UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

KeySpan Energy Development Corporation, KeySpan-Ravenswood, LLC, New York Power Authority, Electric Power Supply Association, Independent Power Producers of New York, Inc.,	)	
Complainants,	)	**Docket No. EL02-125-000**
v.	)	
New York Independent System Operator, Inc.,	)	
Respondent.	)	

BRIEF ON EXCEPTIONS OF NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

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NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
TO THE MAY 8, 2003 INITIAL DECISION

Pursuant to Rule 711 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711, New York Independent System Operator, Inc. (the "NYISO"), respectfully submits this Brief on Exceptions to the Initial Decision of Presiding Administrative Law Judge Jeffie J. Massey, issued in this proceeding on May 8, 2003 (the "Initial Decision").[1] The NYISO takes exception to each of the Presiding Judge's findings that it conducted the 2001 cost allocation in a manner not consistent with the terms of the cost allocation rules set forth in Attachment S to the NYISO's Open Access Transmission Tariff.

The Initial Decision reveals that the Presiding Judge has misunderstood the purpose of Attachment S and its cost allocation methodology, which this Commission has found to be "just and reasonable." Evincing throughout the course of these proceedings an inexplicable bias against the NYISO, the Presiding Judge undermined the Commission's mandate to develop a complete record by ignoring uncontroverted evidence and refusing to admit plainly relevant evidence that must be considered in order to fully and fairly evaluate the issues. The Presiding Judge's Initial Decision also reflects an uncritical acceptance of Complainants' allegation that the NYISO somehow "favored" the Transmission Owners in conducting the 2001 cost allocation, a claim that is without support in the record.

The result is an Initial Decision that fails to present a complete record or answer the Commission's questions. Acceptance of the Presiding Judge's findings would transform the cost allocation process in ways never intended by the NYISO or the Commission and, far from deterring future litigation, will sow the seeds of future conflict among Market Participants.

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[1] 103 FERC ¶ 63,016 (2003).

SUMMARY OF POSITIONS AND POLICY CONSIDERATIONS

The Presiding Judge erred in finding that the NYISO conducted the 2001 cost allocation process in a manner that was inconsistent with Attachment S. The Presiding Judge's Initial Decision reflects a fundamental misunderstanding as to the purpose of the cost allocation rules, which is to fairly allocate interconnection costs of new generation projects and not to plan actual generation facilities. The Initial Decision also misconstrues the existing language of Attachment S, imposes or recommends requirements that have no basis in the tariff's language, and disregards or excludes without reason any evidence favorable to the NYISO.

- The Presiding Judge erred by disregarding plainly relevant evidence of the stakeholder deliberative process that led to the adoption of Attachment S. Affirming the Presiding Judge's Initial Decision would run counter to established Commission precedent holding that extrinsic evidence of a stakeholder deliberative process should be considered when evaluating ambiguous or unclear tariff provisions. The excluded evidence, which was uncontroverted, supports the NYISO's positions in every material respect.

- The Presiding Judge erred by disregarding the NYISO's reasonable interpretations of its own tariff, which under Commission precedent were entitled to deference, and accepting Complainants' and Commission Trial Staff's unsubstantiated allegations of NYISO bias in favor of Transmission Owners.

- The Presiding Judge made findings that have no support in Attachment S or the record. Complainants' failure to meet their statutory burden of proof on the matters raised by the Commission is demonstrated by the fact that the Presiding Judge, going beyond the Commission's mandate and acting contrary to law, couched her findings in the form of recommendations for "clarifying additions" to the NYISO's tariff, which the Commission already has found to be "just and reasonable." The Presiding Judge's recommendations for additions to Attachment S demonstrate that the NYISO did not violate the existing terms of its tariff in performing the 2001 cost allocation.

- Acceptance of the Initial Decision's approach to Attachment S would profoundly transform the cost allocation process from the evaluation of hypothetical generic generating units and associated system upgrade facilities envisioned by the framers of Attachment S, to a "real world" planning exercise never intended by Market Participants or the Commission. Attachment S requires the NYISO to develop hypothetical generating units sufficient to meet reliability requirements; it does not require a high-level integrated utility plan for actual generating units. The NYISO's application of Attachment S was consistent with its terms and underlying purpose and resulted in a fair allocation of interconnection costs to project developers.

- The Presiding Judge's finding regarding the exclusion of certain developer projects from the existing system Baseline representation prepared by the NYISO as part of the cost allocation process contravenes the express language of the tariff, a fact acknowledged yet nevertheless ignored by the Presiding Judge. In conducting the Baseline assessment, the NYISO was entitled to a degree of discretion and deference, and its reasonable application of the tariff's provisions should not be disturbed.

- Finally, the Presiding Judge exceeded her mandate by recommending that the NYISO recalculate the 2001 cost allocation using a neighboring system's data in a manner not supported by Attachment S, the Commission's hearing Order, or Commission precedent.

- The record of this proceeding, reviewed objectively, demonstrates that the NYISO followed its Commission-approved tariff as required by law and Commission precedent. If the Commission concludes, however, that certain provisions of Attachment S are ambiguous and likely to give rise to future litigation, the NYISO should be given an opportunity to revise those provisions following appropriate consultation with its stakeholders. The Initial Decision is not helpful in this regard and, for the reasons stated herein, the Commission should not accept the Presiding Judge's findings or recommendations. Instead, guidance from the Commission will enable the NYISO, in consultation with its Market Participants, to promptly clarify Attachment S in order to avoid future controversy and litigation.

BACKGROUND

In its Order conditionally approving the NYISO's OATT, the Commission directed that the NYISO and Market Participants "jointly develop guidelines for allocating cost responsibility with regard to new interconnections."[2] In response to the Commission's directive, the NYISO's Business Issues Committee formed the Interconnection Issues Task Force ("IITF") to develop, through a consensus, stakeholder process, rules for the fair allocation of costs related to the interconnection of proposed generation projects in New York State. (Exh. NYI-1, Corey Test. 5:16-20; Exh. NYI-22, Mitsche Test. 4:1-3).[3] Attachment S is the fruit of that stakeholder deliberative process. (Exh. NYI-1, Corey Test. 3:18-4:5).

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[2] Central Hudson Gas & Electric Corp., 88 FERC ¶ 61,138, at p. 61,384 (1999).

[3] Citations to "Test." are to the direct, answering or rebuttal testimony ("Reb. Test.") of a referenced witness submitted prior to the hearing. Citations to "Tr." are to the transcript of the pre-hearing conferences and the hearing in this matter. Complainants KeySpan Energy Development Corporation and KeySpan-Ravenswood, LLC are referred to as "KeySpan." Except where otherwise (continued…)

At approximately the same time, the NYISO formed the Transmission Planning and Advisory Subcommittee ("TPAS"), an advisory subcommittee which reports directly to the NYISO's Operating Committee. (Exh. NYI-1, Corey Test. 5:7-8; Exh. NYI-22, Mitsche Test. 3:22-23; Exh. NYI-24 (TPAS Scope and Organization, at § 3.1).[4] TPAS's role is to review and comment on transmission and interconnection-related studies and assessments performed by NYISO staff or Market Participants, such as System Reliability Impact Studies ("SRIS"),[5] and to review and comment on studies related to the cost allocation process. (Exh. NYI-24, at § 4.3; Exh. NYI-1, Corey Test. 5:8-11). At all relevant times, the elected Chairperson of IITF and TPAS was James V. Mitsche, who testified on behalf of the NYISO. (Exh. NYI-22, Mitsche Test. 3:22-4:5; Exh. NYI-23; Exh. NYI-24, at § 3.3). During his tenure as Chairperson, Mr. Mitsche represented Sithe Energies, a Developer that initially had two projects being allocated interconnection costs as part of the 2001 cost allocation process. (Exh. NYI-22, Mitsche Test. 4:6-10).

IITF/TPAS meetings reflected the stakeholder process through which Market Participants with often conflicting commercial interests deliberated, drafted and reached consensus regarding the terms of Attachment S. (Exh. NYI-1, Corey Test. 5:11-13, 18-19; Exh. NYI-22, Mitsche

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indicated, KeySpan and Complainant New York Power Authority ("NYPA") are referred to jointly as KeySpan/NYPA. Intervenor Consolidated Edison Company of New York, Inc. is referred to as "Con Edison." Complainants Electric Power Supply Association ("EPSA") and Independent Power Producers of New York, Inc. ("IPPNY") played no active role in the proceedings, filed no written testimony or exhibits and did not appear at the hearing.

[4] The NYISO's Operating Committee is one of three committees through which the NYISO operates. Its membership includes all five types of Market Participants, and decisions are made through a Commission-approved, weighted voting process. The Operating Committee has approval authority for the cost allocation. (Exh. NYI-1, Corey Test. 4:15-5:6).

[5] An SRIS is a study designed to determine whether a proposed project may degrade system reliability and, if so, to identify the SUFs needed to mitigate the problem(s). The NYISO OATT mandates that an SRIS be conducted for each proposed new power generation project of at least 10 MWs connecting at 115kv or above.

Test. 5:16-21). IITF/TPAS participants arrived at decisions not through formal voting, but by consensus, a procedure set forth in the TPAS Scope and Organization document and approved by the NYISO's Operating Committee. (Exh. NYI-1, Corey Test. 5:7-19; Exh. NYI-22, Mitsche Test. 5:2-3; Exh. NYI-24, at § 3.5).[6]

Attachment S, which took more than a year to complete (Exh. NYI-22, Mitsche Test. 5:19-20), calls for annual performance of two studies: an Annual Transmission Baseline Assessment ("ATBA") and an Annual Transmission Reliability Assessment ("ATRA"). (Exh. NYI-1, Corey Test. 10:3-5; Exh. NYI-22, Mitsche Test. 6:15-18). The purpose of the ATBA is to identify the System Upgrade Facilities ("SUFs")[7] that Transmission Owners would need to install, in the absence of new generation being developed by Developers, to comply with Applicable Reliability Requirements[8] and reliably meet load growth and changes in load pattern

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[6] Contrary to the testimony of Ray Plaskon, a KeySpan/NYPA witness who played no role in the drafting of Attachment S (Tr. 214:12-18, 23-24), consensus for these purposes did not require unanimity. For reasons that are perhaps obvious, had unanimity been the test, the sharply conflicting commercial interests of the Transmission Owners and Developers (demonstrated clearly in this proceeding) would have paralyzed the IITF and guaranteed failure of the rule development process. In this regard, the Commission has previously recognized that consensus does not imply a unanimity of views. See PJM Interconnection, L.L.C., 84 FERC ¶ 61,212, at p. 62,035 (1998) (Commission defers to the judgment of the PJM ISO and its Board based upon a record of "broad, if not unanimous, consensus").

[7] Attachment S defines System Upgrade Facilities as:

> The least costly configuration of commercially available components of electrical equipment that can be used, consistent with good utility practice and Applicable Reliability Requirements, to make the modifications to the existing transmission system that are required to maintain system reliability due to: (i) changes in the system, including such changes as load growth, and changes in load patterns, to be addressed in the form of generic generation or transmission projects; and (ii) proposed New Interconnections. In the case of proposed New Interconnection projects, System Upgrade Facilities are the modifications or additions to the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Minimum Interconnection Standard.

(Exh. NYI-2, Attachment S, at Section I.B (Original Sheet No. 658A - First Revised Sheet No. 659)).

[8] Attachment S defines Applicable Reliability Requirements as:

(continued…)

anticipated for the New York Control Area. (Exh. NYI-1, Corey Test. 10:12-14; Exh. NYI-22, Mitsche Test. 6:3-5, 6:13-7:2). These SUFs have been referred to as "anyway" SUFs because they would be "needed anyway" even without the addition of new Developer projects to the system. (Exh. NYI-22, Mitsche Test. 6:2-5). The ATBA requires the NYISO to develop a "Baseline" representation of existing New York State generating capacity and to compare that Baseline with predicted load growth and changes in load patterns over a five-year study period. (Exh. NYI-1, Corey Test. 12:3-6; Exh. NYI-22, Mitsche Test. 6:20-22). If the Baseline transmission and generation facilities would be insufficient to meet Applicable Reliability Requirements during the five-year period, then the NYISO must "develop feasible solutions that include the identification of [SUFs] that are sufficient to either interconnect additional generic generation and/or increase transmission transfer capability in order to satisfy the Applicable Reliability Requirements." (Exh. NYI-2, Attachment S, at Section IV.F.1.a(1)(e) (First Revised Sheet No. 667)); Exh. NYI-1, Corey Test. 20:21-22; Exh. NYI-22, Mitsche Test. 6:22-7:2).

The purpose of the ATRA is to identify the SUFs that will be needed for the interconnection of the Class Year projects. (Exh. NYI-1, Corey Test. 10:18-19; Exh. NYI-22, Mitsche Test. 6:5-8). These SUFs have been referred to as "but for" SUFs, because they would not be needed "but for" the new Developer projects. (Exh. NYI-1, Corey Test. 9:22; Exh. NYI-22, Mitsche Test. 6:5-7). The analysis of existing capacity and predicted load growth and changes in load patterns under the ATRA is the same as the ATBA, although the ATRA includes

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> The NYSRC Reliability Rules and other criteria, standards and procedures, as described in Section IV.F.1.(a)(1), applied when conducting the Annual Transmission Baseline Assessment and the Annual Transmission Reliability Assessment to determine the System Upgrade Facilities needed to maintain the reliability of the New York State Transmission System. The Applicable Reliability Requirements applied are those in effect when the particular assessment is commenced.

(Exh. NYI-2, Attachment S, at Section I.B (First Revised Sheet No. 655)).

the proposed Developer projects as part of the generating capacity that will be available to meet Applicable Reliability Requirements.[9] (Exh. NYI-1, Corey Test. 10:7-9). Ultimately, the NYISO compares the total cost of SUFs identified in the ATBA with the total cost of SUFs identified in the ATRA, and allocates the net difference to and among Class Year Developers. (Exh. NYI-1, Corey Test. 9:20-23; Exh. CE-1, Turkin Test. 5:11-13).

In the spring of 2001, IITF recommended that Attachment S be approved. On June 6, 2001, the rules were approved by the NYISO's Management Committee, (Exh. NYI-22, Mitsche Test. 5:20-21; Exh. NYI-35), the NYISO's highest level stakeholder governing body. Mr. Mitsche reported to the Management Committee all matters upon which IITF/TPAS participants had not reached consensus. None of those items related to any of the three issues in this proceeding. (Exh. NYI-35; Tr. 1062:20-25). The NYISO thereafter submitted Attachment S to the Commission for approval, in a filing dated August 29, 2001. The 2001 cost allocation process was underway at that time, and had been for several months. (Exh. NYI-16, Lamanna Test. 5:5-8; Tr. 756:18). The cut-off date for inclusion of Developer projects in the 2001 Class Year was May 1, 2001, which was also the commencement date of the 2001 cost allocation studies called for in Attachment S. (Exh. NYI-8, at para. 3; Exh. NYI-1, Corey Test. 31:24-32:5; Exh. NYI-22, Mitsche Test. 6:10-12; Tr. 760:15-761:3). Nothing in the record disputes in any way the accuracy of the foregoing description of the Attachment S process.

As submitted to the Commission for filing, Attachment S reflected the consensus of Market Participant stakeholders arrived at during a lengthy stakeholder deliberative process, just

[9] Developers' proposed projects are analyzed on a Class Year basis as part of the ATRA. (Exh. NYI-1, Corey Test. 10:18-20; Exh. NYI-22, Mitsche Test. 5:7-9).

as the Commission had intended. This was noted explicitly when the NYISO filed the original version of Attachment S with the Commission on August 29, 2001:

> The NYISO staff has worked for more than one year with Market Participants to develop a set of interconnection facility cost allocation rules. Numerous specific proposals were presented and discussed. The transmission pricing and interconnection policies of the Commission were frequently discussed. The interconnection cost allocation rules already in place in PJM, New England and elsewhere were thoroughly reviewed. ***Throughout the process,* [*market*] *participants sought to formulate a set of rules that are in accordance with Commission policies*,** compatible with established NYISO interconnection procedures, consistent with the best practices in PJM and the rest of the Northeast, and fully sensitive to the distinctive characteristics of the New York State power market.
>
> ***The OATT amendments proposed here represent the outcome of a comprehensive process to develop a broad consensus*** and carefully crafted package that deals in an integrated manner with the many related issues of interconnection facilities cost allocation. ***The strong support given to the set of rules ultimately developed reflects the great extent to which* [*market*] *participants believe the goals of the process were effectively accomplished***.[10]

The original version of Attachment S submitted to the Commission required that the ATBA be "initiated by Transmission Owners, and conducted by the Transmission Owners and NYISO Staff."[11] Consistent with that provision, Con Edison, the Long Island Power Authority ("LIPA"), and several other Transmission Owners prepared and submitted to the NYISO, beginning in October 2001, proposed ATBAs covering their transmission districts. (Exh. NYI-17 (Con Edison ATBA); Exh. NYI-18 (LIPA ATBA); Exh. NYI-16, Lamanna Test. 5:10-12; Exh. NYI-22, Mitsche Test. 10:1-10). Under the original version of Attachment S, the Transmission

[10] New York Independent System Operator, Inc. Filing of New Attachment S to Open Access Transmission Tariff to Implement Rules to Allocate Responsibility for the Cost of New Interconnection Facilities, and Request for Expedited Action, Docket No. ER01-2967-000, August 29, 2001 (emphasis added) ("NYISO August 29, 2001 Compliance Filing"). At the hearing, the Presiding Judge took judicial notice of the contents of the original version of Attachment S. (Tr. 970:24-971:17).

[11] NYISO August 29, 2001 Compliance Filing, at Section IV.F.1 (Original Sheet No. 664).

Owners also were alone responsible for developing feasible generic solutions to meet Applicable Reliability Requirements in their respective transmission districts.

Following its receipt of the various Transmission Owners' proposed ATBAs, NYISO staff undertook a review and analysis of their load and capacity forecasts, the locational requirements for the New York City and Long Island control areas (Areas J and K, respectively), and the Transmission Owners' proposed generic units. (Exh. NYI-16, Lamanna Test. 5:12-6:3, 6:9-13; Exh. NYI-28, Corey Reb. Test. 6:22-7:16).

On October 26, 2001, the Commission accepted Attachment S with certain conditions. Among other things, the Commission directed the NYISO to file revised tariff language requiring the NYISO (1) to exercise "decisional control" over the ATBA, and (2) to conduct the ATBA on a statewide basis.[12] After stakeholder discussions at TPAS, the NYISO incorporated the required changes into a revised Attachment S, which was the subject of a compliance filing made on December 26, 2001.[13] By Order issued February 27, 2002, the cost allocation rules were found to be "just and reasonable" under the Federal Power Act, and were accepted by the Commission.[14] Subsequent challenges to Attachment S were rejected.[15]

With respect to decisional control, the revised Attachment S provides:

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[12] New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at p. 61,575-76 (2001).

[13] New York Independent System Operator, Inc. Compliance Filing, Docket No. ER01-2967-000, December 26, 2001. In its December 26, 2001 compliance filing made in response to the Commission's October 26, 2001 Order regarding "decisional control," the NYISO noted that, "[a]s part of its work to prepare the compliance filing, the NYISO has held a series of meetings and telephone conference calls with Market Participants who provided input for the August 29[, 2001 Compliance] Filing to discuss with them the changes required by the October 26 Order. This compliance filing includes input received during that consultative process."

[14] New York Independent System Operator, Inc., 98 FERC ¶ 61,201 (2002); New York Independent System Operator, Inc., 100 FERC ¶ 61,103, at P 9 (2002)

[15] New York Independent System Operator, Inc., 100 FERC ¶ 61,103 (2002).

> The Annual Transmission Baseline Assessment, as described in these rules, will be conducted by the NYISO staff ***in cooperation with Market Participants***. No Market Participant will have decisional control over any determinative aspect of the Annual Transmission Baseline Assessment.

(Exh. NYI-2, Attachment S, at Section IV.F.1 (Original Sheet No. 663A and First Revised Sheet 664) (emphasis added)). Thus, while Attachment S requires the NYISO to maintain "decisional control" over the ATBA, Attachment S also specifically requires that the ATBA be conducted "in cooperation with Market Participants," including Transmission Owners and Developers. (Exh. NYI-2, Attachment S, at Section IV.F.1 (First Revised Sheet No. 664); Exh. NYI-28, Corey Reb. Test. 7:17-8:4). Indeed, Attachment S specifically provides that, in preparing the ATBA, NYISO staff must "first develop Baseline system improvement plans *with each Transmission Owner*." (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(a) (First Revised Sheet 665) (emphasis added)). As part of the process of developing Baseline system improvement plans, the Transmission Owners may propose generic generating units for their transmission districts and the SUFs associated with them. (Exh. NYI-1, Corey Test. 28:5-12).

Following the Commission's October 26, 2001 Order, NYISO staff began a variety of analyses required for the ATBA, a number of which already had been performed by Con Edison and LIPA. (Exh. NYI-16, Lamanna Test. 6:9-19; Exh. NYI-28, Corey Reb. Test. 6:22-7:7) NYISO staff analyzed load and capacity data from the NYISO's *2001 Load and Capacity Data Report* (also known as the "Gold Book") and confirmed the existence of a projected gap between existing capacity and forecasted load by the year 2006, including a gap within four of New York City's load pockets. (Exh. NYI-16, Lamanna Test. 6:9-19; Exh. NYI-22, Mitsche Test. 10:2-4). NYISO staff then undertook an analysis of New York City's load pocket and 80% locational requirements, and prepared to undertake short circuit analysis, matters traditionally undertaken by local Transmission Owners such as Con Edison. (Exh. NYI-1, Corey Test. 35:13-23; Exh. NYI-16, Lamanna Test. 7:2-13).

NYISO staff evaluated Con Edison's and LIPA's proposed generic units and determined that they were feasible under Attachment S and, in the case of New York City, that the proposed generic units would have remedied the gaps identified in New York City's load pockets. (Exh. NYI-16, Lamanna Test. 8:18-23). NYISO staff concluded that the six generic units proposed by Con Edison for Area J (New York City) were feasible insofar as each was modeled or based on an actual proposed project (Generic Unit No. 1), an actual 2001 Class Year project (Generic Unit Nos. 3, 5, 6), or an actual unit that had been placed in service, re-rated or repaired in 2001 (Generic Unit Nos. 2, 4). (Exh. NYI-16, Lamanna Test. 8:8-18; Exh. CE-1, Turkin Test. 10:9-13). For the same reasons, NYISO staff also determined that the generic solutions proposed by LIPA for Area K (Long Island) were feasible. (Exh. NYI-16, Lamanna Test. 7:14-22; Exh. NYI-3, at 26).

Subsequent to the Commission's October 26, 2001 Order, the NYISO sought to complete the ATBA and conclude the 2001 cost allocation in the most expeditious manner possible.[16] Notably, following the Commission's Order regarding decisional control, there were no calls at TPAS for NYISO staff to "start from scratch" in conducting the ATBA or to reject the initial work that had been done by the Transmission Owners. (Tr. 1017:14-18). Between November 2001 and issuance of the final version of the 2001 Cost Allocation Report on May 15, 2002, the NYISO's proposed generic units were presented and discussed at TPAS. (Tr. 1027:6-7). At no time did KeySpan, NYPA or any other Developer, submit to the NYISO a written, formal proposed ATBA or alternative set of generic units. (Exh. NYI-28, Corey Reb. Test. 8:8-11; Tr. 1018:4-9).

[16] The NYISO originally hoped to complete the 2001 cost allocation by late-2001. (Exh. NYI-22, Mitsche Test. 6:10-12). Market Participants, including Developers, wanted the process to proceed quickly as cost certainty and speed were important to the success of their generation projects. (Exh. NYI-22, Mitsche Test. 5:13-15; Tr. 1017:22-1018:3).

The NYISO 2001 Cost Allocation Report was presented to TPAS on May 15, 2002, (Exh. NYI-3), and approved by the NYISO's Operating Committee on May 23, 2002, over the objections of some Market Participants, including Con Edison and KeySpan. (Exh. NYI-13 (Operating Committee Minutes, May 23, 2002)). KeySpan appealed the 2001 cost allocation to the NYISO Board of Directors, which dismissed the appeal on July 16, 2002. (Exh. KEY-13).

On August 28, 2002, KeySpan, together with Complainants NYPA, EPSA and IPPNY, commenced this proceeding, alleging that the NYISO had violated Attachment S in conducting the 2001 cost allocation and seeking an order compelling the NYISO to perform a revised cost allocation study. The NYISO answered the Complaint on September 24, 2002.

On October 30, 2002, the Commission issued an Order establishing hearing procedures (the "Hearing Order"), and identified three narrow questions for review: (1) whether the NYISO's selection of generic generating units was consistent with the feasibility criterion in the cost allocation rules; (2) whether the NYISO's exclusion of certain generating units from the Baseline Assessment was consistent with the cost allocation rules; and (3) whether the most recent PJM model available at the time the studies commenced was used to conduct the Baseline Assessment, and what effects an updated model might produce.[17] As discussed below, the resolution of each of these questions hinges on the interpretation of tariff terms that are either ambiguous or incomplete, and the core issues all relate to the reasonableness of the NYISO's interpretations of the language of Attachment S.

[17] KeySpan Energy Dev. Corp, et al. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,099, at p. 61,368 (2002).

Following extensive discovery, the parties filed testimony and exhibits in February 2003, and a hearing was held on March 5-7, 10-11 2003. Following the submission of Post-Hearing briefs, the Presiding Judge issued her Initial Decision on May 8, 2003.

SPECIFIC EXCEPTIONS AND SPECIFICATION OF ERRORS OF FACT AND LAW

Pursuant to Rule 711 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711 (2002), the NYISO takes exception to each of the findings and recommendations set forth in the Initial Decision and enumerates the associated errors of fact and law as follows:

1. The Initial Decision is compromised by the Presiding Judge's disregard for the language of Attachment S, which provides that the cost allocation process be conducted "in cooperation with" Market Participants. This flaw caused her to misunderstand the cost allocation process, to find that NYISO "favored" the Transmission Owners, and to conclude erroneously that the NYISO did not conduct the 2001 cost allocation in a manner consistent with the cost allocation rules.

2. The Complainants failed to meet their statutory burden of proof with respect to all three questions posed by the Commission in its Hearing Order.

3. The Presiding Judge erred by disregarding relevant evidence of the Commission-approved stakeholder deliberative process that led to the adoption of Attachment S. The Presiding Judge's other findings of NYISO bias and manipulation with respect to the stakeholder process have no support in the record.

4. The Presiding Judge erred by disregarding or failing to give any deference to the NYISO's reasonable interpretations of its own tariff.

5. The Presiding Judge erred in finding that the NYISO selected generic generating units for the 2001 ATBA in a manner that was inconsistent with the "feasibility criterion" contained in Attachment S.

6. The Presiding Judge erred in finding that the NYISO's exclusion of certain Class Year 2001 Developer projects from the ATBA existing system Baseline violated Attachment S.

7. The Presiding Judge erred in denying the NYISO's motion to strike improper rebuttal testimony regarding proposed new generation in the PJM system, by excluding evidence from PJM regarding proper modeling of the PJM system that is directly relevant to a proper determination of what impact use of an updated PJM model would have had on the 2001 cost allocation, and by failing to accept the only evidence presented concerning the impact of using an updated model.

ARGUMENT

At the outset, an important issue merits consideration by the Commission. The Presiding Judge's conduct throughout these proceedings suggests an apparent predisposition against the NYISO. Her uncritical acceptance of KeySpan/NYPA's assertion that every action taken by the NYISO in conducting the 2001 ATBA was done *with the intent* to favor Con Edison permeates the Initial Decision. Of course, insofar as the very purpose of the ATBA is to allocate costs between Transmission Owners and Developers, decisions by the NYISO which result in a lower cost allocation for one group can be said to "favor" the interests of that group over those of the other. But in the Presiding Judge's view, every decision made by the NYISO which happened to result in a lower cost allocation for Transmission Owners is proof positive of an institutional "bias" on the NYISO's part. This alleged predilection has no discernable basis in over three years of discretionary decision-making by the NYISO or in any Commission decision.

In language usually found in works of advocacy rather than reasoned adjudication, the Presiding Judge's Initial Decision is filled with vituperative and unsubstantiated accusations against the NYISO. The Presiding Judge accuses the NYISO of "bias" towards the Transmission Owners, Initial Decision ¶¶ 137 n.34, 141, 142, 169, 196, 205, of failing to implement the TPAS process in a "meaningful" or "transparent" way, id. ¶¶ 147, 148, of "manipulating" Attachment S and the TPAS process, id. ¶¶ 148, 175, of taking "the easy way out on every step of the cost allocation process," id. ¶ 206, and of having a "credibility problem" with the Commission, id. ¶ 149. None of these charges is substantiated by the facts.

In another instance, the Presiding Judge accuses the NYISO of being "disingenuous," lacking "candor," and adding to an "already tarnished reputation" with the Commission because the NYISO's Answer stated incorrectly that the NYISO had used the most current PJM data available to it at the time it commenced the 2001 cost allocation studies. Initial Decision ¶ 202.

But she fails to advise the Commission that, at a December 20, 2002 hearing before the Presiding Judge, the NYISO's counsel explained that the NYISO had recently had determined (after the Answer had been filed) that a more up-to-date PJM model had been available to the NYISO in May 2001, and NYISO then actually stipulated to the fact that the NYISO had not used the most updated PJM model. (Tr. 104:8-11). Indeed, the same acknowledgement was made in early December 2002 in response to Trial Staff's first set of Data Requests, and repeated in the NYISO's pre-filed testimony. (Exh. NYI-1, Corey Test. 41:11-13). Consistent with the Presiding Judge's entire frame of reference, however, these circumstances are transformed into an act of "duplicity." Initial Decision ¶ 202. Given the NYISO's track record as independent administrator of the wholesale electricity markets in New York, it was improper for the Presiding Judge to unjustly impugn the NYISO's integrity in such a reckless and cavalier manner.

Regretfully, the approach displayed by the Presiding Judge in her Initial Decision is simply the culmination of a consistent course of slanted conduct throughout the proceedings. In addition to her decisions to ignore evidence of the IITF/TPAS deliberations and exclude the plainly relevant testimony of a PJM witness, discussed in detail below, other examples of the Presiding Judge's bias against the NYISO abound. For example:

- On December 11, 2002, KeySpan/NYPA moved for an expedited schedule that was intended to, and ultimately did, severely restrict the amount of time the NYISO would have to conduct its PJM model impact evaluation. Given the importance of this issue, the NYISO prepared and filed an Answer to the motion within 24 hours of being served. Unbeknownst to the NYISO, however, the Presiding Judge had issued an order hours earlier granting KeySpan's motion. In other words, she issued an order granting KeySpan/NYPA the relief it requested without affording the NYISO the most basic of rights, an opportunity to be heard on the motion. The NYISO's motion seeking reconsideration was denied.[18]

[18] See Answer of NYISO to Motion of KeySpan and NYPA to Establish a New Procedural Schedule in Conformance with the April 1, 2003 Deadline, Docket No. EL02-125-000, December 12, 2002; Order Re-Establishing Procedural Schedule and Procedures, Docket No. EL02-125-000, December 12, 2002; Motion of NYISO for Reconsideration of the Presiding Judge's Order Re-Establishing (continued…)

- At a hearing held on December 20, 2002, it appeared that the Presiding Judge already had made up her mind about issues related to the Commission's third question, months before completion of discovery, submission of testimony and the evidentiary hearing. At that hearing, the NYISO's counsel was explaining the process in 2001 whereby the NYISO obtained short circuit data, including data of neighboring systems, from the Transmission Owners, which traditionally had been the source of short circuit data and analysis. When NYISO counsel explained that the NYISO was not conducting short-circuit analysis in the same way in 2002, the Presiding Judge interrupted to say: "Well, I hope not, because you obviously did it wrong."[19]

- On January 17, 2003, the NYISO served discovery requests on KeySpan/NYPA seeking expert disclosures and related documents plainly authorized by Commission Rule of 402. On January 28, the NYISO moved to compel after KeySpan/NYPA served objections and refused to make the disclosures. On this occasion, the Presiding Judge granted KeySpan/NYPA nearly a week to respond to the motion despite the NYISO's request for an expedited schedule (which KeySpan/NYPA did not even oppose). She then issued an order on February 4 acknowledging that the NYISO's request for pre-testimony expert disclosure was "clearly contemplate[d]" by Rule 402(c), but denying the NYISO's motion on the ground that the NYISO's need for the information did not outweigh the "burden" that would be placed on KeySpan/NYPA in having to make required expert disclosures (originally due on January 23) so close to the date pre-filed testimony was due (February 11). The Presiding Judge's reasoning was based on no Commission Rule or precedent but rather, on the unsupported view that "[w]hile the Rule might contemplate this [expert disclosure before testimony is filed], it is up [to] the Presiding Judge of each proceeding to decide if such discovery is appropriate, depending upon the circumstances of the proceeding, when the issue is presented to her."[20]

- During the hearing, efforts by the NYISO's counsel to impeach KeySpan/NYPA's witnesses through use of sworn deposition testimony were obstructed by the Presiding Judge, who refused to allow the NYISO's counsel to use the deposition transcripts for impeachment purposes despite the clear mandate of Commission Rule 405(a)(1).[21]

Procedural Schedule & Procedures, Docket No. EL02-125-000, December 17, 2002; Order Denying Request of the NYISO for a Revised Procedural Schedule, Docket No. EL02-125-000, December 23, 2002.

[19] See Tr. 139:21-22.

[20] See NYISO Motion to Compel Testifying Expert Discovery from KeySpan & NYPA and to Shorten Time to Respond to this Motion; Docket No. EL02-125-000, January 28, 2003; Order Setting Response Time to NYISO's Motion to Compel, Docket No. EL02-125-000, January 28, 2003; Order Denying in Part & Granting in Part Motion to Compel of NYISO, Docket No. EL02-125-000, February 4, 2003.

[21] See, e.g., Tr. 301:1-13; 421:15 - 422:17. The Presiding Judge prohibited deposition testimony from being used for impeachment purposes, despite the fact that Commission Rule 402(a)(1) clearly contemplates such use of depositions. 18 C.F.R. § 405(a)(1); see also Florida Power & Light Co., 65 (continued…)

By far the most egregious example of conduct that prejudiced the NYISO's ability to build the record, however, was the Presiding Judge's decision to exclude the testimony of PJM's Executive Director of System Planning, Steven R. Herling, despite its indisputable relevance to issues related to the Commission's third question. As described in detail below, Mr. Herling's testimony directly supported the NYISO's position with respect to the appropriate methodology for modeling proposed generating capacity in the PJM system, a critical issue that determines the impact using an updated PJM model would have on the 2001 cost allocation. The Presiding Judge's exclusion of this evidence, while simultaneously adopting Complainants' competing methodology, conflicted with the liberal rules applicable to the admission of evidence in administrative proceedings and served no other purpose than to favor Complainants by unjustly denying the NYISO the right to present it case.

The totality of these circumstances -- the systematic disregard or exclusion of relevant evidence favorable to the NYISO (discussed below), the unwarranted accusatory tone of the Initial Decision, the apparent pre-determination of issues before hearing the evidence, and a series of procedural rulings which seemed intended to and did, in fact, impede the NYISO's development of the record -- leads to the disturbing but unmistakable conclusion that the Presiding Judge did not act as impartial arbiter of the facts and the law in this proceeding. For all of these reasons and for those that follow, her Initial Decision should be reversed in its entirety.

FERC ¶ 63,000 (1993) (Levant, J.) (deposition testimony can be used to "contradict, impeach, or complete the testimony" of a witness).

I. THE PRESIDING JUDGE ERRED IN FINDING THAT THE NYISO DID NOT SELECT GENERIC GENERATING UNITS IN A MANNER THAT WAS CONSISTENT WITH THE FEASIBILITY CRITERION IN ATTACHMENT S.

The first question posed by the Commission in its Hearing Order was "whether NYISO's selection of generic generating units was consistent with the feasibility criterion in the cost allocation rules."[22] While the Initial Decision states that "the short answer" to that question is no, the Presiding Judge failed to make any findings as to what the "feasibility criterion" set forth in Attachment S requires the NYISO to do when evaluating the feasibility of generic generating units, nor did she make any findings that the two (out of six) generic units KeySpan/NYPA complained about were not "feasible" under Attachment S.

In light of these critical failures, it is difficult to understand on what basis the Presiding Judge concluded that the NYISO did not comply with the feasibility criterion of Attachment S. What is clear, however, is that the Presiding Judge erred in reaching that determination because she ignored a significant body of evidence demonstrating that the NYISO selected generic units in a manner fully consistent with the language of Attachment S and the intentions of IITF/TPAS stakeholders, and overlooked KeySpan/NYPA's failure to meet their burden of proof that the NYISO's Generic Units No. 1 and No. 5 were not feasible.

A. The Presiding Judge Acknowledged The Fact That Complainants Bore The Burden Of Proof Here, But She Failed To Apply That Standard Correctly Or To Recognize That Complainants Failed To Establish That The NYISO Violated Attachment S.

Under Section 206 of the Federal Power Act and Section 556(d) of the Administrative Procedure Act ("APA"), KeySpan/NYPA bears the burden of proof in this proceeding.[23]

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[22] KeySpan Energy, 101 FERC ¶ 61,099, at p. 61,368 (2002).

[23] Section 556(d) of the APA provides, in pertinent part, that "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d) (2003). It is well-established that this burden-of-proof standard is applicable in proceedings brought pursuant to Section 206 of the Federal Power Act, 16 U.S.C. 824(e) (continued…)

KeySpan/NYPA must "carr[y] the burden of persuasion as well as the burden of production with regard to each element of its prima facie case,"[24] and "must also present such evidence as to constitute a preponderance if it is to carry its burden of persuasion under Section 556(d)."[25] Thus, to satisfy the burden of proof in this case, Complainants must prove by a preponderance of the evidence that the NYISO violated Attachment S as currently written.[26]

The Presiding Judge concluded that KeySpan/NYPA met their burden of proof with respect to the Commission's first question. Complainants had argued that NYISO violated Attachment S, yet, as set forth in detail below, they failed to prove that Attachment S contains the requirements allegedly violated. The Presiding Judge therefore erred in finding, without reasoning or explanation, that the NYISO did not select feasible generic units. Specifically, the Initial Decision never finds that NYISO's proposed Generics Nos. 1 and 5 were not feasible. Absent such findings, the Presiding Judge erred by concluding that Complainants' met their burden of proof that the NYISO violated Attachment S's feasibility criterion.

B. The Presiding Judge Erred As A Matter Of Law By Ignoring The Evidence Of IITF/TPAS Deliberations.

The sole reference in Attachment S to the selection of "feasible" generic units is found at First Revised Sheet No. 667, which provides:

(2003). See Ohio Edison Co., 15 FERC ¶ 63,062, at p. 65,300 (1981). In a case such as this, the "proponent of the order" is KeySpan, since KeySpan is "the party seeking to alter the current circumstances." Michigan Gas Storage Co., 83 FERC ¶ 63,001, at p. 65,024 (1998), reversed on other grounds, 87 FERC ¶ 61,038 (1999); Southern California Edison Co., 41 FERC ¶ 61,188, at p. 61,492 (1987) ("the proponents of the change in this proceeding . . . bear the burden of proof"); Ohio Edison Co., 15 FERC ¶ 63,062, at p. 65,300 (assigning burden of proof to the parties who "oppose [the situation] as it presently exists").

[24] Michigan Gas, 83 FERC at p. 65,024; see Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 276 (1994).

[25] Ohio Edison, 15 FERC at p. 65,300.

[26] Id.; Michigan Gas, 83 FERC at p. 65,024.

> If the existing transmission or generation facilities, combined with previously approved and accepted System Upgrade Facilities, are insufficient to meet Applicable Reliability Requirements, then the NYISO staff will *develop feasible solutions* that include the identification of System Upgrade Facilities that are sufficient to either interconnect *additional generic generation* and/or increase transmission transfer capability in order to satisfy the Applicable Reliability Requirements.

(Exh. NYI-2, Attachment S, at IV.F.1.a.(1)(e) (First Revised Sheet No. 667)) (emphases added).

"Generic" generation refers to hypothetical generating units, not actual plants (Exh. NYI-1, Corey Test. 21:3-4; Tr. 893:9-11). Attachment S does not require that generic units be, in fact, capable of being built or that they would be, in fact, built by utilities or transmission owners. (Exh. CE-1, Turkin Test. 8:15-17; Exh. S-1, Sammon Test. 9:20-21; Tr. 264:20-21; Tr. 890:3-7). Generic units may, but need not be, modeled after class year or actual planned projects. (Exh. NYI-1, Corey Test. 25:15-20; Exh. CE-1, Turkin Test. 7:21-8:12; Exh. NYI-2, Attachment S, at Appendix One (First Revised Sheet No. 689)).

The term "feasible solutions" is not defined in Attachment S, and the Presiding Judge acknowledged that Attachment S provides no guidance as to what steps must be taken or factors considered by the NYISO in determining whether a generic generating unit is "feasible." Initial Decision ¶ 134. The Presiding Judge also acknowledged that the parties "submitted competing (and conflicting) evidence" about what is required to determine whether a proposed generic unit is feasible. Initial Decision ¶ 139. Indeed, KeySpan/NYPA's principal witness, Ellis O. Disher, admitted that his own opinion of what the term "feasible" required was not the only reasonable interpretation, and he acknowledged that the IITF/TPAS deliberations would be a useful source of reference for interpreting any ambiguities in Attachment S. (Tr. 405:24-406:15, 414:3-6, 11).

A tariff provision is ambiguous if, consistent with Mr. Disher's own testimony, it is "reasonably susceptible of different constructions or interpretations."[27] In cases involving the interpretation of ambiguous tariff provisions, such as this one, it is appropriate to consider extrinsic evidence,[28] the scope of which is flexible and broad.[29]

In this proceeding, the NYISO submitted extensive evidence regarding the IITF/TPAS stakeholder process that resulted in Attachment S, including evidence of consensus reached by Market Participants and the NYISO during the drafting process.[30] Extrinsic evidence about this stakeholder process was relevant because the consensus achieved there among parties with opposing commercial interests is probative of the reasonableness of the NYISO's interpretation of Attachment S. In short, there is no better evidentiary guide to the interpretation of ambiguous terms in Attachment S than the evidence of stakeholder deliberations at IITF/TPAS. In light of Mr. Disher's own acknowledgement of the relevance of such evidence in interpreting ambiguous terms in Attachment S, the Presiding Judge's refusal to consider such evidence in developing the record, see Initial Decision ¶ 141, was clearly erroneous.[31]

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[27] Mississippi River Transmission Corp., 96 FERC ¶ 61,185, at p. 61,819 (2001) (quoting Lee v. Flintkote Co., 593 F.2d 1275, 1282 (D.C. Cir. 1979)).

[28] See Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1545 (D.C. Cir. 1985) ("extrinsic evidence is admissible to remove and explain away any ambiguity" in tariffs); Mississippi River, 96 FERC at p. 61,819 (stating that, in interpreting ambiguous language in a tariff, "the parties may introduce extrinsic evidence of the parties' intent to prove a meaning to which the contract language is reasonably susceptible").

[29] See Cajun Electric Power Coop. Inc. v. FERC, 924 F.2d 1132, 1137 (D.C. Cir. 1991) ("The sources properly used for the reconciliation of ambiguity, of course, differ depending on the nature of the legal document sought to be interpreted").

[30] Id. (remanding case to FERC to allow party to introduce at hearing extrinsic evidence of negotiating background of ambiguous provision in tariff).

[31] In refusing to consider evidence from TPAS and IITF meetings to resolve ambiguities in Attachment S, the Presiding Judge stated that she was accepting Complainants' "authorities" but failed to recite or discuss her rationale in any way. Initial Decision ¶ 141.

(continued…)

The record contains uncontroverted evidence that IITF/TPAS participants reached consensus with respect to several significant issues in this proceeding, including the following: (1) the term "feasible solutions" had been purposely left undefined in Attachment S in order to grant NYISO staff discretion when selecting generic units for the ATBA (Exh. NYI-22, Mitsche Test. 7:4-6); (2) in selecting generic units for the five-year ATBA study period, in this case 2002-2006, the NYISO was required to employ the perspective of a regulated integrated utility planning new generation at least five or more years prior to the start of the ATBA period (Exh. NYI-1, Corey Test. 21:12-17; Exh. NYI-22, Mitsche Test. 11:3-11); and (3) the NYISO was to rely upon its *Load and Capacity Data Report* to determine *both* load *and* capacity when compiling the existing system Baseline for the ATBA. (Exh. NYI-1, Corey Test. 14:5-7; Exh. NYI-22, Mitsche Test. 9:4-15; Tr. 269:7-11).[32] KeySpan/NYPA offered *no evidence* rebutting or controverting this testimony.

It would appear that the Presiding Judge was referring to Complainants' argument that extrinsic evidence may be considered to resolve an ambiguity only where the evidence shows the "mutual intent" of the parties. (KeySpan Reply Brief at 7-8). But her reliance on that authority is an error of law that miscomprehends the consensus stakeholder process. The evidence presented by the NYISO does not reflect merely the NYISO's own intent, but rather the expressed intent of IITF/TPAS stakeholders as a body. The Presiding Judge apparently would read the law to require unanimity of all stakeholders before the evidence of the stakeholder discussions became admissible. In light of the Commission's well-established recognition that the consensus stakeholder process does not require unanimity, see supra footnote **6** and infra footnote **37**, and the evidence that unanimity was not required at IITF/TPAS, the Presiding Judge's rule has the effect of rendering extrinsic evidence from the stakeholder process inadmissible anytime there is a dissenting vote. The caselaw cited by Complainants, and accepted by the Presiding Judge, is inapplicable to a stakeholder process where the tariff reflects the intentions of a broad consensus, if not the unanimous agreement of all stakeholders.

[32] KeySpan/NYPA's own witness, Ray Plaskon, acknowledged that the issue of using the *Load and Capacity Data Report* for both load and capacity data was addressed at TPAS. Mr. Plaskon, who was representing KeySpan at the time, offered no objection or comment at those meetings regarding use of *Load and Capacity Data Report* to identify existing capacity. (Tr. 269:7-25). Nor did he testify that use of the *Load and Capacity Data Report* was the subject of "considerable disagreement" among IITF/TPAS participants. The Presiding Judge's errors with respect to the Commission's second question concerning the exclusion of the ten NYPA CT units from the ATBA Baseline are addressed at pages **38-52** supra.

Despite the foregoing, the Presiding Judge concluded that consensus "was [n]ever reached on any controversial issue at any TPAS meeting," and on that basis chose *to disregard all evidence of the IITF/TPAS deliberations.* Initial Decision ¶ 147. The sole basis cited by the Presiding Judge to support this decision, however, was the voting record of the Operating Committee's approval of the Cost Allocation Report, Initial Decision ¶ 145 (citing Ex. NYI-13),[33] apparently because the Committee's vote was not unanimous (in fact, the vote was 65.40% in favor, 34.60% against). Nowhere does the Presiding Judge explain how the Operating Committee's vote on the Cost Allocation Report in May 2002 constitutes a basis to negate the NYISO's uncontroverted evidence of IITF/TPAS consensus. There was no evidence that "consensus" in the IITF/TPAS context required unanimity, and the deliberations clearly shed light on the issues in dispute. Thus, disregarding evidence of such deliberations was erroneous as a matter of law.

As the Commission is aware, the OATT's stakeholder-based governance procedures include a requirement that the cost allocation be approved by a formal vote of the NYISO Operating Committee, which is comprised of Market Participants, and the right of Market Participants to appeal any decision by the Committee to the NYISO's Board of Directors. An

[33] At one point, the Presiding Judge states that "[t]estimony from Market Participant attendees of the TPAS meetings makes clear that there was considerable disagreement on points affecting those participants." Initial Decision ¶ 145. She cites nothing from the record to support this statement, however. Moreover, her observation is particularly suspect insofar as KeySpan's principal witness, Mr. Disher, actually attended most of the IITF/TPAS meetings, yet failed to rebut any of the testimony of consensus offered by Messrs. Corey or Mitsche. Indeed, Mr. Disher testified that he had not taken any of the IITF/TPAS deliberations into account in rendering his opinions, and carefully avoided testifying about IITF/TPAS deliberations regarding the selection of feasible generic units. (Tr. 416:20-417:1). Far from there being insufficient proof of IITF/TPAS consensus, Mr. Disher's failure to rebut the NYISO's evidence provided the Presiding Judge a basis to infer that had Mr. Disher testified about the deliberations, his testimony, in fact would have corroborated the accounts of Messrs. Corey and Mitsche. SFPP, L.P., 93 FERC ¶ 63,023, at p. 65,134 (2000) (failure of party to introduce evidence regarding disputed issue about which it had knowledge gives rise to inference that such information would have confirmed adverse party's evidence).

affirmative vote in the Operating Committee in excess of 58% constitutes approval.[34] KeySpan availed itself of these rights by challenging and voting against the 2001 cost allocation at the Operating Committee (as did Con Edison) and later appealing the Committee's decision approving the 2001 cost allocation to the NYISO Board. After its appeal was denied, KeySpan exercised its right under Attachment S to reject its cost allocation and thereafter withdrew its Ravenswood project from the 2001 Class Year. In sum, the Operating Committee's vote on the 2001 cost allocation proves that the stakeholder process and governance procedures worked precisely as intended by the Commission. It was not a proper basis for the Presiding Judge to ignore all evidence of IITF/TPAS deliberations in reaching her conclusions.[35]

C. The Presiding Judge Erred By Failing To Afford Deference To The NYISO's Independent Interpretations Of Its Own Tariff.

The Presiding Judge committed another error by ignoring the well-settled law that in evaluating "competing (and conflicting)" interpretations of a tariff, a reasonable interpretation of a tariff administrator like the NYISO should be favored over an alternative interpretation put forth by other parties.[36] To the extent the NYISO's interpretations of Attachment S represents a

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[34] Similarly, the NYISO's Commission-approved governance process requires a favorable vote of 58% of its Management Committee to authorize tariff amendments under Section 205 of the Federal Power Act.

[35] Consistent with her selective approach of disregarding any evidence favorable to the NYISO, the Presiding Judge recommends to the Commission that it consider the IITF/TPAS evidence in support of Complainants' allegation of NYISO bias in favor of the Transmission Owners. Initial Decision ¶ 141. Here again, while the Presiding Judge *characterizes* interpretations of Attachment S expressed by NYISO staff as proof of institutional "bias" in favor of the Transmission Owners, there simply is no *evidence* that NYISO staff was motivated by bias. The claim is pure speculation on the part of the Presiding Judge based on her fundamental misunderstanding of both the stakeholder process and the fact that Attachment S specifically provides for certain types of participation by the Transmission Owners.

[36] See, e.g., El Paso Natural Gas Co., 48 FERC ¶ 63,023, at p. 65,068 (1989) (Birchman, J.) (affirming interpretation by tariff administrator that was "reasonable" and rejecting alternate interpretations); Trunkline Gas Co., 68 FERC ¶ 61,398, at p. 62,578 (1994) (rejecting alternate tariff interpretation and affirming administrator's "reasonable interpretation").

"permissible, reasonable construction" of its terms, and conforms to the intentions of the Market Participant stakeholders who drafted them, these interpretations should have been afforded deference by the Presiding Judge and upheld.[37] The Presiding Judge instead ignored all the arguments and authorities briefed by the independent NYISO and now recommends acceptance of KeySpan/NYPA's self-serving interpretations of Attachment S.

The NYISO's role as the independent administrator of its tariff provides an additional reason to apply a deferential standard when resolving any ambiguities in Attachment S. The NYISO, of course, has no financial interest in the outcome of the cost allocation process. Rather, its role is solely to administer Attachment S in a neutral manner, and thereby fulfill its charge of furthering the policy objectives the Commission sought to achieve by establishing independent market administrators and, more specifically for purposes of this proceeding, by approving the NYISO interconnection procedures and cost allocation rules.

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[37] See, e.g., PJM Interconnection, L.L.C., 102 FERC ¶ 61,276, at P 38 (2003) (accepting proposed market rule implementation timeline, despite protests, because it "strikes a reasonable balance and reflects the broad consensus view of a majority of PJM's stakeholders."); ISO New England, Inc., 101 FERC ¶ 61,305, at P 11 (2002) (accepting proposed cost projections in the ISO's operating budget in part because they "have been the subject of a stakeholder review process and have received broad stakeholder support."); New York Independent System Operator, Inc., 97 FERC ¶ 61,206, at p. 61,900 (2001) (accepting proposed anti-gaming rules that "address problems in the NYISO-administered market, increase efficiency in NYISO's markets, and have widespread stakeholder support."); New York Independent System Operator, Inc., 90 FERC ¶ 61,319 (2000) (rejecting alternative Installed Capacity recall bid proposal put forward by a single party in opposition to a system approved by the NYISO's stakeholder committees); USGen New England, Inc., 90 FERC ¶ 61,323 (2000) (rejecting unilaterally filed contract for system restoration services); New England Power Pool, 90 FERC ¶ 61,168 (2000) (expressing preference for consensus market re-design proposal in New England); Sithe New England Holdings, LLC and Sithe New Boston, LLC v. New England Power Pool and ISO New England Inc., 86 FERC ¶ 61,283 (1999), reh'g denied, 88 FERC ¶ 61,080 (1999) (rejecting market participants' attempted unilateral revision of a complex arrangement developed by an ISO); PJM Interconnection, L.L.C., 84 FERC ¶ 61,212, at p. 62,035 (1998) ("[W]e emphasize that in accepting PJM's proposed revisions . . . we deferred to the judgment of the PJM ISO and its Board concerning a regional solution to an identified regional problem based on what we understand is a broad, if not unanimous, consensus").

In contrast, the interpretations advanced by KeySpan/NYPA are motivated by their financial self-interest and must be evaluated, with requisite caution, in that light.[38] KeySpan/ NYPA unquestionably seek to lower their interconnection costs as a result of this proceeding. It comes as no surprise, then, that KeySpan/NYPA espouse interpretations of Attachment S that would, without exception, result in a higher cost allocation to Con Edison and, consequently, lower interconnection costs for themselves. Because the NYISO has no financial stake in the outcome, the Commission should reject the Presiding Judge's findings and afford substantial deference to the NYISO's independent interpretation of Attachment S.

D. The Presiding Judge Erred In Finding That The NYISO Violated Attachment S Because It Selected Generic Units Similar To Those Originally Proposed By Con Edison.

The Presiding Judge's discussion of her reasons for concluding that the NYISO did not comply with Attachment S is set forth in three brief paragraphs of a 206-paragraph Initial Decision. Each paragraph is devoted to one of three alleged "shortcomings" in the NYISO's application of Section IV.F.1.a.(e) of Attachment S.

The first alleged "shortcoming" identified by the Presiding Judge is her finding that the NYISO did not "develop its own feasible solutions," as required by Attachment S, but, rather, "simply took what Con Edison had done, slightly massaged it, and put it forward as their own solution." Initial Decision ¶ 136. This finding has no support in the record but is, in any event, premised upon a fundamental misreading of Attachment S.

[38] In the proceeding below, NYPA argued that this factor did not apply to it because it is not a for-profit entity. The point is an empty one. NYPA has brought this proceeding in order to lower its SUF costs; the fact that it does not report profits like KeySpan does not alter the reality that it has a financial interest in the outcome of this dispute.

The Presiding Judge neither cites nor discusses specific evidence to support her finding.[39] In fact, the record shows that, following the Commission's October 26, 2001 decision, the NYISO exercised decisional control over the ATBA process which, up to that point and as originally intended by IITF/TPAS stakeholders, was to have been conducted by the Transmission Owners. NYISO staff analyzed the capacity and load forecasts for the 2002-2006 period, and evaluated the feasibility of Con Edison's proposed generic units. NYISO staff concluded that they were feasible because each was either modeled or based on an actual proposed project (Generic Unit No. 1), an actual Class Year 2001 project (Generic Unit Nos. 3, 5, 6), or an actual unit that had been placed back in service, re-rated or repaired in 2001 (Generic Unit Nos. 2, 4). (Exh. NYI-16, Lamanna Test. 8:8-18; Exh. CE-1, Turkin Test. 10:9-13). For the same reasons, NYISO staff determined that the generic units proposed by LIPA for Long Island were also feasible. (Exh. NYI-16, Lamanna Test. 7:14-22; Exh. NYI-3 at 26).

More significantly, however, the Presiding Judge's finding is based on a fundamental misreading of Attachment S. Nothing in Attachment S precludes the NYISO from adopting a generic unit proposed by a Market Participant so long as the unit represents a "feasible solution" to an identified reliability deficiency. In other words, if a Market Participant proposes a generic unit that represents a "feasible solution" to the deficiency, the NYISO is not prohibited from selecting the generic unit solely because it comes from a Market Participant. Such an interpretation of Attachment S would be nonsensical in light of the tariff's requirement that the

[39] The Presiding Judge prefaced her findings with a comment about the "overwhelming evidence" "detailed in this decision," yet paragraphs 136-138 of the Initial Decision contain virtually no discussion of, or citation to, the record.

ATBA (which includes the selection of generic units) be conducted "in cooperation with Market Participants."[40]

Moreover, nothing in the Commission's Order of October 26, 2001 mandating NYISO "decisional control" over the ATBA precluded input from the Transmission Owners during the ATBA process. In fact, in addition to the provision requiring that the ATBA be conducted "in cooperation with Market Participants," Attachment S requires that in conducting the ATBA "NYISO staff will first develop Baseline system improvement plans with each Transmission Owner." (Exh. NYI-2, Attachment S, at IV.F.1.a.(1)(a) (First Revised Sheet No. 665)).

The Presiding Judge simply ignored the Commission's ruling on rehearing addressing Section IV.F.1.a(1)(a) in which the Commission stated it "did not intend to prohibit the transmission owners from preparing Transmission Planning Assessments of the local systems since they have the greatest experience and knowledge of the electric distribution system at the local level."[41] She also ignored the uncontroverted testimony that "Baseline system improvement plans" submitted by Transmission Owners shall include proposed generic generating units if needed to meet Applicable Reliability Requirements. (Exh. NYI-1, Corey Test. 28:5-12).

In sum, nothing in Attachment S prohibits the NYISO from adopting a proposed set of generic generating units so long as they represent "feasible solutions" to the deficiency identified at the outset of the ATBA process. To the extent the NYISO adopted generic generating units

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[40] Indeed, if the standard for independence requires an ISO or RTO to reject the work product of Market Participants, it is doubtful that many ISOs or RTOs could function. That standard is what the Presiding Judge would impose, since the only fact in the record to support her allegation that the NYISO failed to act independently in developing the ATBA is that the NYISO largely adopted the generic portfolio proposed by Con Edison. In the real world, where ISOs and RTOs do and must work with their Market Participants, that bare fact does not establish any lack of independence.

[41] New York Independent System Operator, Inc., 100 FERC ¶ 61,103, at P 24 (2002).

proposed by Con Edison after its own independent evaluation of their feasibility and compliance with Applicable Reliability Requirements, it did not violate Attachment S in doing so. The Presiding Judge's finding in this regard was clearly erroneous.

E. The Presiding Judge Erred In Finding That The NYISO Selected Generic Units On The Basis Of Least Cost SUFs.

The second "shortcoming" identified by the Presiding Judge is that the NYISO allegedly chose the generic units it did "primarily because they resulted in the least cost SUFs to the TOs." Initial Decision ¶ 137. She claims, in a footnote and without any citation to the record, that this "demonstrates a bias in favor of the TOs by the NYISO." Initial Decision ¶ 137 n.34.

There is no evidence in the record establishing that the NYISO selected its generic units because or even "primarily because" they resulted in the least cost SUFs to Transmission Owners. The record does demonstrate that the NYISO evaluated the proposed generic units to ensure that they met Applicable Reliability Requirements, including New York City's load pocket requirements, and represented "feasible solutions." As to the SUF costs associated with these generic units, NYISO staff, in fact, increased those costs that would be allocated to Con Edison from $10 million to $15 million, an increase of 50%. Because some of the additional SUFs identified by the NYISO negated the need for certain SUFs originally identified by Con Edison, the final SUF costs allocated to Con Edison totaled $13 million, still a 30% increase from the ATBA first proposed by Con Edison in October 2001. (Exh. NYI-16, Lamanna Test. 12:10-13:13). Similarly, the NYISO adjusted the proposed ATBA submitted by LIPA in late-2001 by deleting as unnecessary certain SUFs that LIPA had wanted allocated to Class Year 2001 Developers, and those SUF costs were not allocated to them. (Exh. NYI-16, Lamanna Test. 13:14-22).

These undisputed facts refute the claim that the NYISO adopted generic units solely or primarily because they would result in the least cost SUFs for Transmission Owners or that the

NYISO "manipulated" the process to favor them. To the contrary, Con Edison objected so strenuously to the NYISO's 2001 ATBA that it proposed an entirely different set of proposed generic units that would have lowered its SUF costs to $10 million -- a proposal flatly rejected by the NYISO (see Exh. NYI-1, Corey test. 29:22-30:14; Exh. NYI-16, Lamanna Test. 14:1-13) -- and Con Edison *voted against* the 2001 Cost Allocation Report at the Operating Committee. (Exh. NYI-13). There simply is no support in the record for the Presiding Judge's view that the NYISO was doing Con Edison's bidding in the cost allocation process.

The Presiding Judge ignored these inconvenient facts, relying instead on an e-mail message sent in 2001 by Con Edison's Ray Turkin to his counterparts at NYPA, indicating quite candidly that Con Edison had proposed generic units that represented the least costly SUFs. (Ex. KEY-16). There is no evidence that the e-mail was ever sent to anyone at the NYISO. Thus, despite a document production by the NYISO well in excess of 30,000 pages, KeySpan/NYPA's claim that the NYISO's actual evaluation of generic units was "primarily" driven by SUF costs, adopted uncritically by the Presiding Judge, rests essentially on a single e-mail message from Con Edison that the NYISO had absolutely nothing to do with.[42]

F. The Presiding Judge Erred In Finding That The NYISO Did Not Comply With Attachment S In Developing Generic Generating Units.

The third alleged "shortcoming" identified by the Presiding Judge, based on an isolated comment by the NYISO's Manager of Transmission Planning, is that the NYISO allegedly

[42] Nothing in Attachment S suggests that a Transmission Owner's cost allocation should reflect anything other than the least cost solution to meeting load growth and changes in load patterns over the planning period. Attachment S contains no rationale for imposing a higher cost solution on ratepayers, and the NYISO does not believe that the Commission intended such a result. Thus, the NYISO has no duty to seek out a more expensive solution. The NYISO does have a duty to ensure that the Transmission Owner does not unfairly game the outcome to escape this responsibility; the feasibility criterion and the requirement to meet Applicable Reliability Requirements are the NYISO's primary tools to accomplish this goal.

"view[ed] the entire process of developing 'feasible solutions' as a 'fantasy plan.'" Initial Decision ¶ 138. Moving beyond KeySpan/NYPA's own hyperbole, she makes the wholly unsupported statement that the NYISO, "[h]aving given itself permission to detach the development process from reality, . . . *expressed freedom to approve any solutions save for the most bizarre*." Initial Decision ¶ 138 (emphasis added). This comment, like others disparaging the NYISO, absolutely lacks support in the record (none is cited) and is completely at odds with the evidence concerning the factors the NYISO considers relevant to the feasibility analysis.[43]

While accusing the NYISO of having taken the "easy way out on every step of the cost allocation process," Initial Decision ¶ 206, the Presiding Judge's "fantasy plan" rationale obfuscates the Initial Decision's failure to address or make specific findings with respect to the key issues that were the subject of discovery, testimony and extensive briefing by the parties, namely KeySpan/NYPA's claims that: (1) Attachment S requires the NYISO to identify reliability deficiencies on a year-by-year basis over the five-year ATBA period, (2) to be feasible under Attachment S a generic unit must be capable, in fact, of being built and placed in-service in a specific year in which a deficiency is identified, (3) Attachment S requires the NYISO to employ integrated resource planning (IRP) methods in evaluating the feasibility of generic units, and (4) the NYISO's Generic Units No. 1 and No. 5 were not feasible under Attachment S.

[43] Thus, the Presiding Judge simply ignored Mr. Corey's testimony that the location of a proposed generic unit is the most significant factor in determining a unit's feasibility. (Exh. NYI-1, Corey Test. 23:9-11). It was undisputed that Central Park was the one and only location IITF/TPAS participants identified as being clearly not feasible. (Exh. NYI-1, Corey Test. 23:22-24:4; Exh. NY-22, Mitsche Test. 7:6-7, 7:7-11). Nowhere is there evidence that the NYISO interpreted the feasibility criterion as allowing it "to approve any solutions save for the most bizarre." The Presiding Judge also ignored Mr. Corey's additional testimony that generic units must resemble the type of units that would traditionally have been installed by the integrated utilities, and must be feasible from the traditional planning perspective of an integrated utility planning to address a forecasted shortfall in capacity during the ATBA period. (Exh. NYI-1, Corey Test. 21:19-22:6; Exh. NY-22, Mitsche Test. 11:5-11; Tr. 567:6-15; Ex. KEY-13, at 4).

1. Attachment S Does Not Require That Generic Units Be Identified Or Be Capable Of Being Built And In-Service In A Particular Year Of The ATBA Study Period.

By far the most critical component of KeySpan/NYPA's complaint was its claim that Attachment S requires that the NYISO identify generic units on a year-by-year basis over the five-year ATBA period, and that the proposed generic units be capable, in fact, of being built and coming into service in the specific year in which they are identified. This theory is crucial to KeySpan/NYPA's claim because they challenge the NYISO's Generic Units No. 1 and 5 not on their lack of feasibility per se but on the basis that, having been proposed as part of the 2001 cost allocation, they could not have been built and placed into service by 2002.

Nothing in Attachment S or the IITF/TPAS deliberations supports KeySpan/NYPA's interpretation of Attachment S's feasibility criterion. Nor does the Presiding Judge make any finding that Attachment S requires the NYISO to select only generic units that are capable of being built and placed in service, in a specific year of the ATBA period. Instead, she is forced once again to "recommend to the Commission that they consider favorably" KeySpan/NYPA's argument on the year-by-year feasibility of generic units. Initial Decision ¶ 140.

KeySpan/NYPA's interpretation, however, is not consistent with Attachment S. Indeed, KeySpan/NYPA's witnesses acknowledged that there is nothing in Attachment S stating that generic units (as opposed to SUFs) must be identified on a year-by-year basis in the ATBA. (Tr. 219:21-220:3; Tr. 408:2-3).[44] Moreover, there is no textual support for the contention that generic units must, in fact, be capable of coming into service in a specific year within the five-year ATBA period. Indeed, such a criterion would be impossible to satisfy. No one can predict

[44] As the Presiding Judge acknowledged, Attachment S does not even require the NYISO to identify capacity deficiencies on a year-by-year basis over the five-year ATBA basis. Thus, she found it necessary to recommend that the Commission impose such a requirement as a "clarifying addition." Initial Decision ¶ 149.

whether or not a particular project will actually come into service in a specific year, if at all. The electrical, regulatory, economic, environmental and political issues that factor into such an analysis are simply too numerous and uncertain for such a burden to be imposed on the NYISO as part of the cost allocation process.[45] (Exh. NYI-16, Lamanna Test. 10:12-15). The Commission should reject an interpretation of Attachment S that requires the NYISO to engage in this level of predictive analysis before making a feasibility determination.

Evidence that an actual proposed project on which a generic unit is modeled did not come into service as the merchant developer originally expected is not proof that the generic unit is not feasible for purposes of the cost allocation rules. To conclude otherwise would be to keep the cost allocation process indefinitely open to challenge on the basis of the real-world evolution of those actual projects. Insofar as one of the primary purposes of Attachment S is to timely provide Developers with interconnection cost certainty, and finality, Complainants' view should be rejected.

Attachment S does require the NYISO to identify SUFs on a year-by-year basis. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(a) (First Revised Sheet No. 665)). The purpose of that requirement, however, is explained in Attachment S itself. Year-by-year identification of SUFs is required to ensure that Developers' "net cost responsibility" for the SUF costs associated with their actual projects (identified in the ATRA)[46] are determined using "constant dollars." Section IV.F.4.d provides:

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[45] Indeed, one of the generic solutions identified by KeySpan Energy on behalf of LIPA was modeled after the Cross Sound Cable project. LIPA forecasted that the cable would be operational by 2002. Legislative and regulatory developments in Connecticut, however, stalled the project, and as of the time of the testimony in this case, the cable was not operational. (Exh. NYI-16, Lamanna Test. 10:15-11:6; Exh. NYI-19).

[46] As set forth in Attachment S, the purpose of these provisions "is to allocate to the Developer the responsibility for the cost of the net impact of its project on the needs of the transmission system for (continued…)

> [W]hen netting the cost of System Upgrade Facilities required for its project, as identified in the [ATRA], with those identified in the [ATBA], the cost of [SUFs] ***in the out-years of the [ATBA] and the out-years of the [ATRA]*** will be discounted to a current year value for netting.

(Exh. NYI-2, Attachment S, at IV.F.4.d (First Revised Sheet No. 672) (emphasis added); Exh. CE-1, Turkin Test. 9:7-10:3).

Thus, the purpose of identifying SUFs in the ATBA and ATRA on a year-by-year basis is to facilitate the "netting" of Developers' actual, allocated SUF costs in "constant" dollars. The fact that SUFs must be identified on a year-by-year basis to achieve this purpose, however, does not mean that proposed generic units must be capable, in fact, of coming on line in a specific year of the five-year ATBA study period. (Exh. CE-1, Turkin Test. 10:4-6; Exh. NYI-28, Corey Reb. Test. 4:16-17; Tr. 1084:24-1085:2; Tr. 1116:15-25). Indeed, Commission Staff's witness, John Sammon, also testified (consistently with the NYISO's witnesses and Mr. Mitsche, the IITF/TPAS Chairman) that generic units need not be capable of actually coming on line during a specific year of the five-year period, so long as they are feasible sometime during the five-year period from an integrated utility planning perspective. (Exh. S-1, Sammon Test. 9:18-10:2).

In sum, the evidence demonstrates that KeySpan/NYPA's interpretation of feasibility as requiring year-by-year feasibility of generic units is not supported by the text of Attachment S or the underlying IITF/TPAS stakeholder deliberations.

2. Attachment S Does Not Require The NYISO To Use Integrated Resource Planning Methods When Developing Generic Units For The ATBA.

Another crucial component of KeySpan/NYPA's claim is that Attachment S requires the NYISO to engage in an elaborate "real-world" planning exercise to determine whether or not a

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System Upgrade Facilities. Thus, a Developer is responsible for the cost of the System Upgrade Facilities that are required by, or caused by, its project." (Exh. NYI-2, Attachment S, at IV.F.4.a (Original Sheet 671)).

proposed generic unit is "feasible." Given the complete lack of textual or other support for this claim, it is not surprising that the Presiding Judge's recommended list of "clarifying additions" includes suggestions that would create a basis for KeySpan/NYPA's claim, namely that the Commission (1) adopt the definition of feasibility proposed by KeySpan/NYPA's witnesses, (2) require the NYISO to perform "fatal flaw analysis" with respect to any proposed generic unit, (3) require the NYISO to weight "different" but unspecified factors it considers when selecting generic units, and (4) adjust the due dates in Attachment S in order to provide the NYISO "sufficient time" to perform the analysis being recommended. Initial Decision ¶ 149.

That the Presiding Judge found it necessary to make such recommendations is further proof, if more were needed, that none of these requirements currently exist as part of Attachment S. Insofar as KeySpan/NYPA's claim that the NYISO violated Attachment S in conducting the 2001 ATBA rests upon the theory that these requirements are currently part of Attachment S, there can be no question that KeySpan/NYPA failed to meet their burden of proof and that the Presiding Judge erred in finding that the NYISO violated Attachment S.[47]

[47] The Presiding Judge acknowledges that the Commission directed her only "to develop a factual record" and did not "invite" her views as to "the reasonableness or clarity of the cost allocation provisions of Attachment S," Initial Decision ¶ 131, which the Commission has already found to be "just and reasonable." Moreover, it is axiomatic that a Presiding Judge may not stray from the Commission's hearing order. In all hearings before an Administrative Law Judge, the scope of review is limited to the specific issues identified by the Commission in its order establishing hearing procedures. Issues in a proceeding cannot be broadened beyond the Commission's order, and neither the Presiding Judge nor the Chief Judge can interject an issue not raised by the Commission in its hearing order. Columbia Gas Transmission Corp., Docket No. RP-91-161-000, "Order Denying Motion for Partial Summary Disposition," (Oct. 21, 1992) (Leventhal, J.) (unreported) ("The jurisdiction of a presiding judge in any FERC proceeding is circumscribed by the Commission order establishing hearing procedures"); Pennsylvania Elec. Co., 34 FERC ¶63,094 (1986) (Wagner, C.J.). For these reasons, the Presiding Judge's recommendations for "clarifying additions" to the tariff were improper and should be rejected by the Commission. Potential changes to Attachment S may be filed with the Commission pursuant to Section 205 of the Federal Power Act, but only after receiving approval from the NYISO Board and its Management Committee, the NYISO's highest-level stakeholder governing body. Notice to the public of such proposed changes is required by Section 205(d) of the Federal Power Act. ISO Agreement § 19.01.

(a) Attachment S Does Not Require Use Of IRP Methods.

Much of the testimony of KeySpan/NYPA's principal witness, Mr. Disher, concerned the alleged need for the NYISO to use integrated resource planning (IRP) methods, employed by utilities to plan *actual* generating units, when developing *generic* generating units. Mr. Disher admitted during cross-examination that nothing in Attachment S states that NYISO staff must employ IRP or IRP methods when developing generic units. (Tr. 436:2-11). Other witnesses confirmed the same. (Tr. 884:13-16; Tr. 1018:17-20; 1051:16-19; Tr. 1089:18-22). There is no textual support in the tariff for the contention that IRP or IRP methods (however vaguely defined by KeySpan/NYPA) must be employed by the NYISO when developing generic units.

Mr. Disher also failed to point to anything in the IITF/TPAS deliberative process which supports a conclusion that Market Participants either (i) reached a consensus that IRP methods should be employed to evaluate the feasibility of generic units or (ii) believed that such a requirement is implied by the language of Attachment S. In fact, KeySpan/NYPA offered no evidence to that effect, and the NYISO's and Con Edison's unrebutted testimony was to the contrary. (Exh. NYI-1, Corey Test. 22:10-12; Exh. NYI-22, Mitsche Test. 11:22-12:13; Tr. 1089:18-22).

Commission Staff witness Sammon testified similarly that a determination of feasibility requires the use of "least-cost" planning. (Exh. S-1, Sammon Test. 11:13-15). But like Mr. Disher, Mr. Sammon's pre-filed testimony offered no reference to anything in Attachment S or the IITF/TPAS deliberative process that mandates use of least-cost planning. (See Exh. S-1). Significantly, Mr. Sammon's opinion is inconsistent with that offered by Commission Staff's other witness, Mr. Kim Khu. Mr. Khu did not find that least-cost planning methods are required in any way by Attachment S and, in fact, testified that it is not realistic to expect NYISO staff to

engage in least-cost planning when developing generic units for purposes of the ATBA. (Exh. S-11, Khu Test. 6:22-7:2).

(b) Attachment S Does Not Require The NYISO To Conduct Fatal Flaw Analysis When Selecting Generic Units.

Following up on Mr. Disher's testimony, the Presiding Judge recommends that the Commission require the NYISO to conduct "fatal flaw" analysis when selecting generics. The Presiding Judge points to nothing in Attachment S, however, that requires the NYISO to conduct fatal flaw analysis with respect to proposed generic units. Indeed, no evidence at all exists to support that conclusion. Thus, the Presiding Judge was left to recommend that this requirement be added. Mr. Disher never testified that Attachment S requires such an analysis, which he described as one aimed at determining "whether a particular plan can, in fact, be accomplished," (Tr. 401:2-9), a standard which does not appear in Attachment S. Mr. Disher admitted that to make such a determination would "very likely involve *an in-depth investigation of all of the factors related to construction of a facility, and that could take a year or two,*" (Tr. 402:2-6) (emphasis added), the type of investigation Mr. Disher acknowledged could not be done in the context of conducting the ATBA, (Tr. 404:19-22). This is especially true since the analysis would have to be conducted for each generic unit being proposed (in 2001, six were required). KeySpan's interpolation of such an elaborate analytical requirement into the ATBA process lacks support in both the text of Attachment S and the record, is inconsistent with the intentions of IITF/TPAS participants, and would be completely unworkable.

Moreover, the whole notion of reading a "fatal flaw analysis" requirement into the feasibility criterion set forth in Section IV.F.1.a.(1)(e) of Attachment S is inconsistent with the fact that the term "feasible" is used in reference to "generic generation." The word "generic" means "[c]haracteristic of or relating to a class or group of things; ***not specific***." New Oxford American Dictionary 707 (2001) (emphasis added). Thus, while KeySpan/NYPA's and the

Presiding Judge's entire focus has been on the word "feasible," they ignore that Attachment S's reference to "generic" generation requires only that such hypothetical units have certain general, non-specific characteristics, exactly as described by Mr. Corey, (Exh. NYI-1, Corey Test. 21:5-7), and not that they be the subject of the same detailed level of planning analysis applied to real generating units actually being built. There simply is no textual basis in Attachment S to support a conclusion that all the myriad real-world IRP planning factors that go into fatal flaw analysis must be analyzed in order to determine that a "generic" generating unit is "feasible" for purposes of Attachment S. Again here, the Presiding Judge supplanted the language of Attachment S with her own desired cost allocation paradigm.

(c) The Time Provided In Attachment S For The NYISO To Conduct The ATBA Does Not Allow For Use Of IRP Methods Or Fatal Flaw Analysis.

NYISO staff has six months to complete the ATBA. (Exh. NYI-1, Corey Test. 22:16-18; Tr. 1031:11-14; Exh. KEY-30, at 10). IRP, on the other hand, is a process that took many months, sometimes years, to complete with respect to just one proposed project. (Tr. 401:23-24, 402:2-6; 1046:6-7). Mr. Corey, William Lamanna, the NYISO's lead engineer for the 2001 ATBA, and James Mitsche, the former chairman of IITF/TPAS, all testified that it would be impossible for NYISO staff to engage in the type of analysis suggested by Mr. Disher or Mr. Sammon in the six months dedicated to conducting the ATBA. (Exh. NYI-1, Corey Test. 22:13-18; Exh. NYI-16, Lamanna Test. 10:12-15; Exh. NYI-22, Mitsche Test. 12:2-10). Even Mr. Disher agreed that given the time constraints applicable to the ATBA, it would not be possible for the NYISO to analyze all of the IRP factors he discussed. (Tr. 404:19-22). Mr. Corey also testified that the NYISO does not engage in generation planning of such an elaborate nature. (Tr. 759:14-16). Finally, Messrs. Corey and Mitsche confirmed that it was never the intention of IITF/TPAS participants that the NYISO be required to engage in *real world* generation planning

when developing *generic* generating units for cost allocation purposes. (Exh. NYI-1, Corey Test. 22:18-19; Exh. NYI-22, Mitsche Test. 12:11-13). Here again, the Presiding Judge has strayed from her mandate and has offered her opinion as to what Attachment S should require as opposed to what it does require.

3. KeySpan/NYPA Failed To Meet Their Burden Of Proof That Generic Units No. 1 And No. 5 Were Not Feasible.

The Presiding Judge's Initial Decision is devoid of any analysis as to the feasibility of the NYISO's Generic Units No. 1 and No. 5. These were the only generic units whose feasibility was challenged by KeySpan/NYPA.

(a) The NYISO's Generic Unit No. 1 Is Feasible.

Generic Unit No. 1 was modeled after part of an actual 520 MW combined cycle plant to be built in the Gowanus section of Brooklyn, New York by Sunset Energy Fleet LLC ("SEF"). (Exh. NYI-16, Lamanna Test. at 8:12-13; Exh. CE-1, Turkin Test. 10:10-13; Exh. CE-3). The SEF project had an approved SRIS, and had submitted an Article X application.[48] (Exh. NYI-16, Lamanna Test. 10:5-12; Exh. NYI-7, at line 2). It is configured as a combined cycle plant comprised of two 185 MW combustion turbines and a 150 MW steam turbine. (Exh. NYI-3, at Table 1.2). In contrast, Generic Unit No. 1 was proposed as a single, 185 MW combustion turbine unit to address a portion of the capacity shortfall identified by the NYISO for 2002, and a second 185 MW combustion turbine unit to address the capacity shortfall identified for 2004. (Exh. NYI-16, Lamanna Test. 8:11-12; Exh. NYI-3, at Table 1.2). It is important to make the

[48] Article X certification refers to "The certificate of environmental compatibility and public need required under Article X of the New York State Public Service Law for the siting and construction of a new electric generating facility with 80 megawatts or more of capacity." (Exh. NYI-2, Attachment S, at Section I.B. (First Revised Sheet No. 655)).

distinction between the actual SEF 520 MW project and the NYISO's Generic No. 1 because KeySpan/NYPA continuously sought to blur it throughout this proceeding.

KeySpan/NYPA claimed that proposing the installation of a 185 MW combustion turbine in 2001 was not feasible because the proposed generic unit could not be placed in service by 2002, given the Article X permitting process in New York. But that claim was based almost exclusively on a deficiency letter that SEF received from New York State regulatory authorities raising certain issues regarding SEF's actual 520 MW Gowanus project. (Exh. KEY-6). It is, in effect, an apples-to-oranges comparison. Under Attachment S, NYISO staff was not required to analyze each item identified in the SEF project's Article X deficiency letter simply because a proposed generic unit was partially patterned after it. Nor was the letter relevant to an evaluation of the feasibility of Generic Unit No. 1, which was configured as a single 185 MW combustion turbine engine and not a combined cycle, 520 MW plant. (Tr. 575:2-3). Distilled to its essence, KeySpan/NYPA's evidence that Generic Unit No. 1 was not feasible was based on nothing more than the fact that the actual SEF Gowanus project encountered unexpected delays in its permitting process, an entirely routine occurrence.[49]

NYISO staff considered Generic Unit No. 1 feasible from the perspective of a formerly regulated integrated utility planning several years prior to the ATBA 2002-2006 study period. (Exh. NYI-1, Corey Test. 24:16-25:4; Exh. NYI-16, Lamanna Test. 9:12-16). There was no evidence presented by KeySpan/NYPA that, given a five to seven year lead time, the proposed siting of a 185 MW combustion turbine in Brooklyn, New York would not be feasible.

[49] KeySpan's evidence of Generic Unit No. 1's alleged infeasibility was presented primarily through Ray Plaskon, who admitted that his testimony was based on little more than the Article X deficiency letter. (Tr. 230:8-21). His acknowledgement on cross-examination that SEF has filed an updated and revised Article X application in December 2002 (Tr. 230:22-231:12) (a fact he failed to mention in his pre-filed testimony filed months later), renders his testimony that the SEF project "is unlikely to be built" because of the deficiencies (Exh. KEY-1, Plaskon Test. 7:8-9), of little, if any, value.

Accordingly, KeySpan failed to carry its burden of proof with respect to the feasibility of Generic Unit No. 1.

(b) The NYISO's Generic Unit No. 5 Is Feasible.

Although KeySpan/NYPA also challenged the feasibility of Generic Unit No. 5, modeled after part of Con Edison's East River Repowering Project, they offered paltry support for their claim. KeySpan/NYPA's witness, Mark Waldron, included Generic Unit No. 5 in each of the studies he conducted in support of KeySpan/NYPA's claim. (Exh. KEY-24, Waldron Test. 4:6-15; Tr. 302:24-303:3). The evidence was undisputed that the seven NYPA combustion turbine units (CTs) not included in the ATBA (either as part of the existing system Baseline or as generic units) did not satisfy applicable load pocket requirements, necessitating the selection of Generic Unit No. 5. (Exh. NYI-16, Lamanna Test. 11:10-18; Turkin 13:13-17; Exh. CE-5). No KeySpan/NYPA witness disputed this evidence.

On cross-examination, Messrs. Plaskon and Disher acknowledged that Generic No. 5 was feasible within the five-year ATBA study period, 2002-2006. (Tr. 224:20-24; Tr. 442:23-24). The SRIS for the actual project upon which Generic No. 5 was, in part, modeled, was approved in 2000, and the project received its Article X certification in the summer of 2001. (Exh. NYI-16, Lamanna Test. 10:5-12; Exh. NYI-7, at line 25). From the perspective of an integrated utility planning for 2002 at least several years earlier, Generic Unit No. 5 was feasible. (Exh. NYI-16, Lamanna Test. 9:12-16).

Finally, the Presiding Judge ignored the NYISO's evidence that a presumption of feasibility is appropriate when a generic unit has been modeled after an actual, planned project. (Tr. 554:1-8). Insofar as SEF's 520 MW Gowanus project and Con Edison's ERR project had reached a certain stage in their development at the time Generic Units No. 1 and No. 5 were proposed (planning for each had begun several years before, each had an approved SRIS, and

each had either an approved or pending Article X application (Exh. 1, Corey Test. 24:16-25:4; Exh. NYI-7), it was reasonable for the NYISO to conclude that their developers had previously determined that the projects were capable of being built, i.e., they were at least feasible.[50]

In the absence of definitive evidence at the time the ATBA is under development that an actual project used as a model for a proposed generic unit cannot or will not be built, (and no such evidence existed with respect to the SEF 520 MW Gowanus or Con Edison ERR projects), there is no basis to conclude that a proposed generic unit modeled after such a project is not feasible for purposes of the ATBA. The NYISO's approach to the feasibility criterion is thus a reasonable and pragmatic one. If a developer has planned a project that has advanced to the stage of having obtained an approved SRIS and filed for Article X certification, no reason exists for requiring the NYISO to duplicate the developer's original planning process. Nor is there any reason to make the NYISO responsible for accurately predicting the outcome of the many complex interactions that may impact an actual project's development and construction. This is fully consistent with Attachment S given the fact that the NYISO lacks the expertise, time, and resources necessary to replicate the full scope of a developer's planning process as part of the ATBA. (Exh. NYI-1, Corey Test. 28:21-29:11; Exh. NYI-22, Mitsche Test. 11:20-12:13). This approach to feasibility is also fully consistent with the purpose of the ATBA, which is to establish the Transmission Owner's responsibility for system upgrade costs based on an approximation of what an integrated utility would plan to meet load growth and changes in load patterns.

[50] On the other end of this spectrum, Mr. Corey pointed out, is the generic unit being considered "out of the blue" and for which there exists no proposed project "like or similar" to it. Although not relevant here, in such a case a more in-depth evaluation of feasibility would be warranted. (Tr. 571:24-572:4).

In sum, KeySpan/NYPA failed to meet their burden of proof with respect to their claim that the NYISO's Generic Units No. 1 and No. 5 were not feasible under Attachment S, and the Presiding Judge erred in concluding that the NYISO selected generic units in a manner that was inconsistent with the feasibility criterion in Attachment S.

II. THE PRESIDING JUDGE ERRED IN FINDING THAT THE NYISO'S EXCLUSION OF CERTAIN GENERATING UNITS FROM THE ATBA'S EXISTING SYSTEM BASELINE VIOLATED ATTACHMENT S.

The second question posed by the Commission in its Hearing Order was "whether the NYISO's exclusion of certain generating units from the Baseline Assessment was consistent with the cost allocation rules."[51]

In constructing the existing system Baseline for the 2001 ATBA, the NYISO made three determinations now challenged by the Complainants: (1) the NYISO did not include the NYPA CT units; (2) the NYISO did not include Con Edison's Hudson Avenue No. 10 project; and (3) the NYISO included the Athens and Bethlehem projects. With respect to the question of when a project should be added to the Baseline, the Presiding Judge "acknowledge[d] that Attachment S provides a line of demarcation at the point that projects have had their costs allocated to them and accepted by the Project Developers." Initial Decision ¶ 176. This conclusion notwithstanding, the Presiding Judge inexplicably ruled that Attachment S does not address how the NYISO should treat "projects that are not yet on-line, but are so far along in the development process that they do not fit the category of 'proposed' either," i.e. the NYPA and Hudson Avenue No. 10 projects. Initial Decision ¶ 173. Even more inexplicably, after finding that Attachment S does not address the issue, the Presiding Judge goes on to conclude that NYISO's

[51] KeySpan Energy Dev. Corp. et al. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,099 at 61,368 (2002).

exclusion of the NYPA and Hudson Avenue No. 10 projects violated Attachment S. Initial Decision ¶ 173. She seems to have based this conclusion on a pre-conceived notion of NYISO bias in favor of the Transmission Owners which led her also to make unfounded disparaging comments that the NYISO was "manipulating the system" and "interpreting Attachment S so that a desired result was achieved." Initial Decision ¶¶ 175, 169.

The inconsistency between the Presiding Judge's acknowledgement that Attachment S establishes a demarcation for inclusion in the Baseline and her conclusion that NYISO has not properly compiled the Baseline demonstrates that she focused on an entirely different question than the Commission requested -- her own opinion of what Attachment S *should* require concerning the ATBA Baseline. In this way, the Presiding Judge misinterpreted her role, effectively ignoring the Commission's mandate and failing to apply the burden of proof established by Section 206. The Presiding Judge's conclusion completely ignores the relevant evidence, which shows that in each instance the NYISO's determination was based on either the clear language of Attachment S or on a reasonable interpretation of it. That interpretation was based on a consensus of all stakeholders as represented in the IITF/TPAS process.

A. The NYISO Properly Excluded The NYPA Units From The ATBA's Existing System Baseline Representation.

1. As The Presiding Judge Correctly Acknowledged, Class Year Projects That Have Not Accepted Their Cost Allocation Must Be Excluded From the Existing System Baseline.

It is clear from Section IV.F.1.a(1)(b) of Attachment S that a proposed Developer project shall not be included in the ATBA unless and until interconnection costs for the project have been allocated and accepted by the Developer. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(b) (First Revised Sheet No. 666); Exh. NYI-1, Corey Test. 17:22-24; Exh. S-11, Khu Test. 9:7-13).

Complainants argued below that the NYPA units (and the Hudson Avenue No. 10 unit) should have been included in the Baseline because they were on-line when the NYISO presented the ATBA to Market Participants. (KeySpan Br. at 38-40). Complainants cited the following portion of Attachment S to support their theory:

> The [ATBA] will identify the [SUFs] needed to reliably meet projected load growth and changes in load pattern without the interconnection of any proposed Developer projects, except for those proposed projects to which interconnection facility costs have already been allocated and accepted by the Developers of those projects in accordance with these rules.

(Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(b) (First Revised Sheet No. 666)). In sum, Complainants argue that the NYPA units (and Hudson Avenue No. 10) were no longer "proposed" projects at the time the ATBA was finalized and, therefore, should have been included in the ATBA. (KeySpan Initial Br. at 38).

Complainants' argument, however, viewed the term "proposed" in isolation and failed to point out to the court the very next sentence of this provision:

> When interconnection facility costs have been allocated to proposed Developer projects using these rules, ***then*** those projects and related upgrades will be added to the Baseline system studied in the next Annual Transmission Baseline Assessment.

(Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(b) (First Revised Sheet No. 666) (emphasis added)).

Section IV.F.1.a.(1)(b)'s reference to "proposed developer projects" clearly refers to Class Year projects and establishes when those projects are to be added to the ATBA -- not at the time when the project comes online, but rather at the time "when interconnection facility costs have been allocated" to the project and accepted by the Developer.[52] (Id.)

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[52] Observing this requirement is key to maintaining the separation of "anyway" SUF costs from those that are necessitated by Developer projects, because it ensures that the ATBA (continued…)

Thus, the Presiding Judge correctly found that the "line of demarcation" for inclusion in the Baseline is completion of cost allocation and acceptance of same by the Developer. Initial Decision ¶ 175.[53]

2. The NYPA Units Were 2001 Class Year Projects That Had Not Yet Undergone Or Accepted Their Cost Allocation.

It is undisputed that the NYPA CT units were Class Year 2001 projects. (Tr. 359:11-21). Although they came into service by the summer of 2001, the NYPA units had not yet undergone the cost allocation process under Attachment S and had not accepted their cost allocation. (Exh. NYI-1, Corey Test. 17:21-18:3). Since they were proposed New Interconnection projects that had not yet been through the cost allocation process and accepted their cost allocation, the NYISO's exclusion of the NYPA units from the Baseline was consistent with the plain language of Section IV.F.1.a.(1)(b) of Attachment S. (Exh. NYI-1, Corey Test. 17:21-18:3). This exclusion properly ensures that NYPA pays its proper share for these facilities' impacts on the system.

In the proceeding below, Complainants nonetheless argued that the NYPA units should have been included in the Baseline because NYPA "had already paid for the initial SUFs needed to interconnect them." Initial Decision ¶ 170. The clear and uncontroverted evidence, however, shows that NYPA had not "already paid" for the SUFs needed for the NYPA units. As explained

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Baseline does not include any Developer projects whose system impacts have not been allocated. Including Class Year projects in the ATBA Baseline because they happen to come on-line during the course of the cost allocation studies results in a financial benefit to some Developers as opposed to others in the Class Year, and the allocation of SUF costs to the Transmission Owners that are beyond the scope of their reliability obligations. This is a bizarre and twisted reading of Section IV.F.1.a.(1)(b) that corrupts the logic of the cost allocation method.

[53] The Presiding Judge wrote: "I acknowledge that Attachment S provides a line of demarcation [for inclusion in the Baseline] at the point that projects have had their costs allocated to them and accepted by the Project Developers." (Initial Decision ¶ 176).

by William Lamanna, the NYISO's lead engineer for the 2001 cost allocation, the SRISs for the NYPA units identified three Sherman Creek circuit breakers as needing upgrades "but also identified the need for the NYPA units to be subject to the [Con Edison] global solution[54] and all of its implications." (Tr. at 1008:23-1009:18). Because the NYPA units were urgently required to meet NYPA's in-city capacity requirements and to avoid substantial monetary penalties being assessed against NYPA (Exh. KEY-27, p. 29-30; Tr. 184:21-185:8, 205:24-206:4 (Hiney)), NYPA sought and Con Edison agreed to allow interconnection of the units before completion of the 2001 Cost Allocation process. (Tr. 194:11-22; Exh. 5-16; Exh. KEY-26, Hiney Reb. Test. 4:28-5:5).

At the same time, the 2001 Cost Allocation process was moving forward to identify globally all SUFs needed to accommodate the NYPA units and other Class Year 2001 Developer projects. (Exh. NYI-1, Corey Test. 9:1-10). As indicated in the 2001 Cost Allocation Report, as a result of the broader mitigation SUFs required in the 2001 Cost Allocation, the Sherman Creek breaker replacements were no longer needed to accommodate the NYPA units. (Exh. NYI-3 at 33; Tr. 1008:6-17). Thus, as Mr. Lamanna explained, the Sherman Creek breaker upgrades were "an elected SUF." (Tr. 1010:8-9). As an elected SUF, these specific costs were not to be allocated among the 2001 Class Year Developers. (Tr. 1010:13-14). Instead these upgrades were to be treated as headroom created and owned by NYPA.[55] (Tr. 1010:15-22). Accordingly,

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[54] As Mr. Lamanna explained, the term "global solution" "referr[ed] to the fact that the SRIS for the NYPA GTs was approved subject to the development of an acceptable fault current management plan" and these SRISs "feed into the ATRA process." (Tr. 1009:11-18).

[55] Under Attachment S, any elected SUFs that ultimately are "in excess of the minimum [SUFs] required by the [class-year] projects" are to be treated as causing headroom and allocated accordingly. (Exh. NYI-2, Attachment S, at Section IV.F.3.a (First Revised Sheet No. 670)); see also Exh. NYI-2, Attachment S, at Section IV.F.12 (Original Sheet No. 686) (explaining treatment of SUFs that create headroom)).

it is plainly incorrect to claim that NYPA had already paid for all necessary SUFs. NYPA elected to pay for certain SUFs needed to interconnect early, subject to a final determination of NYPA's cost allocation under the Attachment S process.

The Presiding Judge failed to consider or discredit any of this evidence. As noted above, it is unclear what legitimate, evidentiary basis she relied upon for finding that Attachment S required the NYPA units to be included in the Baseline. Instead, she seems to have merely substituted her own opinion of how Attachment S should have been written.

3. The Presiding Judge Also Failed To Consider Or Credit Complainant NYPA's Prior Admission That The NYPA Units Should Not Be Included In The Baseline.

Perhaps cognizant of the fact that its CT units did not qualify for inclusion in the ATBA Baseline, NYPA's own general counsel admitted in correspondence prior to the onset of this proceeding that the NYPA units did not belong in the Baseline. In that correspondence, sent to the NYISO's general counsel, NYPA distinguished its position from that of KeySpan, noting that its claim "is not that the NYPA facilities should have been included in the Baseline Assessment." (Exh. CE-8, July 8, 2002 Ltr. from Edgar K. Byham to Robert Fernandez, NYISO General Counsel, p. 2). Although this admission by NYPA was noted in the Commission's Hearing Order,[56] the Presiding Judge completely ignored it.

4. KeySpan/NYPA And Commission Witnesses Testified That The NYPA's Units Were Properly Excluded From The Existing System Baseline Insofar As They Were 2001 Class Year Projects.

Finally, the propriety of excluding the NYPA units from the ATBA also was supported by Commission Staff's witness Kim T. Khu. Citing Section IV.F.1.a.(1)(b) of Attachment S, Mr. Khu testified unequivocally that "[g]enerators requesting interconnection [i.e., then-current class

[56] KeySpan Energy Dev. Corp. et al, v. New York Independent System Operator, Inc., 101 FERC 61,099 at P 22 (2002).

year projects] do not belong in the ATBA. . . . Therefore, all the NYPA [units] should not be in the ATBA." (Exh. S-11, Khu Test. 9:7-13). Similarly, KeySpan's own witness, Ellis Disher, conceded that, to the extent the NYPA units are Class Year 2001 projects, they properly were excluded from the ATBA's Baseline existing system representation. (Tr. 359:15-21).

B. The Presiding Judge Failed To Address The Overwhelming Evidence That The Hudson Avenue No. 10 Unit Properly Was Excluded From The 2001 Baseline Because It Was Not Listed As Existing Capacity In The *2001 Load And Capacity Data Report.*

KeySpan's second challenge to the NYISO's Baseline concerns exclusion of the Hudson Avenue No. 10 unit. The Hudson Avenue No. 10 unit was constructed many years ago, but had been mothballed. (Exh. NYI-1, Corey Test. 18:5-6). The unit was reactivated during calendar year 2001. (Exh. NYI-1, Corey Test. 18:4-6). The NYISO did not include the Hudson Avenue No. 10 plant in the 2001 ATBA, however, because the plant was not identified in the *2001 Load and Capacity Data Report* as being either part of the New York Operating System's existing generation capacity as of January 1, 2001, or as a planned re-start as of that date. (Exh. NYI-1, Corey Test. 18:8-10; Exh. NYI-22, Mitsche Test. 8:17-20; Exh. NYI-28, Corey Reb. Test. at 3:20-22).

In her Initial Decision, the Presiding Judge concluded that the NYISO improperly excluded the Hudson Avenue No. 10 unit, based upon largely the same reasoning -- or lack thereof[57] -- adopted with respect to the NYPA units. In addition, however, the Presiding Judge

[57] With respect to both the NYPA and Hudson Avenue No. 10 units, the Presiding Judge seems to base her decision on the opinion that the exclusion of the units was "unsupported" and "favors the TOs." Initial Decision ¶ 172. The view that NYISO's decision is "unsupported" illuminates that the Presiding Judge has ignored the burden of proof in this case and exceeded the question assigned by the Commission -- both of which require the Complainants to show that the NYISO's decisions were prohibited by or violated Attachment S. Instead, the Presiding Judge seems to have placed the burden upon the NYISO to prove that the Complainants' interpretations necessarily violate Attachment S. Similarly, the view that Attachment S could in some ways "favor" TOs (and in other ways "favor" the Developers) is the clearest reflection that the Presiding Judge misinterpreted her mandate and substituted her own opinion of what (continued…)

noted two points with respect to the Hudson Avenue No. 10 unit. First, the Presiding Judge observed that Attachment S does not mandate that the NYISO rely exclusively upon the *Load and Capacity Report*. Initial Decision ¶ 171 n.43. Again, this misapplies the burden of proof, which requires Complainants to prove that the consensus decision that NYISO would rely on the *Load and Capacity Report* somehow violated Attachment S.

Second, and somewhat of a corollary to the first observation, the Presiding Judge also observed that "NYISO offered no response to the Commission Staff's assertion that [the *Load and Capacity Report*] is not to be used to define the existing Baseline." Initial Decision ¶ 171. For the reasons set forth below, all of which were noted fully in NYISO's briefs, this point is absurd. In fact, NYISO presented extensive evidence to rebut the Staff's assertion and show that: (1) it was the consensus of Market Participants in the stakeholder process of TPAS that NYISO would rely upon the *Load and Capacity Report* in constructing the Baseline representation of existing capacity; (2) the decision to do so was eminently reasonable and objective in light of the purpose of the *Load and Capacity Report*; and (3) it also was the specific consensus of Market Participants in TPAS to exclude Hudson Avenue No. 10 and other similarly situated projects that were not listed in the *2001 Load and Capacity Report.* As explained fully above, supra pp. **19-23**, insofar as the Presiding Judge chose to ignore the uncontroverted evidence of IITF/TPAS proceedings and Market Participant consensus on various issues, she did so in clear error. If the Commission considers this extrinsic evidence from the stakeholder

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the Attachment S language *should be* rather than focusing on what the language of Attachment S *is*. It is a tautology to say that a decision to exclude units from the Baseline will "favor" the TOs, just as it is to say that including units in the Baseline will "favor" the Developers. This merely recognizes that the cost allocation process is a zero-sum game between these entities. The Presiding Judge opines that excluding the NYPA Hudson Avenue No. 10 units "unreasonably" favors the TOs here, but aside from her supra-jurisdictional opinion that Attachment S should draw the line differently than it does, she fails (as did the Complainants) to explain *how,* if at all, the exclusion is inconsistent with Attachment S, which of course is the only question presented by the Commission on Issue No. 2.

process, as it properly must, it cannot conclude that NYISO violated Attachment S in compiling the 2001 Baseline.

1. The Stakeholder Decision To Construct The 2001 Baseline From The *2001 Load and Capacity Data Report* Does Not Violate Attachment S.

(a) The Stakeholder Consensus Called For The NYISO To Use The *2001 Load and Capacity Data Report* To Determine Both Forecasted Load And Existing Capacity.

Section IV.F.1.a.(1)(a) of Attachment S provides that the load forecast component of the ATBA shall be based upon the NYISO's annual *Load and Capacity Data Report*. (Exh. No. NYI-2; Exh. NYI-1, Corey Test. 12:13-15; Tr. 269:7-25; Tr. 600: 2-3). The *Load and Capacity Data Report* is the definitive reference tool for load and capacity in New York State, (Exh. NYI-1, Corey Test. 14:7-8), and depicts the New York Transmission System as of January 1 of each year. (Exh. NYI-22, Mitsche Test. 8:16-17). Transmission and generation planners from the integrated utilities historically relied upon the *Load and Capacity Data Report* as the seminal resource for load and capacity data. (Exh. NYI-1, Corey Test. 14:9-11). New York State agencies and related entities rely on the *Load and Capacity Data Report* in meeting various obligations, including development of the State Energy Plan. (Exh. NYI-1, Corey Test. 14:11-12). NYISO staff similarly uses the *Load and Capacity Data Report* as the data source for many of its studies. (Exh. NYI-1, Corey Test. 14:8-9).

For these reasons, Market Participants determined during the IITF/TPAS stakeholder process that it was appropriate and consistent with the aim of Attachment S for the NYISO to utilize the *Load and Capacity Data Report* as the exclusive source for capacity data, as well as for load forecast data, in constructing the Baseline system representation. (Exh. NYI-1, Corey Test. 14:6-8,12-15; Exh. NYI-22, Mitsche Test. 9:4-7; Exh. NYI-28, Corey Reb. Test. 3:4-22). IITF/TPAS Chairperson James Mitsche testified that this determination was the subject of considerable discussion and, ultimately, consensus at IITF. (Exh. NYI-22, Mitsche Test. 9:4).

Even KeySpan/NYPA's witness, Ray Plaskon, acknowledged that IITF/TPAS participants discussed using the *Load and Capacity Data Report* as the source for identifying existing generating capacity; Mr. Plaskon did not object to such a proposed use of the *Load and Capacity Data Report*. (Tr. 269:2-11).

As was made clear at the hearing by both a NYISO employee and by the former chairman of IITF/TPAS James Mitsche, (who represented a Developer during the 2001 cost allocation process), the *Load and Capacity Data Report* was selected as the definitive source for capacity data because it was considered a single, consolidated, and objective source of information. (Exh. NYI-1, Corey Test. 14:5-8; Exh. NYI-22, Mitsche Test. 9:4-6). The NYISO, which authors the *Load and Capacity Data Report*, was accepted by IITF/TPAS participants as the independent arbiter of what should be represented in the Baseline. (Exh. NYI-22, Mitsche Test. 9:6-7).

Using the *Load and Capacity Data Report* as the definitive source for data concerning the Baseline system provided an independent and transparent source of information to accomplish that goal. (Exh. NYI-28, Corey Reb. Test. 3:8-9). Nothing in Attachment S prescribes how the NYISO must construct the existing system Baseline or prohibits the NYISO from using the *Load and Capacity Data Report* in compiling the Baseline. The Presiding Judge's finding reads into Attachment S a prohibition that does not exist, i.e., because Attachment S does not expressly require the NYISO to use the *Load and Capacity Data Report* in determining existing system capacity, the NYISO is prohibited from doing so. This finding is clearly erroneous.

(b) Using The *Load and Capacity Data Report* To Determine Both Forecasted Load And Capacity Makes Sense And Is Consistent With The Intent And Purpose Underlying Attachment S.

As the Commission and the Presiding Judge recognized, the nature of the cost allocation process requires the NYISO to use a "snapshot" of the Baseline system at a given time. (October 30, 2002 Order; Initial Decision ¶ 174; see also Exh. NYI-1, Corey Test. 13:19-14:2). The New

York power system, like any electrical system, undergoes generation and transmission changes on a daily basis for a whole host of reasons. (Exh. NYI-28, Corey Reb. Test. 3:12-13). The only way to establish a Baseline for any type of system study, including the ATBA, it to analyze a snapshot of the system as of a specific date. (Exh. NYI-1, Corey Test. 13:19-14:2; Exh. NYI-28, Corey Reb. Test. 3:13-14). The *Load and Capacity Data Report* provides such a snapshot. (Exh. NYI-28, Corey Reb. Test. 3:15). For the reasons noted above, the IITF/TPAS participants and the NYISO elected to have the NYISO use the *Load and Capacity Data Report* to determine existing capacity. (Exh. NYI-1, Corey Test. 3:4-22). Nothing in Attachment S prohibits the NYISO's reliance on the *Load and Capacity Data Report* for that purpose.

(c) Market Participants In The TPAS Stakeholder Process Specifically Reached A Consensus That The Hudson Avenue No. 10 And Other Similarly Situated Projects Were To Be Excluded From The Baseline For 2001.

During TPAS meetings, Market Participants specifically discussed whether to include within the ATBA several units, including Hudson Avenue No. 10, whose status was uncertain for the coming year. (Exh. NYI-22, Mitsche Test. 8:20-22). In each of those instances, units that were not listed in the *2001 Load and Capacity Data Report* were not included in the ATBA. (Exh. NYI-22, Mitsche Test. 8:22-9:2). Thus, other generating facilities whose status was similar to Hudson Avenue No. 10 were treated in the same manner as the Hudson Avenue No. 10 project -- they were excluded from the ATBA's existing system Baseline for that year. (Exh. NYI-22, Mitsche Test. 9:1-2).[58] Additionally, it is significant to recognize that, even if Hudson Avenue No. 10 had been added to the Baseline, it would not have had a measurable effect on the

[58] It is significant to note that the reactivated Hudson Avenue No. 10 unit was reported as part of the existing power system in the *2002 Load and Capacity Data Report*, and thus is being added to the Baseline system depicted in the 2002 ATBA. (Exh. NYI-6 at 18; Exh. NYI-1, Corey Test. 18:11-15; Exh. NYI-28, Corey Reb. Test. 4:6-10).

2001 ATBA. (Exh. NYI-28, Corey Reb. Test. 4:1-2). This is because adding the unit to the Baseline would have eliminated the need for a like-sized generic unit (such as the 44 MW unit at Fox Hills that was part of Generic Unit No. 6), thereby resulting in a negligible net effect on short circuit current in the ATBA. (Exh. NYI-28, Corey Reb. Test. 4:1-5).

C. The Athens And Bethlehem Projects Were Properly Included In The ATBA.

The Presiding Judge makes only passing reference to the Athens and Bethlehem projects, observing that the NYISO's exclusion of the NYPA and Hudson Avenue No. 10 projects is:

> . . . undermined by the fact that NYISO included two other units (Athens and Bethlehem) as existing units in the Baseline Assessment, despite the fact that these two units were also not listed as existing units in [the *2001 Load and Capacity Report*]." In fact, Athens and Bethlehem were listed as "generator additions" the same designation given the ten NYPA [units].

(Initial Decision ¶ 171).

Insofar as the Presiding Judge seems to be saying "treat similar projects similarly" this conclusion might have superficial appeal. But upon careful inspection, it becomes clear that the Presiding Judge has overlooked the material differences in terms of Attachment S between, on one hand, the NYPA units, and on the other hand the Athens and Bethlehem projects. In light of these differences, the NYISO's decisions were entirely consistent with Attachment S.

The Presiding Judge is correct that the NYPA units were listed in the 2001 *Load and Capacity Report* as "generator additions." (Tr. at 604-605; Exh. NYI-5 at 57). As noted above and acknowledged by the Presiding Judge, however, since the NYPA units constituted Class Year 2001 projects, it would not have been proper to include the NYPA units in the Baseline until they had been allocated and accepted their costs through the cost allocation process.[59]

[59] Since NYPA accepted its cost allocation for these units in the 2001 Cost Allocation, they were included in the Baseline for the 2002 Cost Allocation.

The Presiding Judge also is correct that the Athens and Bethlehem projects were listed in the 2001 *Load and Capacity Report* as "generator additions." (Tr. at 604-605; Exh. NYI-5 at 57). In contrast to the NYPA units, however, the Athens and Bethlehem projects each had an approved SRIS and had accepted their respective interconnection costs prior to the implementation of Attachment S in 2001. (Exh. NYI-22, Mitsche Test. 8:9-14; Tr. 761:4-20). Thus, the Athens and Bethlehem were grandfathered[60] into the 2001 ATBA Baseline. (Tr. 761:16-20). Since the Athens and Bethlehem projects had been allocated costs and had accepted their respective allocations, the Market Participants decided through the TPAS consensus stakeholder process that the Athens and Bethlehem projects should be added to the Baseline as the equivalent of "Class Year 2000" projects. (Exh. NYI-22, Mitsche Test. 8:9-14; Tr. 761:4-20).

This determination by the Market Participants was entirely reasonable and appropriate under the unique circumstances of Attachment S's first year of implementation. Since the Athens and Bethlehem units pre-dated Attachment S, they would never be subjected to a cost allocation under Attachment S. It certainly would not have made sense to exclude the Athens and Bethlehem projects from the Baseline until they came on line and were listed as existing units in the *Load and Capacity Report*.[61] Nor would it have made sense to subject these projects to the Cost Allocation process again since, unlike the NYPA units, these projects had already

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[60] The Complainants did not argue or present any evidence whatsoever to suggest that the Athens and Bethlehem projects were not deemed grandfathered, nor did they argue or present any evidence to suggest that during the TPAS/IITF 2001 Cost Allocation process, either the Complainants or any other Market Participant claimed that the Athens and Bethlehem projects should be required to go through the 2001 Cost Allocation as members of Class Year 2001.

[61] Under that approach projects that have completed the process under Attachment S and accepted their cost allocation would nonetheless remain excluded from the Baseline until they came online, perhaps years later. This would be contrary to the "line of demarcation" acknowledged by the Presiding Judge and could improperly result in higher costs to Developers in the intervening class years.

accepted their complete and final cost allocations. Nor would it have made sense to exclude both the NYPA units and the Athens and Bethlehem projects (as well as all other scheduled listed generator additions for that matter) from the Baseline merely because some of those generator additions (namely the NYPA units) also happened to be Class Year 2001 projects. Rather, the only sensible outcome, and the only outcome at all consistent with the paradigm established by Attachment S, was to include the Athens and Bethlehem projects in the 2001 Baseline and to exclude the NYPA units from the Baseline until they had accepted their cost allocation.

D. Complainants Failed To Meet Their Burden Of Proof And The Presiding Judge Erred On Issue No. 2.

The Presiding Judge committed clear error by concluding the NYPA and Hudson Avenue 10 units were improperly excluded from the Baseline. Complainants did not meet their burden of showing Attachment S required the units to be included in the Baseline, and the Presiding Judge ignored overwhelming evidence to the contrary. Indeed, the Presiding Judge explicitly acknowledged that Attachment S provides a "line of demarcation" under which the NYPA and Hudson Avenue units were required to be excluded from the 2001 Baseline. Rather than answering the question framed by the Commission as to Attachment S's requirements, the presiding Judge rewrote Attachment S. Accordingly, the Presiding Judge erred in concluding the Complainants met their burden of proof on the second issue.

III. THE PRESIDING JUDGE ERRED IN RECOMMENDING THAT THE 2001 COST ALLOCATION BE RECALCULATED USING UNREALISTIC ASSUMPTIONS ABOUT FUTURE GENERATING CAPACITY IN PJM; THE EVIDENCE IN THE RECORD IS THAT USE OF AN UPDATED PJM MODEL WOULD HAVE HAD A NEGLIGIBLE IMPACT ON THE COST ALLOCATION.

The Commission's third and final question asked the Judge to determine whether the NYISO used the most recent PJM model available at the time the 2001 cost allocation studies commenced, and what impact an updated PJM model would have had on the cost allocation.[62]

A. A More Recent PJM Model Was Available To The NYISO In May 2001.

The answer to the first part of this question is that a more current representation of the PJM system was available to the NYISO as of May 1, 2001, the cut-off date for 2001 Class Year projects and the commencement date of the 2001 cost allocation studies. As Mr. Corey noted in his pre-filed testimony (Exh. NYI-1, Corey Test. at 41:11-13), and at the hearing (Tr. 707:9-14), the NYISO had available to it a more current representation of the PJM model at the time the 2001 cost allocation studies were commenced. Thus, as the Presiding Judge notes, Initial Decision ¶ 195, a more current PJM model was available in May 2001.[63]

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[62] KeySpan Energy Dev. Corp., et al. v. New York Independent Sys. Operator, Inc., 101 FERC ¶ 61,099, at p. 61,368 (2002).

[63] The record demonstrates that the NYISO received the PJM model used for the 2001 study from Con Edison and that it was entirely justified in relying on Con Edison's short circuit data, including its then-existing representation of the PJM system. (Exh. NYI-1, Corey Test. 35:4-37:6). Short-circuit analysis and data, including representations of neighboring systems such as PJM, have traditionally been the primary responsibility of Transmission Owners because short-circuit current has a localized effect on the transmission system. (Exh. NYI-1, Corey Test. 35:15-20). In light of this localized effect, Transmission Owners are in the best position to supply and evaluate data regarding the effects a neighboring system's generators have on short-circuit currents in their transmission districts. (Exh. NYI-1, Corey Test. 35:20-23). Indeed, KeySpan/NYPA's own witnesses testified, and KeySpan/NYPA admitted in data responses, that KeySpan relied on the very same PJM representation supplied to the NYISO by Con Edison; the data was, in fact, used to prepare both the original and revised SRISs for KeySpan's Ravenswood facility, the last of which was submitted by KeySpan a mere 6 days before NYISO issued the cost allocation report. (Exh. NYI-4; Exh. NYI-9; Exh. NYI-10 at 16; Exh. NYI-30 at 2; Tr. 212:9-20; Tr. 324:14-325:25).

B. The Presiding Judge Erred In Recommending That The Commission Require The NYISO To Recalculate The 2001 Cost Allocation Using Speculative Estimates Of Future PJM Capacity.

The Presiding Judge erred, however, by recommending that the NYISO be required by the Commission to recalculate the 2001 cost allocation using an updated PJM model that includes all projects in PJM's A, B and C queues that have signed a Facilities Study Agreement ("FSA"), a total of more than 15,000 MW of proposed new capacity. Initial Decision ¶ 200. In addressing the Commission's third question, the Presiding Judge has far exceeded the scope of her mandate from the Commission, and in so doing has made several egregious errors of fact and law. Those findings and recommendations should be rejected in their entirety.

1. Nothing In Attachment S Or The Commission's Hearing Order Requires The NYISO To Model Proposed Future Capacity In PJM.

Attachment S is silent as to how the NYISO should model neighboring control systems when conducting the ATBA and ATRA. Moreover, the Commission's Hearing Order asked only what the impact would be on the cost allocation of using an updated PJM model, i.e., a PJM model current as of the time the 2001 cost allocation studies commenced. Nothing in the Hearing Order directed the parties, or the Presiding Judge, to investigate the propriety or impact of modeling tens of thousands of megawatts of proposed future capacity in the PJM system. The notion of doing so is entirely a concoction of KeySpan/NYPA which is seeking in every possible way to increase fault current levels at Con Edison circuit breakers in order to increase Con Edison's SUF cost allocation and lower their own.

Attachment S explicitly defines what goes into the ATBA Baseline. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(a) (First Revised Sheet No. 665)). As Staff acknowledged in its Initial Brief, Attachment S does not address how to model existing generation in adjacent control areas. (Staff Br. at 42). Attachment S is similarly silent on how the NYISO is to model proposed generation in adjacent areas. Indeed, in its October 26, 2001 Order, the Commission

affirmed that the impact of interconnections on neighboring systems was a "seams" issue beyond the scope of the cost allocation rules.[64] In that Order, the Commission specifically denied Developers' request that the NYISO be ordered to address the issue in a compliance filing. The commission stated that "'it is for the owners and operators of utility systems to establish mutually acceptable operating practices'" regarding reliability issues across neighboring systems.[65] The Presiding Judge first misstated the Commission's holding in that case, and then simply disregarded it. Initial Decision ¶ 177.

2. The Presiding Judge Erred In Rejecting The NYISO's Impact Evaluation Because The Evidence Clearly Establishes That The NYISO Used An Updated PJM Model For Those Studies.

In answering the Commission's third question regarding the impact of an updated PJM model, the NYISO obtained from PJM a representation of the PJM system as it existed at the end of 2001. (Exh. NYI-1, Corey Test. 42:4-8; Exh. NYI-16, Lamanna Test. 16:7-8). Thus, in performing the impact analyses, the NYISO first obtained an up-to-date PJM model, and then added projects that had signed an Interconnection Services Agreement ("ISA"). The NYISO's updated models therefore reflected a representation of the PJM system as of the end of 2001, and included an additional 3,700 and 5,600 megawatts, respectively, of additional generation from PJM queues. (Exhs. NYI-14; NYI-15).

The Presiding Judge, however, erroneously concluded that the data used by the NYISO in its impact evaluations was five years-old. She acknowledged that "the number of megawatts of proposed new generation on the PJM system is considerably greater under the Complainants' and Staff's theory than under the NYISO's theory," but glossed over that fact with the comment,

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[64] New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at p. 61,580 (2001).

[65] Id. (quoting Duke Energy Corporation, 94 FERC ¶ 61,187, at p. 61,658 (2001)) .

"it must be remembered that NYISO was working with numbers that were at least five years old." Initial Decision ¶ 199. This was a clear error of fact. The NYISO's impact studies state:

> The NYISO obtained from PJM a short-circuit representation of PJM's existing system *as of the end of 2001*, known as the PJM Base Case.

(Exhs. NYI-14 at 2; NYI-15 at 2) (emphasis added). The testimony of NYISO staff who conducted the impact analyses affirms that the data used in the updated PJM models was current through the end of 2001. (Exh. NYI-1, Corey Test. 42:4-8; Exh. NYI-16, Lamanna Test. 16:7-8). Not even Complainants or Staff suggested that the data used by the NYISO in its impact studies was out-of-date. Thus, the Presiding Judge's only stated basis for rejecting the NYISO's impact evaluations was based on a fundamental misperception of the facts.

3. The NYISO Is The Only Party That Presented Evidence Of Impact.

The Commission asked the Presiding Judge to assess "what effects an updated [PJM] model might produce."[66] But the Initial Decision and the record are devoid of any evidence of what effects using the FSA milestone would have on the cost allocation. Neither the record nor the Initial Decision contains any evidence about the effects or costs of the FSA generation or the additional system upgrade facilities necessitated by the additional generation. The Presiding Judge implicitly concedes this shortcoming, stating "the definitive answer may not be in the record of this proceeding." Initial Decision ¶ 200. This observation comes despite the Commission's clear mandate to assess the effects of an updated model, not just the data to be used.

The NYISO was the only party to introduce evidence of the impact an updated PJM model would have on the cost allocation. (Exhs. NYI-14, NYI-15). The NYISO's impact

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[66] KeySpan Energy Dev. Corp., et al. v. New York Independent Sys. Operator, Inc., 101 FERC ¶ 61,099, at 61,368 (2002).

assessments demonstrate that updated PJM models would have increased the cost allocation to Con Edison by $30,000 and $60,000, respectively. (Id.). The evidence was uncontroverted. The Presiding Judge attempts to explain away Complainants' lack of evidence on this issue, and bolster her own findings, by stating, "I imagine that all of the parties would have liked to have had a little more time to work these numbers up." Initial Decision ¶ 200. But this statement rings hollow given the fact that the NYISO collected, reviewed and produced well over 30,000 pages of documents and reams of data on CD-ROM, yet still had sufficient time to conduct not one, but two studies assessing the impact of an updated PJM model. (Exhs. NYI-14, NYI-15). Even Staff acknowledged in its initial brief that KeySpan "did not quantify the costs" of using updated PJM data. (Staff Br. at 41).

The evidence at the hearing showed that the NYISO utilized a reasonable approach to updating the PJM system representation for its impact studies, and the results of those studies demonstrated only de minimis impacts on the results of the original cost allocation. Against this showing, KeySpan/NYPA produced no credible evidence to suggest that the NYISO's original short circuit study was so flawed as to justify overturning the result. For these reasons, KeySpan/NYPA have failed to meet their burden to establish that the NYISO's reliance on an out of date PJM model for the original cost allocation amounts to a violation of the Federal Power Act.

4. The Presiding Judge Erred In Recommending That The Commission Adopt The Milestone Proposed By KeySpan/NYPA.

The evidence and arguments presented to the Presiding Judge concerning the different models of the PJM system to use in the ATBA short circuit study revolve around two questions, neither of which the Presiding Judge explicitly answered. Those two questions are: Should the NYISO use a PJM model that incorporates proposed generation in substantially the same way it is treated for the New York Baseline, so as to permit an apples to apples comparison? Or, should

the short circuit data base reflect rather a projection of the proposed generation in the adjacent area based on its likelihood of coming on-line during the planning period? By simply accepting KeySpan/NYPA's view without any explanation other than that it would increase fault current on the Con Edison system, the Presiding Judge neither articulated any reason why the NYISO's approach was not consistent with Attachment S nor addressed the evidence showing that KeySpan/NYPA's projections were unreliable to the point of irrationality.

Given that the choice of model for the PJM system would affect short circuit duties in New York, the NYISO sought to apply a reasonable and objective milestone in the PJM queue process in preparing its impact studies. The NYISO concluded that a fair approach was to use Attachment S as a guide and to select this milestone at that point in the PJM interconnection process that most closely resembles the criteria Attachment S uses to determine which proposed New York projects are included in the ATBA Baseline, i.e., a proposed project's acceptance of its cost allocation. This would have the effect of making the assumptions applied in the study about the impacts of future generation roughly equivalent across the two control areas, and thus impose cost responsibility on Con Edison according to a consistent rule. The Presiding Judge, however, ignored Attachment S as a source of a rationale for the approach to constructing the adjacent area model and concluded the NYISO should have used the Facilities Study Agreement ("FSA") milestone in the PJM interconnection process to update the PJM model. Initial Decision ¶ 197. Use of the FSA has no basis in Attachment S, and bears no rational relationship the methodology set out in the cost allocation rules. Instead, use of the FSA creates a short circuit database built around different conceptions of future impacts, and creates an apples-to-oranges world for the short circuit study. The Presiding Judge therefore erred in approving the FSA as an appropriate milestone for the inclusion of future projects in the ATBA.

As stated previously, Attachment S does not address how to model proposed generation in adjacent areas. The Commission has made clear that this question is for the owners and operators of the systems to address.[67] In updating the PJM model, the NYISO deemed it appropriate in its judgment[68] to include PJM projects that had accepted their cost allocation, the same milestone used or, as the Presiding Judge acknowledged "demarcation", for adding projects to the Baseline in NYISO's control area.[69] (Exh. NYI-1, Corey Test. 42:13-15; Exh. NYI-16, Lamanna Test. 16:11-19; Initial Decision ¶ 175). The NYISO determined that the Interconnection Services Agreement ("ISA") was the appropriate milestone and accordingly modeled those PJM queue projects whose developers had signed an ISA. (Exh. NYI-16, Lamanna Test. 16:14-19; Exh. NYI-22, Mitsche Test. 16:13-16).

The execution of an ISA in PJM parallels closely the acceptance of a project's cost allocation under Attachment S,[70] (Exh. NYI-25, at 5-1), and the NYISO's independent expert, Mr. Mitsche, testified that a PJM developer's execution of ISA was a reasonable proxy for a New York developer's acceptance of its cost allocation (Exh. NYI-22, Mitsche Test. 16:13-16). KeySpan/NYPA's own expert admitted that a project developer in PJM contractually accepts its cost allocation by signing an ISA (Tr. 430:17-23), and even begrudgingly acknowledged "some

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[67] New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at p. 61,580 (2001) (quoting Duke Energy Corporation, 94 FERC ¶ 61,187, at p. 61,658 (2001).

[68] The Commission just recently again recognized that in situations like this where NYISO's tariff and attachments require NYISO to exercise some measure of judgment, the NYISO's decision is entitled to deference so long as it is reasonable. New York Independent System Operator, Inc. 103 FERC ¶ 61,201, at P 17 (2003).

[69] One NYISO engineer, Mr. Lamanna, was of the opinion that Attachment S did not even require the NYISO to include projects that signed an ISA. In Mr. Lamanna's opinion, the short-circuit analysis should have been "Baseline-to-Baseline," which would not have included any of projects that had signed an ISA. (Tr. 1015:15-16).

[70] See also Discussion of PJM testimony at p. **60**, infra.

correspondence" between a PJM developer's execution of an ISA and a New York developer's acceptance of its cost allocation under Attachment S. (Tr. at 431:5-7).

In contrast, the FSA bears no relation to acceptance of interconnection costs. As PJM's own technical manual states that, by signing an FSA, developers only agree to study the possible costs of interconnecting their project to the system. (Exh. NYI- 25, PJM Manual for Generation Interconnection Transmission Planning, at 3-6). At the ISA stage however, the project developer accepts its interconnection costs. As NYISO witnesses made clear, the principle underlying the cost allocation methodology -- that the Transmission Owners should be responsible only for a share of the total system reliability costs and not for the costs caused directly by Developer projects -- dictates that the Baseline should include only those units in adjacent areas which, had they been in the New York Control Area, would have been included in the Baseline. (Exh. NYI-1, Corey Test. 42:13-21; Exh. NYI-22, Mitsche Test. 15:22-16:16). A contrary rule dictates that the Transmission Owner's cost responsibility should be determined according to varying assumptions for the state and the adjacent control area. The Presiding Judge thus erred in not approving the NYISO's use of the executed ISA.

As stated above, Attachment S is silent on the question of what rule to apply in modeling an adjacent control area for the ATBA. Having implicitly rejected the NYISO's choice of a model that allowed an "apples to apples" comparison, the Presiding Judge adopted KeySpan/NYPA's theory that the adjacent area model should include proposed generation according to some view of its likelihood of coming on-line. Apparently applying this standard, the Presiding Judge concluded that the signing of an FSA was "the more reliable and realistic option available," Initial Decision ¶ 197, but cited no evidence to support that conclusion. Perhaps this is because the fact is there simply is no convincing rationale to support the use of

this standard, or any rationale to support reliance on the FSA as an indicator of the likelihood that projects will actually bon constructed.

The FSA milestone was itself only the last in a series of wildly inconsistent arguments espoused by Complainants. In a May 2002 impact evaluation he prepared for KeySpan, Mr. Mark Waldron determined that only an additional 5400 MWs were required to adequately update the PJM system representation. (NYI-31; Tr. 316:22-317:12). Then, at the outset of the proceeding, KeySpan/NYPA advocated adding approximately 10,000 MWs of proposed generation to the PJM representation. (Tr. 312:7-13; see also Exh. NYI-31). In his initial testimony, Mr. Disher next opined that nearly triple that amount should be modeled based upon PJM's June 2001 Regional Transmission Expansion Plan ("RTEP"). (Exh. KEY-7, Disher Test. 35:4-5). Mr. Waldron accordingly modeled 27,500 MWs from the June 2001 RTEP in his initial testimony. (Tr. 305:11-14). Complainants advocated this model despite the fact that a majority of the projects in the June 2001 RTEP were still in the interconnection study process or had been withdrawn. (Exh. NYI-26; Exh. NYI-27; Exh. NYI-1, Corey Test. 43:6-12; Tr. 432:7-8). In essence, the assumption that 27,500 MWs of new generating capacity would actually be built over a five year period in the PJM system which had, in 2001, a total of approximately 55,000 MWs of existing capacity (thus a 50% increase in capacity), bore no relation to reality.

Following Mr. Disher's deposition, KeySpan/NYPA then filed purported rebuttal testimony from a new "expert" on the issue, William Sheehan. Mr. Sheehan advocated modeling approximately 15,000 MWs of proposed PJM capacity based on an entirely different methodology, i.e., modeling those PJM queue projects whose developers had signed an FSA with PJM. (Exh. KEY-25, Sheehan Reb. Test. 15:11-15). This methodology was accepted by the Presiding Judge. Initial Decision ¶ 197. Although KeySpan's witnesses denied it, Mr. Sheehan's testimony was plainly inconsistent with the approach advocated previously by Messrs.

Disher and Waldron, which called for modeling all proposed PJM capacity in the 2001 RTEP without any regard to what portion of it was likely to be built. The proposed use of the FSA, in fact, never surfaced before Mr. Sheehan's rebuttal testimony appeared.

Setting aside the inconsistent arguments of Complainants on this issue, the Presiding Judge erred in adopting the FSA milestone because, as the record shows, the FSA is in fact a poor predictor of the likelihood of proposed projects coming on line in PJM. Mr. Sheehan admitted on cross-examination that approximately two-thirds of the projects he advocated adding to the model had actually withdrawn from the queue process. (Tr. 810:19-20; 811:18-21). Again under cross-examination he was forced to admit that his own company's proprietary methodology suggests that only 5,686 MW would actually come on line in PJM, a far cry from the 15,288 MWs described in his written testimony. (Tr. 874:7-18). After admitting his model was correct only 40% of the time, he stated he still considered the model to be a "good predictor." (Tr. 812:25).

Despite the overwhelming evidence showing the FSA is a poor predictor of PJM projects coming on line, the Presiding Judge nevertheless selected the FSA as the appropriate milestone. Use of the FSA, however, has no basis in Attachment S and unrealistically inflates the impact of the PJM system on the NYISO system. The Presiding Judge therefore erred in recommending the FSA as an appropriate milestone.

5. The Presiding Judge Erred in Denying The NYISO's Motion To Strike KeySpan/NYPA's Improper Rebuttal Testimony Proposing Use Of The FSA As The Appropriate Milestone.

The NYISO filed a motion to strike William Sheehan's testimony proposing use of the FSA in conducting the impact evaluation because it presented a completely new theory of Complainants' case and was, therefore, improper rebuttal testimony. See Motion of NYISO to Strike Testimony of William Sheehan, Docket No. EL02-125-000, March 6, 2003. The

Commission has made abundantly clear that, "[r]ebuttal testimony is intended to refute testimony submitted by other parties, *not to advance a new theory of the case*." See Jack J. Grynberg v. Rocky Mountain Natural Gas Co., 90 FERC ¶ 61,247, at p. 61,821 (2000) (emphasis added). Mr. Sheehan's testimony, however, did precisely that. Complainants first submitted testimony from Mr. Disher advocating use of the June 2001 PJM RTEP report, which would have added all 27,500 MW of generation in PJM queues A, B and C. (Exh. KEY-7 at 35). Then, in responding to the NYISO's testimony detailing the NYISO's impact study reports, (see Exhs. NYI-14 and NYI 15), Complainants responded with the testimony of Mr. Sheehan. He testified not in support of using the June 2001 RTEP, but instead that the NYISO should have used the FSA milestone, a completely different theory of the case that advocated adding 12,000 fewer MWs than the model advocated by Mr. Disher in his direct testimony. (See Exh. Key-25 at 15). Because Mr. Sheehan's testimony presented an entirely new theory of Complainants' case with regard to the third issue, to which the NYISO did not have any opportunity to respond, the Presiding Judge's denial of the motion to strike was error. (Tr. 478:10-479:7).

6. The Presiding Judge Erred By Refusing To Admit Evidence From PJM Concerning Its Own Planning Process.

Perhaps the most egregious error committed by the Presiding Judge was her decision to exclude the testimony of Steven R. Herling, Executive Director of System Planning for PJM, concerning PJM's Interconnection Services Agreement or ISA, the likelihood of proposed projects coming on line in PJM, and the comparability of Baseline representations between the NYISO and PJM control areas, all matters directly relevant to the Commission's third question. After allowing Mr. Herling to testify at the hearing in the form of a proffer, the Presiding Judge ruled a few days later that his testimony was "not necessary to a full and fair adjudication of the

third issue set for hearing by the Commission."[71] That Mr. Herling's testimony was plainly relevant is demonstrated by the Presiding Judge's Initial Decision, in which she accepts the FSA milestone advocated by KeySpan/NYPA rather than the ISA milestone used by the NYISO in evaluating the impact an updated PJM model would have had on the 2001 cost allocation. The Presiding Judge herself stated early on in this proceeding "I do not see how we can do this without them [PJM], quite frankly," acknowledging the central role of PJM's testimony on this issue. (Tr. 154:7-9). Mr. Herling testified specifically with regard to the function and purpose of the ISA in the PJM system, and his testimony was directly relevant to the propriety of the NYISO's use of the ISA as an objective milestone in modeling PJM's system as part of its impact evaluation. The refusal to admit Mr. Herling's testimony into evidence was an inexcusable error, apparently intended by the Presiding Judge to exclude from the record relevant evidence that undermined, if not eviscerated, KeySpan/NYPA's proposed reliance on the FSA.[72] There appears to be no other explanation for the Presiding Judge's decision.

On the first day of the hearing on March 5, 2003, the Presiding Judge stated she would allow Mr. Herling to testify on March 7, 2003, in the form of a proffer. (Tr. 377:12-25). After listening to Mr. Herling's testimony on March 7, the Presiding Judge stated that at the close of the hearing she would "make a determination as to whether or not I believe Mr. Herling's testimony is relevant on the record as it stands at the close of testimony." (Tr. 779:2-4). If the

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[71] See Order Ruling on Proffered Testimony, KeySpan Energy Dev. Corp., et al. v. New York Independent Sys. Operator, Inc., Docket No. EL02-125-000, at P 6 (March 12, 2003).

[72] Exclusion of Mr. Herling's testimony also violated the Commission's general rule that "evidence is to be received liberally in administrative proceedings." See Pacific Gas & Electric Co., 12 FERC ¶ 61,226, at p. 61,554-55 (1980). As the Commission noted in Pacific Gas, it is essential that ALJs apply evidentiary standards "evenhandedly and consistently to all the litigants, and articulate clearly the basis for their evidentiary rulings in a neutral and principled way," id. at 61,555, a standard obviously not met in this case.

testimony was found to be relevant, other hearing participants would then have an opportunity to cross-examine Mr. Herling. (Tr. 779:5-8). Following the last hearing date, the Presiding Judge issued an Order excluding Mr. Herling's testimony and stating that it was "not necessary" to resolution of the Commission's third question.

It is impossible to justify the Presiding Judge's exclusion of such crucial evidence. In his testimony, Mr. Herling stated that his responsibilities as Executive Director of System Planning included transmission and interconnection planning and cost allocation for PJM. (Tr. 771:10-15). Mr. Herling also outlined the PJM study process. In the course of describing the process, Mr. Herling testified that approximately two-thirds of the projects originally in PJM's queues ultimately withdraw. (Tr. 775: 20-23). This testimony is particularly significant since it corroborates the admission by Mr. Sheehan on cross-examination that approximately two-thirds of the projects in the PJM study queues ultimately drop out. (See supra, p. 64). Here, the executive director of system planning for the control area at issue was testifying as to the likelihood of projects coming on line in that area, the precise issue raised by the Commission's third question, yet the Presiding Judge excluded the evidence because she concluded that it was "not necessary" to a full and fair adjudication. It is difficult to imagine a more qualified person to testify about the likelihood of projects coming on line in PJM.

Mr. Herling's testimony was most relevant to the issue of comparability between the NYISO and PJM Baseline representations. In the NYISO control area, only those projects that have accepted their cost allocation are included in the Baseline. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(b) (First Revised Sheet No. 666)). Mr. Herling's testimony directly addressed what projects in PJM had reached a comparable stage of development. For instance, Mr. Herling confirmed that the ISA is the point at which PJM developers become contractually obligated to pay their interconnection costs, (Tr. 776:25-777:4), crucial corroboration of the

NYISO's argument that execution of an ISA in PJM is the equivalent of a New York Developer's acceptance of its cost allocation. Mr. Herling also testified that the ISOs were in discussions, separate and independent of this proceeding, on how ISOs should model proposed generation in adjacent areas when performing their own short-circuit analyses. (Tr. 777:5-20). On this issue -- perhaps the most critical issue with respect to the Commission's third question -- Mr. Herling testified that a PJM developer's execution of an ISA was the step that was the most comparable to a New York developer's acceptance of its cost allocation:

> Q: Mr. Herling, just a couple more questions. Is PJM currently engaged in any discussions, ISO to ISO, with respect to the coordination of regional planning studies?
>
> A: Yes. We have ongoing discussions with the Midwest ISO as well as with New York, New England, and occasionally Ontario.
>
> Q: Okay. Now, am I correct to understand that the purpose of these discussions is to -- ***is an effort to arrive at some measure of consistency between ISO and ISO as to how they will model proposed generation with respect to short-circuit analysis?***
>
> A: That's one element. The primary purpose is to ensure that we have a structure for coordinated planning to ensure reliability. How we perform the studies -- there are a number of analytical details that have to be discussed.
>
> Q: Okay. With respect to the effort to arrive at a comparative sense of base lines between ISO and ISO, [did] PJM indicate[] in these talks any view as to what might be an objective milestone for inclusion [of proposed generation] into the Baseline?
>
> A: With respect to the Midwest ISO, we have not proceeded to that point. With respect to New York and New England, we've been working for a somewhat longer period of time. The interconnection processes of the three ISOs are dissimilar.
>
> ***So we have attempted to find a reasonably equitable position where generators in one queue being studied at the time as generators in another queue would have made similar commitments to their own process.***
>
> The point that we had discussed with respect to both, you know, the load flow analyses and the short-circuit analyses was in New York because of the Article 10 process and the class year. ***The most similar point in the PJM***

interconnection process was the execution of the interconnection service agreement.

(Tr. 777:4-778:14) (emphases added).

Given the undeniable relevance of this testimony with respect to the Commission's third question and the propriety of the NYISO's use of the ISA to model proposed PJM capacity in its impact evaluations, it is nothing short of shocking that the Presiding Judge could conclude that such evidence was "not necessary to a full and fair adjudication" of the Commission's third question, while at the same time recommending to the Commission that it require the NYISO to use the FSA to analyze proposed future PJM capacity. Her decision to exclude PJM's testimony from the record was a gross error of law.

C. Complainants Failed To Meet Their Burden Of Proof On The Impact Aspect Of Commission's Third Question No. 3.

As NYISO conceded prior to the hearing on this matter, it did not use the most up-to-date PJM model in conducting the 2001 cost allocation.

With respect to the impact of using updated PJM data, the Complainants failed to meet their burden of proof and the Presiding Judge erred egregiously in excluding the PJM testimony. Complainants did not show, and the Presiding Judge had no basis for finding, that Attachment S requires the NYISO to model proposed capacity in the PJM system based upon the FSA milestone. Complainants did not show, and the Presiding Judge had no basis for finding, that Attachment S requires the NYISO is obligated to model proposed PJM projects that would not be included in the Baseline if they were located in New York. Moreover, Complainants presented no evidence of the actual impact of using the FSA milestone. Lacking such evidence, the Presiding Judge erred in finding that Complainants met their burden of proof on the third issue.

CONCLUSION

WHEREFORE, for the reasons stated above, the NYISO respectfully requests that the Commission reverse the Presiding Judge's May 8, 2003 Initial Decision in its entirety, uphold the 2001 cost allocation in all respects, and dismiss this proceeding. If the Commission concludes that amendments to Attachment S are necessary to clarify ambiguities in the tariff and prevent disputes with respect to future cost allocation studies, it should reject the Presiding Judge's recommendations for amendments and remand the resolution of any such ambiguities to the NYISO with a direction to file, following appropriate stakeholder consultation, a revised Attachment S with the Commission.

Respectfully submitted,

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Dated: May 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2002).

Dated at Washington, DC this 22nd day of May, 2003.

By: */s/ Arnold H. Quint*

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