STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City.

Case 10-T-0139

BRIEF ON EXCEPTIONS OF
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.

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INTRODUCTION

In accordance with the Notice for Filing Exceptions issued by the New York State Public Service Commission ("Commission") on December 27, 2012 in the above-captioned proceeding, Independent Power Producers of New York ("IPPNY"), by its counsel, Read and Laniado, LLP, hereby submits its Brief on Exceptions to Administrative Law Judges ("ALJs") Kevin J. Casutto's and Michelle L. Phillips's Recommended Decision issued in this proceeding on December 27, 2012 ("RD").[1] IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include approximately 100 companies involved in the development, operation and ownership of electric generators and the marketing and sale of electric power in New York's wholesale and retail markets, including the markets that may be served by the Applicants in this case.

[1] References to the Recommended Decision are preceded by the notation "RD"; references to the transcript in this proceeding are preceded by the notation "Tr."; references to the exhibits admitted into evidence during the hearings are preceded by the notation "Exh.".

IPPNY accepts the RD's Introduction/Procedural Background as its statement of the case. IPPNY takes exception with, and strongly opposes the ALJs' recommendations that (1) certain terms and conditions of the Joint Proposal can be adopted by the Commission; and (2) a Certificate of Environmental Compatibility and Public Need ("Certificate") can be granted to the Project by the Commission. As detailed more fully below, the evidence in this proceeding, including the testimony of IPPNY witness Mr. Mark D. Younger, establishes that the Applicants have failed to meet their burden under New York Public Service Law Article VII of proving that the record supports affirmative Commission findings concerning "the basis of the need for the facility,"[2] and/or that the Project "conforms to a long-range plan for expansion of the electric power grid . . . which will serve the interests of the electric system economy and reliability,"[3] and/or that the "facility will serve the public interest, convenience, and necessity."[4] In short, the ALJ's findings in the RD should be rejected and a Certificate withheld based on the following reasons:

- The RD erroneously finds that the Project would satisfy a resource adequacy need pursuant to the NYISO's 2012 Reliability Needs Assessment ("RNA"), in part by fundamentally misconstruing the relationship between the 2012 RNA and the 2010 RNA, and then placing unwarranted weight on the findings of the 2012 RNA, the first of two steps in the reliability planning aspects of the NYISO's comprehensive system planning process;
- Because the only revenue analysis in the record, performed by IPPNY witness Mr. Younger, shows that, for the Project to cover its costs, a shipper would be

[2] N.Y. Pub. Serv. Law §126(1)(a).

[3] N.Y. Pub. Serv. Law §126(1)(d).

[4] N.Y. Pub. Serv. Law §126(1)(g).

required to pay Applicants a price that is orders of magnitude greater than the price the shipper would receive from the market, the RD's conclusion that the Project (including its shippers) is not likely to require out-of-market subsidies to be viable is utterly lacking any factual basis in the record and so must be rejected;

- The RD erroneously credits Department of Public Service Staff's ("Staff's") so-called "production cost" analysis as a key measure of the Project's economic benefits, notwithstanding IPPNY's demonstration that: (i) Staff's analysis did not measure production cost savings but instead merely compared the costs of two unneeded supply options; and (ii) Staff's analysis, even as amended, contains numerous errors and/or omissions;[5]
- The RD's findings of need rest on fundamentally flawed and internally-inconsistent conclusions concerning the Project's alleged capacity market benefits and wholesale energy savings, and, by extension, erroneous conclusions about the Project's alleged job-inducing effects; and
- Given the record evidence demonstrating the grossly uneconomic nature of the Project, the RD unreasonably fails to require an additional Certificate Condition prohibiting extra-market subsidies indirectly to the Project's shippers, in addition to prohibiting such subsidies directly to the Certificate holders themselves.

As IPPNY demonstrated at the evidentiary hearing and in its Initial Briefs, the flawed economic analyses advanced by Staff and adopted in the RD vastly overstate the Project's

[5] Staff's upper-bound estimate of such "savings" should be entirely disregarded and given no weight since it is keyed to the now outdated 2010 AEO Outlook for natural gas prices. As discussed further in Section I.A *infra*, the most recent AEO study now available estimates that gas prices will be fully 15% lower than even those more recent estimates—the 2011 and 2012 AEOs—relied upon by Mr. Younger. *See* Annual Energy Outlook 2013 Early Release Overview pp 15-16, *available at* http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2013).pdf ("2013 AEO").

economic benefits, in part by greatly understating its costs. Consequently, those analyses do not support the RD's conclusions that the proposed Project is economic and will be operated on a merchant basis. Mr. Younger's analyses, on the other hand, reveal that the Project will not remain a merchant facility because, if approved, it is so uneconomic that the only way it can be constructed and operated over the long term is through some form of out-of-market subsidy funded by New York consumers in some capacity. The RD is remarkably silent on this point.

None of the proposed certificate conditions adequately prevents such a subsidy. The RD claims that proposed Certificate Condition 15.b will ensure that the Project will be constructed and operated as a merchant facility. In fact, this proposed Certificate Condition leaves a gaping loophole for the Project to obtain the subsidized financing it will need to be constructed. The proposed Certificate Conditions, even as revised, will not prohibit the Applicants from receiving subsidies indirectly through the shippers that will contract with Applicants to transmit their energy over the Project. In fact, the newly proposed Certificate Condition requiring the Project to pre-subscribe 75% of the line's transmission capacity prior to commencing construction, viewed in the RD as a benefit, actually compels that result. Mr. Younger's cash flow analysis demonstrates that, to cover its costs, the Project would need to charge shippers seeking to acquire that capacity between $44.52 MWh and $51.54 MWh. However, the price differential at either end of the line, which defines the price that market forces would support being paid to the shippers, ranges only from $8.00 to $11.00. Stated alternatively, the Project is offering, at best, a $44.52 solution to an $8.00 problem. Absent the prospect of an out-of-market contract with New York loads to subsidize its payments to the Applicants, no rational shipper would contract to purchase 75% of the line's transmission capacity on those terms. Again, the RD is virtually silent on this point.

As the Applicants have failed to meet their burden under Article VII to prove "the basis of the need for the facility" and—given its grossly uneconomic nature—cannot show that the Project will "... serve the interests of the electric system economy and reliability," the Commission should reject the JP and deny the issuance of a Certificate to the Applicants for the Project. However, if the Commission should nevertheless decide to grant a Certificate to the Project, the Commission must require the Applicants to accept a certificate condition expressly proscribing, directly or indirectly, a subsidy for the Project in any form whatsoever, and expressly rendering the Project's Certificate null and void should such direct or indirect subsidization take place.

I. THE COMMISSION SHOULD REJECT THE ALJS' ERRONEOUS DETERMINATION THAT THE PROJECT WILL CREATE SUFFICIENT ECONOMIC BENEFITS TO SUPPORT A FINDING OF NEED FOR THE PROJECT.

The RD reviews a number of analyses advanced by the parties in support of and opposition to the Project. Ultimately, the ALJs correctly acknowledged—as IPPNY had established in its briefs—that "the most meaningful economic analysis of this project is one that focuses on the long-term and gauges whether the proposal will provide net benefits to society as a whole."[6] The only such analyses in the record were: (1) DPS Staff witness Thomas Paynter's comparison of the cost of constructing and operating a new capacity resource in New York City with the cost of constructing and operating the HVDC transmission line, which he erroneously characterized as a "production cost savings" analysis when in reality, it was simply a cost comparison of two alternatives that are not needed on the system; (2) Mr. Younger's critique of

[6] RD at 47.

Dr. Paynter's "production cost savings" analysis; and (3) Mr. Younger's full production cost savings analysis, conducted using the GE MAPS database.

The RD rejects Mr. Younger's production cost savings analysis in favor of DPS Staff's analysis, stating that "Staff's long-term analysis is the one that is best suited to determining whether the proposed facility will provide overall net societal benefits" because it "was performed in such a way that it reasonably balanced the competing assumptions and views advocated by the projects' opponents, on the one hand, and Applicants, on the other."[7] First, the mere fact that a position represents the middle ground between two other positions does not make that position correct nor render its assumptions accurate or reliable. Second, the ALJs did not attempt to refute Mr. Younger's detailed explanation of the flaws underlying Staff's updated analysis. Instead of addressing these flaws, the RD simply dismisses them out of hand, claiming, "IPPNY's overarching views on need for additional energy and capacity were informed by the now-outdated 2010 RNA's need finding, and by assumptions that the generation would not be needed until 2026."[8] As discussed more fully in section III, *infra*, the ALJs' reliance on the 2012 RNA was erroneous. More significantly, even if one could set the need issue aside, the ALJs entirely ignored the other identified flaws in Staff's production cost analysis and erroneously rejected the two other analyses Mr. Younger performed demonstrating that the Project is grossly uneconomic.

[7] RD at 47.

[8] RD at 48.

A. The ALJs Erred in Finding That Staff's "Production Cost" Analysis Supports a Finding of Need Because It Contains Numerous Errors and Fails to Actually Measure Production Cost Savings.

A threshold issue that was extensively briefed by IPPNY yet resolved incorrectly in the RD is what metric is best used to accurately measure the economic benefits of the Project. In its Initial Briefs, IPPNY explained that production cost savings is the most appropriate measure of a project's benefits, because that metric ignores transfer payments between producers and suppliers and instead measures long-term sustainable economic benefits to society as a whole. Indeed, Staff itself has relied on this metric in previous Article VII proceedings.[9] As IPPNY explained, Staff's analysis does not calculate the production cost savings that would result from the Project, and therefore does not gauge whether the Project will provide net benefits to society as a whole.[10] Instead, while labeled a "production cost savings" study, all it actually accomplishes is a comparison of the cost of 1,000 MW of Canadian hydroelectric power delivered to the City of New York ("CNY") via the Project to the cost of a New York City based combined cycle gas-fired turbine ("CCGT") of similar capacity.[11] Therefore, Staff's analysis does not actually measure the long-term net benefits to society, as the RD erroneously concludes. It instead measures the amount of money saved through the pursuit of the Project over a hypothetical CCGT unit. These savings, if any, inure to the benefit of the project developer and not to society as a whole.

[9] *See* Initial Brief of Independent Power Producers of New York, Inc. In Opposition to Joint Proposal and Article VII Application of Champlain Hudson Power Express, filed Aug. 22, 2012 (hereinafter "IPPNY Initial Brief"), at Section J.1.

[10] *See* IPPNY Initial Brief at p 33 ("[P]roduction cost savings are preferable to wholesale energy price reductions when evaluating the benefits of the Project because they are permanent in nature, measure benefits to society as a whole, and are a conservative indicator of the profitability of a project.").

[11] Tr. 432.

Accepting Staff's production cost savings for what it was—an exercise in cost comparison—Mr. Younger reviewed its underlying assumptions and testified that Staff's study had significantly understated the combined costs of the Project and the HQ hydro facility while at the same time substantially overstating the CCGT costs that would otherwise be avoided by adding the Project,[12] thus skewing the results.[13] For example, Mr. Younger found that Staff's estimated costs of the hydro facility were understated in three respects: 1) the costs of a hydro facility with unique permitting and operating circumstances were used as the basis for estimating the costs of constructing new hydropower capacity; 2) Staff failed to include in the calculation all the costs of the new hydro facility; and 3) Staff understated the losses associated with delivering power from the hydro facility to the injection point for the Project on the Canadian side of the interface.[14]

On the first point, Staff estimated the cost of a new hydro facility in HQ by averaging the MWh costs of two recent HQ projects: 1) the Eastmain-1-A, La Sarcelle and Rupert Diversion project ("ELRD"); and 2) the Romaine Project.[15] Mr. Younger testified that this representation is flawed in two respects. First, the inclusion of the ELRD project was not appropriate because that project essentially amounted to an uprate of existing hydro facilities, which does not represent the costs of building a typical hydro facility. Next, Staff understated the costs of the Romaine project by failing to account for the cost of building the transmission facilities that are

[12] Upon reviewing Mr. Younger's Direct Testimony in this proceeding, Staff acknowledged a number of the errors that Mr. Younger had identified and revised its analyses. IPPNY herein addresses Staff's position based upon these revised analyses alone. However, IPPNY would note that, as revised, Staff's analysis continues to contain significant flaws.

[13] Tr. 433. Remarkably, even based on Staff's flawed assumptions, the Project produces alleged production cost savings of just $400 million over a 35-year amortization period.

[14] Tr. 442-443.

[15] Tr. 443-445.

necessary to move power from the remote location of the Romaine project to the bulk power system in Quebec. To correct for these errors, Mr. Younger omitted the ELRD project entirely,[16] and revised Staff's Romaine estimate to include operating and maintenance costs for both the hydro facility itself and the transmission line required to connect the facility to the bulk Canadian system.[17]

Regarding losses, Mr. Younger demonstrated that the 10% loss factor used by Staff to account for the losses between the hydro facility and the Project injection point was not reasonable, and that it was unreasonable to omit any fixed and variable operating costs for the hydro facility. To correct for both of these errors, Mr. Younger substituted a 19.4% marginal loss value that more accurately, yet still conservatively, represents both the losses associated with the hydro facility in HQ and the operating and maintenance costs of the facility and the transmission line.[18]

With respect to Staff's overstated estimate of the CCGT costs, Mr. Younger testified that Staff erroneously calculated the CCGT fixed costs as if they would be incurred in 2016, the year that Staff expected CHPE to bring the Project into service.[19] However, as Mr. Younger explained, no new generation is projected to be needed until 2026, which therefore becomes the salient year for purposes of making this comparison.[20] Staff also used an abnormally long, 35-year amortization period for the Project.[21] Mr. Younger explained that relying on such a long

[16] Tr. 444-445.

[17] Tr. 445.

[18] Tr. 445-447.

[19] *Id.*

[20] Even assuming, *arguendo*, that a reliability need may arise as early as 2021, which is the date reflected in the NYISO draft 2012 CRP reports, Staff's use of 2016 costs remains unreasonable.

[21] Tr. 449-450.

period proves that any benefits are not likely to occur for decades, long after substantial expenditures will be required. To correct for this error, Mr. Younger calculated the cost difference between the Project and the CCGT facility using 10, 20, 30 and 35 year amortization periods.[22]

Once all of the errors in Staff's analysis were corrected, Mr. Younger's results were as follows:

Cost of CCGT Compared to CHPE/HQ Hydro

Gas Price Forecast

	2010 AEO	2011 AEO	2012 AEO
10 years	-$8,898	-$9,805	-$9,984
20 years	-$6,004	-$7,410	-$7,645
30 years	-$3,940	-$5,742	-$5,891
35 years	-$3,152	-$5,106	-$5,167

Every combination of the three different gas forecast prices and the four different amortization periods shows that the Project is more expensive than the hypothetical CCGT facility in NYC. Mr. Younger stated:

> Based upon current gas price forecasts, when all of the flaws that I identified in DPS Staff's analysis are corrected and the Project costs are updated to incorporate these newly identified substantial costs, the HQ hydro/Project combination is more than $5 billion more expensive than building CCGTs in New York City when they are needed.[23]

[22] Tr. 450-452.

[23] Tr. 505.

In fact, gas price forecasts published after the Record closed estimate that gas prices will be more than 15% lower than the 2012 forecast upon which Mr. Younger and Staff relied in their analyses. [24] Reflecting the 2013 AEO forecast, the hypothetical CCGT would be even less expensive, making the Project, by comparison, even more uneconomic.

In his rebuttal testimony, Dr. Paynter updated his long-term production cost savings analysis, which produced an estimate of much lower net economic benefits for the Project of $0.4 billion to $2.6 billion (in 2015 $), depending on gas prices, versus the $1.2 billion to $3.2 billion in 2015 that Staff had originally projected.[25] This is the analysis ultimately relied on in the RD. However, while Dr. Paynter correctly modified his modeling, his updated analysis is still fraught with a number of the same errors that Mr. Younger had identified in his direct testimony. Dr. Paynter's estimated costs for the hydro facility were still significantly understated and his estimates of the costs of the CCGT facility in New York were overstated for the same reasons described above.

[24] *See* 2013 AEO at pp 15-16. To the extent necessary, pursuant to Rules 3.6 and 85-2.7 of the Commission's Rules of Procedure and sections 306(2) and 306(4) of the New York State Administrative Procedure Act ("SAPA"), IPPNY hereby moves to incorporate by reference or to take official notice of the 2013 AEO. Rule 85-2.7 provides that "[a]ny party or staff counsel may move to incorporate by reference information contained in any filing with this commission, or contained in any other public document." SAPA § 306(4) provides that "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of all facts within the specialized knowledge of the agency." Good cause exists to incorporate by reference or take official notice of the 2013 AEO. The 2013 AEO was published after the Record was closed in this proceeding. It constitutes an official update to the 2012 AEO gas forecasts used both by Staff and IPPNY witness Younger in this proceeding and represents the most recent data available. The data is directly relevant in this proceeding because it updates certain assumptions used by Staff and Mr. Younger in assessing the Project's economics – a highly contentious issue in the proceeding. *See*, Case 10-T-0139, *Application of Champlain Hudson Power Express, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the PSL for the Construction, Operation and Maintenance of a High Voltage Direct Current Circuit from the Canadian Border to New York City*, Ruling on Motion to Incorporate or Notice (October 10, 2012) (incorporating by reference the 2012 RNA, because it provides updated information on relevant issues in this proceeding.) By the same logic, the Commission should incorporate by reference the 2013 AEO.

[25] Tr. 199.

B. The ALJs Erred in Not Crediting Mr. Younger's Extensive Analyses Demonstrating That the Project is Uneconomic.

The RD's summary conclusion to the effect that "persuasive record evidence" exists to rebut IPPNY's finding "that the project will be an uneconomic entrant" is simply not accurate – there is no such proof. In fact, Mr. Younger performed two separate economic analyses, each showing that the Project is grossly uneconomic. For their part, the Applicants adamantly refused to put on affirmative proof of the Project's business plan or potential income stream, instead taking false refuge beneath the "merchant" label. IPPNY's point, however, is that because this Project is so uneconomic on its face, no rational investor, including HQ, would risk its assets by participating in the Project absent some assurance of extra-market funding. It is this undeniable need for that extra-market funding that renders this Project decidedly non-merchant.

1. The "Cash Flow" Analysis Shows That the Project Cannot Survive in the Competitive Market Without Extra-Market Subsidies.

Mr. Younger's initial analysis, which the RD labels a "cash flow" analysis, demonstrates that the Project will not earn sufficient market-based revenues to cover its costs. In performing this analysis, Mr. Younger used conservative assumptions designed to favor the Project. For example, despite the scope and magnitude of the Project, Mr. Younger accepted the costs of the Project, as advanced by the Applicants, to be $2.194 billion for construction.[26] Mr. Younger also accepted the 90% capacity factor estimated for the Project by the Applicants, notwithstanding the fact that he had established the unreasonableness of that estimate.[27] Because construction costs are not the only costs of operating a transmission facility, Mr. Younger adjusted the construction costs of the facility and then calculated annual costs by applying a levelized generic carrying

[26] Tr. 474.

[27] *Id.*

charge rate of 16% used by the NYISO when evaluating the costs and benefits of a transmission project.[28] This produced a yearly cost of $351 million per year for the Project.[29] When divided by the 7,884 GWh of electricity the Applicants assume the Project will deliver yearly based on the 90% capacity factor, it will cost $44.52 to deliver a single MWh of energy across the line, *i.e.*, Applicants will have to receive that amount per MWh sold to cover the Project's carrying cost.[30] This number represents the cost portion of the cost-benefit analysis. In his rebuttal testimony, Mr. Younger increased the $2.194 billion construction cost to include the $346 million cost that the Applicants had identified to interconnect the Project with TransEnergie's transmission system in Canada, as had DPS Staff in their revised production cost savings analysis.[31] The interconnection costs raised the Project's annualized cost to $406 million, and correspondingly increased the Project's delivered cost to $51.54/MWh.[32]

Mr. Younger then estimated the Project's expected revenues. No party disputed IPPNY's assertion that the benefit of the Project to a shipper, for the purposes of this analysis, is the ability to sell lower-priced energy from one end of the line to the other end of the line where the prices are higher. To quantify this benefit, Mr. Younger compared the most recently available historic data for the two locations.[33] That data showed a difference that ranged from approximately $7.50 to $8.00 per MWh.

[28] Tr. 474-475.

[29] Tr. 475.

[30] *Id.*

[31] Tr. 502.

[32] *Id.* In other words, for the Project to cover its costs and be economic, a shipper would have to pay the Applicants $51.54/MWh to secure transmission rights.

[33] Tr. 476-477.

In other words, a shipper choosing to purchase capacity on the Applicants' line would have to pay more than $44.00 to sell its energy at a price that was just $8.00 higher. Indisputably, spending $44.00 to get $8.00 is not viable. Even adjusting this result by using the most favorable operating assumptions (*e.g.* including capacity payments even though the project will be mitigated, and thus, unable to earn revenue in New York's capacity markets for the foreseeable future, including a lower loss factor, assuming that energy would only be delivered during peak hours, etc.) does not produce a benefit that would come close to covering the Project's costs.[34] Simply stated, absent subsidization, a Canadian shipper would lose substantial amounts of money if it were to use the Project to sell its energy in New York City. Therefore, Mr. Younger concluded, "the Project is so uneconomic that it is unlikely to be built or operated over the long term unless it secured some kind of substantial subsidy."[35] Significantly, no other party conducted a similar or competing analysis and no party challenged the accuracy of Mr. Younger's conclusions concerning the price differential.

The absence of any contrary proof in the record notwithstanding, the RD rejects Mr. Younger's cash flow analysis, stating, *inter alia*, that "the analysis timeframe was limited to a 10-year period, instead of a time period commensurate with the facility's expected service life."[36] This critique misses the point. What the cash flow analysis showed was that the Project cannot operate competitively in the market, now or in the foreseeable future, unless the price differential between the Canadian border and NYC were to increase at least five-fold. There is not a shred of testimony or proof suggesting the likelihood of such a dramatic price change. Therefore, a shipper paying the Applicants what they need to recoup their costs and attempting to

[34] Tr. 478-485.

[35] Tr. 485.

[36] RD at 48.

sell power transmitted over the Project into the In-City market would have to receive some form of supplemental, extra-market subsidy.

Because no other party offered proof on the revenue side of the Project, the RD's implicit conclusion that the Project is economic finds no support in the record. Indeed, even if the Commission was to reject Mr. Younger's cash flow analysis out-of-hand (which it should not, for the reasons discussed *infra*), the Commission would have to conclude that there was no reliable proof of the Project's economics and not, as the RD concludes, that the Project would be economic.

2. The "Production Cost Savings" Analysis Shows That the Project Cannot Be Constructed and Operated in the Competitive Market Over the Long Term Without Extra-Market Subsidies.

For his second analysis, Mr. Younger performed a production cost savings analysis for the Project. Again, to be conservative, Mr. Younger used the same GE MAPS database that Staff used for the economic analysis of wholesale market benefits that it provided in the JP.[37] As discussed above, and as Staff itself has testified in prior certification proceedings, the production cost savings metric more accurately measures the societal benefits of a proposed project because it takes into account market responses to short-term price changes. The benefits represent the production cost savings produced by displacing less efficient internal NYISO generators and the net savings associated with net imports that result from adding the Project.[38]

To further test the validity of his conclusions about the Project's uneconomic nature, Mr. Younger applied the NYISO's Congestion Assessment and Resource Integration Study

[37] In this regard, Mr. Younger measured the same metric, the production costs savings metric, that Staff had relied on in other certification proceedings. Staff, however, did not present this metric when it supported the JP even though it had run the analyses that would produce this metric. If Staff produced this metric, its results have never been made public.

[38] Tr. 489-490.

("CARIS") methodology to determine whether a transmission project is economic. Mr. Younger used Staff's representation of the physical and economic characteristics of the Project and modeled the first ten years of the Project's expected operation. Mr. Younger then made limited updates to Staff's MAPS database to account for the most recent available data.[39] Mr. Younger compared the first ten years of the annualized cost of the Project to its production cost savings over the same period. Pursuant to CARIS, if a project has a Benefit/Cost ratio of less than 1.0, it is uneconomic.

The results showed that over the first ten years of the Project's operations it would cost a total of over $2 billion but create only $590 million in benefits.[40] These numbers produce a Benefit/Cost ratio of only 0.29, substantially below the NYISO's minimum threshold of 1.0 that it uses to determine whether a proposed transmission project is economic. Reflecting the updated costs indicated in Mr. Jessome's direct testimony, Mr. Younger showed in his rebuttal testimony that the increase in Project costs to recognize the necessary transmission infrastructure on the Canadian side of the border makes the Project even more uneconomic as it reduces the Benefit/Cost ratio from the already very low level of 0.29 to an even lower value of 0.25.[41] This analysis, too, shows that the project is uneconomic by such a substantial margin that it will not be sustainable in the competitive market without significant and long-lasting extra-market subsidies in some form.

[39] Specifically, Mr. Younger updated gas prices to reflect the preliminary 2012 Annual Energy Outlook forecast. He also updated New York load forecasts to be consistent with the NYISO's 2012 Load and Capacity Data Book forecast. He then added transmission lines to represent the Hudson Transmission Partners transmission line from New Jersey to New York and the Astoria-Rainey Cable. Finally, he removed generators that either had retired or had issued a notice that they would retire, but not ones that have issued mothball notices. Tr. 487-488.

[40] Tr. 489.

[41] Tr. 504.

Here, again, the RD dismisses the analysis out of hand, stating only that "IPPNY inappropriately incorporated and relied on the CARIS model, which is geared toward determining whether regulated solutions should be approved and thus sets a very high bar."[42] This criticism lacks merit. At the outset, IPPNY is not advocating that the CARIS Cost/Benefit test be used generally as the determinative factor to identify whether a truly merchant project is economic. Here, however, it is entirely appropriate to do so as an additional measure because (i) Mr. Younger's other two analyses showed the Project would be grossly uneconomic, and thus require out-of-market subsidies; and (ii) no alternative measure demonstrating the Project's economics has been advanced by the Applicants or any other party to this proceeding. Regardless of the various arguments concerning the applicability of the CARIS test, the fact remains that the Project would cost a total of over $2 billion but create only $590 million in benefits in its first ten years. The fact that the ratio does not come anywhere near reaching the CARIS-based benchmark of 1.0 is not nearly as relevant as the fact that this analysis reveals once again that the Project's costs so markedly exceed its benefits. The Project's failure of the CARIS Cost/Benefit test is therefore relevant and appropriate because it provides yet another confirmation that the Project is grossly uneconomic and will be unsustainable without extra market subsidies.

In short, if Applicants or others had studies showing that the Project was economic using these or any other measures, it was incumbent upon them to bring those studies to bear on the instant record.[43] Having failed to do so, IPPNY's comprehensive showing that the Project is uneconomic under any readily acceptable metric, including CARIS, must be given weight.

[42] RD at 48.

[43] The ALJs appropriately rejected Applicants' version of the production cost savings analysis because it suffered from multiple, fatal flaws, including: (1) Applicants' treatment of the energy that would be delivered to the Project

C. The ALJs Erred in Recommending That the Project's Installed Capacity Benefits Be Used to Support the Issuance of a Certificate.

The ALJs erroneously concluded that the Project will produce installed capacity benefits and that those benefits can be used to support need and public interest findings. As Mr. Younger testified, NYISO's buyer-side mitigation rules will prohibit the Project from selling its installed capacity into the markets for many years because the Project is so grossly uneconomic.[44] The ALJs seemingly acknowledged this, stating:

> We are not persuaded that capacity price savings should be considered as a factor supporting the need or public interest findings. The analyses supporting these estimates are dependent on numerous assumptions about future developments and conditions, including, but not limited to, the application of buyer-side mitigation rules. The considerable and vigorous debate over the accuracy of these estimates and how and if the buyer-side mitigation rules might be applied to the proposed facility leads us to question whether there is sufficient basis to draw any reliable conclusions concerning the extent to which the facility will qualify for UDRs.[45]

The ALJs go on, however, to state that despite this apparent lack of capacity price savings, the Project will still provide a benefit in the form of "additional installed capacity."[46] The ALJs appear to confuse two concepts, additional transmission capacity on the one hand, and increased installed capacity on the other. The RD states:

> In our view, what is relevant for purposes of reviewing a merchant transmission proposal is whether the proposed facility will offer additional transmission capacity in an area that could benefit from it. We conclude that it will, mainly because New York City is a load pocket. We therefore recommend that with respect to

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as being essentially without cost, i.e., as if it had no opportunity cost; and (2) the use of static supply curves that are unable to represent accurately how marginal costs in the neighboring regions vary across the time of day and time of year. Tr. 507-512.

[44] Tr. 481.

[45] RD at 56.

[46] RD at 57.

> capacity, the additional installed capacity that the facility will provide is what should be considered as a factor supporting both the need and public interest findings.[47]

Contrary to the ALJs' recommendation, transmission capacity refers to something completely different than installed capacity—transmission capacity refers to the ability of a transmission system to import and export energy, whereas installed capacity refers to a reliability product purchased by load serving entities to ensure they have sufficient supply, plus a reserve, to meet their load obligations. As plainly demonstrated by Mr. Younger, the Project will not be permitted to participate in the New York City installed capacity market because of the level of capacity currently on the system in New York City—preventing the Project from securing an exemption under the default mitigation rules—and the Project's grossly uneconomic nature—preventing the Project from securing a unit specific exemption. Therefore, it cannot, in fact, provide any installed capacity benefits. Consequently, the Commission must reject in its entirety the ALJs' reliance on installed capacity benefits as a factor supporting the issuance of a Certificate to the Project.

D. The ALJs Erred in Recommending that Claimed Wholesale Price Reductions Are Evidence Supporting the Required Need and Public Interest Findings.

In its briefs and in Mr. Younger's testimony, IPPNY demonstrated that Applicants' claims of benefits from wholesale energy price reductions produced by the Project must be disregarded entirely in this case. First, as acknowledged by Staff witnesses, such price changes are temporary and represent only transfer payments between generators and consumers and not sustainable benefits to society as a whole.[48] Second, where, as here, any such wholesale price reductions would be caused by uneconomic entry, those price reductions would be the result of

[47] RD at 56-57.

[48] *See, e.g.*, Tr. 401-404.

anti-competitive price suppression and cannot be considered a benefit. The ALJs acknowledged the first point but summarily dismissed it without explanation. The ALJs completely failed to address the second point. They stated:

> We find that, even after accounting for opponents' criticisms and proposed offsets, the proponents have successfully demonstrated that the project will have sizable benefits in the form of reductions in the wholesale price of electricity. These particular benefits will not be enduring but they nonetheless will be realized and thus should be considered as evidence supporting both the required need and public interest findings.[49]

On the first point, the RD's conclusion that the ephemeral wholesale energy price savings will "nonetheless be realized" is in error. Any conclusions concerning whether such savings will be "realized" and, if so, whether such savings would have a perceptible impact on consumers, is pure speculation. The consensus opinion of IPPNY and Staff (apparently not shared by Applicants' witness Julia Frayer) is that wholesale price change estimates are inherently unreliable because, *inter alia*, they do not account for market responses. Put simply, depending on the nature and timing of the market response, it may very well be that little to no wholesale price savings will ever be realized. The RD's summary conclusion to the contrary has no record support.

Next, the ALJs' failure to address the fact that the Project's claimed price reduction benefits amount to artificial anticompetitive price suppression mandates that the Commission reject the recommendation that the wholesale energy price savings support the issuance of an Article VII Certificate for the Project. Therefore, the Commission should place no weight on the claimed wholesale energy price savings in this case.

[49] RD at 54.

Wholesale energy price reductions are not sustained when they are not created by underlying production cost decreases. For example, should a new entrant to the market begin selling electricity at an artificially suppressed price, the overall price of energy would fall. As that happens, however, existing generators that would otherwise be economic would be unable to secure the necessary revenues from the market and would retire. In response, as the energy surplus created by the new entrant disappears due to the premature exit of existing market participants, energy prices would rise following traditional supply and demand principles. Alternatively, if the new entrant lowers prices because it has developed a method to produce and supply electricity at a lower cost, the price decrease can be sustained over the long term because the reduced prices will still be able to support this new lower-cost form of generation.

This is precisely what the production cost savings metric measures. It predicts sustainable society-wide benefits as opposed to inevitably ephemeral wholesale energy price savings. Therefore, the entry of a new economic project would result in both wholesale energy price savings and production cost savings. But the existence of one without the other shows that the wholesale energy price decreases which accompany new entry are nothing more than anti-competitive price suppression.

In properly functioning competitive markets, economic new entrants that have lower costs than existing suppliers will produce price reductions for consumers. However, it is crippling to the market if the new entrant has higher costs than existing, otherwise economic suppliers but artificially suppresses prices for consumers in the short term because it is able to recover its above-market costs through some form of subsidy. As Mr. Younger demonstrated in his testimony, the Project's costs, when combined with the cost of energy that will be transmitted from Canada over the Project, are vastly greater than the costs of existing suppliers as

demonstrated by New York City market prices.[50] For this reason, the ALJs' reliance on estimates of wholesale market benefits must be disregarded because they are merely measuring the artificial price suppression effects of the Project that will only exist—if indeed they exist at all—for a short period of time until the market corrects itself.

II. THE COMMISSION SHOULD REJECT THE ALJS' CONCLUSIONS REGARDING NEED FOR THE PROJECT WHICH WERE ERRONEOUSLY BASED ON FAULTY FINDINGS REGARDING POLICY AND COMPETITIVE BENEFITS OF THE PROJECT

A. The ALJs Erred by Discounting the Potential Wholesale Price Increases Created by the Project at the US-Canadian Border.

The ALJs erroneously rejected the potential price increases created by the Project that will be borne by Upstate New York consumers at the Canadian border. In the RD, the ALJs stated:

> [P]roject opponents claim that the project could raise wholesale electricity prices at the U.S.-Canadian border. This potential scenario, however, is premised on the assumption that all other circumstances would remain constant. In fact, no basis for that assumption is substantiated on this record, where we have credible testimony that markets tend to respond to such price differentials, eventually offsetting them over time.[51]

First, the basis for the assumption of increased border prices was Dr. Paynter's testimony. Thus, it is not simply the Project's opponents who have recognized and demonstrated these potential impacts. In fact, it is the consensus of DPS Staff and IPPNY, though apparently not of the Applicants.

Second, the RD's rationale for rejecting the border price information is inconsistent with the RD's rationale for crediting wholesale energy price savings as described *supra* in section I.

[50] *See supra* Section I.B.

[51] RD at 65.

The RD acknowledges that those savings would be temporary and would likely disappear due to market forces, but nevertheless concludes that the ephemeral wholesale energy savings support a finding of need for the Project. Conversely, the RD then seeks to disregard negative impacts at the border because "markets tend to respond to such price differentials, eventually offsetting them over time"—exactly the same flaw inherent in the wholesale energy price analyses. Thus, the RD applies a discriminatory standard—either all price impacts are relevant regardless of their certainty and expected duration, or none of them are.

B. The ALJs Erred by Rejecting Evidence That the Project Will Harm Competitive Markets.

As IPPNY thoroughly demonstrated in its briefs, the uneconomic entry of a large new project, such as the one at issue here, will harm New York's competitive markets by driving otherwise economic generators out of the market prematurely and chilling future merchant investment. The ALJs summarily dismiss this evidence by stating:

> [T]here is no persuasive support for the assertions that approval of this project would preclude or prevent some other entity or any other party from moving forward with an alternative project designed to meet New York's electric power needs by constructing additional generation and/or HVAC transmission facilities.[52]

The ALJs ignore the fact that the mere approval of a grossly uneconomic new entrant, such as the Project, harms the market by chilling new investment. Investors are loathe to put money into a market where they are not able to compete fairly. An investor cannot be expected to compete against a project that is not limited to market revenues, but can instead expect to be financed through extra-market subsidies.

IPPNY strongly favors the continued development of a fully competitive electric market in New York. As the Commission established when it sanctioned the move to retail competitive

[52] RD at 66.

markets, competitive electric markets, over the long run, lead to more efficient operations and support lower utility bills for customers, a better climate for companies seeking to do business in the State, and a healthier State economy overall. In the Commission's seminal order on competition, the Commission established its policy for the creation of a competitive wholesale generation market, finding that competitors would have a greater incentive to lower costs than utilities under cost of service regulation, which would inure to the benefit of New York's consumers.[53]

The Commission also recognized that the most efficient means of selecting resources was via the competitive market. Further, the Commission found that one of the primary benefits of competitive markets is that investment risks shift from captive utility ratepayers to private investors. Thus, it strongly favored the development and financing of generation by private investors rather than regulated utilities or public power authorities that obligate New York consumers to fund the costs of uneconomic projects in one capacity or another.

Given the fact that the Project is otherwise grossly uneconomic, construction and operation of the Applicants' proposed Project, if it is to go forward at all, is likely to be financed by above-market, subsidized contracts. This would turn the bases underlying the Commission's determination to implement competitive markets on their head. It would significantly harm the very competitive market the Commission sought to produce because it would artificially suppress prices for existing, otherwise economic, generators and would chill future true merchant development by private investors that rely on market-based prices.

Private investors will become unwilling to commit their limited investment funds to the development of resources here in New York State when the state has demonstrated its

[53] Cases 94-E-0952, *et al., In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Competitive Opportunities for Electric Service, Opinion 96-12 (May 20, 1996) at 32.

willingness to subsidize their competitors, rendering their investment uneconomic and, in this case, also exporting jobs and economic opportunity. The policy implications of building uneconomic capacity are clear, as FERC has long recognized. In its order approving the NYISO's proposed measures to mitigate the impact of market power, FERC stated:

> Markets require appropriate price signals to alert investors when increased entry is needed. By allowing [utilities] to artificially depress prices, these necessary price signals may never be seen. While a strategy of investing in uneconomic entry and offering it into the capacity market at a low price may seem to be good for customers in the short-run, it can inhibit new entry, and thereby raise price and harm reliability, in the long run.[54]

As the Project will likely need an above-market contract to be financed and constructed, the Commission's issuance of a Certificate to the Applicants will allow the Project to satisfy a significant project milestone and will encourage the construction of uneconomic entry and the suppression of energy prices, which will chill market-based entry and ultimately cause New York's consumers to pay higher electricity prices in the long-run.

The ALJs further stated:

> [W]e are not persuaded by the claims that the project would hasten the exodus of fossil or renewable generation. There are far too many variables at play that could influence or explain a generator's decision to exit the competitive market, including changes in environmental regulations or tax laws. We find no credible basis for concluding that any generator's decision to exit the market can be definitively and exclusively linked to the entry of this project.[55]

While it may be true that it is not always possible to identify or isolate the one factor or event that led to a generator's retirement decision, it is equally true that simple economics demonstrates that existing generators, otherwise economic, are dependent on market revenues

[54] *New York Independent System Operator, Inc*., 122 FERC ¶ 61,211 at P 103 (2008), *see also*, *New York Independent System Operator, Inc*., 124 FERC ¶ 61,301 (2008) at P 29.

[55] RD at 66.

and cannot survive over the long term when those revenues are artificially depressed in a significant manner by uneconomic entry. In some instances, existing facilities that cannot rely on subsidization to augment their costs will either no longer be dispatched at all or will experience far fewer run hours. In other instances, those that are still dispatched will be paid artificially suppressed market-clearing prices that may be much lower than they would otherwise. Both results are likely to be unsustainable. Those in-City facilities not otherwise needed to meet a reliability requirement may be forced to retire prematurely. Those facilities that are needed to meet a reliability requirement will require a reliability must run contract to continue operations, thereby necessitating even more subsidization on top of the Project's subsidy, all needlessly paid for by New York's consumers. The in-City competitive market, and with it system reliability, will be compromised.

Lastly, the RD's finding that "even IPPNY acknowledges that in properly functioning completive markets, new entrants that have lower costs than existing suppliers will produce price reductions for consumers"[56] only serves to support IPPNY's point. While it is true that new entrants with legitimately lower costs reduce prices as a benefit of competition, the Project's costs here are actually higher, and those costs will be foisted on consumers through indirect subsidies thus rendering the Project anticompetitive.

C. The ALJs Erred by Relying on the Existing Certificate Conditions As a Viable Mechanism To Ensure That the Project Remains Merchant.

The RD applies a far too narrow definition of what it means to be a merchant project, finding that a merchant project is any project where the project developers themselves do not rely on government or ratepayer subsidies. However, a merchant project is one that earns all of its revenues exclusively from the competitive market where both existing and new suppliers

[56] RD at 67.

compete on a level playing field, and where the project's investors alone bear the risk of recovering its construction and operating costs from purely market-based revenues.

As IPPNY has repeatedly stressed in this proceeding, non-merchant subsidization need not take the most obvious form of a direct subsidy to the Certificate holders themselves. Yet this is all that proposed Certificate Condition 15.b prohibits. Instead, as IPPNY and others have demonstrated in this proceeding, a subsidy can be indirect and cause the very same harm. For example, one or more of the Project's shippers might enter into an agreement with a New York State agency or authority pursuant to a discriminatory procurement process to provide electricity to New York City at above-market prices. The shipper could then remit the resulting above-market revenues to the Certificate holders to offset some portion of the Project's costs. In this instance, the Project is no longer a genuinely competitive merchant facility. Whatever form that subsidy might take, its mere existence means that the Project, by definition, is non-merchant.

Addressing the required Certificate Conditions for this Project, the RD initially notes:

> While we recognize that even with the existing certificate conditions, there still are no "iron-clad" guarantees, we believe the goal should be to adopt certificate conditions that will provide reasonable assurances that the statutory obligations will be satisfied, expected benefits of the facility will be realized, conditions precedent will be met, and commitments will be honored.[57]

Despite the extensive record evidence, the ALJs nonetheless concluded that it is sufficient for the Project's Certificate Conditions to be limited to:

> no reliance on New York State or Federal cost-of-service rates for recovery of costs and that no such costs may be included in utility base rates directly or through a contract between certificate holders and any New York State agency, authority, entity or municipal

[57] RD at 67-68.

> subdivision, or any utility subject to cost-based regulation (or any instrumentality of any of the foregoing).[58]

The ALJ have thus ignored, without any analysis or explanation, the indirect subsidization risks inherent in this project well documented by IPPNY. In so doing, this portion of the RD misses the mark entirely. IPPNY is not seeking "iron-clad" guarantees and, in fact, agrees that proposed Certificate Condition 15.b provides adequate assurances that the Applicants themselves will not receive a direct subsidy. However, these proposed conditions do not adequately protect New York consumers because they provide no safeguards whatsoever against the Project's shippers indirectly obtaining and passing through extra-market subsidies.

The ALJs further stated:

> [W]ith these safeguards against and remedies for violating the commitment to construct, operate or finance the facility on a merchant basis, it does not seem reasonable to assume noncompliance with the certificate conditions and then, based on that assumption, impose even more conditions.[59]

This argument, again, misstates the issue. No party has suggested that the existing conditions will be violated or that other conditions are necessary to guard against the Applicants directly securing subsidization. Instead, IPPNY and others have demonstrated that the proposed Certificate Conditions simply do not encompass the very real possibility, documented in the record, that the Project will be financed via subsidies obtained through above-market contracts obtained by shippers using the Project.

The RD then erroneously holds up the fact that "because Applicants must have 75% percent of their service under binding contract for a period of at least 25 years before

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[59] RD at 68.

commencing construction, the HVDC 'cost risk' has been limited substantially."[60] The RD has it exactly backwards. The RD's rationale ignores the well-documented fact that the shipper that will contract for 75% of the Project is likely to seek an above-market contract the benefits of which it will pass on to the Applicants, thereby subsidizing the Project at the expense of New York consumers in some capacity.

Specifically, IPPNY directed the ALJs to the statement issued by the Project's likely anchor tenant, HydroQuébec, in response to the New York Energy Highway's Request for Information ("RFI").[61] In its RFI response, HydroQuébec indicated its desire to sell its hydropower as long as the State gave such power special treatment, proposing that the state of New York "consider innovative ways in which policy and regulation might *prioritize and promote* incremental hydropower deliveries."[62] HydroQuébec, in turn, owns TransÉnergie, the likely shipper on the Project.[63]

Yet despite the detrimental effects caused by allowing indirect subsidies and the clear intention of the Project's likely anchor tenant to seek these very subsidies in some form, the RD inexplicably rejects IPPNY's argument in a single sentence that completely skirts the issue, stating:[64]

> In reality, if Hydro-Québec succeeds in securing a contract as a result of its RFI submission, the resulting contract, at best, will be evidence that two parties were able to agree on terms that were mutually agreeable and presumably mutually beneficial.[65]

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[60] RD at 70.

[61] *See* IPPNY Initial Brief at pp. 52-53.

[62] Exh. 197, Hydro-Québec Response to The New York Energy Highway Request for Information at 7 (emphasis added).

[63] Exh. 197 at 1.

[64] *See* RD at 67-71.

[65] RD at 70.

Unfortunately, that is not the point. IPPNY has no doubt that a contract entered into between HQ and some New York entity may very well be beneficial to its parties. The more salient point is that because the Project is so uneconomic and must therefore command extremely high prices for transmission service, the contract for the sale of power transmitted over the Project will necessarily be above-market and discriminatory. The Project will therefore be detrimental to consumers, who will not be a party to its execution but nonetheless will be required to foot the bill.

Imposing a condition that only prohibits direct subsidies without also proscribing indirect subsidies is clear error. The same logic that necessitates imposing the condition to avoid the same resultant harm and adequately protect New York consumers applies equally to both direct and indirect subsidies. If existing resources are either not able to participate in the procurement process at all or are, in some material respect, hampered in their participation by the discriminatory nature of the process, the resulting contract will not be consistent with market value but will instead yield above-market prices. The best, then, that such a discriminatory process could hope to produce would be the least expensive of a selection of uneconomic, above-market options.

If the Project depends on a discriminatory procurement process that favors its principal shipper, the Project is not "merchant" in the exact same way and for the same reasons as if the discriminatory process had favored the Project's Certificate holder itself. Therefore, if proposed Certificate Condition 15—recommended by the ALJs—is necessary to ensure that the Project operates on a merchant basis, it follows that any Certificate for the Project should extend that condition's prohibition to all parties associated with the Project, including shippers, to guard against both indirect and direct subsidization.

The application of proposed Certificate Condition 15 to all parties, including shippers, is necessary to guarantee that the Project truly operates on a merchant basis. Such application of the condition will help ensure that, in fact, the Project earns all of its revenues exclusively from the competitive market where both existing and new suppliers compete on a level playing field. Revising the Certificate Condition in this manner will also mean that the Project's investors, rather than New York's consumers, bear the risk of recovering the Project's construction and operating costs, as is appropriate for a truly merchant project. Finally, the benefits of true market-based competition will redound to energy consumers in the form of lower prices. Therefore, in the event that the Commission finds that it may grant a Certificate to the Project, it should require the Applicants to revise proposed Certificate Condition 15 to specify that it shall apply to all parties, including shippers, to prohibit both direct and indirect subsidization of the Project's costs.

III. THE COMMISSION SHOULD REJECT THE ALJS' ERRONEOUS RELIANCE ON ASSUMPTIONS CONTAINED IN THE 2012 RNA AND FIND THAT THE PROJECT IS NOT NEEDED.

The ALJs erred by relying on the 2012 Reliability Needs Assessment and certain assumptions contained therein. The NYISO performs the Reliability Needs Assessment ("RNA") every two years as the first of two phases that make up the reliability planning aspects of its comprehensive system planning process. The second phase of this process examines more recently updated load and system information to confirm whether the needs identified in the RNA continue to exist. The NYISO then solicits market responses to identified needs and determines whether actions are required to address those needs. Whether the NYISO will determine that any actions are required depends, in part, upon how far into the future an identified need arises. For example, needs identified in the latter half of the ten years studied

only require submission of conceptual proposals and do not likely require any action. Where, as here, an RNA study's results are based on assumptions that mothballed units will permanently retire, such needs may be eliminated in the second phase of the study—the Comprehensive Reliability Plan ("CRP")—if those units withdraw their mothball notices and re-enter the market.[66] Moreover, if an RNA does make such assumptions for planning purposes, the proposed return of some or all of these facilities can be submitted as a market response and eliminate the reliability need entirely. The most recently conducted RNA, then, may not be truly indicative of actual reliability needs because it has not yet undergone the second phase of the CRP process and incorporated the relevant modifications.

In the RD, the ALJs conceded that "relevant precedent establishes that the most recent RNA is not automatically dispositive."[67] Nevertheless, the ALJs relied solely on the 2012 RNA offered by the Applicants as evidence of need despite the fact that the 2012 CRP had not yet been issued. Indeed, DPS Staff relied on many of the 2012 RNA's assumptions to support its claim that a reliability need exists for the Project without regard to the fact that those assumptions were merely scenarios studied by the NYISO to provide an outer bound to potential impacts. These assumptions include the permanent retirement of mothballed facilities, higher than expected load growth, environmental initiatives and zones at risk, the retirement of the Indian Point facility retirement, and an increasing reliance on Special Case Resources.

A generator's notice that it will mothball a plant is significantly different from a retirement notice. Notably, a generator that has mothballed a plant is under no obligation to retire that plant. Once a plant is permanently retired, it cannot contribute generation capacity to

[66] This has been the case for the Astoria Generating Company Gowanus 1 and 4 generating units discussed *infra*.
[67] RD at 29.

the system. When, however, an owner merely mothballs its facility, the owner may repower the plant and resume generating power if it becomes economically feasible to do so. As capacity prices increase, therefore, mothballed plants can be expected to reenter the market. Indeed, many of the mothballing notices submitted to the Commission expressly reference their intent to return to the market when market prices increase. For example, Astoria Generating Company, L.P. ("AGC") expressed an intent to re-enter the market in its mothball notice filed on December 14, 2011, for its Astoria Steam Station Unit 20 and Gowanus Barges 1 and 4, totaling 268 MW.[68] Subsequently, AGC notified the Commission that, at all times between its December 14 Notice to present, the Gowanus Barge 1 and 4 units had continued operation and it no longer proposed to mothball the units.[69] Likewise, system conditions can require the ongoing operation of a facility even when it remains uneconomic. For example, two of the Dunkirk facilities and the Cayuga facilities that had submitted notices of their respective intention to mothball remain in operation today.[70]

Nevertheless, the Applicants' witness Ms. Julia Frayer reached her conclusions concerning reliability needs only by assuming that plants which had merely filed a mothballing notice were permanently retired. Moreover, several of the units that Ms. Frayer assumed were retired had filed neither mothballing nor retirement notices. Most surprisingly, Ms. Frayer acknowledged that one of the generators she modeled as having already retired had actually rescinded its mothball notice prior to the completion of her testimony:

[68] Case 05-E-0889, *Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Requirements*, Notice of Intent to Mothball (Dec. 14, 2011).

[69] Case 05-E-0889, *Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generation Unit Requirements*, Notification of Intent to Withdraw Retirement Notification (Aug. 3, 2012).

[70] *See* Case 12-E-0136, *Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements*, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (Aug. 16, 2012); Case 12-E-0400, *Petition of Cayuga Operating Company, LLC to Mothball Generating Units 1 and 2*, Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery (December 17, 2012).

Q. Going backwards for a second, page 13, lines 5 through 7, you list some of the generation that [you] assume to be retired in your modeling. Isn't it true that a generator owner has no obligation to retire its facility after it submits the retire mode to the PSC and New York ISO?

A. Yes. I believe a generator has a time frame within which it can start up again.

Q. What is the time frame?

A. I believe it's three years.

Q. Can you explain what the three-year time frame is?

A. The three-year time frame relates to the expiration of its CARIS rights, capacity rights.

Q. And, isn't it true that a generator, prior to the expiration of three years, could come back on line and sell capacity and then mothball it again, thus resetting the three-year CARIS rights?

A. Hypothetically, yes. If it makes sense economically to come back, it could.

Q. Isn't it true that except for BB station, Standard Binghamton, site Massena, Far Rockaway, Glenwood, and D.F. Barrett, all generator owners submitted notices to mothball their facilities in your list on page 15?

A. Yes. I think that is accurate.

Q. Do you know whether any of these plants that submitted a mothball notice have permanently retired or changed their mothball notice to a permanent retirement?

A. I don't know off the top of my head. I don't think so.

Q. Do you know if you checked before you wrote your testimony?

A. Before I wrote the testimony there were no changes in the mothballing.

Q. Isn't it true that site Massena rescinded its notice to retire?

A. I'm not aware.

Q. Look at footnote 13 on page 13. You have a citation to the rescission there.

A. Yes, sorry.

Q. So, you consider Site Massena to be retired; correct?

A. I believe I do consider Massena retired.[71]

In light of the erroneous assumptions regarding plant retirement on which the Applicants' assessment of reliability needs was based, it follows that the ALJs' reliance on that assessment was also in error.

Nor does the 2012 RNA's Zones at Risk analysis support a finding of need for the Project. That analysis found that one could eliminate as much as 1,000 MW of capacity from the Lower Hudson Valley (NYISO Load Zones G – I), NYC (Zone J) or Long Island (Zone K) before reliability violations would occur. Similarly, the retirement of Indian Point and the resulting reliability violation in 2016 is highly speculative. As Mr. Younger established, the owners of Indian Point have filed all necessary papers with the Nuclear Regulatory Commission to renew the operating licenses and have continuously and publicly indicated their intent to continue facility operations. Clearly neither of these scenarios supports a determination that there are reliability needs on the system.[72]

Finally, DPS Staff and the ALJs erroneously relied on the 2012 RNA's assumption that Special Case Resource ("SCR") registration might decline over time which would support the need for the Project.[73] There is no evidence that this is probable or even likely. As Mr. Younger

[71] Tr. 368-370.

[72] *Id.* at 439.

[73] *Id.*

explained, history shows that such a decline—should it occur—would not be significant enough in terms of MW and would not likely occur over a short enough time period to produce a reliability need.[74] Mr. Younger pointed out that SCR participation in the NYISO markets has generally increased even while capacity market clearing prices have decreased. More significantly, any potential SCR decrease would likely happen gradually, allowing for a market solution to respond to any resulting need.[75]

Furthermore, other policy initiatives currently in place are likely to further reduce or eliminate any present reliability needs. For example, Mr. Younger testified that the 2010 RNA would have found an even lower reliability need if it had assumed that New York would meet its full '15 by 15' energy efficiency goal or if it had assumed that renewable generation would be added to the system to meet the State's Renewable Portfolio Standard ("RPS") goal of having renewable resources provide 30% of the State's retail consumption of electricity by 2015.[76] The 2009 Energy Plan stated that "[f]ull and timely implementation of the State's '15 by 15' program is projected to eliminate the need for any major reliability-driven infrastructure additions."[77] As Mr. Younger stated in his testimony, both of these State policy programs provide generous subsidies to meet the programs' goals, so it is reasonable to assume that these policy programs will provide significant benefits.[78]

[74] *Id.* It is important to note that, unlike existing generation assets (a/k/a "steel in the ground"), many SCR providers only provide a very small amount of MWs. Thus, to have an impact of any significance, a large number of individual SCR providers would all have to elect to discontinue participation simultaneously.

[75] *Id.*

[76] *Id.* at 437.

[77] Energy Infrastructure Issue Brief, New York State Energy Plan 2009 at 1 (Dec 2009), available at: http://www.nysenergyplan.com/final/Energy_Infrastructure_IB.pdf.

[78] Tr. 437.

All told, it is clear that the high degree of speculation and quantity of unwarranted assumptions contained in the 2012 RNA made that study a less reliable source for the ALJs' determination of reliability need than the 2010 RNA examined by IPPNY and its witness. In any event, unlike the NYISO's 2010 reliability planning process that ended with the 2010 RNA, the NYISO's 2012 reliability planning process is not yet completed. The Commission should therefore reject the Applicants' request as it is neither economic, nor necessary to meet a system reliability need.

CONCLUSION

For all of the above reasons, as demonstrated by the extensive record evidence in this proceeding, IPPNY respectfully requests that the Commission reject the JP and deny the issuance of a Certificate to the Applicants for the Project. However, if the Commission nonetheless determines that a Certificate may be granted to the Project, IPPNY respectfully requests that the Commission require the Applicants to modify Certificate Condition 15-b to expressly proscribe the Project from securing, directly or indirectly, a subsidy in any form whatsoever and expressly dictating that the Project's Certificate will immediately be rendered null and void if such subsidization is secured.

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