

**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.)	

**INITIAL POST-HEARING BRIEF OF
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

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Dated: April 9, 2003

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**INITIAL POST-HEARING BRIEF OF
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

To: The Honorable Jeffie J. Massey
Presiding Administrative Law Judge

Respondent New York Independent System Operator, Inc. (the “NYISO”) respectfully submits this Initial Post-Hearing Brief, pursuant to the March 10, 2003 Order Confirming Post-Hearing Schedule, the March 11, 2003 Order Revising Post-Hearing Schedule, and Rule 706 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”).

PRELIMINARY STATEMENT

The evidence demonstrates that the NYISO conducted the 2001 cost allocation process in a manner fully consistent with its rules for the allocation of costs related to the interconnection of new generation projects in New York, set forth in Attachment S to its Open Access Transmission Tariff (the “OATT”). For the reasons that follow, Your Honor should recommend to the Commission that the NYISO’s 2001 cost allocation be upheld, and that this proceeding be dismissed.

Overview of the Evidence

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."¹ In response to the Commission's directive, the NYISO's Business Issues Committee formed the Interconnection Issues Task Force ("IITF") and charged it with developing, through a consensus, stakeholder process, rules for the fair allocation of costs related to the interconnection of proposed generation projects in New York State. (Corey Test. (Exh. NYI-1) 5:16-20; Mitsche Test. (Exh. NYI-22) 4:1-3).² Attachment S is the fruit of that stakeholder deliberative process. (Corey Test. 3:18-4:5).

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. (Corey Test. 5:7-8; Mitsche Test. 3:22-23; Exh. NYI-24 (TPAS Scope and Organization, at § 3.1).³ TPAS's role is to review and comment on transmission and interconnection-related studies and assessments performed by NYISO staff or Market

¹ Central Hudson Gas & Electric Corp., 88 FERC ¶ 61,138, at p. 61,384 (1999).

² Citations to "Test." are to the direct, answering or rebuttal testimony ("Reb. Test.") of a referenced witness submitted prior to the hearing. Initial citations to such testimony include its exhibit number. Citations to "Tr." are to the transcript of the proceeding conducted from March 5 through March 11, 2003. Complainants KeySpan Energy Development Corporation and KeySpan-Ravenswood, LLC are referred to as "KeySpan." Except where otherwise indicated, KeySpan and Complainant New York Power Authority ("NYPA") are referred to jointly as KeySpan. 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.

³ 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. (Corey Test. 4:15-5:6).

Participants, including System Reliability Impact Studies (“SRIS”), and to conduct studies related to the cost allocation process. (Exh. NYI-24, at § 4.3; Corey Test. 5:8-11). At all relevant times, the elected Chairperson of IITF and TPAS was James V. Mitsche, the NYISO’s expert witness. (Mitsche Test. 3:22-4:5; Exh. NYI-23; Exh. NYI-24, at § 3.3). While he was 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. (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. (Corey Test. 5:11-13, 18-19; Mitsche Test. 5:16-21). IITF/TPAS participants arrived at decisions regarding Attachment S 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. (Corey Test. 5:7-19; Mitsche Test. 5:2-3; Exh. NYI-24, at § 3.5).⁴

Attachment S, which took more than a year to complete (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”). (Corey Test. 10:3-5; Mitsche

⁴ Contrary to the testimony of Ray Plaskon, a KeySpan 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”).

Test. 6:15-18). The purpose of the ATBA is to identify the System Upgrade Facilities (“SUFs”)⁵ that Transmission Owners would need to install, in the absence of any new generation being built, to comply with Applicable Reliability Requirements⁶ and reliably meet load growth and changes in load pattern anticipated for the New York Control Area. (Corey Test. 10:12-14; Mitsche Test. 6:3-5, 6:13-7:2). These SUFs have been referred to as “needed anyway” SUFs. (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 existing generation with predicted load growth and changes in load patterns over a five-year study period. (Corey Test. 12:3-6;

⁵ 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)).

⁶ Attachment S defines Applicable Reliability Requirements as:

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)).

Mitsche Test. 6:20-22). The ATBA analysis assumes that no Developer projects will come on line during the five-year period. (Corey Test. 10:14-16; Mitsche Test. 6:20-22).

If existing transmission and generation facilities are insufficient to meet Applicable Reliability Requirements, 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); Corey Test. 20:21-22; Mitsche Test. 6:22-7:2).

Developers’ proposed projects are analyzed on a Class Year basis as part of the ATRA. (Corey Test. 10:18-20; Mitsche Test. 5:7-9). The ATRA analysis of existing capacity and predicted load growth and changes in load patterns is the same as the ATBA, although the ATRA includes the proposed Class Year projects as part of the generating capacity that will be available to meet Applicable Reliability Requirements. (Corey Test. 10:7-9). The purpose of the ATRA is to identify the SUFs that will be needed for the interconnection of the Class Year projects. (Corey Test. 10:18-19; Mitsche Test. 6:5-8). These SUFs have been referred to as “but for” SUFs. (Corey Test. 9:22; Mitsche Test. 6:5-7). 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. (Corey Test. 9:20-23; Turkin Test. (Exh. CE-1) 5:11-13).

In the spring of 2001, IITF recommended that Attachment S be approved; the NYISO’s Management Committee voted its approval of the rules on June 6, 2001. (Mitsche Test. 5:20-21; Exh. NYI-35). 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. (Lamanna Test. (Exh. NYI-16) 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; Corey Test. 31:24-32:5; Mitsche Test. 6:10-12; Tr. 760:15-761:3).

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.”⁷ 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); Lamanna Test. 5:10-12; Mitsche Test. 10:1-10). Under the original version of Attachment S, the Transmission Owners were 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 began to undertake 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),

⁷ 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 (“NYISO August 29, 2001 Compliance Filing”). At the hearing, Your Honor took judicial notice of the contents of the original version of Attachment S. (Tr. 970:24-971:17).

and the Transmission Owners' proposed generic units. (Lamanna Test. 5:12-6:3, 6:9-13; Corey Reb. Test. (Exh. NYI-28) 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 which requires the NYISO (1) to exercise "decisional control" over the ATBA, and (2) to conduct the ATBA on a statewide basis.⁸ 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, 2001.⁹ 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.¹⁰ Subsequent challenges to Attachment S were rejected.¹¹

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

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)).

Attachment S requires the NYISO to conduct the ATBA "in cooperation with Market Participants," which include Transmission Owners and Developers, while maintaining

⁸ New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at p. 61,575-76 (2001).

⁹ New York Independent System Operator, Inc. Compliance Filing, Docket No. ER01-2967-000, December 26, 2001.

¹⁰ 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)

¹¹ New York Independent System Operator, Inc., 100 FERC ¶ 61,103 (2002).

“decisional control” over it. (Exh. NYI-2, Attachment S, at Section IV.F.1 (First Revised Sheet No. 664); Corey Reb. Test. 7:17-8:4). 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)). As part of that process, the Transmission Owners propose any required generic generating units for their transmission districts and the SUFs associated with them. (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. (Lamanna Test. 6:9-19; 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. (Lamanna Test. 6:9-19; 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. (Corey Test. 35:13-23; Lamanna Test. 7:2-13).

NYISO staff evaluated Con Edison’s and LIPA’s proposed generic units and concluded that they were feasible under Attachment S and, in the case of New York City, remedied the gaps identified in New York City’s load pockets. (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). (Lamanna Test. 8:8-18; 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. (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. The NYISO originally hoped to complete the 2001 cost allocation by late 2001. (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. (Mitsche Test. 5:13-15; Tr. 1017:22-1018:3). 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 disregard 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 openly presented and discussed at TPAS. (Tr. 1027:6-7). At no time did KeySpan, or any other Developer, submit to the NYISO a written, formal proposed ATBA or alternative set of generic units. (Corey Reb. Test. 8:8-11; Tr. 1018:4-9).

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.¹² Following extensive discovery, the parties filed written testimony and exhibits in February 2003, and a hearing was held before Your Honor on March 5-7, 10-11 2003.

Overview of the Legal Standard

A. Complainants Bear The Burden Of Proof

Under Section 206 of the Federal Power Act and Section 556(d) of the Administrative Procedure Act (“APA”), KeySpan bears the burden of proof in this proceeding.¹³ KeySpan must “carr[y] the burden of persuasion as well as the burden of production with regard to each element

¹² KeySpan Energy Dev. Corp., et al. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,099, at p. 61,368 (2002).

¹³ 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) (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”).

of its prima facie case”¹⁴ and it “must also present such evidence as to constitute a preponderance if it is to carry its burden of persuasion under Section 556(d).”¹⁵ Thus, to satisfy its burden of proof in this case, KeySpan must produce credible evidence sufficient to support each element of its claim that the NYISO violated Attachment S.¹⁶ Additionally, each element of KeySpan’s claim must be proven by a preponderance of the credible evidence.

B. Interpretation Of A Tariff May Require Consideration Of Extrinsic Evidence, Including Evidence Of The Stakeholder Process Through Which The Tariff Was Drafted

The central facts in this case are not in dispute; the decision here must turn on the proper interpretation of certain provisions of the NYISO’s tariff. A tariff provision is ambiguous if it is “reasonably susceptible of different constructions or interpretations.”¹⁷ For example, the term “feasible” is not defined in Attachment S and has been the subject of divergent views expressed on the record. Well-settled principles of interpretation are available to guide Your Honor’s evaluation of these differing views.

In cases involving the interpretation of ambiguous tariff provisions, it is appropriate to consider extrinsic evidence.¹⁸ The scope of such evidence is flexible and broad.¹⁹ In this

¹⁴ Michigan Gas, 83 FERC at p. 65,024; see also Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 276 (1994).

¹⁵ Ohio Edison, 15 FERC at p. 65,300.

¹⁶ Id.; Michigan Gas, 83 FERC at p. 65,024.

¹⁷ 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)).

¹⁸ 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”).

proceeding, Your Honor should give particular consideration to the stakeholder deliberative process that resulted in Attachment S, especially the evidence of consensus reached by Market Participants and the NYISO during the drafting process.²⁰ Extrinsic evidence about this stakeholder process is 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. There is no better guide to the interpretation of the ambiguous terms of Attachment S than the evidence of consensus reached at IITF/TPAS.

The unrefuted evidence is that IITF/TPAS participants reached consensus with respect to several significant issues in this proceeding, including the following: (1) the term "feasible" was intentionally left undefined in Attachment S in order to grant NYISO staff discretion when selecting generic units for the ATBA (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 (Corey Test. 21:12-17; 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. (Corey Test. 14:5-7; Mitsche Test. 9:4-15; Tr. 269:7-11).²¹ KeySpan offered no evidence rebutting any of this testimony.

¹⁹ 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").

²⁰ Id. (remanding case to FERC to allow party to introduce at hearing extrinsic evidence of negotiating background of ambiguous provision in tariff).

²¹ KeySpan'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).

The purposes for which Attachment S was drafted are also relevant guides to the meaning of ambiguous terms. Market Participants worked jointly with the NYISO to establish a mechanism to allocate the cost of SUFs between Transmission Owners and Developers, *not to plan actual generation projects*. Thus, any interpretation by the NYISO that is consistent with that intent should be preferred to one offered by KeySpan that is inconsistent with it. Finally, extrinsic evidence regarding how the NYISO must apply Attachment S, and the time, cost and resource limitations inherent in that process, will also assist Your Honor in correctly interpreting the tariff's provisions.

Your Honor should also consider that the stakeholder process described above extends beyond IITF/TPAS. The NYISO 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 Operating Committee to the NYISO Board of Directors. KeySpan availed itself of these rights by challenging the 2001 cost allocation at the Operating Committee and appealing its decision approving the 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 NYISO's stakeholder process and governance procedures have worked precisely as intended by the Commission, and KeySpan has presented no valid reason to disturb the outcome of the 2001 cost allocation.

C. A Tariff Administrator’s Reasonable Interpretation Of Its Own Tariff Should be Upheld

In assessing conflicting interpretations of a tariff, a reasonable interpretation of the tariff administrator should be favored over an alternative interpretation put forth by other parties.²² To the extent the NYISO’s interpretation of Attachment S represents a “permissible, reasonable construction” of its terms, and conforms to the intentions of the Market Participant stakeholders who drafted them, the NYISO’s interpretations should be upheld.²³

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,

²² 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”).

²³ 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.”).

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.

In contrast, the interpretations advanced by KeySpan are motivated by its financial self-interest and must be evaluated, with requisite caution, in that light. KeySpan unquestionably is seeking to lower its interconnection costs as a result of this proceeding. It comes as no surprise, then, that KeySpan espouses interpretations of Attachment S that would, without exception, result in a higher cost allocation to Con Edison and, consequently, lower interconnection costs for itself. For this reason, Your Honor should give substantial weight to the NYISO's independent interpretation of its own tariff.

ARGUMENT

I. THE NYISO'S SELECTION OF GENERIC UNITS WAS CONSISTENT WITH THE FEASIBILITY CRITERION IN THE COST ALLOCATION RULES

The first question posed by the Commission in its Hearing Order is “whether NYISO’s selection of generic generating units was consistent with the feasibility criterion in the cost allocation rules.”²⁴ Since Attachment S does not define the term “feasible,” Your Honor should look to the extrinsic evidence which explains what was intended by the stakeholder participants who drafted it, as well as to the tariff’s purpose and the practical context in which it must be applied. In the final analysis, Your Honor must not only decide what Attachment S requires, but perhaps more importantly, what it does not.

²⁴ KeySpan Energy Dev. Corp., et al. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,099, at p. 61,368 (2002).

A. KeySpan’s Interpretation of Attachment S’s Feasibility Criterion Is Without Basis In Attachment S Or Its Negotiating History, And Is Unworkable Given The Time, Cost And Resource Limitations Under Which NYISO Staff Must Operate

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

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*²⁵ 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)) (emphasis added).

Although proposed generic generating units must represent “feasible” solutions for meeting Applicable Reliability Requirements, the term “feasible” is not defined in Attachment S. (Corey Test. 23:6; Mitsche Test. 7:4-6). KeySpan is asking Your Honor to conclude that, with respect to the selection of generic units, the term “feasible” requires the NYISO to undertake a planning exercise at a level of detail and complexity comparable to that employed by integrated utilities and merchant developers engaged in actual project development. Such an interpretation would effectively impose on the NYISO an obligation to engage in real world generation planning, instead of the hypothetical planning exercise in aid of the cost allocation process that was intended by the framers of Attachment S. KeySpan’s proposed interpretation as to how the

²⁵ “Generic” generation refers to hypothetical generating units. (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. (Turkin Test. 8:15-17; 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. (Corey Test. 25:15-20; Turkin Test. 7:21-8:12; Exh. NYI-2, Attachment S, at Appendix One (First Revised Sheet No. 689)).

NYISO must determine the feasibility of a generic unit has no basis in the language of Attachment S, or its purpose or negotiating history, and is at odds with the time, cost and resource limitations the NYISO must confront in conducting the ATBA each year. (Corey Test. 22:10-19; Mitsche Test. 11:20-12:13).

1. Attachment S Does Not Require NYISO Staff To Employ Integrated Resource Planning Methods When Developing Generic Units

KeySpan's claim rests, essentially, on the opinion testimony of a single witness, Ellis O. Disher. Mr. Disher is a consultant who works primarily for merchant developers like KeySpan. (Tr. 358:5-6). He attended many of the IITF meetings at which Attachment S was drafted (Tr. 413:19) yet, inexplicably, offered no testimony regarding any of the stakeholder deliberations at IITF. This omission is significant for two reasons.

First, Mr. Disher acknowledged during his cross-examination that the IITF deliberations would be a useful source of reference for interpreting ambiguities in Attachment S. (Tr. 414:3-6, 11). He also acknowledged that his own opinion regarding the term "feasible" was not the only reasonable interpretation of it. (Tr. 406:14-15).²⁶ Notwithstanding these admissions of the IITF deliberations' relevance, Mr. Disher unabashedly testified that he had not taken any of the IITF deliberations into account in rendering his opinions. (Tr. 416:20-23). Such studied indifference to plainly relevant evidence should be reason enough to disregard Mr. Disher's testimony.²⁷

²⁶ Of course, such testimony fits the classic test of "ambiguity," giving rise to the need to consider the very extrinsic evidence Mr. Disher, and KeySpan, ignored. See supra. nn.17, 18. Mr. Disher also stated that he does not consider himself an expert on Attachment S itself. (Tr. 354:25-355:1).

²⁷ Electric Generation, LLC, 101 FERC ¶ 63,005 at P. 147 (2002) (Massey, J.) (testimony of witness given "no weight" after "admit[ting] that she had not considered key pieces of information when formulating her opinions").

Second, Mr. Disher's failure to address the IITF deliberations in his initial testimony was compounded by his failure to offer any rebuttal to the testimony regarding the deliberations submitted by Steven L. Corey, the NYISO's Manager of Transmission Planning, and James V. Mitsche, the former Chairperson of IITF/TPAS. (Tr. 413:13-16; 416:23-417:1). Nor did any other KeySpan witness offer such rebuttal testimony. In sum, KeySpan simply ignored the NYISO's evidence of IITF/TPAS consensus regarding several key issues in this case.

Much of Mr. Disher's pre-filed written testimony was consumed by a discussion of integrated resource planning ("IRP"), the lengthy, expensive and in-depth analytical process by which integrated utilities planned actual generation projects. (Disher Test. (Exh. KEY-7) 12:16-26:19). Neither the fact that the formerly regulated utilities engaged in IRP or the nature of the IRP process itself is very much in dispute. What is in dispute is KeySpan's claim that Attachment S *requires* the NYISO to engage in IRP or some variation of it when developing generic solutions for the ATBA. The evidence offered by KeySpan to establish that view fails on several counts.

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 simply is no textual support in the tariff for the contention that IRP or IRP methods must be employed by the NYISO when developing generic units as part of the ATBA.

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 offered no evidence

to that effect, and the NYISO's and Con Edison's un rebutted testimony was to the contrary. (Corey Test. 22:10-12; Mitsche Test. 11:22-12:13; Tr. 1089:18-22).

In sum, Mr. Disher's testimony amounted to a sort of wish list. He acknowledged as much when he "recommended" that Attachment S be "modified" to list the factors that should be considered by NYISO when selecting generic units. (Tr. 459:20-460:3). Such testimony can only mean that consideration of the specific factors Mr. Disher identified is not required by Attachment S. For that same reason, the fact that NYISO did not consider those factors in selecting generic units for the 2001 ATBA cannot amount to a violation of Attachment S.²⁸

Commission Staff's witness John Sammon testified similarly that a determination of feasibility requires the use of "least-cost" planning. (Sammon Test. (Exh. S-1) 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. Significantly, Mr. Sammon's opinion is inconsistent with that offered by Commission Staff's other witness, Mr. Kim Khu. Mr. Khu 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 (Khu

²⁸ KeySpan's first witness was Ray Plaskon, a former KeySpan employee who was hired in September 2001 to monitor the cost allocation process, then already underway, and progress on the revised SRIS for KeySpan's Ravenswood project. (Tr. 210:23-25). Mr. Plaskon admitted that he had no involvement in the drafting of Attachment S or with the cost allocation process prior to September 2001. (Tr. 214:12-15). And he had no prior experience at all with cost allocation issues related to the interconnection of generation projects. (Tr. 214:16-18). By the time Mr. Plaskon started his consulting work for KeySpan, the original version of Attachment S had been submitted to the Commission for approval. (Tr. 214:19-24). KeySpan's other witnesses were Mark Waldron, a technical witness who testified only with respect to three studies he conducted under the direction of KeySpan's counsel (Tr. 296:2-9), and William Sheehan, a purported rebuttal witness whose testimony regarding proposed capacity in PJM is discussed infra at page 45.

Test. (Exh. S-11) 6:22-7:2), and he offered no testimony that least-cost planning methods is in any way required by Attachment S.

2. It Is Not Possible For NYISO Staff To Employ Integrated Resource Planning Methods Within The Time Available To Conduct The ATBA

NYISO staff has six months to complete the ATBA. (Corey Test. 22:16-18; Tr. 1031:11-14; Exh. KEY-30, at 10). That period does not include the time needed to obtain required approvals through TPAS and, ultimately, from the NYISO's Operating Committee. 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). IRP required the skills of dozens of people with varying expertise, and sizeable planning budgets. (Corey Test. 22:13-14; Mitsche Test. 12:5-11; Tr. 400:17-25). Such a planning exercise as part of the ATBA process is neither practical nor possible given the time, staff and resource constraints under which the NYISO must operate. (Corey Test. 22:16-18; Lamanna Test. 10:12-15; Mitsche Test. 12:11-13). Indeed, the 2001 Cost Allocation Report was largely prepared by one engineer in the NYISO's Transmission Planning Department working under Mr. Corey.

Mr. Corey, William Lamanna, the NYISO's lead engineer for the 2001 ATBA, and James Mitsche, the NYISO's independent witness, 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. (Corey Test. 22:13-18; Lamanna Test. 10:12-15; 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. (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. (Corey Test. 22:18-19; Mitsche Test. 12:11-13).

3. Attachment S Does Not Require That Proposed Generic Units Be Capable Of Actually Coming On-Line In A Specific Year Of The Five-Year ATBA Period

KeySpan's position is that Attachment S requires not only that the NYISO identify generic units on a year-by-year basis over the five-year ATBA study period but also that the proposed generic units be capable, in fact, of coming into service in the year in which they are identified. (Tr. 227:23-228:1). Such an interpretation is not consistent with Attachment S. KeySpan's witnesses acknowledged that there is nothing in Attachment S which states 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). 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 whether or not a particular project will actually come into service in a specific year, if at all. (Lamanna Test. 10:12-15). 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.²⁹ Your Honor should reject an interpretation of Attachment S that requires the NYISO to engage in fortune-telling.

Evidence that an actual proposed project on which a generic unit is modeled did not come into service as originally expected is not proof that the generic unit is not feasible for purposes of

²⁹ Indeed, one of the generic solutions identified by KeySpan Energy on behalf of LIPA was 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. (Lamanna Test. 10:15-11:6; Exh. NYI-19).

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, KeySpan's 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)³⁰ are determined using "constant dollars." Section IV.F.4.d provides:

[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); 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. (Turkin Test. 10:4-6; Corey Reb. Test. 4:16-17; Tr.

³⁰ 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 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)).

1084:24-1085:2; Tr. 1116:15-25). Commission Staff's witness, John Sammon, agreed 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. (Sammon Test. 9:18-10:2).

In sum, the evidence submitted at the hearing demonstrates that KeySpan's interpretation of feasibility is not supported by either the text of Attachment S or the underlying stakeholder deliberations, and would be impossible for NYISO staff to implement.

B. The NYISO's Interpretation Of Attachment S's Feasibility Criterion Calls For A Simplified Analysis Of Siting And Timing Factors Resulting In The Selection Of Generic Units That Reasonably Resemble The Portfolio An Integrated Utility Would Have Developed To Maintain Reliability

The NYISO interprets Attachment S's feasibility criterion as requiring it to develop generic units that reasonably resemble a portfolio of projects that an integrated utility would have developed to meet load over the five-year ATBA period. This approach requires consideration of three basic issues regarding the proposed generic units: their siting, their resemblance to the former utilities' traditionally mixed portfolio of generating units, and the time within which they could be constructed.

1. Generic Units Must Be Feasible In Terms Of Their Siting

Attachment S's feasibility criterion requires consideration of a proposed generic unit's location. (Corey Test. 23:9-11). The location of generic units is the most significant factor in determining feasibility because Developers were concerned that Transmission Owners, which originally had the responsibility to prepare ATBAs for their transmission districts, might propose generic units in preposterous locations in order to minimize their SUF costs. (Corey Test. 23:17-20). IITF/TPAS participants addressed that concern by imposing a feasibility requirement intended to ensure that generic units would not be proposed in preposterous locations such as the

middle of Central Park. (Corey Test. 23:22-24:4; Mitsche Test. 7:7-11). Such a general siting requirement is also entirely consistent with the methodology of using the perspective of an integrated utility. No utility would have attempted to site significant generation in Central Park. (Corey Test. 24:3-4). All of this testimony concerning the underlying purpose of the feasibility criterion went un rebutted by KeySpan.

Beyond the Central Park example, however, there was little discussion at IITF/TPAS about sites that would not be feasible. (Mitsche Test. 7:6-7). Nor did KeySpan challenge the NYISO's testimony that there are hundreds of potentially feasible sites for the interconnection of generation facilities in New York City. (Corey Test. 24:6-7). This fact makes the NYISO's approach to feasibility all the more sensible; since the NYISO is not in a position to identify and evaluate all of those hundreds of sites, it properly focuses on eliminating the possibility that a Transmission Owner might succeed in gaming the results of the ATBA by proposing units at preposterous locations. For the NYISO to satisfy itself that the proposed site of a generic unit is reasonable, *i.e.*, not preposterous, it need not evaluate all of the permitting and environmental factors that might, ultimately, determine whether or not a plant is actually built on such a site. Attachment S, and the NYISO's role as independent administrator of the cost allocation rules, does not require anything more with respect to the siting of generic units. KeySpan failed to prove that the generic units selected by the NYISO were not feasible from this siting perspective.

2. Generic Units Must Resemble A Utility's Mixed Portfolio

Traditionally, integrated utilities maintained a mixed portfolio of base and intermediate units, as well as peaking units such as the NYPA combustion turbines ("CTs"). (Corey Test. 21:19-22:6). KeySpan's witness, Mr. Disher, agreed that integrated utilities had traditionally maintained such mixed portfolios and that combustion turbines are peaking units usually installed to address emergency situations. (Tr. 408:22-409:3, 410:7-10). While integrated

utilities may have responded to unanticipated shortfalls in capacity by installing peaking units, they certainly did not conduct their long-range planning in that manner. (Tr. 409:9-10). Thus, there is no evidence in the record to suggest that the mix of generation represented in the generic portfolio developed by the NYISO is anything but a reasonable reflection of traditional utility planning.

3. Generic Units Must Be Selected From The Perspective Of A Formerly Regulated Integrated Utility Planning New Generation Several Years Before The Onset Of The Five-Year ATBA Study Period

Ultimately, KeySpan's claim relates principally to the third factor identified above, the timing within which a generic unit could have been expected to come into service.

With respect to that issue, Mr. Corey explained the NYISO's position as follows:

When the ISO is conducting the ATBA, we have to put ourselves into the hypothetical position of when the utility *would have been doing the planning* for their generation. . . . So for instance, for the class 2001 cost allocation that applied to the year 2002 to 2006, *we have to put ourselves in the mind of . . . the utility planners . . . when they were planning for that period, . . . probably they would have started that process around 1995 or something in that neighborhood.*

(Tr. 567:6-15) (emphasis added).

The propriety of the NYISO's use of this retrospective view was corroborated by Mr. Mitsche. He testified:

Load forecasts traditionally had been made on at least a five-year, forward looking basis, if not longer. Thus, when analyzing what generation might be needed in 2002 using this perspective, NYISO was required to consider what an integrated utility might have planned for several years before 2002, in order to ensure that the additional capacity would be in-service by 2002 to meet the load requirements.

(Mitsche Test. 11:6-11).

The use of this perspective also was approved by the NYISO's Board of Directors which, in dismissing KeySpan's appeal from the 2001 cost allocation report, concluded that the NYISO staff's interpretation of the feasibility criterion was reasonable:

The NYISO staff evaluated the feasibility of generic solutions *from an integrated utility's planning perspective*, and the assumption that necessary facilities would be in service by certain dates was not unreasonable *since the planning utility would have taken steps well in advance of actual construction to ensure their availability*.

(Exh. KEY-13, at 4) (emphasis added).

Commission Staff's witness, John Sammon, testified consistently that, in the context of the ATBA, the assumption that a former utility would have taken adequate steps to ensure the availability of proposed generic units in time to satisfy the identified reliability requirements is a "reasonable" one. (Sammon Test. 9:21-10:2; Tr. 1188:1-4).

The NYISO's use of this perspective, characterized by Mr. Mitsche as wearing a "the way we were" hat, was the subject of discussion and consensus at IITF/TPAS. (Mitsche Test. 11:5-6). Significantly, KeySpan offered no evidence rebutting Mr. Corey's or Mr. Mitsche's testimony on this issue.

The central dispute regarding "feasibility," therefore, lies in the question of whether the NYISO should be required to develop generic units from the perspective of an integrated utility planning in the year of the cost allocation study for the succeeding five-year period, e.g., planning in 2001 for the years 2002-2006, or as the NYISO contends, from the retrospective view of an integrated utility planning at least five or more years prior to the onset of the ATBA's five-year study period, just as the integrated utilities themselves traditionally had done.

KeySpan's interpretation rests on the entirely unrealistic proposition that an integrated utility would have waited until 2001 to actually forecast load requirements for, and plan the installation of new generation in, 2002. KeySpan offered no evidence to support that contention; in fact, all of the evidence was to the contrary.

Integrated utilities traditionally planned at least five, ten, and sometimes as many as twenty years in advance. (Corey Test. 24:19-21; Mitsche Test. 11:6-7; Tr. 463:12-20; Tr.

757:13-758:1; KEY-36). In contrast, KeySpan has urged an interpretation of Attachment S that would require the NYISO to consider as feasible only units for which planning is begun hypothetically in the year of the cost allocation study itself, and which can actually be built during the five-year ATBA study period, including the very first year. Such a perspective would effectively limit proposed generic units to combustion turbines of less than 80 MW, which do not require New York Article X certification,³¹ since that is all that realistically can be sited within a one to two year time frame. (Corey Test. 25:9-13; Mitsche Test. 13:7-10).

While integrated utilities addressed unanticipated shortfalls in capacity through the siting of such peaking units, they did not plan in that manner, a fact KeySpan's witness, Mr. Disher, acknowledged. (Tr. 409:4-10). It is, therefore, not reasonable to interpret Attachment S's feasibility criterion so as to require the NYISO to develop generic units for the ATBA as if it were an integrated utility that, contrary to good utility planning, left itself just one year to plan for and install potentially substantial amounts of new generation to meet Applicable Reliability Requirements. (Corey Test. 25:9-13). No regulated utility employing good utility practice would have left itself just one year to plan for the installation of new generation to meet such requirements. (Lamanna Test. 9:16-10:2; Tr. 759:1-6). Attachment S should not be interpreted to impose costs on Transmission Owners that are contrary to prudent utility planning principles. KeySpan's misguided notion of feasibility would have just that result.

³¹ 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)).

4. The Generic Units Selected By The NYISO Are Feasible

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

Based on the perspective employed by the NYISO, all of its proposed generic units were feasible, including the two (Units No. 1 and 5) challenged by KeySpan.

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”). (Lamanna Test. at 8:12-13; Turkin Test. 10:10-13; Exh. CE-3). The SEF project had an approved SRIS, and had submitted an Article X application. (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. (Lamanna Test. 8:11-12; Exh. NYI-3, at Table 1.2). It is important to make the distinction between the actual SEF 520 MW project and the NYISO's Generic No. 1 because KeySpan has continuously sought to blur it throughout this proceeding.

KeySpan claims 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. That claim is 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's evidence that Generic Unit No. 1 is not feasible is based on nothing more than the fact that the actual SEF Gowanus project has encountered unexpected delays in its permitting process, an entirely routine occurrence.³²

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. (Corey Test. 24:16-25:4; Lamanna Test. 9:12-16). There was no evidence presented by KeySpan 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. Accordingly, KeySpan failed to carry its burden of proof with respect to the infeasibility of Generic Unit No. 1.

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

Although KeySpan also challenged the feasibility of Generic Unit No. 5, modeled after part of Con Edison's East River Repowering Project, it offered paltry support for its claim. KeySpan's witness, Mark Waldron, included Generic Unit No. 5 in each of the studies he conducted. (Waldron Test. (Exh. KEY-24) 4:6-15; Tr. 302:24-303:3). The evidence was undisputed that the seven NYPA 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,

³² KeySpan's evidence of Generic Unit No. 1's alleged infeasibility was presented primarily through Ray Plaskon, a "fact witness" 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 (Plaskon Test. (Exh. KEY-1) 7:8-9), of little, if any, value.

necessitating the selection of Generic Unit No. 5. (Lamanna Test. 11:10-18; Turkin 13:13-17; Exh. CE-5). No KeySpan 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. (Lamanna Test. 10:5-12; Exh. NYI-7, at line 25). From the perspective of an integrated utility planning for 2002 at least five years earlier, Generic Unit No. 5 was feasible. (Lamanna Test. 9:12-16).

5. The NYPA Units Were Not Appropriate Generic Units From An Integrated Utility Perspective, But Even If They Were Feasible, The NYISO Would Have Had To Select Generic Unit No. 1 Because The NYPA Units Would Have Resulted In Higher Total SUF Costs

KeySpan's position in this proceeding is that the NYISO should have modeled the seven remaining NYPA CTs as generic units instead of Generic Unit No. 1. Selecting the NYPA CTs as generic units would have been contrary to the intentions of IITF/TPAS participants insofar as the generic solutions proposed in the 2001 ATBA would not then have resembled the mixed portfolio of generating units traditionally planned by integrated utilities. (Corey Test. 29:13-20; Mitsche Test. 12:18-22). Indeed, the reason the NYISO rejected an alternative set of generic units proposed by Con Edison in May 2002, was the fact that it did not reflect an integrated utility perspective insofar as it consisted almost entirely of combustion turbine units, rather than the traditional portfolio mix of base, intermediate and peaking units. (Corey Test. 30:10-14; Lamanna Test. 14:1-13).

But the fatal flaw in KeySpan's position regarding use of the NYPA CTs is that KeySpan did not -- and could not -- refute the fact that selection of the NYPA CTs as generics would have resulted in higher total SUF costs compared to the NYISO's ATBA based on Generic Unit No. 1.

(Exh. NYI-3, at App. D; Exh. NYI-20; Corey Test. 29:14-17; Lamanna Test. 12:1-4; Turkin Test. 20:4-10; Exh. CE-7). KeySpan's principal witness with respect to the feasibility of Generic Unit No. 1 claimed not to know whether the SUF costs associated with the NYPA CTs would have been higher. (Plaskon Test. 13:9-11), and KeySpan presented no other evidence on the issue. Thus, the NYISO's evidence that selection of the NYPA CTs as generic units in lieu of Generic Unit No. 1 would have resulted in higher total SUF costs went unrefuted.

Finally, it is not true that the NYISO's selection of generics was driven solely by the cost of SUFs. (Lamanna Test. 14:18-15:7). While this appears to have been a concern of the Commission in setting this matter for hearing, there was no evidence that the NYISO's selection of generic units was based solely on the least cost SUFs. Mr. Corey made clear that NYISO staff first satisfied itself that the generic units were feasible and met all Applicable Reliability Requirements (Corey Test. 26:3-5), and then completed the ATBA by determining the least cost SUFs needed to reliably interconnect those units. (Corey Test. 26:8-28:16).³³

Despite a document production from the NYISO in excess of 30,000 pages, KeySpan supported its claim with two e-mails from Ray Turkin of Con Edison indicating that the generic units Con Edison proposed in its initial ATBA had been selected on the basis of lowest SUF costs. (Exhs. KEY-16, KEY-17). One of the e-mails was sent by Mr. Turkin directly to Ralph Ruffano of NYPA in October 2001, so Con Edison's interpretation of Attachment S in this regard was certainly no secret to the Complainants. (Exh. KEY-16). But the view expressed by Mr. Turkin is simply another way of saying that, if faced with two equally feasible generic units,

³³ Even if the portfolio did represent a "least cost only" approach, the concept of feasibility functions as a check on the Transmission Owner's ability to influence the results unfairly. In this case, there simply is no evidence in the record from which to conclude that the generics were not feasible.

the NYISO must select the generic unit with the least overall SUF cost. That is a correct interpretation of Attachment S, and one that Mr. Mitsche confirmed at the hearing. (Tr. 1055:12-19). In fact, Attachment S would mandate that result since it requires the NYISO to identify the least costly SUFs needed to reliably interconnect any proposed generic units. (Exh. NYI-2, Attachment S, at Section I.B (Original Sheet 658A)).³⁴ Thus, even if Generic Unit No. 1 and the NYPA CTs were equally feasible solutions, the NYISO would have had to select Generic Unit No. 1 because it results in lower total SUF costs than a generic solution using the NYPA CTs in lieu of Generic Unit No. 1. (Corey Test. 29:13-17; Lamanna Test. 12:1-9).

C. The NYISO Acted Independently Of Con Edison In Conducting The 2001 ATBA

Strictly speaking, the Commission did not set for hearing any issue relating to NYISO's "independence" from Con Edison in conducting the ATBA. That fact, however, did not dissuade KeySpan from attempting to prove some dark conspiracy between the NYISO and Con Edison to "fix" the ATBA to favor Con Edison's interests. In his direct testimony, Mr. Disher suggested that the NYISO "appear[ed] to" have "neglected its independent role" in conducting the ATBA because it and Con Edison proposed the same generic units. (Disher Test. 19:11-18). Similarly, Mr. Sammon of the Commission Trial Staff testified that it "appeared" "NYISO did not act independently of Con Ed, a self-interested party, in the selection of generic generators." (Sammon Test. 14:5-8). These conclusions rest entirely upon the fact that NYISO staff ultimately proposed the same generic units first proposed by Con Edison. There is no other evidence to support this claim, and the evidence refuting it is overwhelming.

³⁴ The NYISO applies the same principle to the ATRA and thus protects Developers from excessive SUF costs. In short, this rule protects all parties in the cost allocation process.

First, the NYISO retained its independent judgment throughout the entire cost allocation process. The NYISO did not simply rubber-stamp Con Edison's proposals. From the beginning, the NYISO disagreed with Con Edison at various points of the cost allocation process, and Con Edison had no reservations about expressing its disagreements to NYISO staff. (Exh. NYI-21; Exh. NYI-29; Exh. NYI-32; Lamanna Test. 14:1-7; Corey Reb. Test. 6:3-8).

Second, there was nothing improper about Con Edison's submission of an ATBA to the NYISO and NYISO staff's consideration of it. Under the cost allocation rules as originally submitted to the Commission, the Transmission Owners were called upon to prepare an ATBA for their respective transmission districts. (Lamanna Test. at 5:5-8; Mitsche Test. 10:7-9). Con Edison and other Transmission Owners such as LIPA did so. (Exh. NYI-17; Exh. NYI-18; Lamanna Test. 5:10-11; Mitsche Test. 10:10). The Commission specifically approved this aspect of the process, clarifying an earlier order regarding Attachment S by stating: "the Commission did not intend to scrap the process whereby affected transmission owners conduct studies concerning the impact of proposed interconnections on their systems and submit these studies to NYISO."³⁵ The fact that the NYISO began its analysis on the basis of the ATBAs presented by the Transmission Owners does not mean that the NYISO failed to act independently of them.³⁶

³⁵ New York Independent System Operator, Inc., 100 FERC ¶ 61,103 at P. 10 (2002).

³⁶ "Independence" in the context of Attachment S has to mean something other than ignoring the input of Transmission Owners, a notion that the Commission already has rejected. (New York Independent System Operator, Inc., 100 FERC ¶ 61,103 at P.10 (2002)). The evidence demonstrates that the NYISO has neither the personnel nor the necessary expertise to conduct the ATBA without input, data and assistance from the Transmission Owners, a point recognized by the Commission. The NYISO does not fail to act independently when it conducts a neutral evaluation of a Transmission Owner's submissions.

Third, after the Commission's October 26, 2001 Order, the NYISO took decisional control over the ATBA. (Corey Reb. Test. 6:21-22; Lamanna Test. 6:7-19; Mitsche Test. 10:11-14). While the NYISO looked to Con Edison's ATBA as a starting point, NYISO staff conducted its own analysis of load pocket requirements and the feasibility of the generic units. (Corey Reb. Test. 6:22-7:2; Lamanna Test. 7:2-13; Tr. 534:22-25). After confirming that the generic units originally proposed by Con Edison were not sited inappropriately and met all Applicable Reliability Requirements, including the important New York City In-City load pocket requirements, NYISO staff exercised independent judgment and decided to propose the same generic units. (Lamanna Test. 8:18-23). Mr. Sammon even agreed that, assuming Con Edison selected generics to produce the least costly SUFs, the NYISO was justified in "reasonably rely[ing] on those same generics." (Tr. at 1185:12-16).

Fourth, nothing in the Commission's Order of October 26, 2001 precluded input from the Transmission Owners during the ATBA process, and Attachment S specifically states that for the ATBA "the 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)). Baseline system improvement plans submitted by Transmission Owners can include proposed generic units if needed to meet Applicable Reliability Requirements. (Corey Test. 28:5-12). The Commission has specifically stated that 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."³⁷

Fifth, nothing prevented Developers like KeySpan or NYPA from formally submitting proposed generic solutions to the NYISO. (Tr. 765:10-14). None was submitted. While

³⁷ New York Independent System Operator, Inc., 100 FERC ¶ 61,103, at P. 24.

KeySpan orally voiced objections to the NYISO's ATBA once NYISO began circulating early drafts of the Cost Allocation Report to TPAS participants in mid-March 2002, prior to the final version of the Cost Allocation Report in May 2002, no Developer submitted a formal, written ATBA proposal or an alternative set of generic units to the NYISO. (Tr. 1018:8-9).

Sixth, following NYISO staff's independent analysis of required SUFs, the NYISO increased SUF costs allocated to Con Edison by 50% or \$5.1 million, compared to Con Edison's original ATBA. (The net increase was \$3 million since the additional SUFs required by the NYISO eliminated the need for certain SUFs originally identified by Con Edison). (Lamanna Test. 13:4-13; Tr. 1074:25-1075:15). NYISO staff also determined that changes to SUFs originally proposed by LIPA in its ATBA were necessary; these changes directly benefited Class Year 2001 Developers by reducing their cost allocation. (Lamanna Test. 13:15-22).

Seventh, Con Edison strenuously objected to the NYISO's ATBA in May 2002, (Lamanna Test. 14:1-2; Exh. NYI-21), and submitted an alternative ATBA based on an entirely different configuration of generic units consisting of combustion turbines and associated SUFs costing \$10 million allocable to Con Edison (instead of the \$13 million determined by the NYISO). (Lamanna Test. 14:1-7; Exh. NYI-21). Con Edison acknowledged that its objective in proposing the alternative ATBA was to secure a lower cost allocation for itself. (Tr. 1108:1-4). The NYISO rejected Con Edison's alternative set of proposed generic units, and stood by its version of the ATBA. (Exh. NYI-21; Lamanna Test. 14:10-13).

Perhaps most significantly, Con Edison voted at the NYISO Operating Committee against approval of the 2001 Cost Allocation Report, and in favor of a motion to shelve approval of it. (Corey Reb. Test. 9:4-8; Exh. NYI-13, at 4-5). If this was a conspiracy between the NYISO and Con Edison, it failed miserably.

In sum, the attack on the NYISO's independence rests on nothing more than unfounded insinuations. There is no evidence that the NYISO failed to meet the standard of independence required for the fair administration of the cost allocation rules.³⁸

II. THE NYISO'S EXCLUSION OF CERTAIN GENERATING UNITS FROM THE BASELINE ASSESSMENT WAS CONSISTENT WITH THE COST ALLOCATION RULES

The NYISO's decisions with respect to which generating units were to be included in the ATBA's existing baseline system were reasonable and consistent with Attachment S. When faced with choices about the inclusion or exclusion of generating units, NYISO staff relied on either the express language of Attachment S or the consensus of Market Participants achieved through the IITF/TPAS process. Your Honor should uphold the NYISO's determinations.

First, based upon a consensus reached at IITF/TPAS, the NYISO appropriately used the *Load and Capacity Data Report* as the definitive source for determining existing system capacity. Second, based upon the plain language of Attachment S, the NYISO properly excluded the NYPA CTs from the ATBA's existing system baseline. Third, based upon a consensus reached at IITF/TPAS, the NYISO properly excluded Con Edison's Hudson Avenue No. 10 unit

³⁸ Given the lack of evidence, KeySpan's witnesses were understandably cautious in their testimony when accusing the NYISO of conspiring with Con Edison or lacking "independence." For instance, on a single page alone KeySpan's witness Ray Plaskon used the word "appeared" no less than three times when alleging that the NYISO did not act independently of Con Edison. (Plaskon Test. 10:12, 14, 17; *id.* at 13:7 ("The NYISO appeared to select generic units based solely upon the least cost impact to the transmission system")). Similarly, Mr. Disher testified that it also "appeared" to him that the NYISO had not acted independently; again a conclusion based on nothing more than the fact that the NYISO adopted the same generic units originally proposed by Con Edison. (Disher Test. 19:11). Commission Staff witness John Sammon testified likewise. (Sammon Test. 14:16) ("it appears that [the NYISO] did not independently..."). Because these musings amount to nothing more than speculation, they do not represent probative evidence and Your Honor should disregard them. See *City of Las Cruces, New Mexico*, 83 FERC ¶ 63,017, at p. 65,212 (1998) (speculation does not constitute probative evidence); *Stowers Oil & Gas Company*, 40 FERC ¶ 63,001, at p. 65,022 (1987) (a witness's speculation is "of no probative value").

from the ATBA baseline since it was not depicted as existing capacity or identified as a planned re-start unit in the *2001 Load and Capacity Data Report*. Finally, again based upon a consensus reached at IITF/TPAS, the NYISO properly included the Athens and Bethlehem projects in the ATBA baseline since they were deemed to have had their interconnection costs allocated prior to the finalization of Attachment S and the onset of the new cost allocation process in 2001.

A. The NYISO Properly Used Its Load and Capacity Data Report To Conduct The ATBA

1. The Stakeholder Consensus Called For The NYISO To Use The 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; 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, (Corey Test. 14:7-8), and depicts the New York Transmission System as of January 1 of each year. (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. (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. (Corey Test. 14:11-12). NYISO staff similarly uses the *Load and Capacity Data Report* as the data source for many of its studies. (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. (Corey Test. 14:6-

8,12-15; Mitsche Test. 9:4-7; 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. (Mitsche Test. 9:4). Even KeySpan'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).

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. (Corey Test. 14:5-8; 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. (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. (Corey Reb. Test. 3:8-9).

2. Use Of 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

The nature of the cost allocation process requires the NYISO to use a "snapshot" of the baseline system at a given time. (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. (Corey Reb. Test. 3:12-13). The only way to establish a baseline for any type of system study, including the ATBA, is to analyze a snapshot of the system as of a specific date. (Corey Test. 13:19-14:2; Corey Reb. Test. 3:13-14). The *Load and Capacity Data Report* provides such a snapshot. (Corey Reb. Test. 3:15). For the reasons noted above, the IITF/TPAS participants elected to have the NYISO use the *Load and Capacity Data Report* to determine

existing capacity. (Corey Test. 3:4-22). Nothing in Attachment S prohibits the NYISO's reliance on the *Load and Capacity Data Report* for that purpose.

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

1. Under Attachment S, Class Year Projects That Have Not Yet Accepted Their Cost Allocation Must Be Excluded From the Existing System Baseline

Under Section IV.F.1.a(1)(b) of Attachment S, 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); Corey Test. 17:22-24; Khu Test. 9:7-13).

There is good reason why a proposed project is not added to the baseline until the year after it has been through the cost allocation process and the Developer has accepted its cost allocation. The basic purpose of Attachment S is to determine the impact a proposed project will have on the reliability of the pre-existing system and to allocate the net cost of that reliability impact to the project responsible for causing it. (Corey Test. 15:4-7). Each New Interconnection project must go through this process before being added to the baseline. (Corey Test. 15:7-8).

Adding a project to the baseline before it has accepted its cost allocation would result in that project escaping responsibility for the cost of SUFs needed for its interconnection. (Corey Test. 15:13-16). This free-ride would be unfair to other Developers and the Transmission Owners, who would then bear responsibility for the costs of interconnecting such a project. (Corey Test. 15:16-19). It also would be inconsistent with the requirements and objectives of Attachment S. (Corey Test 15:19-21).

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

The NYPA CTs were Class Year 2001 projects. (Tr. 359:11-21). Although the NYPA CTs were planned to come on line in mid-2001, they had not yet undergone the cost allocation process under Attachment S and had not accepted their cost allocation. (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 CTs from the 2001 ATBA was consistent with the plain language of Section IV.F.1.a.(1)(b) of Attachment S. (Corey Test. 17:21-18:3). This exclusion properly ensures that NYPA pays its proper share for these facilities' impacts on the system.

3. KeySpan 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

The propriety of excluding the NYPA CTs from the ATBA was also 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 year projects] do not belong in the ATBA. . . . Therefore, all the NYPA GTs should not be in the ATBA." (Khu Test. 9:7-13). Similarly, KeySpan's own witness, Ellis Disher, conceded that, to the extent the NYPA CTs are class year 2001 projects, they properly were excluded from the ATBA's existing system representation. (Tr. 359:15-21).

C. The Hudson Avenue No. 10 Unit Was Properly Excluded From The ATBA Because It Was Not Listed as Existing Capacity In The 2001 Load And Capacity Data Report

Con Edison's Hudson Avenue No. 10 unit was constructed many years ago, but had been mothballed. (Corey Test. 18:5-6). The unit was reactivated during calendar year 2001. (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 part of the New York Operating System's existing generation capacity as of January 1, 2001 according to the *2001 Load and Capacity Data Report*, nor was it reported therein as a planned re-start. (Corey Test. 18:8-10; Mitsche Test. 8:17-20; Corey Reb. Test. at 3:20-22).

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. (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. (Mitsche 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. (Mitsche Test. 9:1-2).

The NYISO's decision to exclude the Hudson Avenue No. 10 unit because it was not listed as existing capacity in the *2001 Load and Capacity Data Report* was based on a consensus at TPAS, was reasonable, and was consistent with Attachment S.³⁹ 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 2001 ATBA. (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. (Corey Reb. Test. 4:1-5).

³⁹ 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; Corey Test. 18:11-15; Corey Reb. Test. 4:6-10).

D. Athens And Bethlehem Were Properly Included In The ATBA

TPAS members also determined by consensus that NYISO staff should include the Athens and Bethlehem plants in the 2001 ATBA existing system baseline because these plants were considered to be the equivalent of Class Year 2000 projects in that each had an approved SRIS and had accepted its respective interconnection costs prior to the implementation of the cost allocation process governed by Attachment S. (Mitsche Test. 8:9-14; Tr. 761:4-20). In this way, the Athens and Bethlehem projects were essentially grandfathered into the baseline. (Tr. 761:16-20). The NYISO's decision to include these plants was reasonable and consistent with Attachment S.

III. ALTHOUGH A MORE RECENT PJM MODEL WAS AVAILABLE FROM PJM AT THE TIME THE 2001 COST ALLOCATION STUDIES COMMENCED, USE OF SUCH A MODEL WOULD HAVE ONLY HAD A NEGLIGIBLE IMPACT ON THE COST ALLOCATION

The Commission's third and final question asks Your Honor 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.

A. A More Recent PJM Model Was Available For The 2001 Cost Allocation

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 (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, in response to the first part of the Commission's third question, it is clear that a more current PJM model was available in May 2001.

KeySpan attempted to portray the NYISO's use of the older PJM data supplied by Con Edison as malfeasance or negligence on the part of the NYISO. But KeySpan's characterizations obfuscate the issue. The Commission has not asked Your Honor to report on the circumstances surrounding the NYISO's use of Con Edison's older PJM data. The Commission asked only whether the most recent PJM data had been used, and what impact use of updated data would have had on the cost allocation.

The evidence nevertheless demonstrates that the NYISO was entirely justified in relying on Con Edison's short circuit data, including its then-existing representation of the PJM system. (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 insofar as short-circuit current has a localized effect on the transmission system. (Corey Test. 35:15-20). Because 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. (Corey Test. 35:20-23). It was, therefore, entirely reasonable for the NYISO to rely on Con Edison to provide accurate short circuit data. In fact, KeySpan's own witnesses testified, and KeySpan 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 SRIS for KeySpan's Ravenswood facility. (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. Use Of An Updated PJM Model Would Have Had Only A Negligible Impact On The 2001 Cost Allocation

In order to respond to the second part of the Commission's third question, the NYISO prepared an assessment of the impact that using updated PJM data would have had on the 2001

cost allocation. (Exh. NYI-14; Exh. NYI-15). In assessing that impact, the NYISO obtained data from PJM representing the data that would have been available in May 2001, and selected for inclusion into the ATBA baseline PJM queue projects that had reached a stage of development comparable to the criteria used by the NYISO to include proposed New York projects in the baseline, namely, acceptance of the project's cost allocation. (Corey Test. 42:13-21; Lamanna Test. 16:11-19). The comparable objective milestone in the PJM queue process selected by the NYISO was execution by the PJM developer of an Interconnection Services Agreement ("ISA").

KeySpan's approach to the issue of how to model proposed PJM capacity has been wildly inconsistent, and driven by the desire to increase the amount of proposed PJM capacity being modeled. In a May 2002 impact evaluation he prepared for KeySpan, Mr. 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 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"). (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). KeySpan 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; 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, bore no relation to reality.

Following Mr. Disher's deposition, KeySpan 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 a Facilities Study Agreement ("FSA") with PJM. (Sheehan Reb. Test. 15:11-15). 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 without any regard to what portion of it was likely to be built.

KeySpan's final position reflects the use of an objective milestone to determine which PJM proposed units to include in the baseline representation, one that would nevertheless add 15,000 MWs of proposed PJM capacity to the ATBA baseline.

The motive behind KeySpan's dizzying gyrations is transparent: the greater the amount of proposed PJM capacity modeled in the baseline, the greater the increase in fault current levels at Con Edison substations, resulting in higher SUF costs allocable to Con Edison and lower costs for KeySpan. Since the ATRA is netted against the ATBA, higher SUF costs identified in the ATBA reduce the SUF costs in the ATRA, a portion of which would be allocable to KeySpan. It thus comes as little surprise that the milestone finally settled upon by KeySpan still produces inflated estimates of PJM's future capacity.⁴⁰

KeySpan's so-called rebuttal witness, Mr. Sheehan, has a finance background, has never worked for a utility or transmission owner, has no experience in transmission planning, and

⁴⁰ KeySpan's wildly varying testimony on this issue provides a perfect illustration of the possibility for data manipulations that only the NYISO, as neutral tariff administrator, is situated to detect and prevent. The NYISO's central responsibility in the cost allocation process is to avoid gaming by any party that is intended to achieve an improper cost-shifting result.

confessed he was “not knowledgeable” about and does not “comprehend” Attachment S. (Tr. at 782:22-783:12; 861:2-8). He nevertheless offered his opinion that approximately 15,000 MWs would come on line in PJM by 2006. As noted above, this approximation was tied to the signing of an FSA by PJM project developers. (Sheehan Test. 15:11-15). During cross-examination, however, Mr. Sheehan was forced to admit that his own company’s proprietary methodology suggests that the total MWs from all PJM projects likely to come on line amounts to only 6,686 MWs, a far cry from the 15,000 MWs described in his written testimony. (Tr. at 874:7-18; Exh. NYI-34, at 1).

Setting aside KeySpan’s inflated PJM estimates, KeySpan also failed to introduce any evidence of the impact that use of an updated PJM model would have on the 2001 cost allocation. KeySpan presented no evidence regarding the impact that adding 15,000 MWs of PJM proposed capacity to the ATBA baseline would have on fault duties at Con Edison substations. KeySpan identified no additional mitigation measures that would be necessary and, therefore, presented no evidence of impact on the cost allocation. When KeySpan filed its initial testimony modeling 27,500 MWs based on the June 2001 RTEP, Mr. Waldron at least conducted an analysis showing that the inclusion of all 27,500 MWs would result in several overstressed breakers in the Con Edison system. (Waldron Test. 17:8-15). But even Mr. Waldron’s earlier studies failed to identify any SUFs that would be necessary to mitigate those conditions, a glaring omission noted by the Commission Staff’s technical expert, Mr. Khu. (Khu Test. 10:1-7). Now that KeySpan has discarded its 27,500 MW estimate, Mr. Waldron’s studies lose all relevance. KeySpan has offered no other evidence of impact on the results of the 2001 cost allocation and, therefore, has failed to meet any burden of proof it might have on this issue.

In contrast, in preparing its impact study in response to the Commission's third question, the NYISO estimated PJM's future capacity by selecting a reasonable, objective milestone in the PJM queue process that closely resembles the criteria the NYISO is required under Attachment S to use to determine which proposed New York projects are included in the ATBA baseline, i.e., a project's acceptance of its cost allocation. (Corey Test. 42:13-15; Lamanna Test. 16:11-19). The NYISO accordingly modeled those PJM queue projects whose developers had signed an ISA. (Lamanna Test. 16:14-19; 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, (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 (Mitsche Test. 16:13-16). KeySpan'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 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).

The NYISO has presented credible and unrefuted evidence that use of an updated PJM model, adjusted in the manner described above, would have only a negligible impact on the 2001 cost allocation. As noted, the NYISO included PJM projects for which an ISA was signed as of May 1, 2001,⁴¹ the commencement date of the 2001 cost allocation studies. Using the executed

⁴¹ The May 1, 2001 commencement date for the start of the 2001 cost allocation studies was the date used in the NYISO's January 13, 2003 impact report, entered into evidence as Exh. NYI-14. The NYISO also prepared a second report, dated January 29, 2003, entered into evidence as Exhibit NYI-15, which included PJM projects that signed an ISA by December 1, 2001, a commencement date advocated by KeySpan at the December 20, 2002 Technical Conference held before Your Honor. The January 29, 2003 report showed somewhat higher
(continued...)

ISA as a milestone, the NYISO estimated that adding the proposed PJM projects to the baseline would result in somewhat higher fault levels at Con Edison's Farragut substation. (Exh. NYI-14, at 5). KeySpan's witness, Mr. Waldron, did not take issue with the accuracy of the NYISO's methodology. (Waldron Test. 16:20-19:3). The NYISO then also determined that the Farragut overduty condition could be mitigated by a minor adjustment to a previously identified SUF, the cost of which has been allocated to Con Edison. Increasing the impedance of that SUF, a series reactor in Feeder 15055, from 5% to 8%, would result in a negligible \$30,000 or .043% increase in the total cost of SUFs allocated to Con Edison in the 2001 Cost Allocation. (Exh. NYI-14, at 5; Lamanna Test. 17:3-5). NYISO staff has determined that such an increase in the series reactor's impedance would not itself result in the need for any additional mitigation. (Lamanna Test. 18:13-17). KeySpan offered no evidence to challenge this conclusion.

fault duties because additional PJM projects had signed an ISA by December 1, 2001. The overduty conditions identified therein, however, could also be mitigated by a increase in the impedance levels of the 15055 series reactor, from 5% to 9%. The January 29, 2003 impact report shows that such an increase would result in a \$60,000 increase in SUF costs allocable to Con Edison, still a negligible impact.

CONCLUSION

For the reasons set forth above, KeySpan has failed to prove that the NYISO violated Attachment S in conducting the 2001 cost allocation. The NYISO's selection of generic units for the 2001 ATBA, and its exclusion of the NYPA CTs and the Hudson Ave. No. 10 unit from the ATBA's existing system baseline, were fully consistent with the requirements of Attachment S. Finally, while a more updated model of the PJM system was available and could have been used to prepare the 2001 ATBA, use of the updated PJM data would have had a negligible impact on the 2001 cost allocation.

Respectfully submitted,

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Dated: April 9, 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 9th day of April, 2003.

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