UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

PROTEST OF THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"),[1] the Electric Power Supply Association ("EPSA")[2] hereby protests[3] the complaint[4] filed by Hudson Transmission Partners, LLC ("HTP") against the New York Independent System Operator, Inc. ("NYISO") concerning the application of the buyer-side market power mitigation provisions ("Buyer-Side Market Power

1 18 C.F.R. § 385.211 (2012).

2 EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for nearly 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

3 EPSA has filed a motion to intervene in the above-captioned proceeding. *See* (doc-less) Motion to Intervene of the Electric Power Supply Association, Docket No. EL12-98-000 (filed August 16, 2012).

4 *Complaint of Hudson Transmission Partners, LLC,* Docket No. EL12-98-000 (filed August 3, 2012) ("HTP Complaint").

Rules")[5] of the NYISO Market Administration and Control Area Services Tariff ("Services Tariff")[6] to a new controllable transmission facility being developed by HTP ("HTP Project").

Specifically, the HTP Complaint alleges that the NYISO improperly applied the Mitigation Exemption Test ("MET") to the HTP Project, a new $900 million, 660 MW high-voltage, direct current ("HVDC") merchant transmission facility intended to enter service in mid-2013 that will run between Northern New Jersey and New York City to import energy and capacity into the NYISO from PJM Interconnection, LLC ("PJM"). HTP asserts there are four errors associated with the NYISO's implementation of the MET to the HTP Project, including the timing of the test, the assumed market conditions used in the test, and the types and level of costs and revenues assumed in HTP's cost of new entry. HTP states this led to the improper determination that the HTP Project will not be exempt from mitigation and is subject to an Offer Floor of $133.62/kW-year for its sales of installed capacity ("ICAP") in the ICAP Spot Market Auction, thereby precluding it from participating in the ICAP market. HTP requests that the Commission direct the NYISO to correct these specific errors and conduct a MET "redo." (The NYISO has separately undertaken a mitigation exemption re-determination for

5 The Buyer-Side Market Power Rules were amended on November 27, 2010. The Buyer-Side Market Power Rules that were in effect prior to November 27, 2010 are referred to herein as the "Pre-Amendment Rules," and the Buyer-Side Market Power Rules in effect since November 27, 2010 are referred to as the "Post-Amendment Rules." References to the Pre-Amendment Rules are to the version of the Services Tariff submitted in the NYISO's June 30, 2010 baseline tariff filing. *See* Compliance Filing of the New York Independent System Operator, Inc., Docket No. ER10-1657-000 (filed June 30, 2010) (the "June 2010 Baseline Tariff Filing").

6 See Attachment H of the Services Tariff. Except as otherwise indicated, capitalized terms used herein have the same meaning as set forth in the NYISO Services Tariff or if not defined therein, in the NYISO's Open Access Transmission Tariff ("OATT").

the HTP Project pursuant to requirements of the EL11-42 Complaint Order. On November 6, 2012, the NYISO announced the results and once again determined that HTP failed the MET and is subject to mitigation.[7])

Additionally, HTP requests that if the NYISO determines HTP should be subject to Offer Floor Mitigation and thus unable to sell capacity based on a correct application of the MET, the Commission should direct the NYISO to develop a mechanism to compensate HTP for the value of the reliability benefits it would provide, or in the alternative, clarify that HPT may file, under Section 205 of the Federal Power Act ("FPA"), a rate schedule to receive just and reasonable compensation for these benefits.

These issues and others are addressed in significant detail in separate protests (with accompanying expert affidavits) filed today by the Independent Power Producers of New York ("IPPNY") and the New York City Suppliers,[8] and EPSA has had the opportunity to review and strongly supports both of these filings. As discussed below and in the IPPNY and New York City Suppliers' filings, the NYISO correctly determined that the HTP Project is not exempt from Offer Floor Mitigation under the Buyer-Side Market Power Rules. Accordingly, EPSA requests that the Commission act on an expeditious and definitive basis to reject the HTP Complaint.

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[7] *See* Assessment of the Buyer-Side Mitigation Exemption Test for the Hudson Transmission Partners Project by Potomac Economics, Ltd. (November 6, 2012), available at: http://www.nyiso.com/public/webdocs/products/icap/incity_mitigation/HTP_Report_11-6-12_Final.pdf

[8] The New York City Suppliers are, collectively, Astoria Generating Company, L.P., the NRG Companies, and TC Ravenswood, LLC.

I. PROTEST

While IPPNY and the New York City Suppliers will address the numerous details associated with the complaint in-depth, EPSA submits the following are critical points the Commission should bear in mind in reviewing and rejecting the HTP Complaint:

- The HTP Project, pursuant to terms of a 20-year contract with the New York Power Authority, is a "poster child" for the type of uneconomic project the Buyer-Side Market Power Rules are intended to protect against. HTP chose to proceed forward with its project although studies, including during the certificate review phase, indicated it was uneconomic and would be mitigated.

- As approved by the Commission, the Buyer-Side Market Power Rules apply equally to controllable transmission facilities such as the HTP Project as they do for new generation entry. HTP's allegations that the ISO has made arbitrary and unjustifiable assumptions in "adapting this generator-based test" that unduly discriminate against merchant transmission facilities are unfounded.

- If the project is mitigated, HTP should not receive alternative compensation from the ISO. Such a new proposed mechanism would undermine the intent and purpose of the Buyer-Side Market Power Rules.

As the Commission has correctly determined for the NYISO in prior orders addressing the Buyer-Side Market Rules, including the two recent complaint proceedings,[9] buyer-side market power is as relevant a concern as seller market power, and similar strong action is required here by the Commission to protect the integrity of the NYISO capacity markets, and provide greater regulatory certainty to existing and potential market participants, as well as potential

9 *See Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 (2012) (Docket No. EL11-50-00) (the "EL11-50 Complaint Order") (granting, in part, and denying, in part, complaint alleging serious errors in the NYISO's exemption of two new entrants from buyer-side market power mitigation); *See Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 (2012) (Docket No. EL11-42-000) (the "EL11-42 Complaint Order") (granting, in part, and denying, in part, complaint alleging serious errors in the NYISO's implementation of the Buyer-Side Market Power Rules).

investors. It is an overarching concern to EPSA that, once again, there is another issue with respect to implementation of the Buyer-Side Market Power Rules, highlighting the need for the Commission to ensure the NYISO's rules function as intended, are clear and properly implemented, and as objective as possible.

A. The HTP Project Is The Type Of Uneconomic New Entry The Buyer-Side Market Power Rules Are Intended To Protect Against

The HTP Project is yet another example of an uneconomic state-subsidized project that threatens to undermine capacity market pricing mechanisms.[10] HTP is financed by an out-of-market long-term contract with the New York Power Authority ("NYPA") that, if exempt from Offer Floor Mitigation, would artificially suppress prices in the New York City capacity market to the detriment of competitive capacity markets. Specifically, HTP began developing the project in response to a Request for Proposals ("RFP") with the NYPA in 2005, won the RFP in 2006, and signed a 20-year firm contract with NYPA for capacity and optional energy into New York City. The economics of the project have been a major focus in New York, including in the Article VII certificate proceeding before the New York Public Service Commission ("NYPSC"). In the context of that proceeding, a major study was conducted to assess the costs and benefits of the

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[10] "Power Authority Approves Revised Plan for Hudson Cable," New York Times (April 4, 2011) ("State officials declined to say how much they thought the [New York Power Authority] would lose over the life of the 20-year contract with the cable's developers. But they said they expected it to be less than [State Senator] Maziarz's estimate of $78 million a year.") http://www.nytimes.com/2011/04/05/nyregion/05power.html?ref=newyorkpowerauthority "Power Cable Under Hudson Has Critics In 2 States," New York Times, (May 30, 2011) http://www.nytimes.com/2011/05/30/nyregion/power-cable-under-hudson-has-critics-in-2-states.html?ref=newyorkpowerauthority

HTP Project and alternatives, which concluded, among other things, that new capacity is not needed in New York City until at least 2019 or later and that the project would be subject to Offer Floor Mitigation under the Buyer-Side Market Power Rules for potentially 10 to 20 years.[11]

Still, this out of market project has proceeded forward with an in-service date of mid-2013 although its actual need at this time is and has been significantly in question, a result which is inefficient for the market. HTP commenced construction in May 2011[12] although it had not yet received its final MET determination, which was completed in December 2011 under the current "Post-Amendment Rules." HTP disputes the NYISO's timing and treatment of the determination. However, it does not appear that HTP formally requested a MET determination after the Class Year 2008 cost allocation process concluded on January 4 2010,[13] and it was actually eligible to obtain a final MET determination under the "Pre-Amendment Rules" in effect at that time, but was obligated as the developer to submit the request for a determination to the NYISO under the rules. It is unclear why this was not pursued, but HTP had the ability to know whether its project would be mitigated before proceeding with construction, which

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[11] *See* the Charles River Associates International ("CRA") Study prepared for NYPA and the New York City Economic Development Corporation, and entitled "A Master Electrical Transmission Plan for New York City." The CRA Study (dated May 2009) is available at: http://www.crai.com/uploadedFiles/Publications/a-master-electrical-transmission-plan-for-new-york-city.pdf
Also, see CRA's Summary of its study provided to the NYISO on June 2, 2009, available at: http://www.nyiso.com/public/webdocs/committees/bic_espwg/meeting_materials/2009-06-02/NYCEDC_Master_Trans_Plan_NYC_Presentation.pdf

[12] *Comments of Hudson Transmission Partners, LLC* at 6, New York City Suppliers v. NYISO, Docket No. EL11-42 (filed July 6, 2011).

[13] HTP Complaint at 22.

raises questions with respect to its lack of or reduced risk given the out-of-market contract with NYPA. On a similar note, the Commission recently determined in the EL11-50 Complaint Order that with respect to the NYPA's long-term firm contract with the Astoria Energy II Project, the power purchase agreement "is an out-of-market payment available only to Astoria II, will lower the project's risk, enabling it to attract debt and equity capital investors on more favorable terms inconsistent with a competitive offer."[14]

On another related note, in the EL11-50 Complaint Order the Commission emphasized "that our actions herein do not serve to restrict the authority state or local agencies may have to address reliability concerns," recognizing the need of states or such entities to address legitimate policy or reliability needs with respect to energy infrastructure. The Commission further stated "that if NYISO projects a capacity shortfall that threatens reliability, *by design* NYISO's buyer side mitigation rules exempt new capacity offers from mitigation." [15] Under this scenario, the HTP Project has been appropriately mitigated.

EPSA submits this latest complaint surrounding application of the Buyer Side Market Power Rules underscores the need for the NYISO to have clear and sufficient rules in place, but also the importance of the Commission to remain firm in ensuring that the rules function as intended to deter uneconomic investment to depress capacity prices, while allowing for competitive investment.

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14 EL11-50 Complaint Order at P 135.

15 EL11-50 Complaint Order at P 142. (Emphasis included in order)

B. The Buyer-Side Market Power Rules Apply Equally to Controllable Transmission Facilities, Such As the HTP Project, and New Generation Entry

HTP attempts to distinguish the issues in this proceeding from those raised in the other buyer mitigation rule proceedings to date, including the complaints in Docket Nos. EL11-42 and EL11-50, stating these proceedings relate to the NYISO's application of the MET to generator new entrants. Instead, HTP says its complaint relates to defects in the NYISO's application of the MET to the HTP Project and its proposed approach to evaluating merchant transmission facilities, asserting that HTP is the first, and only, transmission facility "that has ever been subjected to capacity market mitigation in the NYISO…"[16] In the initial proceeding establishing the Buyer-Side Market Power Rules, the Commission denied requests by HTP and another merchant transmission developer, East Coast Power, LLC, that controllable transmission projects be exempted from the Buyer-Side Market Power Rules.[17] The Commission determined that "[c]ontrollable transmission and generating capacity should be subject to the same mitigation"[18] because "both transmission and generating capacity are paid based on the same principle of making capacity available in-City, there should be no special exemption."[19] HTP did not seek rehearing of the Commission determination. In subsequent proceedings on the rules, there have been no

[16] HTP Complaint at 3.

[17] *See* Motion to Intervene and Comments of Hudson Transmission Partners, LLC at 3-4, Docket No. EL07-39-000 (filed Nov. 19, 2007); *also*, Initial Comments of East Coast Power, LLC to Compliance Filing of the New York Independent System Operator, Inc. Regarding the New York City ICAP Market Structure at 5-8, Docket No. EL07-39-000 (filed Nov. 19, 2007).

[18] March 2008 Order, 122 FERC ¶ 61, 211 at P 121 (Docket No. EL07-39-000).

[19] *Id.*

changes in Commission decisions with regard to *whom* the rules apply to, rather, the Commission has further explained its buyer-side market power concerns and the need for appropriate market price signals to alert investors when new entry is needed. In sum, the Buyer-Side Market Power Rules as proposed by the NYISO and approved by the Commission apply generally to *all* new entrants unless a determination is made that an entity is exempt from mitigation.

C. The Commission Should Reject HTP's Alternative Request For A "Reliability Benefits" Compensation Mechanism

HTP also requests that if the Commission determines the project is mitigated, it should be compensated through a new mechanism (whether established by the NYISO or by HTP through a section 205 FPA filing) for reliability benefits the HTP Project would provide to the NYISO grid. First, such a mechanism is already available to controllable transmission line developers through the allocation of the Unforced Capacity Deliverability Rights ("UDRs") to provide compensation for reliability benefits from the incremental capacity that the project creates to provide appropriate economic incentives for development by merchant providers. As HTP states in its complaint, under the terms of its contract, NYPA will receive the UDRs for 75 percent of the transmission rights on the project. However, because the HTP Project is not economic, it will not receive compensation associated with the UDRs in the capacity auctions.[20] As discussed, HTP proceeded forward with its project even though it was known the project was uneconomic, and appears to have had an earlier opportunity to receive a MET determination, but did not request one. EPSA submits that

[20] *See* IPPNY Protest at 21-24.

projects like this that are clearly inefficient should not be allowed to enter the market with another "back door" opportunity for payment; developers, not the market, should assume liability for uneconomic aspects of the project they have completed, especially when the project inefficiencies are foreseen. Providing a new compensation scheme only serves to encourage other similar uneconomic investment that is unnecessary.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully requests that the Commission act decisively and expeditiously to (1) reject the HTP complaint for the reasons set forth above; and, (2) grant such other relief as may be necessary to ensure competitive outcomes in the NYISO ICAP market and provide greater regulatory certainty to market participants.

Respectfully submitted,

NEBagot

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Dated: November 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., November 13, 2012.

NEBagot

Nancy Bagot, VP of Regulatory Affairs