵⁷ Illogical and unsupported speculation notwithstanding, the Complainants have failed to provide any evidence beyond the realm of unsupported assertion that the existing BSM Measures create any barrier or impediment to an otherwise economic project entering New York's ICAP market.

Finally, the Complainants' reference to the competitive entry exemption in the PJM Regional Transmission Organization ("PJM") tariff does not provide any support for their assertion that the NYISO requires such exemption rules. First, the Commission accepted PJM's proposed competitive entry exemption under FPA § 205, which did not require PJM to prove that its existing tariff is unjust and unreasonable.⁵⁸ The fact that the Commission found PJM's proposed competitive entry exemption to be a just and reasonable change to PJM's tariff does not establish that PJM's tariff was unjust and unreasonable without a competitive entry exemption, much less that the Services Tariff, which is materially different from PJM's tariff, is unjust and unreasonable without the Complainants' proposed competitive entry exemption, which is materially different from PJM's exemption.

Moreover, PJM's competitive entry proposal was broadly supported by stakeholders because it was one element of a comprehensive package of reforms to PJM's Minimum Offer Price Rule, which was the product of a negotiated settlement.⁵⁹ Unlike the process in PJM, the NYISO's stakeholders were unable to reach agreement on a comprehensive package of reforms.⁶⁰ Instead, the TOs requested that the Commission strip out just one aspect of the

⁵⁷ *Id.* ¶¶ 8, 30.

⁵⁸ *PJM Interconnection, LLC*, 143 FERC ¶ 61,090, at P 1 (2013).

⁵⁹ *Id.* at P 12.

⁶⁰ *See Younger Affidavit* ¶¶ 25–26.

proposal and order the NYISO to solely adopt a competitive entry exemption of their unique design. The suggestion that the NYISO must have a competitive entry exemption simply because PJM and its stakeholders saw fit to adopt a competitive entry exemption is not only legally unsupported, but also fundamentally inconsistent with the Commission's established policy of allowing for regional differences.⁶¹

Second, PJM's market has important differences from the NYISO's market. Mr. Younger explains that PJM operates a forward market, and, therefore, it "makes capacity obligation decisions at the same time that investors decide whether to enter the market."⁶² Whereas a system such as PJM's with a forward market incentivizes investors to bid entry costs for certain resources into the market and choose whether to enter based on whether those costs clear the market, New York's shorter-term system does not afford the ICAP market the same ability to show whether a developer's entry will be economic. Mr. Younger shows that, contrary to the Complainants' assertion, assuring mitigation of uneconomic entry is critical in New York's market because "the NYISO market design itself does not provide such a direct feedback."⁶³ Instead, as Mr. Younger explains, the NYISO has devised a structure where all resources are tested using the same criteria with determinations issued at an early stage in project development.⁶⁴ Thus, the Commission's acceptance of a competitive entry exemption for PJM should not be given any weight in deciding whether the TOs have met their burden of demonstrating the BSM Measures are unjust and unreasonable.

⁶¹ See *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 10 ("Absent a single national power market, the development of regional markets is the best method of facilitating competition within the power industry.")

⁶² Younger Affidavit ¶ 43.

⁶³ *Id.*

⁶⁴ See *id.*

Absent any factual evidence of, or rational basis for, the TOs' claims, the Commission should reject the Complaint due to the TOs' failure to meet their burden under FPA Section 206 of proving that the BSM Measures are unjust and unreasonable.

IV. THE COMPETITIVE ENTRY EXEMPTION AS PROPOSED BY THE NYISO IN THE STAKEHOLDER PROCESS WAS FLAWED.

The competitive entry exemption that the NYISO proposed in its stakeholder process was challenged repeatedly during the stakeholder process because it is fundamentally flawed in several material respects. First, the NYISO's proposal relies on a process of self-certification in which it must trust new entrants to certify that they are not party to any prohibited contracts. However, the weaknesses in such a system were discussed at length, and highlighted by the NYISO itself, during the discussions around implementing potential exemptions to the BSM Measures. As the NYISO demonstrated to the Commission when the BSM Measures were first implemented, it not only lacks access to all the contractual arrangements that may be applicable to a new generator, but increasing its access to contracts and agreements would not resolve the concern because "contracts that provide a subsidy to the developer would not have to be specific to a particular unit. Financial contracts that are not explicitly linked to the new unit could, nonetheless, be fully effective in subsidizing uneconomic entry, as long as a sufficient subsidy flowed to the developer."⁶⁵ By proposing a self-certification system, the NYISO essentially abandons any notion of reviewing a developer's contracts, and also cedes to the developer the work of determining whether those contracts create a subsidy,⁶⁶ however indirect. The system, as proposed, contains effectively no oversight. As Mr. Younger states in his affidavit, "the

⁶⁵ NYISO Rehearing Request at 4.

⁶⁶ Varying definitions and interpretations of what is and is not a subsidy also render such a process susceptible to the very manipulation the BSM Measures are intended to prevent.

NYISO’s proposed competitive entry exemption provides a blueprint for avoiding mitigation for subsidized projects: provide the subsidy in a way that is not closely tied to the new unit.”⁶⁷

Second, the proposal does not adequately account for public funding through indirect means. Mr. Younger further demonstrates that the NYISO proposal does not account for how a project sponsor can ensure it has no indirect contracts with non-qualified entities.⁶⁸ The NYISO proposal, however, does not require a certification from each intermediary party, only from the project sponsor itself.⁶⁹ Thus, the NYISO proposal effectively requires the project sponsor to have comprehensive knowledge of each contract to which every one of its intermediate parties may be subject. By limiting the certification requirement to the developer alone, the NYISO proposal depends entirely on the project sponsor to arrive at a complete and total understanding of all of its intermediaries’ affairs—a position no project sponsor is likely to attain. There is therefore virtually no way under the NYISO proposal to assure “that there are not a string of contracts that ultimately provide a subsidy to the project.”⁷⁰

Third, the duration for required certifications is insufficient. The NYISO proposal ceases to require an entrant’s self-certification that it has no inappropriate contracts as soon as that entrant begins providing power. As Mr. Younger states, “[t]he existence of any out-of-market contracts after a new entrant begins providing power should be a clear warning sign that inappropriate behavior may have occurred.”⁷¹ Mr. Younger demonstrates that there would be no rational reason for any entity to sign an out-of-market contract with a unit that has already entered the market (*i.e.*, after its costs have been sunk) unless the promise of such a contract

⁶⁷ Younger Affidavit ¶ 48.

⁶⁸ *Id.* ¶ 49.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 57.

induced the unit's decision to enter the market in the first place.⁷² The failure of the NYISO proposal to require continued certification by new entrants after they begin providing power is irrational and will only serve as a roadmap for circumventing mitigation simply by delaying the execution of out-of-market contracts. Requiring continued annual certifications would, at worst, be superfluous. Failure to do so will almost certainly lead to under-mitigation and, concomitantly, artificial price suppression.

Fourth, the penalty structure will not be a sufficient deterrent. The NYISO-proposed competitive entry exemption also assigns woefully inadequate penalties to violators.⁷³ The proposal would penalize projects found to have offered false, misleading, or inaccurate information unless the NYISO finds that it would have granted the exemption if it had received complete and accurate information.⁷⁴ The penalty the proposed tariff terms would impose is 150% of the maximum ICAP revenue the project could have earned in each month it offered, up to a maximum of three years.⁷⁵ Mr. Younger demonstrates that this proposed penalty is inadequate because it grossly underestimates the damage inflicted on markets by uneconomic entry, risks failing to adequately penalize false information not identified for several years, and fails to compensate units made uneconomic and forced from the market due to the NYISO's improper allowance of uneconomic entry.⁷⁶

If the NYISO's proposed competitive entry exemption were not otherwise flawed, the NYISO should apply any uneconomic project's penalty to every month, without limit, that the

⁷² *Id.*

⁷³ *See id.* ¶¶ 50–51.

⁷⁴ Nicole Bouchez, NYISO, Proposed ICAP Buyer-Side Mitigation Modifications – Competitive Entry Exemption, Offer Floor Change, Renewable Generator Exemption, and Municipal Utilities/Coop Exemption 12 (2014), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-05-28/Agenda%2006_CompulsiveEntryExemption.pdf.

⁷⁵ *Id.*

⁷⁶ *See Younger Affidavit* ¶¶ 52–55.

project was permitted to sell into the ICAP market without mitigation, and such penalty should be applied jointly and severally to the uneconomic project and to the Non-Qualifying Entry Sponsor that benefits from the suppression of prices in the capacity market.⁷⁷ Units harmed by the uneconomic entry should be adequately compensated.⁷⁸

Fifth, the NYISO proposal would permit far too broad a range of entities to secure the exemption.⁷⁹ As recommended by the MMU, the competitive entry exemption would apply only to private investment with its own capital at risk. But as Mr. Younger demonstrates, the NYISO exemption as proposed would allow Hydro-Quebec, which is owned by a Canadian governmental province, to qualify for the exemption despite that entity's non-private status.⁸⁰ A competitive entry exemption in line with what the MMU proposed or such as that which is in place in PJM would disallow projects with any governmental backing because, as Mr. Younger notes, "the potential for indirect subsidy only multiplies when the 'merchant' entrant is backed by a governmental entity."⁸¹

Given the myriad flaws in the NYISO's proposed competitive entry exemption, the Commission should not, absent a clear demonstration that the BSM Measures are unjust or unreasonable, impose a measure through a Section 206 filing that was overwhelmingly rejected in the stakeholder process. Rather, the Commission should dismiss the Complaint and find, as it did in the Order on Rehearing, that the existing BSM Measures are necessary to prevent the artificial suppression of prices by uneconomic new entry.

⁷⁷ *Id.* ¶ 52.

⁷⁸ *Id.* ¶ 54.

⁷⁹ *Id.* ¶ 58.

⁸⁰ *See id.* ¶ 59.

⁸¹ *Id.* ¶ 61.

V. THE COMPLAINANTS' PROPOSED CHANGES WEAKEN THE NYISO'S PROPOSED COMPETITIVE ENTRY EXEMPTION.

The changes requested by the TOs in the Complaint only weaken the already flawed competitive entry exemption the NYISO proposed in the stakeholder process. Specifically, the Complainants have modified the NYISO's competitive entry exemption proposal in two ways. First, the Complainants would allow an even greater threshold of contracts with Non-Qualifying Entry Sponsors before disqualifying entrants as uneconomic.⁸² While the NYISO proposed to apply a five percent cap to the total level of the contracts, the Complainants propose applying the five percent cap solely to the above-market portion of the contract. Mr. Younger demonstrates two problems with this proposed change. First, it requires that the NYISO estimate the value of the subsidy, not the total cost of the contracts, which would be prohibitively difficult.⁸³ Second, Mr. Younger notes that the NYISO selected a five percent allowance level based on the presumption that the five percent would derive from the total contract price, not the subsidy. If applied solely to the subsidy, the five percent level goes well beyond a level that could be considered de minimis.⁸⁴ No subsidy should be permitted at all but, at most, a one or two percent allowance should be permitted to prevent the creation of a "conduit for providing five percent subsidies to projects seeking an exemption from uneconomic entry mitigation."⁸⁵

Second, the Complainants would revise the self-certification process. For example, the Complainants' proposal would no longer require a party that had certified its eligibility to notify the NYISO promptly if the information it previously certified ceases to be true. As Mr. Younger demonstrates, this change puts the onus on the NYISO to ensure that a project continues to

⁸² *Id.* ¶ 62.

⁸³ *See id.* ¶ 70.

⁸⁴ *Id.* ¶ 71.

⁸⁵ *Id.*

qualify for the exemption.⁸⁶ If, subsequent to self-certifying, an entrant enters into a prohibited contract, the NYISO, not the entrant, bears the burden of discovering that fact and the NYISO has long been on record that it will not be able to do so. If the NYISO fails to inquire, the exemption would be allowed despite the entry being uneconomic.⁸⁷

The Complainants would further weaken the NYISO's proposal by excusing the executing officer from certifying that parent or affiliate companies will provide information or cooperate with the NYISO. Nor would the Complainants' proposal require that officer to certify that they have knowledge of the facts and circumstances that support the exemption. The Complainants' proposal also would no longer consider a company that failed to provide accurate information as having provided a false, misleading, or inaccurate submission disqualifying it from receiving the exemption. Such weakening of the certification process, which is, as Mr. Younger notes, "the backbone of the NYISO's competitive entry exemption," would frustrate the purpose of such an exemption and deflate any potential success the exemption might otherwise achieve.⁸⁸ Rather than weakening the NYISO's proposed competitive entry exemption, any change to it should have been structured to improve it by, *e.g.*, allowing for more verification of companies' certifications, not less. The process, if implemented, should also provide for higher penalties and an expanded monitoring period as discussed above.⁸⁹

The Complainants' proposed change to the NYISO's proposed certificate form also opens a major loophole that would allow companies in the corporate ladder above the "corporate entity developing the project" to execute contracts with Non-Qualifying Entry Sponsors. This, in

⁸⁶ *Id.* ¶ 65.

⁸⁷ *Id.*

⁸⁸ *Id.* ¶ 68.

⁸⁹ *Id.*

turn, would allow the upstream company to finance the project without having to execute a contract with the corporate entity developing the project. So long as the upstream parent company did not “execute a contract” with the corporate entity developing the project, the officer would not have to disclose the contract. The NYISO’s proposed language does not limit the certification’s reach to contracts executed by the corporate entity developing the project. The NYISO’s proposal requires the certification to cover all contracts, no matter which entity executed them.

Therefore, Complainants’ proposed changes to the NYISO’s competitive entry exemption proposal weaken, rather than strengthen it, and the Complaint must be denied.

VI. CONCLUSION

For the foregoing reasons, the Commission should reject the TOs' complaint in its entirety.

Dated: January 15, 2015

Respectfully submitted,

/s/

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EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Consolidated Edison Company of New York, Inc.,)	
Orange and Rockland Utilities, Inc.,)	
New York State Electric and Gas Corp.,)	
Rochester Gas and Electric Corp., and)	
Central Hudson Gas and Electric Corp.)	Docket No. EL15-26-000
)	
v.)	
)	
New York Independent System Operator, Inc.)	

AFFIDAVIT OF MARK D. YOUNGER

1. My name is Mark D. Younger. I am employed as President of Hudson Energy Economics, LLC. My business address is 480 Pondview Road, Petersburg, New York 12138.
2. My entire professional career has been devoted to matters relating to electric generation and the development of competitive electricity markets. For the past fifteen years, I have been an active participant in the working groups refining the New York Independent System Operator, Inc. (“NYISO”) market structure and developing methods to improve the market design, including all aspects of its energy, ancillary services and installed capacity (“ICAP”) markets. Over this time period, I have also testified in numerous Federal Energy Regulatory Commission (“Commission”) and New York State Public Service Commission proceedings relating to all aspects of the overall NYISO market design. I actively participated in the NYISO stakeholder discussions and submitted affidavits in the associated Commission proceedings concerning the initial development and subsequent refinement to the NYISO’s seller-side and buyer-side ICAP market

power mitigation measures (the latter is referred to herein as, “BSM Measures”) set forth in Attachment H to the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”). In addition, I submitted affidavits in the complaint proceedings before the Commission concerning the NYISO’s application of the BSM Measures, which resulted in additional enhancements to these tariff provisions to provide further transparency and certainty to all market participants. My resume is attached as Exhibit MDY-1.

3. I write this affidavit in support of the Protest of Independent Power Producers of New York, Inc. (“IPPNY”) and Electric Power Supply Association (“EPSA”) of the Complaint of the Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., New York State Electric and Gas Corporation, Rochester Gas and Electric Corporation, and Central Hudson Gas and Electric Corporation (collectively, “Complainants” and “Complaint”) filed on December 4, 2014 in the above-captioned docket. IPPNY and EPSA have asked me to address whether the Complainants have demonstrated their claim that the existing BSM Measures unnecessarily and unreasonably inhibit new competitive investment from entering the market and whether the absence of a competitive entry exemption renders the existing BSM Measures insufficient as proposed in the Complaint. IPPNY and EPSA have also requested that I address the flaws in the Complainants’ proposed competitive entry exemption.

Summary and Conclusions

4. In their Complaint, Complainants argued that the BSM Measures are “unjust, unreasonable, unduly discriminatory and preferential” in the absence of a competitive

entry exemption because they contend that “purely private investment” should be able to invest in new supply based on their own expectations of future retirements.¹ The Complainants claim that, unless the competitive entry exemption is adopted, the BSM Measures will “over-mitigate and undermine the NYISO’s competitive markets.”² They assert this “will inhibit new capacity from entering the market” and will likely require out of market intervention to assure resource adequacy, which will jeopardize “the competitiveness and long-term health of the NYISO electric markets.”³ The Complainants request that the Commission order the NYISO to adopt a competitive entry exemption “substantially similar” to one proposed by the NYISO but soundly rejected in the stakeholder process, with two material modifications.⁴

5. As I address below, the Commission should deny the Complaint. The Complainants have failed to demonstrate that the existing BSM Measures have impeded or are impeding economic new entry. In fact, the evidence demonstrates that economic new entrants subjected to the BSM Measures have gone forward with their projects. The BSM Measures have worked as intended and have not harmed resource adequacy. In addition, I address the flaws in the competitive entry exemption proposed by the NYISO in the stakeholder process and demonstrate that the Complainants proposed modifications would only further weaken that proposal.

¹ Complaint at 2.

² *Id.* at 3.

³ *Id.*

⁴ *Id.*

Background

6. In 2006, the NYISO market participants began discussions regarding whether a need existed to revise the market power mitigation rules applicable to the New York City ICAP market. While the initial focus was on revising the rules concerning the mitigation of market power of pivotal suppliers, market participants raised concerns that the problems in the New York City ICAP market were equally driven by uneconomic new entry as by the behavior of the existing suppliers.
7. On September 29, 2006, the NYISO's Management Committee ("MC") approved revisions to essentially reduce the offer caps that applied to certain existing suppliers in the New York City ICAP market from \$105/kW-year to \$82/kW-year but did not address the problem of uneconomic entry notwithstanding the objections of market participants in the generator and other supplier sectors. All of the load-side interests in the MC voted in favor of the revisions. Generators and other suppliers appealed the MC decision to the NYISO Board of Directors ("Board") and indicated that if the issue of uneconomic entry was not addressed by the NYISO or its Board, the issue would be raised before the Commission when the NYISO submitted the tariff filing approved by the MC.
8. The Board rejected the appeals and on December 22, 2006, the NYISO filed proposed revisions to its Services Tariff to incorporate the measures that had been passed by the MC and approved by the Board, without addressing the uneconomic entry issue.⁵ The NYISO's filing offered no analytic support for the one-sided changes. IPPNY and other

⁵ See FERC Docket No. ER07-360-000, *New York Indep. Sys. Operator, Inc.*, Tariff Revisions to Modify Installed Capacity Market Mitigation Measures Applicable to Certain In-City Generating Units (Dec. 22, 2006) ("NYISO Initial In-City Filing"). The NYISO Initial In-City Filing was made following numerous stakeholder meetings addressing this subject that took place throughout 2006.

market participants protested the NYISO Initial In-City Filing, demonstrating that the proposed revisions were insufficient and unbalanced because they did nothing to protect the ICAP market from the harms posed by uneconomic entry. As of that time, two such projects had entered the In-City capacity market and the ability for additional uneconomic entry to follow was completely unlimited.

9. In its order rejecting the NYISO Initial In-City Filing, the Commission instituted a new proceeding on its own motion, (the “In-City Proceeding”), to consider “the justness and reasonableness of the [NYISO’s] in-city ICAP market, and whether and how market rules need to be revised to provide a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators.”⁶ Thereafter, when settlement negotiations reached impasse, the Commission issued an order establishing a paper hearing process and directed the NYISO to submit a comprehensive proposal to revise the In-City ICAP markets.⁷
10. In compliance with the Commission’s directive in the July In-City Order, the NYISO submitted its proposal to restructure the In-City ICAP market rules on October 4, 2007.⁸ In its In-City Compliance Filing, the NYISO proposed a comprehensive set of mitigation rules, including for the first time, BSM Measures that mitigated the ability of new

⁶ *New York Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,182, at P 6 (2007), *order on reh’g and compliance*, 118 FERC ¶ 61,251, at P 3 (2007) (“March In-City Order”).

⁷ *See New York Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,024, at P 5 (2007) (“July In-City Order”).

⁸ FERC Docket No. EL07-39-000, *Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure*, at 1 (Oct. 4, 2007).

uneconomic entrants to artificially suppress ICAP market prices.⁹ The NYISO, working together with its independent market adviser, Potomac Economics, established that it had based the BSM Measures on a two-prong mitigation exemption test (“MET”) designed to replicate competitive outcomes with the goal for prices to be determined by legitimate levels of supply.¹⁰ The structure for the MET is an important consideration in this case. Part A measures whether the market itself is projected to require economic entry by relying upon the net cost of new entry (“Net CONE”) of the NYC proxy unit as a default. In contrast, Part B permits a developer to reap the benefits of its own innovation by using the unit’s Net CONE to measure whether the entrant is projected to be economic. The potential new entrant gets the benefit of both of these assumptions.

11. Consolidated Edison Company of New York, Inc., the New York Power Authority, the City of New York, the New York State Consumer Protection Board, and Multiple Intervenors (a group of large electric consumers) all filed protests in opposition to the NYISO’s proposed BSM Measures. In general, these parties argued that the BSM Measures were unnecessary rather than opposing the mechanics of the how the BSM Measures would operate.
12. In its order on the NYISO’s In-City Compliance Filing, the Commission found that the BSM Measures were needed to prevent uneconomic entry that would artificially reduce prices in the New York City ICAP market below just and reasonable levels.¹¹ The

⁹ *Id.* at 21–28.

¹⁰ *Id.* at 16.

¹¹ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 1 (2008), *order on reh’g and compliance*, 124 FERC ¶ 61,301, at P 29 (2008).

Commission accepted the NYISO's proposal that uneconomic entry must be deterred by applying mitigation in the form of an offer floor on the ICAP offers of new entrants, unless the new entrant could pass one of two prongs contained in the MET (*i.e.*, the new entrant could show that its entry was expected to be economic).¹² Accordingly, economic projects would not be mitigated and could enter and participate in the market without being subject to an offer floor.

13. The Commission emphasized that artificially depressed prices may seem to be beneficial in the short run but they would harm consumers in the long run by inhibiting economic new entry, thereby raising prices and adversely affecting reliability.¹³ The Commission also concluded that competitive markets will foster efficient levels of investment “only if market participants can expect prices that provide a reasonable opportunity to recover the costs of needed investment.”¹⁴ While the Commission generally adopted the NYISO's buyer-side concept, it initially super-imposed a “net buyer” requirement on these rules.
14. NYISO, IPPNY, Astoria Generating Company, LLC, and NRG all requested rehearing of the Commission's order with respect to demonstrating that the BSM Measures should not be limited to net buyers only. In the NYISO's rehearing request, it noted its proposal was intended to apply to all new generation and controllable transmission line projects and explained the problems with targeting the BSM Measures to net buyers alone. The NYISO stated:

¹² *Id.* ¶¶ 107, 117. Accordingly, economic projects would not be mitigated and could enter and participate in the market.

¹³ *Id.* ¶ 103.

¹⁴ *Id.* ¶¶ 103, 105.

Limiting the application of these measures “only to net buyers bringing uneconomic capacity into the market” could undermine enforcement because such a limitation could necessarily give rise to opportunities to avoid application of the measures. New “uneconomic” generation may be developed and brought on line by a developer with no apparent connection to a “net buyer.” Nevertheless, that developer could have entered into a financial agreement, such as a “contract for differences,” with another entity that would have the effect of providing an out-of-market subsidy and may enable the “uneconomic entry” by the developer. The NYISO would have no knowledge of such private contractual arrangements; all it would see is entry by an entity that is not itself a “net buyer.”

The NYISO does not have access to the full range of contractual arrangements that may be applicable to a new generator, would have no way of verifying that any set of contracts that might be provided to the NYISO constituted all of the relevant agreements, and may not be in a position to fully assess the significance of such documents even if they were furnished to the NYISO. Moreover, expanding the NYISO’s access to contracts and agreements would not resolve the concern because contracts that provide a subsidy to the developer would not have to be specific to a particular unit. Financial contracts that are not explicitly linked to the new unit could, nonetheless, be fully effective in subsidizing uneconomic entry, as long as a sufficient subsidy flowed to the developer. Thus, limiting the application of the uneconomic entry provisions to only “net buyers” would open many possible avenues to avoid mitigation and severely undermine the very existence of the measures.

Equally important, the relative market position of the developer’s counterparty on the financial agreement (i.e., net buyer or net seller) has no bearing on whether the capacity would be uneconomic without the subsidy. Rather, it is the out-of-market subsidy itself that is problematic because it may cause otherwise uneconomic generation to enter the market and artificially depress auction prices. As explained in the NYISO’s October 4, 2007 market power mitigation proposal in this docket, “uneconomic entry would be a significant concern if it can depress prices in the NYC capacity market.” Thus, the NYISO proposed a bid floor to mitigate uneconomic entry in order to “provide the NYC capacity market with protection that is the mirror image of the supplier measure: it would ensure that capacity auction prices are not significantly lower than legitimate competitive expectations, and

that the market clears on the basis of legitimate expectations of supply and the Demand Curve.”¹⁵

15. The NYISO further cautioned that the reasons uneconomic generation was being built was secondary to its detrimental impact and urged the Commission to focus on the related effects on the In-City capacity auction clearing prices.¹⁶
16. In its September 30, 2008 Order on Rehearing and Further Order on Compliance Tariff Sheets, the Commission granted rehearing on this issue, eliminating the “net buyer” provision and establishing that the BSM Measures would apply to all uneconomic entry.¹⁷

In explaining its decision, the Commission stated broadly:

We find that all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address. Parties requesting rehearing have convinced us that defining net buyers raises significant complications and provides undesirable incentives for parties to evade mitigation measures.¹⁸

17. The size of the New York City market and the steep slope of the NYC Demand Curve make preserving the balance that was achieved in the In-City Proceeding critical. For example, for its CY 2012 MET determination the NYISO estimated the slope of the NYC demand curve at \$1.1483/kW-month. At this slope the uneconomic entry of a combined cycle unit with 500 MW of summer unforced capacity, all other things being held equal, would cause the capacity price to decline by \$77.5/kW-year. This is 47% of the NYC

¹⁵ See FERC Docket No. EL07-39-000, *Request for Clarification or, in the Alternative, Rehearing of the New York Independent System Operator, Inc.*, at 3–4 (Apr. 7, 2008) (“NYISO Rehearing Request”) (citations omitted).

¹⁶ *Id.* at 5.

¹⁷ *New York Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008), *order on reh’g and compliance*, 131 FERC ¶ 61,170, at PP 52, 106 (2010).

¹⁸ *Id.*

capacity clearing prices for the 2014/2015 capability period.¹⁹ The same is true of the newly implemented Lower Hudson Valley Zone (“LHV”), the other Mitigated Capacity Zone in New York in which the BSM Measures apply where the impact would be a lesser, but still unreasonable, \$43.4/KW-year, and where this suppression of prices would be 45% of the LHV 2014/2015 capability period clearing price.²⁰ Indeed, the real world, devastating impact of failing to apply the BSM Measures as designed was revealed in July, 2011 when the uneconomic entry of Astoria Energy II’s (“AE II”) 575 MW generating facility was permitted without mitigation and otherwise economic facilities were rendered uneconomic by the precipitous fall in the NYC Demand Curve market clearing prices.²¹ This is very different than PJM where the cost of new entry does not vary significantly across the control area and, therefore, the price impact from a large entrant into even a small region is likely to be muted by that region being backstopped by demand in neighboring regions.²²

18. Through efforts undertaken in the NYISO stakeholder process and as the result of complaint proceedings that have occurred since the implementation of these rules, the BSM Measures have been refined to provide new entrants and all other market participants with further transparency and certainty. The Services Tariff now defines the

¹⁹ 2014/2015 Capability Period capacity clearing prices calculated using actual prices from May 2014 through January 2015 and assuming the January 2015 price persist through April 2015.

²⁰ 2014/2015 Capability Period capacity clearing prices calculated using actual prices from May 2014 through January 2015 and assuming the January 2015 price persist through April 2015.

²¹ *Astoria Generating Company, L.P. and TC Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at PP 1, 7, 12 (2012) (“AE II Case”).

²² See PJM, Preliminary MOPR Floor Offer Prices for 2018/2019, available at <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/preliminary-mopr-floor-offer-prices-for-2018-2019.ashx> (providing information on the cost of new entry).

assumptions the NYISO must use to conduct the MET and specifies that a MET determination, mandatory for all new entrants, must be conducted before the developer must accept its interconnection cost allocation, which has been identified as a critical decision point for prospective investors that should occur before the investor has made significant investments in building its facility. To provide further transparency and certainty to the market, the NYISO must post the MET determinations and the NYISO Market Monitoring Unit's ("MMU") analysis of the NYISO's MET determinations.

19. Since 2008, the BSM Measures have been applied to several proposed new entrants. As addressed below, two of these projects earned exemptions based upon the innovations they were able to drive in their own costs. Other projects have been mitigated but have continued with project development.
20. The NYISO made its initial proposal for a competitive entry exemption at the December 3, 2012 ICAP Working Group meeting. The NYISO began its presentation by stating, "The competitive market exemption would exempt from buyer side mitigation competitive entry that is *not receiving support outside of competitive markets*, thus, allowing such entrants to enter *at their own risk and based on their own business outlook.*"²³ The NYISO proposed that a new project would be exempt from the offer floor requirement under the BSM "if the project has no contracts (direct or indirect) with any NY distribution company, Municipal Utility, *or any governmental entity* including

²³ Nicole Bouchez et al., NYISO, Proposed ICAP Buyer Side Mitigation Competitive Entry Exemption 3 (Dec. 3, 2012), *available at* http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2012-12-03/Competitive_EntryExemptionFINAL12042012.pdf (emphasis added).

but not limited to Public Authorities.”²⁴ The NYISO proposed that it would enforce the provisions by requiring the applicant to periodically certify, up until the time that its project first began to produce energy, that it had no such contracts.²⁵

21. As explained by Ms. Bouchez at the beginning of her presentation, because the BSM Measures were formulaic, it was possible that they would not reflect what an investor believed would happen over the long term. She indicated that the NYISO’s proposal was to exempt parties that were not receiving support outside of the market but, instead, were risking the investment themselves. Several parties raised questions about the parameters that the NYISO had set in their presentation regarding the degree to which they would limit the sources of public funding.
22. As noted in more detail below, several projects have been evaluated under the BSM Measures. Of the projects that have been developed so far, some have been determined to be economic and some have been mitigated. With respect to projects that are still in the development stage, some are moving forward (apparently confident in their economics) while others are not (apparently concerned with their relative economics). Thus, the BSM Measures appear to be working well such that the economic projects are going forward and the more expensive (uneconomic) projects are being mitigated or not going forward. Notwithstanding the logical outcome of economic projects going forward and uneconomic projects being discouraged, in its 2012 State of the Market Report, Potomac Economics, the Market Monitoring Unit for the NYISO, identified a concern

²⁴ *Id.* at 6 (emphasis added).

²⁵ *Id.* at 8.

that the forecast of prices used for the uneconomic entry mitigation exemption test might understate prices because it understated future unit retirements or mothballing.²⁶ Based on this specific concern, Potomac Economics cited the NYISO's stakeholder efforts concerning its proposed competitive entry exemption and recommended that "the NYISO amend the rules to grant exemptions to suppliers engaged in purely private investment. This would allow merchant investors to invest based on their own expectations of whether additional retirements (beyond those that have been noticed to the PSC) were likely to occur."²⁷

23. In response to the questions from the December 3, 2012 meeting, the NYISO specified in its January 30, 2013 presentation that its earlier reference to excluding entities having contracts with "any governmental entity" was limited to "NY State or local government entities."²⁸ Thereafter, in its May 28, 2013 presentation, the NYISO further clarified that a new entrant was proscribed from receiving support outside of competitive markets only if such support came from *an entity with an incentive to suppress New York capacity prices*.²⁹ In essence, the NYISO proposed to limit the application of the BSM Measures

²⁶ David B. Patton et al., Potomac Economics, 2012 State of the Market Report for the New York ISO Markets 24 (Apr. 2013), *available at* http://www.nyiso.com/public/webdocs/markets_operations/documents/Studies_and_Reports/Reports/Market_Monitoring_Unit_Reports/2012/NYISO2012StateofMarketReport.pdf.

²⁷ *Id.* (citing to NYISO March 3, 2013, ICAP presentation which continued to state the exemption would be limited to entities that received *no* support outside of competitive markets and noting that the NYISO proposal prohibited both direct and indirect public subsidies).

²⁸ Nicole Bouchez, Proposed ICAP Buyer-Side Mitigation Tariff Revision: Competitive Energy Exemption Modified Proposal 9 (January 30, 2013), *available at* http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2013-01-30/Competitive%20EntryExemption.pdf

²⁹ Nicole Bouchez et al., NYISO, Proposed ICAP Buyer-Side Mitigation Tariff Revision: Competitive Entry Exemption Modified Proposal and Tariff Review (May 2013), *available at*

in a manner similar to the net buyer type construct, which it had strongly opposed only a few years earlier, while only expanding the prohibited entities slightly. This is a far cry from the MMU's recommendation that mitigation exemptions be provided to entities pursuing purely private investment with their own capital at risk.

24. Potomac Economics' 2013 State of the Market Report also addressed the concept of competitive entry. Reiterating its concerns about the difficulty associated with adequately accounting for expected retirements and mothballing actions, Potomac Economics included the same recommendation that the NYISO should adopt a competitive entry exemption, once again specifying that this exemption should be limited to "suppliers engaged in purely private investment."³⁰
25. Ultimately, the NYISO presented a motion to the May 12, 2014, Business Issues Committee ("BIC") meeting to approve an expanded competitive entry exemption that also included proposals to revise the default bid floor on uneconomic entry and adopt additional exemptions from the BSM Measures for renewable facilities and municipal electric systems.³¹ As was the case throughout the ICAP meetings addressing the competitive entry exemption, several suppliers raised concerns, among other things, that the exemption was not limited to only entities utilizing purely private investment and the proposed certification provisions were not sufficient to prevent subsidization from going

http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2013-05-28/CompetitiveEntryExemption%20May%2028.pdf (emphasis added).

³⁰ David B. Patton et al., Potomac Economics, 2013 State of the Market Report for the New York ISO Markets 25–26 (Apr. 2014) ("2013 SOM Report").

³¹ *Business Issues Committee Meeting Final Motions*, NYISO 2 (May 12, 2014), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/bic/meeting_materials/2014-05-12/051214%20BIC%20Final%20Motions.pdf.

- undetected. The NYISO's proposal failed to win committee approval with only 18.6% of the committee voting in favor of the proposal.³²
26. The NYISO next presented a motion at the May 28, 2014, MC meeting, seeking approval of the same proposal.³³ The proposal failed to win committee approval with only 32.5% of the committee voting in favor of the proposal.³⁴
27. The NYISO Budget and Priorities Working Group presented its proposed 2015 budget to the MC at its October 29, 2014 meeting. Complainants' affiant, Mr. Richard Miller, chairs this working group and made the presentation. Listed in the key priorities and projects for 2015 under the "Capacity and Energy Market Enhancements" is "Implement Rules for Mothballing and Retirement."³⁵ This project is specifically designed to review the concerns raised by Potomac Economics in its 2012 and 2013 SOM reports. The NYISO Board of Directors has approved the budget and 2015 project list, inclusive of this project.
28. On December 4, 2014, the Complainants filed their complaint requesting that the Commission direct the NYISO to add the competitive entry exemption proposed on May 28, 2014, to its Services Tariff, with two modifications.³⁶ First, Complainants proposed to expand the scope of permissible contracts with Non-Qualifying Entry Sponsors while

³² *Id.*

³³ *Management Committee Meeting Final Motions*, NYISO 1 (May 28, 2014), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-05-28/052814_MC_Final_Motions.pdf.

³⁴ *Id.*

³⁵ *NYISO 2015 Budget Overview*, NYISO 5 (October 29, 2014), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-10-29/Agenda%2005_2015%20Draft%20Budget%20and%202016-2017%20Projections.pdf

³⁶ Complaint at 1–2.

still qualifying for the exemption.³⁷ Second, Complainants proposed significant revisions to the required certification form that applicants must execute to demonstrate that they do not have any prohibited contracts that would make them eligible for the competitive entry exemption.³⁸ The revisions to the certification significantly weaken its effectiveness by creating a loophole for uneconomic entry to inappropriately avoid the BSM Measures.

29. At the December 12, 2014, ICAP Working Group meeting, the NYISO made its first presentation concerning enhancements to the market rules for forecasting retirements and mothballing.³⁹ The NYISO referenced the MMU's concerns in the SOM reports and specified its future steps included "further development of a proposal" and "presentation of proposed criteria and rules to stakeholders at a future ICAPWG meeting."⁴⁰ These actions undertaken by the NYISO represent the normal course under which the recommendations made in the MMU's SOM report to improve the market design or rules proceed in the stakeholder process.

The Complainants Have Failed to Demonstrate That the Existing BSM Measures Have Impeded or Are Impeding Economic New Entry.

30. The Complainants argue that the BSM Measures "can apply to all new entry, even if it is merchant supply, creating an unnecessary and unreasonable barrier for such new entry

³⁷ *Id.* at 8–10.

³⁸ *Id.* at 13–14.

³⁹ See Julia Popova, NYISO, Enhancements to the ICAP and Energy Forecasts in the Buyer-side Mitigation Rules (2014), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_icapwg/meeting_materials/2014-12-12/EnhancementsICAPEnergyFrcstBSM_ICAPWG_12-12-2014.pdf.

⁴⁰ *Id.* at 10.

that prevents competitive investment from entering the market.”⁴¹ As I discussed, *supra*, the central purpose of the BSM Measures is to deter uneconomic entry, while providing “a level of compensation that will attract and retain needed infrastructure and thus promote long-term reliability while neither over-compensating nor under-compensating generators.”⁴² The Commission’s decisions specifically rejected a lack of bad intent as a reason to exempt new entry from the BSM Measures. Essentially, the Complainants’ argument is that application of the BSM Measures under-compensates generators, and, thus, impairs new entry, unless Complainants’ proposed competitive entry exemption is adopted, thereby allowing some new entrants to bypass the BSM Measures. The Commission, however, carefully struck the right balance between over and under-compensation when it determined that the BSM Measures should apply to all new entrants into the New York City ICAP market, not just net buyers. As I explain above, preserving this balance in practice has proven critical to the ongoing viability of New York’s capacity markets.

31. The Complainants have failed to show any evidence that the BSM Measures have caused under-compensation to economic generators or that the measures unreasonably impair their ability to enter the market. In fact, the experience in applying the BSM Measures to all new entrants has demonstrated that the BSM Measures are producing appropriate economic results and the appropriate entry of new resources when economic.

⁴¹ *Id.* at 3.

⁴² March In-City Order at P 17.

32. The Complainants claim, without proof or examples of harm, that applying the BSM Measures to all entrants is “over-mitigat[ing] and undermin[ing] the NYISO’s competitive markets by blocking economic new entry.”⁴³ Mr. Richard Miller, who submitted an affidavit to the Complaint, repeatedly makes similar statements throughout his affidavit, again without any citations or empirical evidence.⁴⁴ Contrary to the Complainants’ claim, the evidence demonstrates that the BSM Measures have not been an impediment to economic new entry. In fact, at least one and possibly two projects have failed the MET and have been assigned an offer floor but have accepted their Class Year cost allocations.
33. The NYISO issued final MET determinations for at least eight proposed new projects under the BSM Measures since these rules went into effect. Five of those projects, at least on their face based on publicly available information, appear to constitute “purely private investment.” The remaining three projects, AE II, Hudson Transmission Partners (“HTP”), and Taylor Biomass had already entered into subsidized contracts with the New York Power Authority (“NYPA”) when their MET determinations were conducted. The NYISO was required to post its MET determinations for two of the projects, the 512 MW Bayonne Energy Center (“BEC”) and the proposed 650 MW CPV Valley Energy Center (“CPV”), receiving exemptions. The NYISO posted notices advising the market that both of these projects passed the MET and were therefore exempt from offer floor

⁴³ Complaint at 3.

⁴⁴ See, e.g., Aff. of Richard B. Miller on Behalf of the Complainants ¶¶ 7, 8, 10, 23, 30 (Dec. 4, 2014) (“Miller Affidavit”).

mitigation under the BSM Measures.⁴⁵ BEC has been constructed and is operating and CPV made a commitment to move forward with its project by accepting its Class Year cost allocation of \$22,448,601 million.⁴⁶ Next, the Linden VFT transmission upgrade was tested before the requirement was put into place for the NYISO to post all MET results. However, the market results for the months after the Linden VFT transmission upgrade began operation show that either Linden VFT was exempted from the offer floor or its offer floor was low enough that it did not impede clearing its ICAP in the market.

34. At least one of the remaining two of these five projects failed the MET. In Class Year 2011, the NYISO determined that NRG's 200 MW Berrians GT and 50 MW GT II project are subject to offer floor mitigation but NRG accepted its Class Year cost allocation anyway, committing to pay a total of \$2,268,000 interconnection costs for the combined Berrians GT and GT II project.⁴⁷ And, in Class Year 2012, the NYISO determined that NRG's 250 MW Berrians GT III project was subject to offer floor

⁴⁵ See *Buyer-side Mitigation Exemption and Offer Floor Determinations* (Nov. 6, 2012), available at http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Buyer_Side_Mitigation/CY_2009%20CY_2010%20HTP/NYISO_Notice_of_BSM_Determinations_Nov_6_2012.pdf; *Buyer-side Mitigation Exemption and Offer Floor Determination* (Mar. 7, 2014), available at http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Buyer_Side_Mitigation/Class_Year_2011/Web%20Posting%20CPV%20March%207%202014.pdf (“CPV Determination”).

⁴⁶ See Letter from Steven L. Corey, Manager of Interconnection Projects, NYISO, to Remaining Developers of Class Year 2011 Projects (Oct. 1, 2013), available at http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Interconnection_Studies/Notices_to_Market_Participants/Notice%20of%20Class%202011%203rd%20Round%20Decisions_all%20accepted_post%20security.pdf (“CY 2011 Third Round Decision Results”); Letter from Steven L. Corey, Manager of Interconnection Projects, NYISO, to Remaining Class Year 2011 Project Developers and Connecting Transmission Owners (Oct. 15, 2013), available at http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Interconnection_Studies/Notices_to_Market_Participants/Class%202011%20Notice%20of%20Completion%20of%20Decision-Settlement%20Process_10-15-2013.pdf (“CY 2011 Notice of Completion of Decision”).

⁴⁷ See CPV Determination; CY 2011 Third Round Decision Results at 3; CY 2011 Notice of Completion of Decision.

mitigation but NRG accepted its Class Year cost allocation anyway, committing to pay a total of \$11,818,563 interconnection costs for Berrians GT III.⁴⁸ At this point the NYISO has not announced whether the project is subject to offer floor mitigation. Thus, the MET determination, and the associated requirement to submit a competitive bid into the New York capacity markets, did not prevent either of these projects from making the critical project decision to accept interconnection cost allocations. I would note that there were two other projects tested in Class Year 2012, one of which was TDI USA Holdings Corp.'s ("TDI") proposed Champlain Hudson Power Express Project, a high-voltage, direct current 1,000 MW transmission line that would deliver electricity from Canada to New York City.⁴⁹ This project is the subject of a complaint in Docket No. EL15-33-000 with protests due on the same date as this proceeding. The NYISO has not yet issued a final MET determination for that project but the developer has reported that it has been notified that the project did not receive an exemption and, therefore, failed both prongs of the MET. As I establish in my affidavit in that proceeding, I performed extensive analyses in TDI's transmission siting case that demonstrated that this project is uneconomic by a large measure. The three projects contracted by NYPA, AE II, HTP, and Taylor Biomass also were demonstrably uneconomic projects and were mitigated.

⁴⁸ See *Class Year 2012 Buyer-side Mitigation Exemption and Offer Floor Determinations* (Jan. 13, 2015), available at http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Buyer_Side_Mitigation/Class_Year_2012/Notice_of_BSM_Determination_January_13,_2015.pdf; Letter from Steven L. Corey, Manager of Interconnection Projects, NYISO, to Remaining Developers of Class Year 2012 Projects (Jan. 6, 2015), available at http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Interconnection_Studies/Notices_to_Market_Participants/Notice_of_Class_2012_2nd_Round_Decisions_all_accepted_post_security.pdf.

⁴⁹ The other project, the Cricket Valley Energy Project, faced nearly \$300 million in interconnection costs and rejected its cost allocation. The NYISO has not published this project's MET determination.

The fact that all four of these projects failed both prongs of the MET provides real world evidence that these rules are working as designed to prevent uneconomic entry from having the deleterious impact of artificially suppressing prices in New York's capacity markets.

35. Potomac Economics has confirmed the fact that, as applied to Class Year 2011, the BSM Measures worked as intended. In the 2013 SOM report, Potomac Economics found that “[t]he Buyer-Side Mitigation rules limited the effects of uneconomic new entry as two projects were subject to Offer Floor mitigation.”⁵⁰ Because the Class Year 2012 determinations have not been issued yet, Potomac Economics has not yet addressed them.
36. Moreover, the views of the generator sector—those very entities that are theoretically undercompensated by the existing rules and whose new capacity is allegedly being inhibited from entering the market—on the appropriateness of implementing the NYISO's Competitive Entry Exemption proposal are also shown by their votes on the issue, where not a single generation developer in either the generator or other supplier sector voted for the proposed Competitive Entry Exemption changes at the BIC or the MC.

The Complainants' Assertions About the Market Impacts Caused By the BSM Measures Are Flawed

37. The Complainants argue that the NYISO may determine that an investor's proposed project is uneconomic under the MET, but the investor may believe that its project is economic because, based on its own assumptions regarding generator retirements, it

⁵⁰ 2013 SOM Report at iii.

expects greater ICAP revenues than the NYISO expects under the NYISO's different retirement assumptions. The Complainants' witness, Mr. Richard Miller, argues that "[i]f a unit's ability to earn revenue, however, may be limited by BSM, the lack of a competitive entry exemption is likely to preclude investment that would have otherwise occurred in a competitive market."⁵¹ Mr. Miller's argument presumes, incorrectly, that a generator that receives an offer floor under the BSM Measures would not build because it would be prohibited from earning revenues in the ICAP market when it is economic.⁵² This claim is absolutely false. An offer floor prevents a project from selling ICAP when it is *uneconomic*. As the Commission recognized just a year ago in the HTP proceeding, being assigned an offer floor does not proscribe a new entrant from offering its capacity into the NYISO's markets. It simply ensures that the new entrant submits a competitive bid.⁵³ If an investor's own forecast of higher ICAP clearing prices is correct and its new project is economic, there is no harm in applying the offer floor to the project. Its offers will clear the market anyway because the market price will be above its offer floor as a result of its expected retirement forecast, regardless of the NYISO's forecast. Further, under the BSM Measures, the offer floor mitigation phases out once the new entrant has cleared the market for twelve, not necessarily consecutive, months.⁵⁴ Once phased out, the offer floor is not subsequently reinstated even if market conditions worsen. Thus, if

⁵¹ Miller Affidavit ¶ 19.

⁵² *See id.*

⁵³ *New York Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,156, at P 128 (2013).

⁵⁴ The NYISO does not post any information informing the Market Participants when a unit phases out of mitigation. However, it is clear from the amount of capacity that has cleared the NYC capacity market over at least the past two years that AE II is no longer subject to offer floor mitigation.

the new entrant is in fact economic, its offer floor requirement will be eliminated just twelve months after it enters the market.

38. The Complainants also make an unsupported claim that application of the BSM Measures may threaten reliability because investors proposing new projects that may be needed to maintain reliability may not construct them if they are subject to an offer floor.⁵⁵ This claim fails to recognize that the default offer floor is set at a level that would result in the NYISO carrying more than the minimum level of capacity that is required to meet reliability requirements. If the capacity market is approaching a shortage condition, the market price will rise above the default offer floor, allowing the new entrant to immediately begin earning revenues in the ICAP market.
39. The NYISO has published information on the level of the demand curve and the default offer floor in its report on assumptions used in the MET for projects in the 2012 Class Year.⁵⁶ The summer Default Offer Floor for New York City for 2015 is \$12.92/kW-month of Unforced Capacity (“UCAP”).⁵⁷ The demand curve reference point, *i.e.*, the price at zero excess capacity level, is \$20.03/kW-month of UCAP.⁵⁸ The New York City demand curve declines to zero at 18% above the minimum requirement. Consequently, the default offer floor translates to a point that is 35.45% of the way down the demand curve, or 6.39% excess capacity. Under the load forecast assumptions that the NYISO

⁵⁵ Complaint at 3.

⁵⁶ See NYISO, Buyer Side Mitigation ICAP Forecast – Class Year 2012 Assumptions and References 7–11 (2014), available at http://www.nyiso.com/public/webdocs/markets_operations/services/market_monitoring/ICAP_Market_Mitigation/Buyer_Side_Mitigation/Class%20Year%202012/ICAP%20Forecast%20Posting%20CY2012%20Document.pdf.

⁵⁷ *Id.* at 11.

⁵⁸ *Id.* at 6.

used for the 2012 Class Year MET, this 6.39% excess translates to the Default Offer Floor being equal to 620 MW of excess capacity. With respect to the application of the BSM Measures in the LHV ICAP region, the summer Default Offer Floor for the LHV is equivalent to a 5.2% excess, or 713 MW of excess capacity. This means that the NYISO offer floor mitigation will not restrict payments to any proposed new entrant in the New York City or LHV markets unless and until there is at least 620 MW or 713 MW of excess capacity in the New York City or LHV markets, respectively. It is difficult to see how a mitigation scheme that does not apply at points up to 620 MW of excess could possibly be a threat to reliability.⁵⁹ In short, as these MW level figures demonstrate, a new entrant subject to an offer floor would clear the market well before the NYISO ran short of capacity.⁶⁰

40. The Default Offer Floor for New York City and LHV are set at more than three times the average excess capacity level assumed in setting the demand curve. If it is necessary to provide a stronger signal to protect against the potential of losing large quantities of capacity, the efficient solution is to set the demand curve assuming the market will maintain a larger average excess level.
41. Mr. Miller also fails to recognize that in New York a unit is required to issue a retirement notice before it can leave the market so that it is possible to determine whether the unit's

⁵⁹ The NYISO has proposed raising the Default Offer Floor to 100% of the Net CONE of the Proxy Unit because the current mitigation allows uneconomic units to be brought into the market with subsidized out-of-market contracts and to suppress the clearing price to 75% of the projected cost of the proxy unit. Even with this change, the Default Offer Floor would be equal to the average excess level assumed in setting the demand curve.

⁶⁰ The situation complained of would only arise if the demand curve was established using an unrealistically low new entry cost and new entry could not in fact be constructed for the clearing prices produced by the demand curve. This would not be an issue with BSM Measures, but instead with the new entry cost used to establish the demand curves. The solution would be to increase the new entry cost used to establish the demand curves.

exit would threaten reliability. If reliability was threatened, the unit would be retained in operation through an agreement until the reliability threat associated with its exit can be addressed. Consequently, there are backstops to assure reliability.

42. Mr. Miller further claims that the BSM Measures create a dangerous barrier to entry that leads to out-of-market contracts.⁶¹ This is not correct. The current BSM Measures ensure that uneconomic generation is not able to artificially suppress ICAP market prices. This reduces the risk for new entry by economic projects thereby lowering their cost of capital. Changes to the BSM Measures that increase the risk of oversupply in the market caused by uneconomic entry will increase that risk and costs for all developers, and make it more likely that the NYISO has to rely upon out-of-market contracts to induce new entry. Moreover, a poorly designed competitive entry exemption that does not adequately protect against subsidized entry by any governmental entities or loads will greatly increase the risk in the market and make it very difficult and more costly for economic projects to enter the market. The Commission recognized this critical interplay between efficient pricing and the ability to attract and retain adequate infrastructure investment in the In-City Proceeding.⁶² Therefore, adoption of the proposed competitive entry exemption will have exactly the opposite effect claimed by Mr. Miller and, instead, will ultimately increase the reliance upon out-of-market contracts.
43. Mr. Miller also draws a flawed comparison to the PJM Regional Transmission Organization having a competitive entry exemption and a forward capacity market and

⁶¹ Miller Affidavit ¶ 8.

⁶² See March In-City Order at P 105.

argues that, since the NYISO does not have a forward capacity market, it is even more important to implement a competitive entry exemption in the NYISO markets.⁶³

However, it is the very presence of a forward market in PJM that works as a backstop to potential harm resulting from application of the competitive entry exemption. The forward market in PJM makes capacity obligation decisions generally at the same time that investors decide whether to build a new unit to enter the market. Therefore, an investor has every incentive to bid its entry costs into the forward market and will only construct its project if it clears the market based upon those costs. In contrast, the NYISO MET is performed at the point when a unit is being evaluated for its interconnection costs and, therefore, is not in the position of having already invested most of the project costs, as was the concern in PJM. Additionally, the shorter term NYISO ICAP market does not provide the same ability for the market to show whether entry is economic. Therefore, an investor will have much less invested in a proposed new entrant when the NYISO performs the MET. Further, assuring that uneconomic entry is mitigated is even more important in the NYISO ICAP market than the PJM forward market because the NYISO market design itself does not provide such a direct feedback.

The NYISO's Proposed Competitive Entry Exemption is Flawed and the Complainants' Proposed Changes to It Make It Even Worse.

Flaws in the NYISO Proposal

44. As noted above, the Commission has previously ruled that all uneconomic entry, regardless of intent, harms the competitive market. Complainants here endorse adopting the NYISO's competitive entry exemption proposal subject to two important

⁶³ Miller Affidavit ¶ 9.

modifications. Even if, *arguendo*, competitive entrants should be free to sell their uneconomic capacity into the market if they are risking their own capital and the uneconomic entry is the result of their own bad decisions, suppliers voted against the NYISO's competitive entry exemption proposal because its design failed to ensure that an exemption would not be a conduit for market manipulation.

45. The simple problem is that the proposal uses a "Trust but Verify" enforcement mechanism that is far too trusting with far too little emphasis placed on verification. The flaws inherent in the proposed certification structure include: (i) the NYISO will not be able to adequately monitor and detect out of market support; (ii) the contracts may be structured in a way that obfuscates subsidization to a project; (iii) the entrant may not be able to confirm the reach of contracts that intermediaries may hold; (iv) the proposed duration for the certification requirements will not adequately preclude out of market arrangements; and (v) the penalty structure is inadequate in reach, form, structure and duration.
46. The NYISO Rehearing Request demonstrated a number of reasons why the BSM Measures should be applied to all new entrants, rather than limiting their application to net buyers. The Commission agreed with the NYISO and refined its determination in the In-City Proceeding by expressly directing that the BSM Measures must apply to all new entrants.
47. The NYISO's main issue with limiting the application of the BSM Measures to net buyers was that the NYISO would not be able to monitor and detect the myriad ways in

which a new entrant could obtain out-of-market support.⁶⁴ This issue is equally of concern with respect to the proposed competitive entry exemption. In the NYISO Rehearing Request, the NYISO stated that it “does not have access to the full range of contractual arrangements that may be applicable to a new generator, would have no way of verifying that any set of contracts that might be provided to the NYISO constituted all of the relevant agreements, and may not be in a position to fully assess the significance of such documents even if they were furnished to the NYISO.”⁶⁵ During the stakeholder process, the NYISO cast aside its concerns about the potential incompleteness and inscrutability of potential contracting arrangements, and its inability to monitor, detect, and understand all the potential contracts and, instead, relied merely on a certification from an applicant’s corporate officer to assure that the project is not receiving subsidies.⁶⁶ Complainants now press for approval of the same flawed proposal in this regard.

48. In the NYISO Rehearing Request, the NYISO also explained that providing “access to contracts and agreements would not resolve the concern because contracts that provide a subsidy to the developer would not have to be specific to a particular unit. Financial contracts that are not explicitly linked to the new unit could, nonetheless, be fully effective in subsidizing uneconomic entry, as long as a sufficient subsidy flowed to the developer.”⁶⁷ The NYISO’s proposed competitive entry exemption totally ignores this concern and, instead, limits its review of contracts to only those directly or indirectly

⁶⁴ NYISO Rehearing Request at 3–4.

⁶⁵ *Id.* (citations omitted).

⁶⁶ It is also not clear whether or how subsidy would be defined (*i.e.*, what would, and what would not, be considered a subsidy).

⁶⁷ NYISO Rehearing Request at 4.

related to the generator or UDR project. In effect, the NYISO's proposed competitive entry exemption provides a blueprint for avoiding mitigation for subsidized projects: provide the subsidy in a way that is not closely tied to the new unit.

49. Equally deficient, while the NYISO's proposal prohibits a project from having any indirect contracts with non-qualified entities, it relies on the project sponsor's certification to assure that there are no indirect contracts.⁶⁸ However, if there are intermediate parties involved in the project, the project sponsor may not be able to assure that there are no indirect contracts unless it is aware of all the contracts that the intermediate party holds. The only way to assure that there are no indirect contracts is to require this information from the intermediate party and any of the entities with which intermediate party has contracted and assure that a string of contracts that ultimately provide a subsidy to the project does not exist.
50. The NYISO's proposed penalty structure is also inadequate in light of the harm a violation would cause to the markets. As was established in the In City Proceeding, the potential reduction in capacity market prices, and, therefore, the loss of revenues to other capacity providers in the market, can greatly exceed the cost of out-of-market contracts.
51. The NYISO proposed that if it determines that a project provided false, misleading, or inaccurate information, the project would be penalized unless the NYISO determines that it would have granted the competitive energy exemption even if it had received complete and accurate information.⁶⁹ The NYISO's proposed penalty for providing the false,

⁶⁸ Complaint, Exhibit B at 1, 4-5.

⁶⁹ Nicole Bouchez, NYISO, Proposed ICAP Buyer-Side Mitigation Modifications – Competitive Entry Exemption, Offer Floor Change, Renewable Generator Exemption, and Municipal Utilities/Coop Exemption 12

misleading, or inaccurate information that resulted in an inappropriate grant of a competitive entry exemption requires the project to pay 1.5 times the maximum ICAP revenue it could have earned in each month it offered for a maximum of three years.⁷⁰

52. The three-year limitation on the penalty is totally inconsistent with the damage that could be inflicted on the market from an inappropriately provided exemption. The time limit should be eliminated and, instead, the penalty should be applied to every month that the project was able to sell into the ICAP market with its exemption.
53. A three-year penalty period may not adequately capture the duration of improper conduct or its impact. For example, if improper conduct is detected after it has continued for more than three years, the initial impact of the conduct will go unpenalized. This is particularly problematic because the greatest damage to the market was likely inflicted in the early years after the project's entry. Therefore, as the penalty is the result of the project providing misleading information, the penalty should be assessed over the entire period of the damage to act as an effective deterrent.
54. The NYISO's proposal also fails to provide any compensation to existing units that were made uneconomic and, thereby, inappropriately forced from the market due to the NYISO inappropriately granting an exemption to an uneconomic project. This is exactly what happened when the NYISO inappropriately granted an exemption to AE II, which

(May 28, 2014), available at http://www.nyiso.com/public/webdocs/markets_operations/committees/mc/meeting_materials/2014-05-28/Agenda%2006_CompetitiveEntryExemption.pdf.

⁷⁰ *Id.*

- resulted in some existing units becoming uneconomic when they might have continued to be economic if an appropriate offer floor had been imposed on AE II.⁷¹
55. Given that the NYISO's proposed competitive entry exemption essentially relies upon the project sponsor's honesty in granting the exemption, and given the potential damage to the suppliers in the market from the project sponsor's failure to provide accurate and honest information, the penalty should be consistent with the level of the price suppression that resulted from the inappropriately granted exemption, measured from the moment that the project entered the market until the point that the exemption was rescinded. As with the NYISO's proposal, the funds from the penalty should be paid to the other suppliers because they are the entities that were harmed by the uneconomic entry.
56. The NYISO's proposal is also flawed because it is impossible to have an inappropriate direct or indirect non-qualifying contractual relationship without having a Non-Qualifying Entry Sponsor on the other end of the relationship. It is the Non-Qualifying Entry Sponsor that benefits from the suppression of prices in the capacity market, but the NYISO's proposal does not charge any penalty to the Non-Qualifying Entry Sponsor that collaborated in the contractual relationship.
57. Another failing of the NYISO's proposal is that it ceases to require a project sponsor to certify that it does not have inappropriate contracts at the point that the project begins producing power.⁷² An efficient market should value all capacity providers equally. The

⁷¹ AE II Case at PP 7–12.

⁷² Complaint, Exhibit B at 5.

existence of any above-market contracts after a new entrant begins providing power should be a clear warning sign that inappropriate behavior may have occurred. A Load Serving Entity, or other entity, should be unwilling to sign an above-market contract with a unit that has already entered the market, unless that contract was somehow an inducement for entry in the first place. The failure to require the submission of these contracts after operation starts severely hinders the NYISO's ability to discover agreements that violated the exemption rules.

58. The NYISO's proposal is also flawed because it allows a group that is too broad to qualify for the exemption. Potomac Economics' original proposal was to grant an exemption to a purely private investment that is risking its own capital. The NYISO expanded the proposed exemption to also apply to non-private entities. The Complainants continue this fiction throughout their Complaint by baldly claiming that the exemption is targeted at providing an exemption to suppliers engaged in purely private investment and merchant supply.⁷³ Yet, review of the proposed tariff provisions reveals that the exemption would not, in fact, be limited to "purely private investment."
59. Of particular concern is that the NYISO's proposal would allow out-of-State, government-backed entities, such as Hydro Quebec—a company owned by the province of Quebec—to qualify for the exemption even though Hydro Quebec is not a purely private entity risking its own capital. Instead, to the degree that it is risking its investment, that risk is ultimately backed by the Quebec government.

⁷³ See Complaint at 2, 3, 9, 13.

60. In contrast, the PJM exemption that the Complainants reference would prohibit projects with backing from *any* governmental entity (obtained outside of competitive and nondiscriminatory solicitations) from receiving the exemption and, therefore, would not grant the exemption to Quebec-backed projects.
61. From a more practical perspective, the potential for indirect subsidy only multiplies when the “merchant” entrant is backed by a governmental entity.

Complainants’ Proposed Changes to the NYISO’s Competitive Entry Exemption Further Weaken It.

62. The Complainants have proposed two changes to the NYISO’s proposal that further erode it. Specifically, they have proposed to weaken the certification project sponsors must provide to qualify for the exemption and allow a greater level of contracts with Non-Qualifying Entry Sponsors while still qualifying for the exemption.
63. As noted above, the requirement that the project sponsor certify that there are no inappropriate contracts is the core component—in fact, the *only* component—of the NYISO’s proposal for assuring that the project is eligible for the exemption. From its initial presentation on this issue, the NYISO emphasized the need for the onus to be on the developer to make the certification in the first instance and to notify the NYISO of any changes. The NYISO’s proposed tariff language reflected this fact by expressly mandating that the project sponsor notify the NYISO if anything should change to make the information in the certification no longer accurate. While the time period assigned to these certification requirements was too short, these provisions correctly reflected the fact

that the NYISO could not adequately detect the myriad changed circumstances that could result after the initial certification was made.

64. The Complainants' proposed revisions to the certification requirements individually and collectively weaken the assurances that the project constitutes a purely private investment eligible to qualify for an exemption.
65. The Complainants have proposed to eliminate the NYISO's proposed requirement that the project notify the NYISO promptly if the information it previously certified ceases to be true.⁷⁴ This places more of an impossible burden on the NYISO to assure that the project continues to qualify for the exemption, and puts the NYISO in the position of having allowed an invalid exemption in the event the applicant enters into a non-qualifying contract simply because the NYISO failed to inquire about such contract (problematically, about which it may—or may not—have any notice).
66. Other ways that the Complainants have proposed to further weaken an already weak Certification requirement are: (1) not requiring the officer executing the certification to assure that parents or affiliates provide any information or cooperation requested by the NYISO;⁷⁵ and (2) not requiring the officer to have knowledge of the facts and circumstances supporting the requested exemption.⁷⁶

⁷⁴ Complaint, Exhibit B at 5.

⁷⁵ *Id.*

⁷⁶ *Id.*

67. Finally, the Complainants have also removed the NYISO's proposed language stating that a failure to provide accurate information shall be considered a false, misleading or inaccurate submission and would make the generator ineligible for the exemption.⁷⁷
68. All of these changes proposed by the Complainants make an already weak Certification process even weaker. Since the Certification process is the backbone of the NYISO's verification process to support the concept of the competitive entry exemption, the process should not be weakened. Instead, if any effort to develop a mechanism in this regard goes forward, the process should be revised to provide for more verification and higher penalties, and should expand the time that the NYISO continues to monitor for improper contracting.
69. Likewise, the Complainants had proposed to allow contracts with Non-Qualifying Entry Sponsors up to a level of five percent of the total levelized cost of all capital and fixed operation and maintenance costs of the proposed new generator or UDR.⁷⁸ The Complainants propose to change this proposal by establishing that the NYISO's proposed five percent cap will be measured using the above-market portion of the contract only, not the entire contract.⁷⁹
70. Two problems exist with the Complainants' proposed change. First, while it is relatively straightforward to estimate the total cost of such contracts, as would be required by the NYISO's proposal, estimating the subsidy value would be far more difficult and is likely to be subject to extensive dispute.

⁷⁷ *Id.*

⁷⁸ *Id.* at 4.

⁷⁹ *Id.*

71. Second, this allowance for some level of contracts with Non-Qualifying Entry Sponsors is necessary because it may not be possible to enter the market without having any contracts with Non-Qualifying Entry Sponsors. However, the category should not be a conduit for providing five percent subsidies to projects seeking an exemption from uneconomic entry mitigation. The NYISO determined the five percent allowance level reflected a proper de minimis level based upon the total contract price, not the subsidy. If the exception is going to be applied solely to the above-market portion of the contract, the five percent should be significantly reduced to a value of one to two percent.
72. This concludes my affidavit.

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Consolidated Edison Company of New York, Inc.,)	
Orange and Rockland Utilities, Inc.,)	
New York State Electric and Gas Corp.,)	
Rochester Gas and Electric Corp., and)	
Central Hudson Gas and Electric Corp.)	Docket No. EL15-26-000
)	
v.)	
)	
New York Independent System Operator, Inc.)	

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 15, 2015

_____/s/_____
Mark D. Younger

MARK D. YOUNGER

Mr. Younger is President of Hudson Energy Economics, LLC and has over thirty years of experience in energy analysis.

EDUCATION

MBA, Cornell University, 1983

M.E., Operations Research
Cornell University, 1983

B.S., Engineering, Major - Operations Research
Cornell University 1981

PROFESSIONAL EXPERIENCE

President

Hudson Energy Economics, LLC (2012 - Present)

Specialist on electric deregulation, market structure issues and deregulated electric energy, ancillary service and capacity market design. Involved as an active participant in the working groups refining the New York Independent System Operator, Inc. ("NYISO") market structure and developing methods to improve the market design, including all aspects of its energy, ancillary services and capacity markets.

Vice President

Slater Consulting (1994 - 2012)

Involved as an active participant in the working groups refining the New York Independent System Operator, Inc. ("NYISO") market structure and developing methods to improve the market design, including all aspects of its energy, ancillary services and capacity markets. One of the original architects of New York's capacity demand curve.

Senior Project Manager

Morse, Richard, Weisenmiller & Associates, Inc. (1986-1994)

Responsible for directing MRW's projects on production cost modeling. Prepared extensive analysis and expert witness testimony on avoided costs in California, New York, Pennsylvania and New Jersey. Performed analyses of electric utility emissions reductions associated with cogeneration projects.

Energy Economist

Pacific Gas & Electric Company (1983-1986)

Responsible for developing models and methods for integrated supply and demand-side resource analysis. Developed and performed an analysis of resource planning under uncertainty using Monte Carlo techniques.

Research Specialist for Duane Chapman, Professor of Resource Economics Cornell University (1982-1983)

Formulated the financial simulation section of the University Research Group on Energy's (URGE) integrated model of the electric utility industry. Performed an analysis of the impact on New York Pollution levels and New York utilities of proposed acid rain abatement strategies.

Mark D. Younger
Affidavits and Testimony

- Affidavit on behalf of the Independent Power Producers of New York regarding the flaws in the NYISO's proposal to define generator outage states and associated requirements and calculations (FERC Docket Number ER14-2518-000), September 2, 2014.
- Affidavit on behalf of the Independent Power Producers of New York regarding the need to maintain confidentiality for certain data submitted to the New York Public Service Commission by lightly regulated utilities. (NY PSC Matter No. 13-01288) August 6, 2014
- Second Supplemental Affidavit on behalf of the Independent Power Producers of New York regarding the need to mitigate the uneconomic retention of the Dunkirk Power Plant which is being retained pursuant to a 10 year out-of-market contract (FERC Docket Number EL13-62-000), March 25, 2014.
- Supplemental Affidavit on behalf of the Entergy rebutting the claimed rate impacts associated with the implementation of the NYISO Lower Hudson Valley capacity zone. (FERC Docket Number ER14-500-000), January 6, 2014.
- Affidavit on behalf of the Entergy regarding the need to not use a phase in for implementing the Lower Hudson Valley Demand Curve capacity zone. (FERC Docket Number ER14-500-000), December 20, 2013.
- Affidavit on behalf of the Entergy regarding the need to reject a phase in for implementing the NYISO Lower Hudson Valley capacity zone Demand Curve. (FERC Docket Number ER14-500-000), December 20, 2013.
- Affidavit on behalf of the Independent Power Producers of New York regarding the appropriate values for determining the NYISO Installed Capacity Demand Curves. (FERC Docket Number ER14-500-000), December 20, 2013.
- Second Supplemental Affidavit on behalf of Entergy regarding why it is inappropriate to phase in capacity prices for the NYISO New Capacity Zone for the Lower Hudson Valley region and why the new information that the NYISO relied upon for their filing is neither new nor correct. (FERC Docket Number ER13-1380-000), November 12, 2013.
- Affidavit on behalf of the Independent Power Producers of New York before the Board of the NYISO regarding the proposed demand curves being set at too low a level to adequately address the risk of entering the New York electricity markets as a merchant facility. October 2, 2013.
- Supplemental Affidavit on behalf of the Independent Power Producers of New York regarding the why regulated RMR contracts must bid into the NYISO Installed Capacity Market at their full going forward costs. (FERC Docket Number EL13-62-000), June 14, 2013.
- Supplemental Affidavit on behalf of Entergy regarding the need to not delay in implement a New Capacity Zone for the Lower Hudson Valley region and the flaws in arguments that a New Capacity Zone is not needed at this time. (FERC Docket Number ER13-1380-000), June 5, 2013.
- Affidavit on behalf of Entergy regarding the need to implement a New Capacity Zone for the Lower Hudson Valley region. (FERC Docket Number ER13-1380-000), May 21, 2013.

Mark D. Younger
Affidavits and Testimony

- Affidavit on behalf of the Independent Power Producers of New York regarding the need to revise the NYISO tariff to assure that generators with regulated RMR contracts bid into the NYISO Installed Capacity Market at their going forward costs. (FERC Docket Number EL13-62-000), May 10, 2013.
- Affidavit on behalf of the Independent Power Producers of New York to the NYISO Board of Directors regarding why a peaking unit should continue to be used as the Demand Curve Proxy Unit. April 17, 2013.
- Affidavit on behalf of the Independent Power Producers of New York regarding the inappropriate requirement that Cayuga bid into the NYISO Installed Capacity Market at a de minimis price while recovering its costs from a regulated RMR contract. (FERC Docket Number ER13-405-000), January 7, 2013.
- Affidavit on behalf of the New York City Suppliers rebutting Hudson Transmission Partners claims that their Buyer-Side Mitigation examination by the NYISO had been performed in a manner inconsistent with the NYISO Service Tariff Requirements. (FERC Docket Number EL12-98-000), November 13, 2012.
- Affidavit on behalf of Entergy Nuclear Power Marketing, LLC and the GenOn Parties concerning the NYISO's June 29, 2012 Compliance Filing proposing tariff revisions to its Market Administration and Control Area Services Tariff ("Services Tariff") to implement both buyer-side and supplier-side mitigation measures for New Capacity. (FERC Docket Number ER12-360-001), July 20, 2012.
- Rebuttal Testimony on behalf of the Independent Power Producers of New York on the flaws in the project sponsor's and the New York Department of Public Service's evaluation of the economics of the Champlain Hudson Power Express. (NYPSC Docket Number 10-T-0139), June 28, 2012.
- Testimony on behalf of the Independent Power Producers of New York on the economics of the Champlain Hudson Power Express. (NYPSC Docket Number 10-T-0139), June 7, 2012.
- Third Supplemental Affidavit on behalf of the New York City Suppliers rebutting Bayonne Energy Center's claims regarding their gas pricing advantage and the value of TCCs for their project. (FERC Docket Number EL11-50-000), October 10, 2011.
- Second Supplemental Affidavit on behalf of the New York City Suppliers on the New York Independent System Operator's flawed analysis in its mitigation determination for Astoria Energy II and the Bayonne Energy Center. (FERC Docket Number EL11-50-000), September 23, 2011.
- Supplemental Affidavit on behalf of the New York City Suppliers on the New York Independent System Operator's failure to properly apply its capacity market mitigation rules to Astoria Energy II and the Bayonne Energy Center. (FERC Docket Number EL11-50-000), July 11, 2011.
- Second Supplemental Affidavit on behalf of the New York City Suppliers on the tight correlation between natural gas pricing and LBMPs and the inability of the NERA model to represent this relationship. (FERC Docket Number EL11-42-000), July 21, 2011.

Mark D. Younger
Affidavits and Testimony

- Affidavit on behalf of the New York City Suppliers on the New York Independent System Operator's failure to properly apply its capacity market mitigation rules to Astoria Energy II and the Bayonne Energy Center. (FERC Docket Number EL11-50-000), July 11, 2011.
- Supplemental Affidavit on behalf of the New York City Suppliers on the flaws and inconsistencies shown in the New York Independent System Operator release of data to use for the New York City uneconomic entry mitigation exemption test. (FERC Docket Number EL11-42-000), June 15, 2011.
- Affidavit on behalf of the New York City Suppliers on the proper way to apply the New York City uneconomic entry mitigation exemption test. (FERC Docket Number EL11-42-000), May 31, 2011.
- Affidavit on behalf of the Independent Power Producers of New York in response to the NYISO's Compliance Filing on the Capacity Demand Curve on the appropriate level of average excess to assume in setting the Capacity Demand Curve. (FERC Docket Number ER11-2224-004), April 19, 2011.
- Affidavit on behalf of New York City Suppliers on the need to revise the Baseline for Special Case Resources. (FERC Docket Number ER11-2906-000). March 4, 2011.
- Reply Affidavit on behalf of Independent Power Producers of New York on New York Installed Capacity Demand Curve on the arguments against including System Deliverability Upgrade costs in the Demand Curves, on the inappropriateness of using a Long Island unit as a proxy for the NYCA demand curve and set the Demand Curve based upon inaccurately and the flaws of using historic auction results to determine the amount of excess capability due to winter unit ratings. (FERC Docket Number ER11-2224-000), January 7, 2011.
- Affidavit on behalf of Independent Power Producers of New York on New York Installed Capacity Demand Curve on the need for accurate representation of the average excess capacity levels, System Deliverability Upgrade costs and New York City interconnection costs in the development of the Demand Curves. (FERC Docket Number ER11-2224-000), December 21, 2010.
- Affidavit on behalf of New York City Suppliers on the New York Independent System Operator's proposed revisions to the New York City Installed Capacity Mitigation measures on the impact of the NYISO's changes on reducing the effectiveness of the mitigation. (FERC Docket Number ER10-3043), November 22, 2010.
- Affidavit on behalf of Independent Power Producers of New York in response to the Comments of the New York Transmission Owners on the NYISO's Second Tariff Compliance Filing and Request for Waiver of the NYISO on the inappropriateness of using the price at the 104% point on the New York City Demand Curve as the Net CONE value. (FERC Docket No. ER08-695-001), June 21, 2010.
- Affidavit on behalf of AES Eastern Energy, L.P., Constellation Energy Nuclear Group, LLC, Empire Generating Co., LLC, GDF SUEZ Energy North America, NRG Companies, PSEG Companies, Shell Energy North America (US), L.P., and TC Ravenswood, LLC on the New York Independent System Operator and New York Transmission Owner compliance filing to implement the Comprehensive Deliverability Plan on the need to apply a

Mark D. Younger
Affidavits and Testimony

deliverability test to capacity imports. (FERC Docket Number ER04-449-019), May 18, 2009.

- Affidavit on behalf of Independent Power Producers of New York on the NYISO's October 30, 2008 Tariff Compliance Filing on the In-City Capacity Mitigation on the inappropriateness of the NYISO's proposed Special Case Resource uneconomic entry mitigation and test for uneconomic exports. (FERC Docket Number EL07-39), December 2, 2008.
- Affidavit on behalf of the In City Capacity Suppliers in support of their Section 206 filing to restate the New York City Installed Capacity Demand Curve pursuant to expiration of the New York City ICIP Tax Abatement Program. (FERC Docket Number EL09-4), October 14, 2008.
- Affidavit on behalf of Independent Power Producers of New York in support of their motion for leave to file answer, and answer to the New York Transmission Owner's Comments on the Commission decision implementing New York City Capacity Market Mitigation on the appropriateness of using the Net CONE as shown at 100% of the minimum capacity requirement as the basis for the mitigation offer floor. (FERC Docket Number ER08-695), June 11, 2008.
- Affidavit in support of the limited protest being submitted by Astoria Generating Company, L.P to address the New York Independent System Operator's ("NYISO") Second Tariff Compliance Filing of and Request for Waiver of the New York Independent System Operator Inc. Implementing New York City ICAP Market Mitigation Measures ("NYISO Compliance Filing") to address appropriate recognition of opportunity costs associated with exports and appropriate thresholds and penalties for determining mitigation. (FERC Docket No. ER08-695-001), May 27, 2008.
- Testimony on behalf of Independent Power Producers of New York on the Vertical Market Power concerns on the Acquisition of Energy East Corporation by Iberdrola, S.A. (NY PSC Case 07-M-0906). January 11, 2008.
- Affidavit on behalf of AES Eastern Energy, L.P., Astoria Generating Company, L.P., a US Power Generating Company, Entergy Nuclear Power Marketing, LLC and the Mirant Parties on New York Installed Capacity Demand Curve on the appropriate values for the Demand Curve. (FERC Docket Number ER08-283-000), December 31, 2007.
- Affidavit on behalf of AES Eastern Energy on the New York State Department of Environmental Conservation's and New York State Energy Research Development Authority's proposed regulations to implement the Regional Greenhouse Gas Initiative (6 NYCRR Part 242, 6 NYCRR Part 200 and 21 NYCRR Part 507), December 19, 2007
- Affidavit on behalf of Astoria Generating Company, L.P., a U.S. Power Generating Company on the NYISO's proposed Capacity Market Mitigation Measures on the appropriate design of New York City Installed Capacity mitigation measures. (FERC Docket Number EL07-39-000), December 10, 2007.
- Affidavit on behalf of Astoria Generating Company, L.P., a U.S. Power Generating Company on the NYISO's proposed Capacity Market Mitigation Measures. (FERC Docket Number EL07-39-000), November 19, 2007.

Mark D. Younger
Affidavits and Testimony

- Affidavit on behalf of AES Eastern Energy, LP., Astoria Generating Company, L.P., a U.S. Power Generating Company, Dynegy Northeast Generation, Inc., Entergy Nuclear Power Marketing, LLC, the Indeck Companies, and the Mirant Parties to NYISO Board of Directors on NYISO Staff proposed Installed Capacity Demand Curves on the appropriate values for the Demand Curves. October 1, 2007.
- Affidavit on behalf of Independent Power Producers of New York to NYISO Board of Directors on NYISO Staff proposed Installed Capacity Demand Curves on the appropriate values for the Demand Curves. October 1, 2007.
- Affidavit on behalf of Independent Power Producers of New York on the Vertical Market Power concerns in the Merger of National Grid PLC and KeySpan Corporation. (NY PSC Case 06-M-0878), July 11, 2007.
- Affidavit on behalf of Independent Power Producers of New York on the proper determination of Location Based Marginal Costs on May 8 and 9, 2000 (FERC Docket Number EL01-19-006), July 8, 2005.
- Affidavit on behalf of Entergy Corporation, Mirant Bowline, LLC, Mirant Lovett, LLC, Mirant NY-Gen, LLC, Mirant Americas Energy Marketing, and Sithe Energies, Inc. to NYISO Board of Directors on NYISO Staff proposed Installed Capacity Demand Curves. October 15, 2004
- Affidavit on behalf of Independent Power Producers of New York to NYISO Board of Directors on NYISO Staff proposed Installed Capacity Demand Curves. October 15, 2004
- Affidavit on behalf of Independent Power Producers of New York on New York Installed Capacity Demand Curve (FERC Docket Number ER03-647-000) on the need to implement an Installed Capacity Demand Curve for the NYISO. April 10, 2003.
- Affidavit on behalf of AES, Mirant & Sithe to NYISO Board of Directors on Appeal of the Management Committee Decision on the ICAP Demand Curve on the need to implement an Installed Capacity Demand Curve for the NYISO. March 7, 2003.
- Affidavit on behalf of Independent Power Producers of New York to NYISO Board of Directors on Appeal of the Management Committee Decision on the ICAP Demand Curve on the need to implement an Installed Capacity Demand Curve for the NYISO. March 7, 2003.
- Affidavit on behalf of Independent Power Producers on the ICAP Demand Curve under Appeal of the NYISO Business Issues Committee decision at the NYISO Management Committee on the need to implement an Installed Capacity Demand Curve for the NYISO. December 27, 2002.
- Affidavit on behalf of Reliant Energy Power Generation on Setting the Conduct and Impact Thresholds for in-City Generating Units. (FERC Docket Number ER01-3155-002 et. al.), May 15, 2002.
- Testimony on behalf of TransGas Energy Systems in their Article 10 Citing proceeding (NY PSC Case 01-F-1276) on the energy and pollutant savings associated the TransGas Energy Systems proposed 1000 MW Combined Cycle facility.

Mark D. Younger
Affidavits and Testimony

- Affidavit on behalf of Reliant Energy Power Generation on New York Independent System Operator's Compliance Filing Regarding Comprehensive Market Mitigation Measures. (FERC Docket Number ER01-3155-002 et. al.), April 23, 2002
- Testimony on behalf of Orion Power New York GP, Inc. on Con Edison Company of New York, Inc.'s Proposal to Revise the Localized Market Power Mitigation Measures (FERC Docket Number ER98-3169-000), April 3, 2001.
- Affidavit on behalf of Southern Energy North America, Inc., AES NY, L. L. C., Sithe Power Marketing, L. P., & FPL Energy LLC on the need to retain the PJM Installed Capacity Market. (FERC Docket Number EL01-3-000), October, 25, 2000.
- Testimony on behalf of the Mid-Atlantic Power Supply Association on the Baltimore Gas & Electric Company stranded costs. (Maryland PSC Case No. 8794), December 22, 1998.
- Testimony on behalf of Enron Power Marketing, Inc on New York Electricity Companies' request for market-based rate authority. (FERC Docket Number ER97-1523 et al.), October 31, 1997.
- Testimony on behalf of Sithe Energies, Inc on Petition of Niagara Mohawk Power Corporation to Employ 1996 Fuel Adjustment Clause Targets in 1997 (NY PSC Case 96-E-0928) on the inappropriateness of using the outdated targets to determine the 1997 avoided costs.
- Testimony on behalf of Independent Power Producers of New York and Enron Capital & Trade Resources on Central Hudson Gas & Electric Corporation rate/restructuring proceeding (NY PSC Case 96-E-0909) on the problems with the proposed settlement associated with the proposal that Central Hudson continue to be a vertically integrated utility holding company and to propose interim rate treatment until the time that Central Hudson divests its generation assets.
- Testimony on behalf of Independent Power Producers of New York and Enron Capital & Trade Resources on Orange & Rockland Utilities, Inc. rate/restructuring proceeding (NY PSC Case 96-E-0900) on the problems in the proposed settlement associated with Orange and Rockland continuing to own generation resources in the deregulated competitive generation market, propose incentives for Orange and Rockland to divest, and, to propose interim rate treatment until the time that Orange and Rockland divests its generation assets..
- Testimony on behalf of Independent Power Producers of New York and Enron Capital & Trade Resources on Consolidated Edison Company of New York, Inc. rate/restructuring proceeding (NY PSC Case 96-E-0897) on the problems in the propose settlement associated with Con Edison continuing to be a vertically integrated utility owning generation resources in the developing competitive generation market, to propose stronger incentives for divestiture of Con Edison's fossil generation and to propose interim regulatory treatment until the time that Con Edison divests its generation assets.
- Testimony on behalf of Independent Power Producers of New York and Enron Capital & Trade Resources on New York State Electric & Gas Corporation rate/restructuring proceeding (NY PSC Case 96-E-0891) on the problems with NYSEG's proposal to continue

Mark D. Younger
Affidavits and Testimony

owning generation under a utility holding structure, the manner in which the proposed structure shielded the generating company from competition, and the need to divest the generating assets.

- Testimony on behalf of Sithe Energies, Inc on Consolidated Edison Company of New York, Inc. rate proceeding (NY PSC Case 96-E-0798) on the appropriate bases for calculating the short run avoided energy costs for Qualifying Facilities for Con Ed.
- Testimony on behalf of California Cogeneration Council on Southern California Edison 1995 Energy Cost Adjustment Clause (CPUC Application No. 95-05-049) on the value of Qualifying Facilities for SCE
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1995 Energy Cost Adjustment Clause (CPUC Application No. 95-04-002) on the value of Qualifying Facilities for PG&E and the O&M costs avoided by QFs
- Testimony on behalf of Sithe Energies, Inc on Consolidated Edison Company of New York, Inc. rate proceeding (NY PSC Case 94-E-0334) on the appropriate bases for calculating the short run avoided energy costs for Qualifying Facilities for Con Ed.
- Testimony on behalf of Independent Power Producers of New York on Niagara Mohawk Power Corporation rate proceeding, (NY PSC Cases 94-E-0098 and 94-E-0099) on need to retire certain generating units that are part of their portfolio or in the alternative to introduce rate making that puts Niagara Mohawk at risk for the units being economic.
- Testimony on behalf of California Cogeneration Council on San Diego Gas & Electric Company 1994 Energy Cost Adjustment Clause (CPUC Application No. 94-10-023) on the value of Qualifying Facilities for SDG&E and the O&M costs avoided by QFs
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1994 Energy Cost Adjustment Clause (CPUC Application No. 94-04-002) on the value of Qualifying Facilities for PG&E and the O&M costs avoided by QFs
- Testimony on behalf of Sithe Energies, Inc on Combined Long Run Avoided Cost and Generic Fuel Adjustment Clause proceeding (NY PSC Cases 93-E-0912 and 93-E-1075) on the appropriate long and short run avoided energy costs for Qualifying Facilities.
- Testimony on behalf of Sithe Energies, Inc on Niagara Mohawk Power Corporation 1993 Rate Case (NY PSC Cases 93-E-0376, et al.) on the appropriate bases for calculating the short run avoided energy costs for Qualifying Facilities for NMPC.
- Testimony on behalf of Kamine and Besicorp Companies on New York Public Service Commission Curtailment Proceeding (NY PSC Case Nos. 92-E-0814 and 88-E-081) on the need for Niagara Mohawk Power Corporation to curtail Qualifying Facilities
- Testimony on behalf of KELCO Division of MERCK & Co., Inc. on San Diego Gas & Electric Company 1992 Energy Cost Adjustment Clause (CPUC Application No. 92-09-078) on the value of Qualifying Facilities for SDG&E and the O&M costs avoided by QFs

Mark D. Younger
Affidavits and Testimony

- Testimony on behalf of California Cogeneration Council on Southern California Edison 1992 Energy Cost Adjustment Clause (CPUC Application No. 92-05-047) on the value of Qualifying Facilities for SCE
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1992 Energy Cost Adjustment Clause (CPUC Application No. 92-04-001) on the value of Qualifying Facilities for PG&E and the O&M costs avoided by QFs
- Testimony on behalf of KELCO Division of MERCK & Co., Inc. on San Diego Gas & Electric Company 1991 Energy Cost Adjustment Clause (CPUC Application No. 91-09-059) on the value of Qualifying Facilities for SDG&E and the O&M costs avoided by QFs
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1991 Energy Cost Adjustment Clause (CPUC Application No. 91-04-003) on the value of Qualifying Facilities for PG&E
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1990 Energy Cost Adjustment Clause (CPUC Application No. 90-04-003) on the value of Qualifying Facilities for PG&E
- Testimony on behalf of California Cogeneration Council on San Diego Gas & Electric Company 1989 Energy Cost Adjustment Clause (CPUC Application No. 89-09-031) on the value of Qualifying Facilities for SDG&E
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1989 Energy Cost Adjustment Clause (CPUC Application No. 89-04-001) on the value of Qualifying Facilities for PG&E (1989, Phases I and II)
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1990 Test Year General Rate Case (CPUC Application No. 88-12-005) on the amount of utility operations and maintenance costs avoided by the presence of QF generation.
- Testimony on behalf of California Cogeneration Council on San Diego Gas & Electric Company 1988 Energy Cost Adjustment Clause (CPUC Application No. 88-07-003) on the value of Qualifying Facilities for SDG&E.
- Testimony on behalf of California Cogeneration Council on Pacific Gas & Electric Company 1988 Energy Cost Adjustment Clause (CPUC Applications Nos. 88-04-020 and 88-04-057) on the value of Qualifying Facilities for PG&E (1988, Phases I and II).