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August 17, 2007

BY ELECTRONIC FILING

Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: 330 Fund I, L.P. v. New York Independent System Operator, Inc.; Docket No. EL07-78-000; Answer to the Motion for Leave to Answer of 330 Fund I, L.P., and Response of New York Independent System Operator, Inc.

Dear Ms. Bose:

Enclosed for electronic filing in the referenced docket is the Answer to the Motion for Leave to Answer of 330 Fund I, L.P., and Response of the New York Independent System Operator, Inc.

If there are any questions concerning this filing, please call me at (202) 661-2205.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for
New York Independent System Operator, Inc.

Enclosures

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

330 Fund I, L.P., *Complainant,* v. New York Independent System Operator, Inc. *Respondent.*	)	Docket No. EL07-78-000

ANSWER TO THE MOTION FOR LEAVE TO ANSWER OF 330 FUND I, L.P., AND RESPONSE, OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 and § 385.213 (2007), the New York Independent System Operator, Inc. (the "NYISO") submits an answer to the Motion for Leave to Answer of 330 Fund I, L.P. ("330 Fund"). The NYISO also moves for leave to submit a limited response to the Answer of 330 Fund I, L.P. ("330 Fund Answer") to the NYISO's July 19, 2007 answer ("NYISO Answer") to the June 29, 2007 complaint filed by 330 Fund ("Complaint") in the instant docket.

I. NYISO ANSWER TO 330 FUND MOTION FOR LEAVE TO ANSWER

The Commission should deny 330 Fund's Motion for Leave to Answer[1] for several reasons.

First, 330 Fund argues that, "[t]o the extent that the answers request summary dismissal of the Complaint, they are motions for affirmative relief to which this answer is permitted."[2]

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[1] 330 Fund Answer at 3-4.

[2] 330 Fund Answer at 3 (citing Con Ed Motion at 4, 11; NYISO Answer at 1).

This argument is readily dismissed: NYISO's request that the Complaint be denied is the very essence of the core answer to a complaint. Under 330 Fund's theory, *every* complainant would be entitled to submit an answer to an answer, because a respondent (and third parties sharing similar interests) almost always wants the complaint dismissed. Notably, 330 Fund fails to cite any Commission precedent in support of its novel theory.

Second, the Commission should reject the 330 Fund Answer because it raises new arguments in an attempt to impermissibly amend the Complaint. That is, 330 Fund raises new arguments as to the allegedly erroneous nature error of the NYISO's conclusion that the Seymour GTs' new point of injection ("POI") did not constitute a material change that warranted its inclusion in the interconnection queue. In particular, 330 Fund includes new analysis provided through a new witness, Dr. Richard Tabors. This backdoor attempt to amend its Complaint – without explicitly taking the steps necessary to do so, so that the NYISO has a fair opportunity to respond – should be denied.

Third, the 330 Fund Answer impermissibly introduces facts, evidence, and analysis that were "attainable" by 330 Fund when it filed its Complaint. The provisions of 18 C.F.R. § 385.206(b)(8) require a complainant to "[i]nclude all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits." 330 Fund incorrectly contends that that it is entitled to file an answer because the NYISO Answer introduces allegedly new information concerning the NYISO's review of the requested POI change,[3] particularly the NYISO's reliance on its 2001

[3] *Id.* at 4.

interconnection request procedures.[4] Posted with materials on the portion of the NYISO website devoted to the Transmission Planning Advisory Subcommittee ("TPAS") – *the advisory body where the vast majority of stakeholder activity occurs with respect to generator interconnection issues* – the NYISO's 2001 interconnection procedures were attainable by 330 Fund, had 330 Fund simply submitted a password request to the NYISO.[5] The Tabors affidavit in particular does not rely on any information that was not attainable by 330 Fund through the TPAS portion of the NYISO's website before it filed its Complaint. The Complaint thus could have included the Tabors affidavit and any other analysis supporting an allegation that the NYISO failed to follow the 2001 interconnection procedures.

For these reasons, the Commission should reject the 330 Fund Answer.

II. NYISO MOTION FOR LEAVE TO ANSWER

If the Commission nonetheless decides to accept 330 Fund's answer, the Commission should also accept the NYISO's response, provided in Section IV through VII below.

Because a response is not normally permitted in these circumstances, the NYISO hereby moves, pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2007), for leave to file the response contained in the remainder of this document. The Commission has accepted such a response in similar circumstances when a

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[4] *See, e.g.*, *id.* at 4 (arguing that the NYISO's reliance on its 2001 interconnection and materiality criteria constitute "new assertions"); *id.* at 6 & n.10 (explaining that the NYISO relied on criteria that was not posted on its website until this year and that the 330 Fund seeks to demonstrate how the NYISO's methodology did not comply with that criteria); *id.* at 8-15 & n.22 (alleging that the NYISO improperly applied this criteria, relying on the Tabors affidavit).

[5] The 330 Fund Answer complains that the 2001 interconnection and materiality criteria were not posted on the NYISO website until this year. 330 Fund Answer at 6 & n.10. This point is immaterial, because the 2001 Criteria have always been available to interested parties on the password-protected TPAS portion of the NYISO website. 330 Fund at any time could have obtained a password from the NYISO to gain access to it.

complainant has raised new arguments not included in its complaint[6] or when the respondent has provided information that has assisted the Commission perform its decision-making process.[7] The NYISO believes that its response herein satisfies both of these standards, as it will assure a more complete record in this proceeding and otherwise assist the Commission in understanding and resolving the issues presented. This response is particularly critical in this case where the 330 Fund Answer repeatedly misrepresents the NYISO's arguments, makes factual errors, and introduces new arguments that (assuming their relevance) should have been first raised in the Complaint.

III. INTRODUCTION AND EXECUTIVE SUMMARY

NYISO agrees with 330 Fund that the provision of pertinent information to its customers[8] is important. To that end, the NYISO OATT has been carefully designed to specify the nature of the information to be disclosed and the manner in which it is disclosed.[9] The NYISO has fully complied with the governing OATT provisions, including those raised by 330 Fund.

As explained in the NYISO Answer and in this Response to the misstatements and new allegations contained in the 330 Fund Answer, in no way has the NYISO has failed in any of its disclosure obligations to TCC bidders. In fact, the 330 Fund Answer continues to perpetuate the

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6 *See, e.g., Tesoro Refining and Marketing Company v. SFPP, L.P.*, 118 FERC ¶ 61,092 at P 3 (2007) (accepting a respondent's answer when the complainant raised new arguments in response to the respondent's initial answer).

7 *See, e.g., Carville Energy LLC v. Entergy Services, Inc.*, 119 FERC ¶ 61,156 at P 14 (2007); *Central Iowa Power Cooperative v. Midwest Independent Transmission System Operator*, 110 FERC ¶ 61,093 at P 27 (2005).

8 Note that, in addition, most New York market participants find it extremely helpful to be engaged in the stakeholder process in order to keep a finger on the pulse of the markets and bulk power system changes. 330 Fund has never joined any stakeholder committees or attended any meetings. Such a total absence of participation is a fair indicator of 330 Fund's TCC investment activities unsupported by basic due diligence.

9 To the extent stakeholders (or the Commission) wish to modify these disclosure obligations, the NYISO is open to considering these modifications, which should be vetted through the stakeholder process.

fatal flaw in the Complaint: a failure to identify a violation of the OATT attachment that provides the *comprehensive and governing statement* of the NYISO's responsibilities with respect to its conduct of TCC auctions, namely OATT Attachment M (entitled "Sale of Transmission Congestion Contracts"). Attachment M Section 9.8 dictates the "Information to be Made Available to [TCC] Bidders," *which 330 Fund does not allege the NYISO violated*. Instead, 330 Fund attempts to identify other provisions of the OATT or Commission regulations that do not address TCC auctions, and twists, misreads or misinterprets these provisions' plain language in order to trump up a tariff "violation."[10]

Cutting through the jungle-like underbrush of confusion that the Complaint and 330 Fund Answer seek to create, a key fact is revealed: Even if the POI change for the Seymour GTs *were* required to be disclosed to TCC bidders (which under OATT Attachment X, and as explained below, it is not), *330 Fund sustained no injury because the NYISO in fact disclosed the POI change* in documents (TPAS and OC minutes) that were posted on the website and available to 330 Fund. This information was hardly "buried" or unavailable. Indeed, the fact that the TPAS minutes were obtained by 330 Fund without extraordinary measures and were attached to the Complaint shows that these were readily available to assist the fund's pre-bidding due diligence.

As a corollary key fact, the manner in which the NYISO performed its Attachment X analysis – on which 330 Fund has expended almost 100 pages to date – bears no relevance to 330 Fund's alleged injury. The core assertion of the Complaint is that simple *awareness* of the impending POI change (as opposed to "proper" conduct of NYISO's work under Attachment X)

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[10] It is significant that neither the Complaint nor the 330 Fund Answer takes issue with the NYISO's compliance with its TCC Manual or its Outage Scheduling Manual, which provide additional detail on the key issues at here: how the NYISO administers the TCC auction in accordance with the OATT and how the NYISO reports outage schedules.

could have changed its bidding behavior. The TPAS and OC minutes provided a means for 330 Fund to be so aware.

That being said, the NYISO in fact fully performed its obligations under Attachments X and N, and (as explained in the NYISO Answer) the Commission's OASIS regulations do not create some sort of free-floating obligation, as asserted by 330 Fund. The NYISO responds to the new allegations of 330 Fund below regarding Attachments X and N below.

In light of the fact that there is no substance to this Complaint, perhaps it is not surprising that 330 Fund's tone has become increasingly shrill, escalating from accusations of "mere" negligence to implications of intentional deception of 330 Fund by the NYISO: *e.g.*, "bait and switch" in sales of TCCs (p. 6); "manipulation" of TCC markets (p. 34). The disclosure of the POI change in two sets of minutes posted on the NYISO website and available to 330 Fund immediately quashes any such implication or allegation, which NYISO vigorously disputes and indeed resents.

In sum, neither the Complaint nor the 330 Fund Answer reveals any basis for granting the Complaint, as confirmed by the discussion below.

IV. THE NYISO CARRIED OUT ITS ATTACHMENT X RESPONSIBILITIES IN THE MANNER REQUIRED IN THE FILED RATE, AND THE FILED RATE DID NOT REQUIRE PLACING THE SEYMOUR GTS IN THE INTERCONNECTION QUEUE

A. NYISO's Determination of Immateriality Was Consistent with Order No. 2003

The 330 Fund Answer makes new assertions regarding its claim that NYISO violated its tariff by failing to abide by the standard established in Order No. 2003 for determining the

materiality of a change in operating characteristics for the Seymour GTs.[11] These assertions are incorrect.

1. Attachment X and the New Interconnection Procedure Are Consistent with Order No. 2003

With respect to the Seymour GTs, Order No. 2003 simply requires an examination of whether the POI change constituted a material modification in the operating characteristics or an increase in capacity of the units.[12] This requirement is explicitly incorporated into the LFIP definition of Interconnection Request in Attachment X:

> Developer's request … to interconnect a new Large Generating Facility or Merchant Transmission Facility to the New York State Transmission System, or to *increase the capacity of, or make a material modification to the operating characteristics* of, an existing Large Generating Facility or Merchant Transmission Facility that is interconnected with the New York State Transmission System. (emphasis supplied)[13]

Furthermore, as demonstrated in Mr. Corey's affidavit accompanying the NYISO Answer, this standard is integrated directly into the implementing procedure entitled "Criteria for Defining a 'New Interconnection'" ("New Interconnection Procedure"), which states as follows:[14]

> The defining electrical characteristics of the Developer's generation or transmission facility when the proposed project is completed, do not differ materially from the defining electrical characteristics of the preexisting facility in a manner adverse to system reliability.

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11 *See, e.g.*, 330 Fund Answer at 6.

12 See discussion, NYISO Answer at 15.

13 *Id*.

14 *Id*., Corey Affidavit at P 6.

Thus, it is clear that neither NYISO's tariff nor its implementing procedure deviates from the Order No. 2003 standard.[15] The reference in the New Interconnection Procedure to system reliability analysis is of course consistent, in turn, with the overall goal of interconnection studies under Order 2003, and under the Minimum Interconnection Standard for such interconnections approved by the Commission for use in New York.

2. NYISO Properly Conducted the "Material Modification" Analysis Required Under Order No. 2003 as Implemented in Attachment X and its Related Procedures

Notwithstanding this obvious consistency with the Order No. 2003 standard, 330 Fund still seeks to deliberately distort the NYISO's actions as described in Mr. Corey's affidavit. Specifically, 330 Fund claims that the NYISO failed to conduct a sufficient analysis of whether the POI change constituted a material modification in the Seymour GTs, for example by failing to study "stability impacts" or to fully consider the implications of a change in "capacity factor."[16] Nothing could be further from the truth. There is no equivocation in Mr. Corey's affidavit. Upon review of the information provided by NYPA, NYISO staff concluded "there was no increase in capacity of the Seymour GT units and there was no change to the operational characteristics of the units themselves."[17] This determination was based on the Order No. 2003 standard as clearly embodied in the New Interconnection Procedure.

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[15] This is made more clear by the fact that the types of studies performed for interconnections are directed toward determining whether reliability is degraded or adversely affected. Specifically, Sections 19B.1 and 19B.2 of the OATT make this point, and Section 19B.2 explicitly connects this concept with Attachment X. Thus, because interconnection studies are generally focused on reliability impacts, it makes sense that the materiality determinations under the New Interconnection Procedure and Attachment X would be similarly focused.

[16] 330 Fund Answer at 11, 18-19.

[17] July 19 Answer, Corey Affidavit at P 13.

Moreover, all of the factors referenced in the New Interconnection Procedure were considered, including stability impacts.[18] The specific mention by Mr. Corey in his affidavit of short circuit and power flow was intended only to emphasize that these factors were the more important ones, given the nature of the POI change.[19] The New Interconnection Procedure points out that the factors are "considered together" and that "no single factor shall be considered automatically conclusive."[20] Stability impacts have been studied many times over the years for projects located within New York City and these studies generally have not shown stability to be a determinative issue.[21] Therefore, when the NYISO staff evaluated stability impacts, this factor was not considered particularly significant. Notably, during all of the discussion among TPAS members, many of whom are very experienced with stability impacts on the New York State Transmission System and in particular within New York City, no one raised a stability concern.

3. A Change in Capacity Factor, Assuming *Arguendo* That Such a Change Occurs for the Seymour GTs, Is Not a Material Modification Triggering a New Interconnection Study

330 Fund's argument – that the POI change could cause the capacity factor for the Seymour GTs to change, thus resulting in a material modification of an operating characteristic – must be rejected as spurious on its face. It is readily evident that a capacity factor change – even if experienced by the Seymour GTs – cannot be a trigger requiring a new interconnection study for an existing generating resource. This position, advocated in both Mr. Garwood's and Dr.

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18 Supplemental Affidavit of S. Corey at P 8.

19 *Id*.

20 *Id*. at P 9.

21 *Id*. at P 8.

Tabors' affidavits, would lead to an absurd result. If such a position were accepted, mere changes in weather patterns, or the interconnection or retirement of another unit in the vicinity of an existing generator, would cause that existing generator to constantly be placed back into the interconnection queue. Indeed, such a principle would, over time, place almost all of the generators in New York back onto the queue. Order No. 2003 in no way contemplates such a result, nor has the Commission ever so ruled.

4. 330 Fund Misreads the Stakeholder Process Applied to the POI Change

Finally, in yet another attempt to misdirect attention away from the real issues in this proceeding, 330 Fund seeks to discredit the stakeholder process that was used to review the NYISO's materiality determination.[22] For example, 330 Fund claims that TPAS's concurrence with NYISO's determination was "flawed" because the meeting minutes contained only a "one line" explanation.[23] This desperate argument should be dismissed on its face. Such brief reports in stakeholder committee meeting minutes are typical, not only for NYISO, but for other RTOs. Moreover, as indicated in Mr. Corey's Supplemental Affidavit, there was a substantive discussion regarding NYISO's materiality decision.[24] However, employing a court reporter to take verbatim transcripts of discussion at such meetings would hardly be an expense that stakeholders would tolerate or find useful. 330 Fund's argument also needlessly denigrates the valuable participation of the TPAS members. Perhaps 330 Fund would not be so cavalier if it actually took the time to join any of the NYISO stakeholder committees.

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22 330 Fund Answer at 24-28.

23 *Id*. at 25.

24 Supplemental Affidavit of S. Corey at P 8.

B. 330 Fund's Assertion of the Applicability to the POI Change of Attachment X, Section 4.4 Flies in the Face Of Its Plain Language

330 Fund accuses NYISO of violating the "fundamental rules of tariff construction"[25] by failing to examine the four corners of the tariff. However, this failure is in fact 330 Fund's, and not NYISO's. In the OATT's full context, it is clear that Attachment X, Section 4.4, does not govern the NYISO's examination of the POI change.

Quite simply, it would have been inappropriate for the NYISO to utilize Section 4.4 as the template for its review. Section 4.4 states: "The Developer shall retain its Queue Position if the modifications are in accordance with Sections 4.4.1, 4.4.2 or 4.4.5, or are determined not to be Material Modifications pursuant to Section 4.4.3." An existing generator no longer has a "Developer" nor does it have a "Queue Position." Moreover, the "Material Modification" definition from Attachment X is facially inappropriate for use in the context of an existing generator, as it addresses impacts on projects with a "later queue position." An existing generator will not have a queue position at all, so there will not be projects that are "later" than it in the queue. It is clear that the context of the OATT requires reference, instead, to the definition of Interconnection Request, which states the governing standard in a manner which *by its very terms* applies to an "existing Large Generator facility" such as the Seymour GTs.

These conclusions, along with related discussion previously presented in NYISO's July 19 Answer,[26] can hardly be deemed "sophistry," as 330 Fund claims, when they simply represent a plain reading of *all* relevant portions of Attachment X.

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[25] 330 Fund Answer at 11.

[26] NYISO Answer at 16-17.

"Ignoring the context" is also the strategy employed in the 330 Fund Answer with respect to its treatment of the discussion at the May 3, 2007 TPAS meeting.[27] First, any understanding that 330 Fund might have of this discussion is limited to the brief meeting minutes it cites in its Answer, because no 330 Fund representative was in attendance.[28] Second, 330 Fund simply misreads the meeting minutes. As Mr. Corey notes in his Supplemental Affidavit, the focus of the discussion was on interconnection projects already in the queue, and his remarks were responsive to a question about such pending projects.[29] The statement 330 Fund *omits* from its discussion of the meeting minutes demonstrates this: "Project changes that NYISO determines to be material either result in the Developer withdrawing the proposed changes, or loss of queue position."[30] As discussed above in the context of the plain language of Attachment X Section 4.4, an existing facility has no "Developer" nor can it lose a "queue position" because it has none.

C. 330 Fund Seeks to Graft Criteria onto Attachment X That Simply Do Not Exist in the Text of the Filed Rate or Even Flow from the Spirit of Order No. 2003

The Tabors and Garwood affidavits seek to introduce new criteria into Attachment X. First, Mr. Garwood asserts that a change in capacity factor is a change to a unit's operating characteristics.[31] As previously discussed, this concept cannot be part of the standard enunciated by Order No. 2003, nor was it ever intended to be part of the standard.

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27 330 Fund Answer at 14-15.

28 Supplemental Affidavit of S. Corey at P 11.

29 *Id*.

30 *Id*. at P 12.

31 *Id*., Garwood Affidavit at P 7.

Second, Dr. Tabors asserts that the change in POI is material because it impacts load flows and congestion.[32] In both cases, Dr. Tabors indicates that these types of impacts are "a material change in the operating characteristics of the *system*" (obviously meaning the New York State Transmission System).[33] The concept of examining the market-related characteristics of the system or grid itself is inconsistent with the standard embodied in the NYISO tariff (and thus Order No. 2003), which explicitly refers to the "operating characteristics of an existing, Large Generating *Facility* or Merchant Transmission *Facility*." Requiring consideration of impacts on the "operating characteristics" of the grid as a whole to incorporate such factors as congestion and price impacts (versus grid reliability) to the materiality determination under Attachment X would inappropriately add new criteria that would be inconsistent with the NYISO OATT and not required by Order No. 2003.

For example, 330 Fund argues that price separation is relevant to the materiality determination. Specifically, 330 Fund states that where prices separate, two points on a transmission line (such as the original and new interconnection points) cannot be electrically the same and, thus, the "determination that the change in POI was not material cannot stand."[34] Again, price separation or, for that matter, economic factors in general are not part of the materiality determination. Indeed, the application of such criteria to a materiality determination would violate Attachment S of the tariff and be inconsistent with the Minimum Interconnection Standard that presently governs interconnections in New York. NYISO made these very points

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32 *See generally* 330 Fund Answer, Tabors Affidavit.

33 *See id.*, Tabors Affidavit at P 14 (emphasis supplied).

34 *Id*. at 26.

previously in its July 19 Answer.[35] Moreover, there is no support for such an application in Order No. 2003.[36]

For the foregoing reasons, placing the Seymour GTs in the interconnection queue because of the POI change would have been inappropriate. It should be noted, however, that even if NYISO were deemed to have been required to put the project back in the queue, the purported noncompliance would have been *immaterial* to the gravamen of the Complaint, because the POI change was disclosed through materials posted on the NYISO website and readily available to 330 Fund.

V. THE NYISO ALSO PROPERLY OBSERVED THE REQUIREMENTS OF ATTACHMENT N, ALTHOUGH THEY ARE NOT PERTINENT FOR PURPOSES OF RESOLVING THE COMPLAINT

Attachment N's Section 3.6.6.1 requires the NYISO to post an "Uprate/Derate Table" designed to facilitate the NYISO's *post*-auction calculation of Congestion Rent Shortfalls payable by Transmission Owners. That is why the NYISO OATT includes Uprate/Derate Table requirements in Attachment N Section 3.6, which is called "Charges and Payments to Transmission Owners for Auction Outages and Returns-to-Service."

Mr. Garwood's contention in his supplemental affidavit that Section 3.6.6.1 dictates the NYISO's requirements for posting an actual outage schedule simply does not hold water, and he fails to provide any support for this interpretation. It would make no sense to include a pre-auction obligation to inform TCC bidders of all actual outage schedules within the OATT

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[35] July 19 Answer at 22-23.

[36] It is ridiculous, and unsupported, to assert (as does witness Tabors in his affidavit at P 24), that the heart of Order No. 2003 is to require Transmission Providers to consider the commercial and congestion benefits of generators as part of the interconnection studies.

attachment that addresses settlements of TCCs *already bought at auction* (*i.e.*, within Attachment N – entitled "Congestion Settlements Related to the Day-Ahead Market and TCC Auction Settlements"). Nor would it make sense to view as a required pre-TCC auction disclosure a table included within the section of Attachment N addressing the calculation of Congestion Rent Shortfalls (Section 3.6 – "Charges and Payments to Transmission Owners for Auction Outages and Returns-to-Service"), again, a post-auction calculation. Instead, if the table were designed to provide pre-auction guidance for TCC bidders, it would surely be logical to include it in the OATT attachment that dictates how the NYISO must administer the TCC auctions (Attachment M –"Sale of Transmission Congestion Contracts"), and particularly in its Section 9.8 that dictates the "Information to be Made Available to Bidders" which already addresses disclosure requirements for certain transmission facility outages.[37]

The NYISO Answer never claimed, as alleged in the 330 Fund Answer,[38] that the Uprate/Derate Table is "solely" for the benefit of Transmission Owners,[39] and market participants like 330 Fund are free to consult it to understand what the expected interface transfer limit impact would be assuming a particular transmission facility goes out of service. But as the plain language of Section 3.6.6.1 indicates, *particularly when read in the proper context of where it does and does not appear in the OATT*, the Uprate/Derate Table does not identify an actual outage schedule. If Mr. Garwood's interpretation were correct, then surely additional market participants would have demanded that the NYISO create a new Uprate/Derate Table that

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[37] NYISO OATT Attachment M, § 9.8(iii) (requiring the NYISO to make available to TCC auction bidders "assumptions made by the ISO relating to transmission maintenance outage schedules").

[38] 330 Fund Answer at 31.

identifies actual outage schedules (or as Mr. Garwood suggests, a subjective test whereby the NYISO must estimate when an outage might or might not take place before a Transmission Owner has submitted an outage request).

Beyond these allegations, however, 330 Fund and Mr. Garwood also complain that the Uprate/Derate Table is faulty through its failure to include Line 42231. This point is irrelevant, because even the inclusion of Line 42231 on the Uprate/Derate Table would not have indicated when the facility would be out of service. Nevertheless, the NYISO also responds through the attached Supplemental Affidavit of Allen Hargrave to explain why the Uprate/Derate Table appropriate does not include underground New York City transmission elements such as Line 42231.

VI. THE COMMISSION SHOULD ASSERT ITS EXCLUSIVE JURISDICTION TO RULE ON THE TOTALITY OF THE COMPLAINT, INCLUDING ANY REMEDIES

330 Fund's attempt to bifurcate its action by obtaining a declaratory order from the Commission and tort/contract damages from a state court is a shrewd attempt at forum shopping[40] that should be soundly rejected by the Commission as a derogation of its exclusive jurisdiction over remedies. The 330 Fund Answer's discussion does not dispel the appropriateness of that result. Fundamentally, 330 Fund's very filing of the Complaint under Section 206 is an acknowledgement of the Commission's comprehensive jurisdiction, and 330

(...continued)

[39] *See, e.g.*, NYISO Answer at 26 ("This information is posted on the NYISO website *primarily* for the benefit of the Transmission Owners, because they ultimately must pay any Congestion Rent Shortfalls.") (emphasis added).

[40] Clearly, 330 Fund is hoping that a state court will fail to take on the comprehensive consideration of remedies and their impacts on markets and market participants that the Commission would undertake.

Fund's readiness to hold the state court complaint in abeyance pending Commission decision only underscores this point.

More specifically, under governing precedent, a state or federal court is not in a position – due to the filed rate doctrine and the concomitant plenary authority of the Commission over rates and remedies – to award damages for a utility's alleged breach of tariff, under whatever contrived theory that 330 Fund devises.

In *TANC v. Sierra Pacific Power Co.*, 295 F.3d 918 (2002) ("*TANC*"), the plaintiff sought damages (under breach of contract and tort theories) in state court against utilities that were alleged to have breached a transmission operating agreement approved and on file with FERC. Interestingly, 330 Fund's law firm represented one of the defendant utilities, all of which sought a finding, in that proceeding, that judicial actions for damages were improper. The action was removed to Federal court, and the Ninth Circuit held that the action was preempted by the filed rate doctrine and the Federal Power Act, because the requested remedies if granted by a court would amount to setting rates or terms relating to the utilities' service.[41] In the context of the instant Complaint, an award of damages would also amount to rate setting, as involves a judgment as to what should be paid or refunded in connection with the TCCs at issue.

More recently, the Ninth Circuit referred to the *TANC* decision and stated, in rejecting California state law claims seeking damages against utilities alleged to have violated their FERC market-based rate tariffs: "Thus, TANC, like Duke Energy, stands for the proposition that remedies for breach and non-performance of FERC-approved operating agreements in the

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[41] *See generally, TANC* at 929-932.

interstate wholesale electricity market fall within the exclusive domain of FERC…."[42] Similarly, 330 Fund's attempt to pursue the remedy of damages in state court for alleged breaches of ISO-related tariffs and documents violates this fundamental principle and should be rejected.

As respectfully requested in the NYISO Answer, the Commission should deny the Complaint altogether. However, if the Commission does not do so, it should require amendment[43] of the Complaint to incorporate a request for remedies, and – importantly – to explain specifically how the NYISO's conduct caused injury to 330 Fund. Of course, the Commission should also permit the NYISO to respond to any such amendment.

VII. ATTACHMENTS

The following documents are attached to this Response:

- **Exhibit E**: Supplemental Affidavit of Allen Hargrave
- **Exhibit F**: Supplemental Affidavit of Steven L. Corey

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[42] *See People of the State of California, ex rel. Lockyer v. Dynegy, Inc., et al.*, 375 F.3d 831, 852 (9th Cir. 2004).

[43] Although 330 Fund seeks to dodge it (see 330 Fund Answer at 39), the Commission indeed has authority to require a complainant to amend its complaint or face dismissal. *See, e.g., Texaco Refining and Marketing, Inc. v. SFPP, L.P.*, 86 FERC ¶61,035 (1999).

VIII. CONCLUSION

WHEREFORE, for the foregoing reasons, the NYISO respectfully requests the Commission to deny the Complaint.

Respectfully submitted,

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

By _*/s/ Robert E. Fernandez*_____

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August 17, 2007

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 these proceedings.

Dated at Washington, D.C. this 17th day of August, 2007.

/s/ *Pamela M. Higgins*
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ATTACHMENTS

Exhibit E

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

330 Fund I, L.P.,	)	
Complainant,	)	Docket No. EL07-78-000
v.	)	
New York Independent System Operator, Inc.	)	
Respondent.	)	
	)	
	)	

SUPPLEMENTAL AFFIDAVIT OF ALLEN HARGRAVE FOR THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

I, Allen Hargrave, being duly sworn, depose and state as follows:

1. My name is Allen Hargrave. My business address is 3890 Carman Road, Schenectady, NY 12303. I serve as Manager of Energy Market Operations for the New York Independent System Operator, Inc ("NYISO"). My job responsibilities include managing the NYISO division that evaluates and processes generation and transmission maintenance outage requests. I am the same Allen Hargrave that submitted an affidavit dated July 19, 2007 and labeled as NYISO Exhibit C in this proceeding.

2. In its answer at page 31, 330 Fund I, L.P. ("330 Fund") says that it "understands that the Uprate/Derate tables are intended to be contingency tables, showing what *might* happen if a particular line were to go out-of-service," yet it "fails to understand why the NYISO did not incorporate the line into its Uprate/Derate tables during such time, as the line represented a *possible* outage with potentially large impacts." Mr. Garwood raises the

same argument in his Supplemental Affidavit at ¶ 10. The purpose of this affidavit is to respond to this new argument.

3. By way of background, NYISO OATT Attachment M ("Sale of Transmission Congestion Contracts") governs how the NYISO administers its TCC auctions. In contrast, NYISO OATT Attachment N ("Congestion Settlements Related to the Day-Ahead Market and TCC Auction Settlements") primarily provides the rules for calculating Congestion Rent Shortfalls, which are paid by Transmission Owners to cover any shortfall in congestion rents the NYISO collects in the day-ahead market. In particular, Section 3.6 of Attachment N governs "Charges and Payments to Transmission Owners for Auction Outages and Returns-to-Service." This section includes the requirement in Section 3.6.6.1 to create an Uprate/Derate Table to identify "the expected impact … of all transmission facility outages … on interface transfer limits."

4. An interface is a defined set of transmission facilities that separate NYISO Locational Based Marginal Pricing ("LBMP") load zones or that separates the NYISO from adjacent Control Areas. (See, for instance, the definition for Interface in Section 2.76 of the NYISO's Market Services Tariff.) The interface transfer limit is the limit of energy that can be transferred over the set of transmission facilities in a reliable manner. (The term "interface transfer limit" is synonymous with "Total Transfer Capability," which the NYISO's Market Services Tariff defines as I've identified above.) Interface transfer limits are established primarily where voltage or stability reliability criteria are more restrictive than the sum of the thermal limit of the individual transmission facilities.

5. The primary purpose of Section 3.6.6.1 is to require the NYISO to maintain the Uprate/Derate Table the NYISO will use to account for the impact any transmission

facility outages will have on interface transfer limits that are more restrictive than the thermal limits on individual transmission facilities when calculating Congestion Rent Shortfalls. The NYISO posts this information website *primarily* for the benefit of the Transmission Owners, because they ultimately must pay any Congestion Rent Shortfalls.

6. Because the purpose of the Uprate/Derate Table, as defined in Section 3.6.6.1, is to identify the impact on interface transfer limits that are more restrictive than the thermal limits of individual transmission facilities, the table lists those transmission facilities that, if out of service, would impact an interface transfer limit. The Uprate/Derate Table does not include transmission facilities in southeastern New York – including Line 42231 – because outages on the underground cable system would only result in thermal limitations. Any and all transmission facilities not listed on the Uprate/Derate Table simply have no interface transfer limits that are more restrictive than the thermal limits of individual transmission facilities, so there would be no reason to include them on the table.

7. Should a Transmission Owner increase the transmission capacity of a particular facility such that it would result in an interface transfer limit being more restrictive than the thermal limits of individual transmission facilities, the NYISO would add such a facility to the Uprate/Derate Table, along with the expected impact to the interface transfer limit.

8. This concludes my Affidavit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 17, 2007

/s/ Allen Hargrave
Allen Hargrave

Exhibit F

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

330 Fund I, L.P.	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket No. EL07-78-000**
	)	
New York Independent System Operator, Inc.	)	
	)	
	)	
Respondent.	)	

SUPPLEMENTAL AFFIDAVIT OF STEVEN L. COREY
FOR NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

A. QUALIFICATIONS AND PURPOSE

1. My name is Steven L. Corey. I serve as Manager, Interconnection Projects for the New York Independent System Operator, Inc. ("NYISO"). Our offices are located at 10 Krey Boulevard, Rensselaer, New York 12144.

2. I received a Bachelor of Science degree in Electrical Engineering from the Clarkson College of Technology (now Clarkson University) in 1972, and I received a Master of Engineering degree in Electrical and Computer Engineering in 1975, also from Clarkson.

3. I joined the NYISO when it was formed in 1999. From December 1999 until November 2005, I held the position of Manager, Transmission Planning. My responsibilities included coordination and performance of various transmission studies and reliability assessments in the “planning timeframe,” which included interconnection studies and various transmission planning studies. Starting in November 2005, I became the Manager, Interconnection Projects and hold that

position currently. My responsibilities include general administration of the NYISO's interconnection procedures, including coordination and performance of interconnection studies.

4. Prior to joining NYISO, I worked at the New York Power Pool ("Power Pool"). I was employed by the Power Pool from 1974 until I joined NYISO. From 1974, until 1980, I was a computer analyst. From 1980 until 1985, I served as the Computer Application Supervisor. From 1985 until 1991, I served as Manager of Operations Engineering. In 1991 I became the Supervisor Transmission Planning and served in that capacity until I joined NYISO.

5. The purpose of this affidavit is to address two issues raised in the answer that 330 Fund filed in this docket on August 3, 2007 ("August 3 Answer"). These issues include: (i) 330 Fund's misunderstanding of NYISO's technical analysis of the Seymour GTs' point of interconnection ("POI") change as described in my initial affidavit; and (ii) 330 Fund's misreading of the minutes for the Transmission Planning Advisory Subcommittee ("TPAS") meeting held on May 3, 2007.

B. NYISO's TECHNICAL ANALYSIS

6. 330 Fund's August 3 Answer (at p. 15) states that the "2001 Criteria" (which I referred to in my initial affidavit as the "New Interconnection Procedure") requires "the NYISO staff to consider all of the enumerated criteria in reaching its [materiality] determination." The August 3 Answer (at pp. 15-16) goes on to state "there is nothing in the record in this proceeding to show that the NYISO did so….Instead, it effectively allowed the short circuit and the power flow study to 'trump' the POI analysis. It apparently did not even consider stability impacts." In making these statements, 330 Fund cites to Paragraph 13 in my initial affidavit.

7. Paragraph 13 from my initial affidavit states as follows:

> The focus of a determination under the New Interconnection Procedure is on adverse reliability impacts, as demonstrated by the types of technical factors taken into consideration under the procedure. It does not take into account, nor should it, economic or commercial implications. NYISO staff reviewed the information provided by NYPA (Attachment 3) and concluded that it demonstrated that the proposed reconfiguration had no material impact on short circuit and power flow. In addition, there was no increase in capacity of the Seymour GT units and there was no change to the operational characteristics of the units themselves.

8. Although my statement in Paragraph 13 specifically refers to "short circuit and power flow," this was only intended to highlight that these considerations were the key ones in making the NYISO's materiality determination. I agree with 330 Fund that under the New Interconnection Procedure all of the factors are to be considered as part of NYISO's evaluation. In fact, this is the case – all of the factors were considered, including stability impacts. Stability impacts, however, were not regarded to be of great significance for the NYPA POI change, certainly as relative to factors like short circuit and power flow. This is due, in large part, to the fact that stability impacts of projects located within New York City have been studied multiple times over the years and not found to be a determinative factor for reliability. During the TPAS discussions, I explained that the NYISO staff's decision as to materiality was based on the application of the New Interconnection Procedure criteria. There was substantive discussion, with several questions among the participants. One individual raised an issue about changes to flow to Staten Island, but no one raised a stability concern. This is notable given that several of the TPAS members are very experienced with the stability impacts on the New York State Transmission System.

9. In addition, 330 Fund's use of the term "trump" implies that individual factors, such as stability, should not be weighted differently. This is incorrect and, if implemented as 330 Fund suggests, it could result in an improper analysis under a variety of situations. Depending on the circumstances, each factor may have a different significance. This is why the New Interconnection Procedure (at p. 2) states as follows:

> These factors shall be considered together. No single factor shall be considered automatically conclusive in the determination of whether or not the proposed project will result in a facility that differs materially from the preexisting facility. ISO Staff shall make an overall determination of whether or not a material adverse difference exists, and shall report that determination to TPAS.

C. MAY 3, 2007 TPAS MEETING MINUTES

10. 330 Fund's August 3 Answer (at p. 14) asserts that minutes from the May 3, 2007 TPAS meeting demonstrate that Section 4.4 of Attachment X governs the definition of materiality and that these minutes directly contradict statements made in my initial affidavit.

11. 330 Fund simply misreads and misunderstands the May 3, 2007 meeting minutes. The table presented to TPAS showed both changes to existing facilities and changes to projects in the queue. However, the focus of the discussion as recorded by the minutes was on projects already in the queue, not existing interconnected facilities. While the meeting minutes accurately reflect the key points of the actual discussion, this context would have been clear to 330 Fund had a representative attended the meeting.

12. In addition, however, 330 Fund should still have been able to appreciate the context of the discussion through a more careful reading of the brief meeting

minutes. Specifically, 330 Fund's August 3 Answer omits the following sentence from the minutes: "Project changes that NYISO determines to be material either result in the Developer withdrawing the proposed changes, or loss of queue position." Given that an existing facility does not have a "Developer" and or a "queue position" clearly indicates that the focus of the discussion was on pending interconnection projects, not existing facilities already interconnected to the New York State Transmission System.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 2007

/s/ *Steven L. Corey*
Steven L. Corey

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