

**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.)	

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

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Dated: April 23, 2003

TABLE OF CONTENTS

	<u>Page No.</u>
PRELIMINARY STATEMENT	1
ARGUMENT	4
I. NEITHER KEYSpan NOR COMMISSION TRIAL STAFF HAS PROVEN THAT THE NYISO’S SELECTION OF GENERIC GENERATION WAS INCONSISTENT WITH THE FEASIBILITY CRITERION IN ATTACHMENT S	4
A. KeySpan’s Reliability-Based Construction Of The ATBA Would Distort The Meaning And Purpose Of The Cost Allocation Rules.....	4
B. Attachment S Does Not Require The NYISO To Employ Integrated Resource Planning Methods When Developing Generic Units	5
C. KeySpan’s Challenge To The Feasibility Of The NYISO’s Generic Units No. 1 And No. 5 Lacks Merit	7
D. The Doctrine of <i>Contra Proferentem</i> Is Inapplicable To The Proper Construction Of Ambiguities In Attachment S.....	12
E. Trial Staff’s Arguments Lack Support In The Record And Are Contradicted By The Testimony Of Trial Staff’s Own Witnesses	14
II. THE EVIDENCE IS OVERWHELMING THAT THE NYISO PROPERLY EXCLUDED THE NYPA CT UNITS AND HUDSON AVENUE NO. 10 FROM THE ATBA EXISTING SYSTEM BASELINE	19
A. KeySpan’s Argument Ignores The Language of Attachment S.....	19
B. Trial Staff’s Arguments Ignore The Language Of Attachment S, And Are Inconsistent With The Testimony Of Its Own Witness	23
III. USE OF AN UPDATED PJM MODEL WOULD HAVE HAD A NEGLIGIBLE IMPACT ON THE 2001 COST ALLOCATION	26
A. KeySpan Has Not Met Its Burden Of Proof On The PJM Issue.....	26
B. KeySpan And Trial Staff’s Approach To Modeling Proposed PJM Capacity Is Inconsistent With Attachment S	26
CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases

<u>D.S. Swain Gas Co. v. Dixie Pipeline Co.</u> , 911 F.2d 721, 1990 WL 112071 (4th Cir. 1990).....	14 n.14
<u>Dawn Equip. Co. v. Micro-Trak Sys., Inc.</u> , 186 F.3d 981 (7th Cir. 1999).....	12 n.10
<u>Eley v. Boeing Co.</u> , 945 F.2d 276 (9th Cir. 1991).....	12 n.10
<u>National Van Lines v. United States</u> , 355 F.2d 326 (7th Cir. 1966).....	14 n.14

FERC Administrative

<u>Regional Transmission Organizations</u> , 89 FERC ¶ 61,285, 65 FR 810 (1999).....	14 n.13
<u>SFPP, L.P.</u> , 93 FERC ¶ 63,023 (2000)	8 n.6
<u>New York Independent System Operator, Inc.</u> , 100 FERC ¶ 61,103 (2002)	13 n.11, 15 n.15
<u>New York Independent System Operator, Inc.</u> , 97 FERC ¶ 61,118 (2001)	13 n.11, 24, 27 n.30
<u>Duke Energy Corporation</u> , 94 FERC ¶ 61,187 (2001)	27 n.30
<u>Central Hudson Gas & Electric Corp.</u> , 88 FERC ¶ 61,138 (1999).....	13 n.11

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

Respondent New York Independent System Operator, Inc. (the "NYISO") respectfully submits this Post-Hearing Reply Brief, pursuant to 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

In a post-hearing brief long on rhetoric but short on probative evidence, KeySpan argues that Attachment S requires the NYISO to conduct the ATBA as if it were planning actual generation projects through the use of integrated resource planning ("IRP") methods. KeySpan also asserts that two of the generic units selected by the NYISO for the 2001 ATBA, specifically Generic Units No. 1 and No. 5, were not "feasible" under Attachment S because they could not be licensed, built and brought into service by 2002. Both arguments are based on a fundamental misreading of Attachment S's purpose and text, and lack support in the record. Accepting them

would run counter to the expressed intentions of the Market Participants who, together with the NYISO, drafted and approved Attachment S in response to the Commission's directive.¹

Adopting KeySpan's approach to the selection of generic units would work a profound transformation of the ATBA--from the simplified evaluation of hypothetical generic generation envisioned by the framers of Attachment S to a "real world" planning exercise never intended by Market Participants. As envisioned by Market Participants, the ATBA requires the development of a portfolio of hypothetical generating units sufficient to meet reliability requirements, not a plan for actual generation to satisfy those requirements. The NYISO's interpretation is supported by NYISO witnesses who were present during the IITF/TPAS drafting process and who conducted the 2001 ATBA in coordination with Market Participants. It is corroborated in every respect by James V. Mitsche, the former Chairperson of IITF/TPAS. Mr. Mitsche testified not only as an expert with respect to PJM issues, but also as a fact witness regarding the IITF/TPAS stakeholder deliberations he led, and the consensus arrived at among the Market Participants who helped to draft Attachment S and who approved the 2001 cost allocation, including the NYISO's selection of generic units. None of that evidence was challenged, no less refuted, by KeySpan.

In its post-hearing brief, Commission Trial Staff ("Trial Staff" or "Staff") abandons all pretense of objectivity and essentially mimics KeySpan. It is not surprising, then, that many of Trial Staff's arguments lack record support or are based on incomplete, even bizarre, readings of the evidence. For instance, while it ignores a mountain of contrary evidence, Staff supports its assertion that the NYISO failed to act independently with amateur psychology about the coercive

¹ This Reply Brief uses the same abbreviations and citation form used in the NYISO's Initial Post-Hearing Brief. See NYISO Br. at 2 n.2.

effects of a Con Edison e-mail sent to Steven Corey. In another instance, Staff glosses over the language of Attachment S to argue that the NYPA CTs should have been added to the ATBA baseline because NYPA previously paid all its SUF costs; but Staff fails to mention undisputed, conflicting testimony by a NYISO witness solicited at the hearing by Trial Staff's own counsel.

Most disturbing of all, however, is the fact that Trial Staff's arguments are contradicted in almost every respect by the testimony of its own witnesses, John Sammon and Dr. Kim Khu. For instance, Trial Staff endorses KeySpan's position that Generic Units No. 1 and No. 5 were not feasible, despite the fact that Mr. Sammon testified that the units were feasible. And while Dr. Khu testified emphatically that the NYPA CTs had been properly excluded from the ATBA existing system baseline, Staff's brief inexplicably takes the opposite position while simultaneously failing to mention, let alone distinguish, Dr. Khu's contrary testimony. Even NYPA has taken the position that the CTs should not have been included in the ATBA's existing system baseline.

KeySpan and Trial Staff share one last thing, an obsession with the word "fantasy." The word is repeated seven times by KeySpan, eight times by Staff. While Mr. Corey acknowledged using the word at a TPAS meeting, an isolated instance of hyperbole is not evidence that the NYISO violated Attachment S. Attachment S is not a "fantasy" and there is no evidence that in evaluating the feasibility of generic units for the 2001 ATBA the NYISO acted as if it were. But neither is the ATBA a "real world" planning exercise designed to replicate the elaborate IRP methods the former integrated utilities used to plan real projects. The NYISO's interpretation of the feasibility criterion is consistent with the intent of the IITF/TPAS Market Participants who drafted Attachment S and the goals the Commission had in mind when it approved it as "just and reasonable."

ARGUMENT

I. NEITHER KEYSpan NOR COMMISSION TRIAL STAFF HAS PROVEN THAT THE NYISO'S SELECTION OF GENERIC GENERATION WAS INCONSISTENT WITH THE FEASIBILITY CRITERION IN ATTACHMENT S

A. KeySpan's Reliability-Based Construction Of The ATBA Would Distort The Meaning And Purpose Of The Cost Allocation Rules

Throughout its brief, KeySpan supports its arguments with generalized assertions that reliability concerns dictate the outcome it favors, and that the NYISO violated Attachment S by not taking into account “real world” reliability issues when developing the ATBA. (KeySpan Br. at 33, 35). The fallacy in this approach is that the cost allocation methodology looks at system reliability requirements from two different perspectives, and confusing one with the other would frustrate the cost allocation process. The NYISO's approach to creating the ATBA preserves the distinction between these two perspectives and thereby achieves the goals of Attachment S.

The cost allocation rules are predicated on the concept that the SUFs necessary to meet system reliability requirements may be different with or without the proposed Developer projects identified in the ATRA. (Exh. NYI-1, Corey Test. 10:5-7).² One set of SUFs may be necessary to satisfy reliability needs in the absence of any merchant generation projects; a different and potentially more costly set may be required to maintain reliability once those merchant projects are added. (Exh. NYI-1, Corey Test. 10:7-10; Exh. NYI-22, Mitsche Test. 6:3-7). The very essence of the cost allocation process is to identify the differences in the SUFs needed under the two scenarios, so that the burden of making the necessary upgrades can be apportioned. The costs of accommodating changes in load growth and load patterns fall on the Transmission Owners. (Exh. NYI-1, Corey Test. 10:12-14). The costs associated with maintaining system

² At bottom, the cost allocation method is an attempt to determine which of the two warring groups – Transmission Owners and Developers – “caused” the need for making system upgrades. This “cost causation” principle requires the two different assessments of reliability. See Filing, infra n.12.

reliability when the proposed merchant projects are added fall on the Developers of those proposed projects. (Exh. NYI-1, Corey Test. 10:18-21). For this fundamental reason, the ATBA and the ATRA assess “reliability” from two distinctly different vantage points: from a hypothetical viewpoint that excludes the actual impact of the proposed new units (ATBA), and from the real world perspective that includes them (ATRA). (Exh. NYI-1, Corey Test. 10:3-10; Exh. NYI-22, Mitsche Test. 6:15-18).

To conflate the two perspectives, as KeySpan would have Your Honor do here, would twist the logic underlying the cost allocation rules and shift some of the reliability costs that arise from the presence of Developers’ projects onto the Transmission Owner, in this case Con Edison. Thus, whenever KeySpan raises reliability as a rationale for its proposed construction of the ATBA, it really is talking about shifting costs identified in the ATRA to the ATBA. Because the goal of the ATBA is to estimate and allocate to the Transmission Owner only those hypothetical SUF costs that the Transmission Owners would be responsible for anyway, Your Honor should reject KeySpan’s assertion that generic generating units developed for the ATBA must reflect real world conditions.

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

A central theme in KeySpan’s brief is its argument that if the NYISO must develop generic units from the perspective of a formerly regulated integrated utility, then it must also use IRP methods in determining the feasibility of proposed generic units. (KeySpan Br. at 26-37). Despite its superficial appeal, there is simply no evidence to support this conclusion.

The undisputed testimony of Messrs. Corey and Mitsche was that Market Participants at IITF/TPAS, including NYPA’s representative Ralph Rufrano, reached a consensus that, in applying Attachment S, the NYISO must develop a generic portfolio that resembles the portfolio that would have been developed by an integrated utility planning several years prior to the

applicable ATBA study period. (Exh. NYI-1, Corey Test. 21:12-17; Exh. NYI-22, Mitsche Test. 11:3-5). There is no evidence of any discussion, no less evidence of consensus, that in determining whether a particular generic unit is “feasible” for that purpose, the NYISO must employ IRP. KeySpan’s position, essentially adopted by Trial Staff, rests on the opinion testimony of a single witness, Ellis O. Disher, who failed to rebut any of the testimony of Messrs. Corey or Mitsche despite his attendance at the IITF/TPAS meetings, and who admittedly ignored the IITF/TPAS deliberations in his own testimony. (Tr. 416:20-23).

It bears emphasis here that the NYISO’s reliance on the integrated utility perspective as described by Messrs. Corey and Mitsche is not some litigation posture adopted for this proceeding, but is based on a consensus reached at IITF/TPAS two years ago. While KeySpan may object to the NYISO’s approach because it did not yield the result it prefers, the consensus at IITF/TPAS was to recommend approval of the NYISO’s selection of generic units, which had been based on the application of this perspective. (Exh. NYI-1, Corey Test. 21:12-17; Exh. NYI-22, Mitsche Test. 11:3-5). The NYISO’s selection of generic units and the 2001 cost allocation were also approved by the Operating Committee, comprised of Market Participant stakeholders. (Exh. NYI-13). Your Honor must not ignore or minimize the importance of such evidence.

In fact, the evidence at the hearing shows that all of the NYISO’s proposed generics met the standard of feasibility that Market Participants intended. Mr. Disher acknowledged that the integrated utilities traditionally maintained a mixed portfolio of base, intermediate and peaking units. (Tr. 408:22-409:3, 410:7-10). KeySpan presents no evidence that the generic portfolio selected by the NYISO does not resemble such a mixed portfolio. In fact, they do, a point recognized by the New York Public Service Commission in its brief. (NYPSC Br. at 4-5). Nor did KeySpan present any evidence showing that the generic portfolio failed to meet Applicable

Reliability Requirements.³ In fact, the NYISO presented uncontroverted evidence that the generic units satisfy those requirements. (Exh. NYI-16, Lamanna Test. 9:3-7).

In sum, the approval of the NYISO's proposed generic units by Market Participant stakeholders at both the informal TPAS and formal Operating Committee levels demonstrates that the NYISO's application of an integrated utility perspective when developing a portfolio of generic units for the 2001 ATBA was consistent with the feasibility criterion in Attachment S.

C. KeySpan's Challenge To The Feasibility Of The NYISO's Generic Units No. 1 And No. 5 Lacks Merit

KeySpan makes a number of generalized assertions regarding the feasibility criterion, but its challenge to the 2001 cost allocation ultimately boils down to a claim that two of the generic generating units proposed by the NYISO⁴ were not feasible because they could not be licensed, built, and brought into service by 2002, the first year of the 2001 ATBA five-year study period. KeySpan's challenge rests entirely upon the absurd premise that a traditional utility would not have begun planning for a given year's reliability needs until the year before. (KeySpan Br. 28-31). Absent this premise, KeySpan's challenge collapses. It presented no credible evidence that the two generic units are not feasible given a traditional planning horizon for their construction.

The term "feasible" is not defined in Attachment S, and was purposely left undefined so as not to restrict the NYISO's discretion in developing proposed generic generating units for the ATBA. (Exh. NYI-1, Corey Test. 23:6-11; Exh. NYI-22, Mitsche Test. 7:4-6). KeySpan failed

³ While KeySpan says that there is no evidence that Con Edison would have planned such a portfolio to meet its own reliability requirements, (KeySpan Br. at 19 n.17), one of the two generic units whose feasibility is challenged by KeySpan, Generic Unit No. 5, is in fact modeled after an actual project being built by Con Edison. (Exh. NYI-16, Lamanna Test. 8:16-17).

⁴ The two challenged units are Generic Unit No. 1, partially modeled after Sunset Energy Fleet's ("SEF") 520 MW combined-cycle Gowanus barge project, and Generic Unit No. 5, partially modeled after Con Edison's East River Repowering ("ERR") project.

to rebut that evidence and ignores it in its brief. KeySpan argues nevertheless that Your Honor’s inquiry regarding the term “feasible” should end simply by looking up the word in a dictionary. (KeySpan Br. at 27). However, the dictionary definition of “feasible” provides no support for KeySpan’s view that the NYISO must be limited to planning emergency generation for the first year of any ATBA planning period.

The definition of “feasible,” while not irrelevant, is by no means dispositive. The best proof of that is KeySpan’s witness Mr. Disher, who testified that his own interpretation of “feasible,” and of how the feasibility of generic units should be determined, is not the only reasonable one, and that others may have different interpretations of how to apply the term in the context of Attachment S. (Tr. 406:14-15). Mr. Disher also acknowledged that the IITF/TPAS deliberations could shed light on the meaning intended by Market Participants. (Tr. 414:3-6, 11). Despite these admissions, neither Mr. Disher nor any KeySpan witness testified about the IITF/TPAS deliberations or rebutted the NYISO’s evidence as to what Market Participants intended with respect to the term “feasible.” Thus, the NYISO’s evidence was uncontroverted.⁵ Moreover, given Mr. Disher’s failure to present such testimony, either in his initial testimony or in rebuttal, Your Honor should infer that had he testified about the IITF/TPAS deliberations, his testimony, in fact, would have corroborated the accounts of Messrs. Corey and Mitsche.⁶

⁵ See NYISO Br. at 25-26. NYISO witness Steven Corey, TPAS Chairman James Mitsche and Staff witness John Sammon all testified that it was appropriate and reasonable under Attachment S for NYISO to select generic units from the perspective of a formerly regulated integrated utility planning new generation several years before the onset of the five-year ATBA study period. *Id.* The New York State Public Service Commission also has concluded that “the NYISO’s selection of generic solutions cannot be judged in hindsight” but “must be judged on the basis of what a reasonable integrated utility would have included” (NYSPSC Br. at 5).

⁶ *SFPP, L.P.*, 93 FERC ¶ 63,023, at p. 65,134 (2000) (failure of party to introduce evidence regarding disputed issue about which it had knowledge gives rise to inference that such information would have confirmed adverse party’s evidence). During cross-examination, Mr. Disher cautiously
(continued...)

KeySpan is also wrong when it implies that “fatal flaw” analysis of proposed generic units is required under Attachment S or that the NYISO’s Generic Units No. 1 and No. 5 were “fatally flawed.” First, there is nothing in Attachment S which requires the NYISO to conduct fatal flaw analysis with respect to proposed generic units. Indeed, no evidence at all exists to support that conclusion. Mr. Disher never testified that Attachment S requires such an analysis, which he described as one aimed at determining “whether a particular plan can, in fact, be accomplished,” (Tr. 401:2-9), a standard which does not appear in Attachment S. Mr. Disher admitted that to make such a determination would “very likely involve *an in-depth investigation of all of the factors related to construction of a facility, and that could take a year or two,*” (Tr. 402:2-6) (emphasis added), the type of investigation Mr. Disher acknowledged elsewhere could not be done in the context of conducting the ATBA. (Tr. 404:19-22). KeySpan’s interpolation of such an elaborate analytical requirement into the ATBA therefore lacks support in both the text of Attachment S and the hearing record.

KeySpan is also wrong when it asserts that Generic Units No. 1 and No. 5 were “fatally flawed.” No KeySpan witness made such a claim and no evidence exists to support it. Indeed, Messrs. Plaskon and Disher both admitted that Generic Unit No. 5 was feasible over the 2002-2006 study period, (Tr. 224:20-24; 442:23-24), and neither witness testified that Generic Unit No. 1 or the SEF 520 MW Gowanus project on which it was partially modeled has a “fatal flaw” that renders it infeasible over traditional planning horizons for generating units of their nature.

Ironically, KeySpan concludes its discussion of the generics issue by arguing that Generic Units No. 1 and No. 5 were “materially different from the real projects” they were modeled after, (KeySpan Br. at 36 n. 28), something the NYISO has been saying all along.

avoided testifying about IITF/TPAS discussions regarding the selection of feasible generic units. (Tr. 416:23-417:1).

(Exh. NYI-16, Lamanna Test. 8:11-18). KeySpan acknowledges the “material” difference between the proposed generic units and the actual projects they were partially modeled after, a distinction stressed by the NYISO in its Initial Brief, but then fails to explain why permitting and other factors peculiar to *the real projects* should be determinative of the feasibility of *the proposed generic units*.⁷ Up to now, KeySpan’s entire case has rested on its claim that Generic Units No. 1 and No. 5 were not feasible because, looking forward from the perspective of late-2001, it was unlikely that the actual SEF 520 MW Gowanus project or Con Edison ERR project would be in-service by 2002 (KeySpan Br. at 32-33). But that is the wrong question to ask when evaluating the feasibility of Generic Units No. 1 and No. 5. If, as KeySpan concedes, there are “material differences” between the real projects and the generic units, then the fact that the real projects experienced delays in construction following development of the ATBA is no basis for invalidating the earlier feasibility analysis regarding the generic units.⁸ Nothing in Attachment S dictates such a result. (See NYSPSC Br. at 5 (concluding that KeySpan’s argument “shows that KeySpan does not understand the . . . process”)).

Finally, in addressing the NYISO’s Generic Units No. 1 and No. 5, both KeySpan and Trial Staff ignore Mr. Corey’s testimony that a presumption of feasibility is appropriate when a generic unit is modeled after an actual, planned project. (Tr. 554:1-8). Insofar as SEF’s 520 MW

⁷ The word “generic” is defined as “[c]haracteristic of or relating to a class or group of things; not specific.” New Oxford American Dictionary 707 (2001). Thus, while KeySpan’s entire focus is on the term “feasible,” it ignores Attachment S’s reference to “generic” generation which suggests that such units need only have certain general, non-specific characteristics, exactly as described by Mr. Corey. (Exh. NYI-1, Corey Test. 21:5-7).

⁸ For instance, the Cross-Sound Cable project, used as a model for a generic transmission transfer solution for the LIPA transmission district in the 2001 ATBA, was originally scheduled to be in service in 2002, but has yet to become operational. E.g., Ken Dixon “*Cross-Sound Cable Power Nixed in Connecticut*,” Connecticut Post, April 15, 2003; Tom McGinty “*Judge Blocks LI Sound Power Line*,” Newsday (New York), April 15, 2003.

Gowanus project and Con Edison's ERR project had reached a certain stage in their development at the time Generic Units No. 1 and No. 5 were proposed (planning for each had begun several years before, each had an approved SRIS, and each had either an approved or pending Article X application, (Exh. 1, Corey Test. 24:16-25:4; Exh. NYI-7), it was reasonable for the NYISO to conclude that their developers had previously determined that the projects were actually capable of being built, i.e., they were at least feasible.⁹

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

⁹ On the other end of this spectrum, Mr. Corey pointed out, is the generic unit being considered "out of the blue" and for which there exists no proposed project "like or similar" to it. Although not relevant here, in such a case a more in-depth evaluation of feasibility would be warranted. (Tr. 571:24-572:4).

the selection of generic units whenever an actual project used as a model encounters unexpected delays in the years following the cost allocation.

KeySpan and Trial Staff ignore all these facts and argue that Attachment S requires the NYISO to undertake a high-level, detailed analysis of IRP factors regardless of whether a proposed generic unit is modeled after an actual, planned project. Such an interpretation would eviscerate the obvious utility of allowing the NYISO to develop generic units modeled after actual projects, something expressly contemplated by Attachment S. (Exh. NYI-2, Attachment S, Appendix 1 (First Revised Sheet No. 689); Exh. NYI-1, Corey Test. 25:15-16).

D. The Doctrine of *Contra Proferentem* Is Inapplicable To The Proper Construction Of Ambiguities In Attachment S

In an argument advanced at several points in its brief, Trial Staff states that “the NYISO bears the risk of any uncertainty in the language” of Attachment S. (Staff Br. at 18, 20). Staff cites no decision, however, that has applied the doctrine of *contra proferentem* against an ISO with respect to a tariff which, like Attachment S, is the product of a stakeholder deliberative process. Nor has the NYISO uncovered such authority. The issue may well be a matter of first impression, but well-settled case law supports the view that the *contra proferentem* doctrine should not be applied with respect to the NYISO and Attachment S. For that reason, there is no basis to construe any ambiguities in Attachment S “against” the NYISO.

Where a tariff, like a contract, is the product of a lengthy negotiation process involving sophisticated parties, the doctrine of *contra proferentem* is not applicable.¹⁰ Here, Attachment S

¹⁰ See, e.g., Dawn Equip. Co. v. Micro-Trak Sys., Inc., 186 F.3d 981, 989 n.3 (7th Cir. 1999) (“The principle that ambiguity should be construed against the drafter does not control because we deal with a negotiated contract between sophisticated commercial clients ‘advised by counsel and having equal bargaining power’”); Eley v. Boeing Co., 945 F.2d 276, 280 (9th Cir. 1991) (holding that instrument is not construed against drafter where agreement is result of “arms-length bargaining by parties of equal power”).

was the product of a deliberative process open to all Market Participant stakeholders, many with competing commercial interests such as the principal antagonists, KeySpan and Con Edison. (Exh. NYI-1, Corey Test. 5:18-20; Exh. NYI-22, Mitsche Test. 5:19-20). This stakeholder process was initiated at the Commission's direction.¹¹ Attachment S was not, therefore, a unilateral tariff filing by the NYISO, and the NYISO, unlike common carriers or the former utilities, has no financial interest in the outcome of disputes involving it. Having been drafted during a lengthy stakeholder deliberative process, Attachment S reflects the consensus of Market Participants, just as the Commission intended. This was noted explicitly when the NYISO filed the original version of Attachment S with the Commission on August 29, 2001:

The NYISO staff has worked for more than one year with Market Participants to develop a set of interconnection facility cost allocation rules. Numerous specific proposals were presented and discussed. The transmission pricing and interconnection policies of the Commission were frequently discussed. The interconnection cost allocation rules already in place in PJM, New England and elsewhere were thoroughly reviewed. ***Throughout the process, [market] participants sought to formulate a set of rules that are in accordance with Commission policies,*** compatible with established NYISO interconnection procedures, consistent with the best practices in PJM and the rest of the Northeast, and fully sensitive to the distinctive characteristics of the New York State power market.

The OATT amendments proposed here represent the outcome of a comprehensive process to develop a broad consensus and carefully crafted package that deals in an integrated manner with the many related issues of interconnection facilities cost allocation. ***The strong support given to the set of rules ultimately developed reflects the great extent to which [market] participants believe the goals of the process were effectively accomplished.***¹²

¹¹ New York Independent System Operator, Inc., 100 FERC ¶ 61,103, at P. 2 (2002); New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at p. 61,118 (2001); Central Hudson Gas & Electric Corp., 88 FERC ¶ 61,138, at p. 61,384 (1999).

¹² New York Independent System Operator, Inc. Filing of New Attachment S to Open Access Transmission Tariff to Implement Rules to Allocate Responsibility for the Cost of New Interconnection Facilities, and Request for Expedited Action, Docket No. ER01-2967-000, August 29, 2001 (emphasis added). (Judicial notice taken, Tr. 970:24-971:17). Similarly, in its December 26, 2001 compliance filing made in response to the Commission's October 26, 2001 Order regarding "decisional control," the
(continued...)

Insofar as Attachment S is the result of a consensus stakeholder process sanctioned by the Commission, a reasonable interpretation of its provisions by the NYISO should be given deference over a conflicting interpretation offered by a Market Participant, like KeySpan, with a financial interest in the outcome. As the Commission has already stated, “*some degree of deference can be granted on certain issues to independent RTOs that have appropriate procedural mechanisms in place to ensure fair representation of viewpoints.*”¹³ Because the IITF/TPAS stakeholder process plainly meets this standard, interpretations of Attachment S by the NYISO that conform to the intentions of the Market Participants who drafted and approved it should be afforded deference and upheld.¹⁴

E. Trial Staff’s Arguments Lack Support In The Record And Are Contradicted By The Testimony Of Trial Staff’s Own Witnesses

Trial Staff first argues that the NYISO violated Attachment S by adopting Con Edison’s original proposed generic units and not developing its own proposal (Staff Br. at 11-12). Nothing in Attachment S supports Trial Staff’s view of the NYISO’s role. Staff’s argument is based on an incorrect reading of Attachment S, which already has been rejected by the

NYISO noted that, “[a]s part of its work to prepare the compliance filing, the NYISO has held a series of meetings and telephone conference calls with Market Participants who provided input for the August 29 Filing to discuss with them the changes required by the October 26 Order. This compliance filing includes input received during that consultative process.” 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, Docket No. ER01-2967-000, December 26, 2001 (“NYISO December 26, 2001 Compliance Filing”).

¹³ Regional Transmission Organizations, 89 FERC ¶ 61,285, 65 FR 810, 831 (1999) (emphasis added); see also NYISO Br. at 14 n.23 and the cases cited therein.

¹⁴ D.S. Swain Gas Co. v. Dixie Pipeline Co., 911 F.2d 721, 1990 WL 112071, at *3 (4th Cir. 1990) (upholding tariff drafter’s interpretation of ambiguous language on the basis that it was “a permissible, reasonable construction”) (unpublished); National Van Lines v. United States, 355 F.2d 326, 333 (7th Cir. 1966) (refusing to apply *contra proferentem* “when [it] ignores a permissible, reasonable construction which conforms to the intention of the framers of the tariff,” does not conflict with the law and is practical).

Commission. Attachment S requires the NYISO to conduct the ATBA (which includes the selection of generic units) “in cooperation with Market Participants.” (Exh. NYI-2, Attachment S, at Section IV. F. 1 (First Revised Sheet No. 664). In accepting Attachment S, as revised, the Commission stated that it never “intend[ed] 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.”¹⁵

Nothing in Attachment S bars the NYISO from adopting a Market Participant’s proposed generic units if the NYISO satisfies itself, as it did in this case, that the proposed units are feasible and meet Applicable Reliability Requirements. Thus, the bare fact that the NYISO’s ATBA presented a generic portfolio that largely adopted Con Edison’s original proposal is not evidence that the NYISO failed to meet its obligations under Attachment S.¹⁶

In addition, Trial Staff’s arguments ignore all of the circumstances surrounding the October 26, 2001 Commission Order regarding decisional control, the progression of the 2001 cost allocation process up to that point, the desire of all Market Participants to conclude the 2001 allocation as quickly as possible, (Exh. NYI-22, Mitsche Test. 5:11-15), and the fact that Market Participants never called upon the NYISO to abandon the initial assessments submitted by the Transmission Owners and begin the ATBA from scratch.¹⁷ (Tr. 1017:18, 1018:8-9). Indeed, Trial Staff’s argument is inconsistent with its recommendation that a committee of 2001 Class Year Developers be allowed to present its own proposed set of generics. (Staff Br. at 33-34).

¹⁵ New York Independent System Operator, Inc., 100 FERC ¶ 61,103, at P. 24 (2002).

¹⁶ The NYISO addressed the allegation that it “lacked independence” at length at pages 32-36 of its Initial Post-Hearing Brief, and does not repeat those arguments here.

¹⁷ See NYISO December 26, 2001 Compliance Filing, at 3 (“[T]he NYISO has been working intensely with Market Participants to implement these rules in conformity with the Commission’s October 26 Order for the ten Developer projects in Class Year 2001, and to do so as rapidly as possible.”)

What is the point of such a recommendation if the NYISO does not have the discretion to adopt the Developers' (or any Market Participant's) proposed generic units if they meet Attachment S's requirements?

Trial Staff next argues that the NYISO somehow violated Attachment S because it did not have the capability to develop its own set of generic units and should have hired a third-party consultant to select them. (Staff Br. at 13-14). Not even KeySpan makes this argument. Moreover, Mr. Corey testified that there was no need for the NYISO to hire a consultant to select generic units because NYISO staff was capable of doing so. (Exh. NYI-28, Corey Reb. Test. 7:8-12). That testimony was uncontroverted.¹⁸

Trial Staff's argument that a former integrated utility would not have selected generic units the way the NYISO did, (Staff Br. at 17-23), understandably lacks any foundation in the record. Integrated utilities never planned generic generating units; they planned real generating units. That is another important reason why IRP methods cannot be transplanted, in whole or in part, to the generic selection process. The process of developing "generic generation" under Attachment S is, as Trial Staff concedes, (Staff Br. at 2), unique to the post-deregulation environment in which the NYISO operates and must be evaluated in that context.

Trial Staff next incorrectly asserts that the NYISO violated Attachment S because it selected generic units located outside New York City load pockets. (Staff Br. at 23-33). The evidence shows that the NYISO did in fact locate generic units within the relevant load pockets. The NYISO lead engineer William Lamanna analyzed the shortfall in capacity in New York City in 2002 and determined that four New York City sub-load pockets would have deficiencies over

¹⁸ While Staff witness Sammon suggested in his written testimony that the NYISO might have "appeared" more independent if it had hired a consultant to select generic units, (Exh. S-1, Sammon Test. 14:4-11), neither he nor any other witness testified that NYISO staff lacked the capability to develop a generic portfolio. Thus, no evidence at all supports Staff's argument.

the five-year ATBA study period requiring the location of new generation within the sub-load pockets to meet Applicable Reliability Requirements. (Exh. NYI-16, Lamanna Test. 7:2-13). The evidence was undisputed that Generic Unit No. 5 was sufficient to meet the sub-load pocket requirements for the East River, East 13th Street/East River, and West 49th Street load pockets. (Exh. NYI-16, Lamanna Test. 9:3-5). The other generic units were selected to meet remaining deficiencies related to the overall New York City load pocket. (Exh. NYI-16, Lamanna Test. 7:2-13, 9:5-7). Thus, all of the generic units were properly sited either within the New York City load pocket or, in the case of Generic Units No. 5 and No. 3, in the relevant sub-load pockets.¹⁹

Trial Staff next argues that the NYISO should have investigated the Article X deficiency letter concerning the actual SEF 520 MW Gowanus project. (Staff Br. at 26-28). Nothing in Attachment S requires NYISO staff to make retroactive feasibility determinations based on the course of an actual project's ongoing development simply because the ATBA included a generic unit modeled after it. In any event, there was no evidence that anything in the Article X deficiency letter represented a "fatal flaw" with respect to the SEF 520 MW Gowanus project that would have rendered Generic Unit No. 1 infeasible. The letter referred to several issues which, according to Mr. Lamanna, were by no means insurmountable. (Tr. 938:3-8). Indeed, SEF filed an amended Article X application in December 2002 indicating that, in response to the Siting Board's concern, it was modifying the project's once-through cooling system, a principal "deficiency" KeySpan focused on. Despite the fact that SEF's amended application was filed in December 2002, KeySpan's witnesses failed to mention it in their testimony submitted months later, (Tr. 230:22-231:12), choosing to discuss only the Siting Board's September 2000 letter.

¹⁹ The relevance of Trial Staff's argument on this point is unclear. It addresses none of the three questions set for hearing by the Commission; clearly it does not relate to the feasibility of the generic units selected by the NYISO. Moreover, KeySpan's Complaint and its subsequent pre-filed testimony raises no issue pertaining to the siting of the generics and the New York City load pockets.

This argument is a good example of why Your Honor should not judge the feasibility of a proposed generic by the subsequent progress of the actual project that the generic unit was modeled after. If a proposed generic unit is modeled after an actual project expected to come into service by a certain date and, shortly before the cost allocation report is finalized the actual project encounters a delay caused by legal, economic, environmental or other factors, the NYISO should not have to reject the proposed generic unit. Similarly, when an actual project used as a model for a generic unit encounters a delay subsequent to completion of a cost allocation, the delay should not result in the need to re-do the ATBA. Linking the feasibility of generic units to the developmental status of an actual project used as a model will result in countless future disputes regarding the selection of the generic unit whenever the actual project does not proceed to completion as originally scheduled. Given the unpredictable course of project development, this interpretation of the feasibility criterion would also preclude the NYISO from ever completing a cost allocation since the portfolio of generics would vary with the vagaries of the permitting, construction, and financing of the model projects.

Finally, Trial Staff argues that the NYISO violated Attachment S by not setting forth an explanation of its reasons for selecting the generic units it did. (Staff Br. at 28-33). Nothing in Attachment S requires such an explanation. Staff's argument amounts to a recommendation for the future administration of the cost allocation rules, and is not a basis to find that Attachment S has been violated. Moreover, the argument completely ignores the fact that the NYISO's generic units were openly debated at TPAS from November 2001 through May 2002. (Tr. 555:12-16). Market Participants became aware of Con Edison's proposed generic units as early as October 2001. (Exh. NYI-17). There was ample time for discussion and debate, and the record demonstrates that debate concerning the generic units took place and was often robust, even contentious. (Exh. NYI-22, Mitsche Test. 5:19-21; Exh. NYI-28, Corey Reb. Test. 8:5-11).

II. THE EVIDENCE IS OVERWHELMING THAT THE NYISO PROPERLY EXCLUDED THE NYPA CT UNITS AND HUDSON AVENUE NO. 10 FROM THE ATBA EXISTING SYSTEM BASELINE

With respect to Issue No. 2, KeySpan and Trial Staff ignore the clear language and intent of Attachment S. Trial Staff also ignores the testimony of its very own witness. Even PSEG, the other Complainant-Intervenor in this action, does not support KeySpan's and Trial Staff's position on this issue. Indeed, with respect to the NYPA CTs, the Complainants' position is flatly inconsistent with NYPA's pre-litigation admission that its "claim is not that the NYPA facilities should have been included in the Baseline Assessment." (Exh. CE-8 at 2).

A. KeySpan's Argument Ignores The Language Of Attachment S

KeySpan first argues that the NYPA CTs and Hudson Avenue No. 10 unit should have been included in the ATBA baseline because they were on-line when the NYISO presented the ATBA to Market Participants. (KeySpan Br. at 38-40). This view is contrary to Attachment S.

KeySpan cites the following portion of Attachment S to support of its theory:

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

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

KeySpan's argument, however, views the term "proposed" in isolation and completely ignores the very next sentence of this provision:

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

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

Section IV.F.1.a.(1)(b)'s reference to "proposed developer projects" clearly refers to Class Year projects and establishes when those projects are to be added to the ATBA--not at the time when the project comes online, but rather at the time "when interconnection facility costs have been allocated" to the project and accepted by the Developer. Observing this requirement is key to maintaining the separation of "anyway" SUF costs from those that are necessitated by Developer projects, because it ensures that the ATBA baseline does not include any Developer projects whose system impacts have not been allocated. Including Class Year projects in the ATBA baseline because they happen to come on-line during the course of the cost allocation studies results in a financial benefit to some Developers as opposed to others in the Class Year, and the allocation of SUF costs to the Transmission Owners that are beyond the scope of their reliability obligations.

Such a bizarre reading of Section IV.F.1.a.(1)(b) would also encourage disputes by incentivizing Class Year Developers to claim that their projects should be included in the ATBA baseline because they have reached such a stage of development where they should no longer be considered "proposed" projects. Were such an interpretation of Section IV.F.1.a.(1)(b) to be adopted, Developers' SUF costs would be unfairly shifted to Transmission Owners.

KeySpan's second argument, that the NYPA CTs should have been included in the baseline because NYPA "had already paid for the initial SUFs needed to interconnect them" also fails. First, Attachment S includes in the baseline only Developer projects that have accepted their cost allocation *pursuant to the Attachment S rules*, which NYPA had not done. Second, KeySpan overlooks the clear, uncontroverted evidence that, in fact, NYPA had not "already

paid” for the SUFs needed for its projects.²⁰ As explained during the cross-examination testimony of Mr. Lamanna, the SRISs for the NYPA projects identified three specific Sherman Creek breakers needing upgrades “but also identified the need for the NYPA GTs to be subject to the global solution and all of its implications.”²¹ (Tr. at 1008:23-1009:18). Because the CTs were urgently required to meet NYPA’s in-city capacity requirements and to avoid substantial monetary penalties (Exh. KEY-27, p. 29-30; Tr. 184:21-185:8, 205:24-206:4 (Hiney)), NYPA sought and Con Edison agreed to allow interconnection of the NYPA CTs before completion of the 2001 Cost Allocation process. (Tr. 194:11-22; Exh. 5-16; Exh. KEY-26, Hiney Reb. Test. 4:28-5:5).

At the same time, the 2001 Cost Allocation process was moving forward to identify globally all SUFs needed to accommodate the NYPA CTs and other Class Year 2001 proposed generator projects. (Exh. NYI-1, Corey Test. 9:1-10). As indicated in the 2001 Cost Allocation Report, as a result of the broader mitigation SUFs required in the 2001 Cost Allocation, the Sherman Creek breaker replacements were no longer needed to accommodate the NYPA CTs. (Exh. NYI-3 at 33; Tr. 1008:6-17). Thus, as Mr. Lamanna explained, the Sherman Creek breaker upgrades were “an elected SUF.” (Tr. 1010:8-9). As an elected SUF, these specific costs were not to be allocated among the 2001 Class Year Developers. (Tr. 1010:13-14). Instead these upgrades were to be treated as headroom created and owned by NYPA²². (Tr.

²⁰ Trial Staff makes a similar argument, stating that because NYPA had paid for some upgrades needed to bring the NYPA CTs on line they were necessarily “existing.” (Staff Br. at 35). For the same reasons set forth above, Staff’s argument is flawed.

²¹ As Mr. Lamanna explained, the term “global solution” “referr[ed] to the fact that the SRIS for the NYPA GTs was approved subject to the development of an acceptable fault current management plan” and these SRISs “feed into the ATRA process.” (Tr. 1009:11-18).

²² Under Attachment S, any elected SUFs that ultimately are “in excess of the minimum [SUFs] required by the [class-year] projects” are to be treated as causing headroom and allocated accordingly. (continued...)

1010:15-22). Accordingly, it is plainly incorrect to claim that NYPA had already paid for all necessary SUFs. NYPA elected to pay for certain SUFs needed to interconnect early, subject to a final determination of NYPA's cost allocation under the Attachment S process. Even NYPA has admitted that its claim "is not that the NYPA facilities should have been included in the Baseline Assessment." (Exh. CE-8, July 8, 2002 Ltr. from Edgar Byham, p. 2).²³

With respect to Hudson Avenue No. 10, KeySpan argues that "Attachment S does not require the NYISO to exclude units from the existing baseline if they are not listed in the [*Load and Capacity Data Report*]" and, since NYISO allegedly knew²⁴ that Hudson Avenue No. 10 was being reactivated, NYISO should have included the unit in the ATBA. (KeySpan Br. at 39).²⁵ KeySpan misstates the issue, however, in light of the applicable burden of proof in this

(Exh. NYI-2, Attachment S, at Section IV.F.3.a (First Revised Sheet No. 670)); see also Exh. NYI-2, Attachment S, at Section IV.F.12 (Original Sheet No. 686) (explaining treatment of SUFs that create headroom)).

²³ Having no choice but to quietly admit "that NYPA does not object to its inclusion in Class year 2001," KeySpan ultimately backpedals into an attempt to distinguish its point by arguing that the NYPA CTs should be included in the ATRA only "for purposes of paying additional SUF costs" but also should be included in the ATBA as existing units. See KeySpan Br. at 39, n.31. There is no basis in Attachment S for including units in both the ATRA and the ATBA.

²⁴ KeySpan overstates the evidence when it claims "It is clear that the NYISO knew by April 2001 Hudson Avenue No. 10 was being reactivated and would be on-line during the 2002-2006 baseline period" (KeySpan Br. at 39). When specifically asked whether he knew about this reactivation, Mr. Corey responded that he "didn't know that for any certainty." (Tr. 607:13-17). As noted in the brief submitted herein by the New York State Public Service Commission, the NYISO's decision to rely on objective criteria as listed in the *Load and Capacity Report* rather than adopting more subjective criteria such as rumor, conjecture and unofficial reports, is a reasonable approach. (NYPSC Br. at 6).

²⁵ KeySpan also argues that NYISO could have made adjustments to the Gold Book data as it did in deciding to incorporate the Waterside unit into the ATBA despite the fact that it is shown as retiring prior to January 1, 2002. The analogy is a red herring, however. As Mr. Lamanna explained, the Waterside unit retirement was clearly linked with the installation of the East River Repowering project. (Tr. 925:19-23). Under Attachment S, it was necessary to either include the Waterside unit or the East River Repowering project to provide an accurate snapshot of the existing baseline. (Tr. 925:24-926:11; 1097:20-25). Including both units in the baseline would have artificially inflated the representation of the existing system, since both units were not projected to be in service contemporaneously. Excluding both units would have had the opposite effect.

case. As KeySpan admits, it bears the burden of proof to prove by substantial evidence that NYISO's interpretations and actions are unjust and unreasonable. (Tr. 29; KeySpan Br. at 25; see also NYISO Br. at 10-11 and cases cited therein; Con Ed Br. at 2). Thus, the question is not whether the NYISO was required by Attachment S to rely upon the *Load and Capacity Data Report*, but whether KeySpan can show by substantial evidence that the NYISO's reliance upon the *Report* is unjust or unreasonable -- that is, whether the NYISO's reliance was prohibited by Attachment S. In light of the extensive evidence that NYISO's approach was based upon the consensus interpretation of Market Participants as developed through the TPAS process (see NYISO Br. at 37-39, 40-41), and KeySpan's failure to present any counter-evidence, KeySpan clearly has not satisfied this burden of proof.²⁶

B. Trial Staff's Arguments Ignore The Language Of Attachment S, And Are Inconsistent With The Testimony Of Its Own Witness

At the outset it is noteworthy that Trial Staff's argument that the NYPA CTs should have been included in the ATBA baseline is plainly contradicted by the testimony of its own witness, Dr. Kim Khu, who testified unequivocally that the NYPA CTs "do not belong in the ATBA." (Exh. S-11, Khu Test. 9:4-11).²⁷

²⁶ KeySpan asserts in a footnote that "Contrary to claims made by NYISO witnesses, the NYPA GTs were listed in the 2001 [*Load and Capacity Report*]." (KeySpan Br. at 38). KeySpan misstates NYISO's testimony. NYISO relied on the *Load and Capacity Report's* identification of existing capacity. (Exh. NYI-5 at Table III-2, pp. 16-53; Exh. NYI-1, Corey Test. 14:5-8; Exh. NYI-22, Mitsche 7:22-8:2). KeySpan fails to point out that the NYPA CTs were listed in the *2001 Report* as proposed "Additions" and not as "Existing Generation Capacity." (Compare Exh. NYI-5 at Table IV-1, p. 57, with Exh. NYI-5 at Table III-2, pp. 16-53). Thus, KeySpan's point is inapposite and misleading.

²⁷ Trial Staff's other witness, John Sammon, did not opine on the issue. (See Exh. S-1, Sammon Test.). Thus, Staff's position is directly contrary to the only evidence it submitted. Equally striking, Staff's brief does not attempt to explain or distinguish Dr. Khu's testimony in any way. Instead Staff fails to even acknowledge or refer to Dr. Khu's testimony.

In a variation on one of KeySpan's claims, Trial Staff argues that the NYPA units should have been included as part of the existing baseline representation because each was connected to the grid before September 26, 2001, the effective date of Attachment S.²⁸ (Staff Br. at 34, citing New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at 61,580 (2001)). Trial Staff's "September 26th cutoff", however, is not a theory supported by any witness or any other party to these proceedings. It is conjured out of thin air. There is no evidence that any Market Participants, let alone the parties here, suggested that the NYISO should delay the ATBA or any other cost allocation studies until Attachment S was deemed effective by the Commission. Nor is there any evidence that, following the Commission's October 26, 2001 Order, any of the Market Participants or parties here suggested that the ATBA needed to be recommenced in light of the September 26th effective date. Indeed, even KeySpan does not argue that any significance rests in this date. Since Trial Staff is the only participant herein which was not represented at the IITF/TPAS proceedings and there is no evidence supporting its view from other witnesses, this new theory should be rejected.

Having no evidence in the record to support its theory, Trial Staff relies upon a legal argument, claiming that Attachment S "does not explicitly address how to handle projects which cease to be proposed and become realities before the cost allocation rules take effect." (Staff Br. at 37).²⁹ Staff misses the point that Attachment S does, in fact, address the issue and provides

²⁸ As noted above, Trial Staff raises other arguments closely parallel to KeySpan. Rather than repeating its responses again here, NYISO relies upon its arguments above and specifically addresses in this section only Staff's arguments that are substantively different from those of KeySpan.

²⁹ In this regard, Trial Staff mistakenly argues that "[t]he NYISO as drafter and filer of Attachment S must bear the consequences for this lacuna in that provision." (Staff Br. at 37). First, even if Your Honor found that such lacuna exists, there is no legal authority for applying the *contra proferentem* doctrine here. (See supra p.12). To the contrary, the ISO's reasonable interpretation is actually entitled to deference.

explicitly that proposed Developer projects become part of the baseline when they have accepted their cost allocation. Attachment S does not distinguish between “proposed” and “existing” projects for purposes of the ATBA baseline. It identifies only “proposed” projects and those that have been through the cost allocation process in order to make it possible to determine the difference between the “anyway” costs and the costs “caused by” the presence of the Developer projects. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(b)(First Revised Sheet No. 666)). Trial Staff may hold the opinion that a better cost allocation method would define the baseline in terms of “existing” units, but that is not the method Market Participants chose or the Commission approved in Attachment S.

Trial Staff also wrongly claims that “it is not likely that the NYPA combustion turbine scenario will be repeated with any frequency because Attachment S rules are now in effect and the emergency type nature of the need for generators which can be quickly built and brought on line may be rare.” (Staff Br. at 37-38, n.30). In truth, there is no way to predict the likelihood of needing emergency generators in a short time frame again, and relying on such unknowns would make for an unwise rule. Moreover, even if these circumstances could be guaranteed never to repeat themselves, there is still no reason why NYPA should be excused from its obligations for SUFs in contrast to all the other 2001 Class Year Developers. The purpose and intent of the cost allocation rules is “to provide a fair methodology and process for assigning responsibility . . . for the cost of SUFs” needed for new interconnection projects. (Exh. NYI-1, Corey Test. 6:13-17; Exh. NYI-2, Attachment S, at Section I.A (Second Revised Sheet No. 653)). Treating NYPA’s CTs differently from other 2001 Class Year projects would be inconsistent with this intent.

Finally, it also bears noting that future developers could easily game the process under Trial Staff’s proposed interpretation of Attachment S. If the ATBA baseline was defined to include all facilities in operation, a developer could reject its cost allocation year after year, until

construction is completed and the plant is in operation, at which point it would become part of the ATBA rather than the ATRA.

III. USE OF AN UPDATED PJM MODEL WOULD HAVE HAD A NEGLIGIBLE IMPACT ON THE 2001 COST ALLOCATION

A. KeySpan Has Not Met Its Burden Of Proof On The PJM Issue

The NYISO is the only party to introduce evidence of the impact an updated PJM model would have on the cost allocation. (Exhs. NYI-14, NYI-15). The NYISO’s impact assessments demonstrate that updated PJM models would have increased the cost allocation to Con Edison by \$30,000 and \$60,000, respectively. (*Id.*). This evidence was uncontroverted.

KeySpan explains the gap in its proof by insisting that “no party had an opportunity to examine the full impact” of updated PJM models because of this proceeding’s “expedited hearing schedule.” (KeySpan Br. at 46). Yet, the NYISO had time to conduct not one, but two studies assessing the impact of updated PJM data on the cost allocation. (Exhs. NYI-14, NYI-15). KeySpan’s assertion rings particularly hollow in light of the fact that it insisted that the NYISO complete its assessment by January 13, 2003, so that it would have at least four weeks to analyze the NYISO’s study and conduct its own before submitting written testimony on February 11. Even Trial Staff acknowledges that KeySpan did not “quantify the costs” of using updated PJM data. (Staff Br. at 41). KeySpan has failed to meet its burden of proof on this issue.

B. KeySpan And Trial Staff’s Approach To Modeling Proposed PJM Capacity Is Inconsistent With Attachment S

KeySpan and Trial Staff challenge the NYISO’s reliance on an executed Interconnection Services Agreement (“ISA”) as a milestone for inclusion of proposed plants in the PJM model. (KeySpan Br. at 42; Staff Br. at 42). KeySpan suggests that the purposes of the ATBA and PJM model are dissimilar, (KeySpan Br. at 42), and that a signed Facilities Study Agreement (“FSA”) is a better milestone than the ISA because it would include more proposed generation and hence

depict higher fault duties on the New York system. (KeySpan Br. at 43-44). Parroting KeySpan, Staff argues that the ATBA's focus on reliably serving future load growth compels the NYISO to include in the PJM model all projects that have signed an FSA. (Staff Br. at 42-43). Neither argument has any support in Attachment S.

Attachment S explicitly defines what goes into the ATBA baseline. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(a) (First Revised Sheet No. 665)). As Staff acknowledges, Attachment S does not address how to model proposed generation in adjacent control areas.³⁰ (Staff Br. at 42). However, the principle underlying the cost allocation method -- that the Transmission Owners should be responsible only for a share of the total system reliability costs and not for the costs caused directly by Developer projects -- dictates that the baseline should include only those units in adjacent areas which, had they been in the New York Control Area, would have been included in the baseline. (Exh. NYI-1, Corey Test. 42:13-21; Exh. NYI-22, Mitsche Test. 15:22-16:16).

The NYISO's approach to the ATBA baseline follows this principle. As the evidence shows, the NYISO baseline does not include all projects proposed in New York. Exhibit NYI-8 lists 127 proposed projects in the New York Control Area, totaling over 39,000 MW of proposed capacity. Of those projects, 61 (nearly half) are proposed to be in service by the end of 2006. (Exh. NYI-8). But with two exceptions, the Athens and Bethlehem projects, none of those

³⁰ Indeed, in its October 26, 2001 Order, the Commission affirmed that the impact of interconnections on neighboring systems was a "seams" issue beyond the scope of the cost allocation rules. New York Independent System Operator, Inc., 97 FERC ¶ 61,118, at p. 61,580 (2001). The Commission denied Developers' request to order the NYISO to address the issue in a compliance filing, noting that "it is for the owners and operators of utility systems to establish mutually acceptable operating practices" regarding reliability issues across neighboring systems. Id. (quoting Duke Energy Corporation, 94 FERC ¶ 61,187, at p. 61,658 (2001)).

projects are included in the baseline.³¹ Instead, as Attachment S dictates, only proposed projects that have accepted their cost allocation can be included. (Exh. NYI-2, Attachment S, at Section IV.F.1.a.(1)(b) (First Revised Sheet No. 666)). Thus, keeping with the logic of modeling only those proposed projects in adjacent areas that would have been included in the baseline had they been in New York, the NYISO included proposed PJM projects that had reached a milestone in the PJM interconnection process comparable to a New York developer's acceptance of its cost allocation. The uncontroverted evidence is that, in PJM, the ISA is the point at which a developer accepts its interconnection costs. (Exh. NYI-1, Corey Test. 42:18-19; Exh. NYI-16, Lamanna Test. 16:17-19; Exh. NYI-22, Mitsche Test. 16:13-16).

KeySpan's argument also ignores the procedural differences between the PJM and New York interconnection processes, and the likelihood of proposed projects that have signed an FSA actually coming on line in PJM. The ATBA baseline does not include all proposed projects in New York that may come on line by 2006; rather, the baseline includes only those proposed projects that have accepted their cost allocation. (Exh. NYI-1, Corey Test. 15:1-21; Exh. NYI-16, Lamanna Test. 16:14-17). Yet KeySpan argues that the NYISO should use a different standard for proposed PJM projects, and simply include all proposed projects that have executed an FSA as of a certain date, regardless of whether they accepted their cost allocation under PJM's interconnection rules. (KeySpan Br. at 42-45). KeySpan's argument presents a classic case of comparing "apples to oranges." The ATBA includes only projects which have accepted their cost allocation, which does not include a large portion of proposed New York projects. (Exh. NYI-1, Corey Test. 15:1-21; Exh. NYI-3; Exh. NYI-7). But on the PJM side, KeySpan

³¹ The Athens and Bethlehem projects were grandfathered into the baseline based on consensus at TPAS that both were the equivalent of Class Year 2000 projects. (See NYISO Br. at 42; NYSPSC Br. at 6).

says the model should include all proposed projects regardless of whether they have accepted their cost allocation. KeySpan's approach yields nothing close to comparable models because it would include many PJM projects that would not be included in the baseline if they were in New York. (Exh. NYI-1, Corey Test. 43: 6-12; Exh. NYI-22, Mitsche Test. 16:11-16).

KeySpan also argues that the correct way to model adjacent areas is to assess the likelihood that proposed projects will come on-line and that use of the signed FSA is the best way to do that with PJM. (KeySpan Br. at 43-45) Even if this were the appropriate rule to apply, KeySpan's evidence of it falls short. The FSA is not an appropriate milestone because, as the evidence shows, it is a poor indicator of the likelihood of projects coming on line. (Tr. at 811:22-812:6, 874:7-18; Exh. NYI-34, at 1) KeySpan's witness on this point, Mr. Sheehan, predicted in his written testimony that, based on the number of projects that had signed an FSA, approximately 15,288 MW of proposed projects would come on line in PJM by 2006. (Exh. KEY-25, Sheehan Test. 15:11-15). But on cross examination, he admitted that nearly two-thirds of projects that had signed FSAs were canceled or withdrew from the process. (Tr. 810:15-20; 811:18-21). Mr. Sheehan also stated he "didn't review how many projects were financed, how many weren't," (Tr. 843:5-7), nor did he look at any retirements; only additions to the PJM system were considered. (Tr. 826:19-25). Given the evidence that a large majority of the projects on which Mr. Sheehan based his estimate have withdrawn from the process, (Tr. 810:15-20; 811:18-21), and the cursory level of his review, (Tr. 843:5-7; 826:19-25), it becomes clear that Mr. Sheehan's estimate severely overstates the impact of PJM on the New York system.

Trial Staff's assertion that the execution of an FSA is a better milestone because "reliably serving load growth is paramount under the ATBA," (Staff Br. at 42), is similarly flawed. As the NYISO has shown, the ATBA assesses a hypothetical view of system reliability for the purpose of determining the "anyway" costs that should fall on Transmission Owners. It is not a

tool for establishing Transmission Owners' actual reliability obligations; those determinations are made by regulatory agencies, not the NYISO. Fairness dictates that the adjacent control area model used for the ATBA be consistent with its limited purposes, and the NYISO's approach to the updated PJM model accomplishes exactly that.

CONCLUSION

For the reasons set forth above, and in the NYISO's Initial Post-Hearing Brief, Your Honor should uphold the NYISO's 2001 cost allocation in all respects and recommend that this proceeding be dismissed.

Respectfully submitted,

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Dated: April 23, 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 23rd day of April, 2003.

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