

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Independent Power Producers of)	
New York, Inc.,)	
)	
Complainant,)	
)	Docket No. EL18-189-000
v.)	
)	
New York Independent System)	
Operator, Inc.)	
)	
Respondent.)	

**MOTION FOR LEAVE TO ANSWER AND ANSWER
OF INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ Independent Power Producers of New York, Inc. (“IPPNY”) respectfully seeks leave to answer² and submits this limited answer to the Answer of the New York Independent System Operator, Inc. (“NYISO”),³ the Protest of Linden VFT, LLC (“Linden VFT”)⁴ and the joint Protest of the New York Power Authority (“NYPA”) and Hudson Transmission Partners, LLC (“HTP,” collectively with NYPA, “NYPA/HTP” and

¹ 18 C.F.R. §§ 385.212, 385.213 (2018).

² Although the Commission’s procedural rules do not allow for answers to protests and answers as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, such answers will assist the Commission’s understanding of the record and its decisionmaking. *See, e.g., Southwest Power Pool, Inc.*, 154 FERC ¶ 61,279 at P 13 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,278 at P 6 (2016); *New York Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268, at P 17 (2016).

³ Docket No. EL18-189-000, *Indep. Power Producers of N.Y. v. N.Y. Indep. Sys. Operator, Inc.*, Answer of New York Independent System Operator, Inc. (Aug. 20, 2018) (“NYISO Answer”).

⁴ Docket No. EL18-189-000, *supra*, Protest of Linden VFT, LLC (Aug. 20, 2018) (“Linden VFT Protest”).

collectively with the NYISO and Linden VFT, the “Opponents.”)⁵ filed in response to IPPNY’s July 31, 2018 complaint in this proceeding.⁶ Given the ample record evidence of the ongoing substantial harm to reliability and harm to both the PJM Interconnection, L.L.C. (“PJM”) and NYISO markets from continued ineligible sales of installed capacity (“ICAP”) from PJM into New York (NYISO New York City ICAP zone) and the NYISO’s clear statements in its Answer that it will not comply with its tariff to prohibit such sales, IPPNY respectfully requests that the Commission expeditiously issue an order granting IPPNY’s Complaint and directing the NYISO to comply with its tariff and prohibit resources in the PJM market from scheduling ICAP withdrawals to New York City across the two Merchant Transmission Facilities⁷ (“MTFs”) that elected to convert their Firm Transmission Withdrawal Rights (“Firm TWRs”) to Non-Firm Transmission Withdrawal Rights (“Non-Firm TWRs”) at the end of last year (“Conversion”).

In their answer and protest, the NYISO and Linden VFT argued that, pursuant to North American Electric Reliability Corporation’s (“NERC”) and North American Energy Standards Board’s (“NAESB”) Transmission Loading Relief (“TLR”) Procedure, Firm TWRs are not required to withdraw firm energy and ICAP from PJM across an MTF to Zone J because these rules base curtailment priority *solely* on the firmness of the Point-to-Point Transmission Service from points within PJM to the MTF’s Point of Receipt (“POR”), *i.e.*, the PJM side of the MTF.⁸ Linden VFT, NYPA and HTP additionally argued in their protests that the PJM OATT provides that curtailment priority of service over an MTF is based *solely* on the firmness of the Point-to-

⁵ Docket No. EL18-189-000, *supra*, Protest of the New York Power Authority and Hudson Transmission Partners, LLC (Aug. 20, 2018) (“NYPA/HTP Protest”).

⁶ Docket No. EL18-189-000, *supra*, Complaint Requesting Fast Track Processing (July 31, 2018) (the “Complaint”).

⁷ This and other capitalized terms herein have the meanings given in the PJM Open Access Transmission Tariff (the “PJM OATT”) and the NYISO’s Market Administration and Control Area Services Tariff (the “Services Tariff”).

⁸ NYISO Answer at 17; Linden VFT Protest at 9-11.

Point Transmission Service from points within PJM to the MTF's POR (again, on the PJM side of the interface), and thus, TWRs (whether Firm or Non-Firm) have no relevance to the firmness of capacity sales and associated curtailment priority.⁹

NYPA and HTP argued in their protest that Firm TWRs are not required for an MTF customer to be eligible under the NYISO Services Tariff to withdraw firm energy and ICAP from PJM to Zone J. They argued that customers can schedule Firm Reservations to deliver firm energy and ICAP to Zone J over MTFs with only Non-Firm TWRs because TWRs are an interconnection service, not a transmission service, and nothing in the PJM OATT requires a customer to have Firm TWRs to make a Firm MTF Reservation to schedule Firm transmission service across an MTF to Zone J.¹⁰

As discussed below and in the Answering Affidavit of Mr. Thomas Piascik, attached as Exhibit A hereto, the Commission should reject the Opponents' arguments and grant IPPNY's Complaint. As cited by IPPNY in its Complaint, the Commission ruled last December and reaffirmed this past May in three separate proceedings that, for the Linden VFT and HTP MTFs to avoid their respective RTEP cost allocations, PJM, post-Conversion, would be authorized to curtail energy deliveries from PJM to Zone J over these MTFs if the energy is needed to serve load, to address a reliability or operational issues, or for economics on the PJM system (hereinafter referred to as the "Non-Firm Service Subject to Curtailment Ruling" or the "Ruling").¹¹

⁹ Linden VFT Protest at 14; NYPA/HTP Protest at 15.

¹⁰ NYPA/HTP Protest at 10, 12-13.

¹¹ *Linden VFT, LLC v. Pub. Serv. Elec. & Gas Co. & PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,264, at P 25 (2017), *settlement judge procedures established*, 164 FERC ¶ 61,034 (2018) ("Linden VFT TWR Proceeding" and "Linden VFT TWR Order," respectively); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262, at P 43 (2017), *settlement judge procedures established*, 164 FERC ¶ 61,034 (2018) ("HTP TWR Proceeding" and "HTP TWR

The Commission's Ruling is dispositive to this case. Linden VFT, NYPA and HTP were all parties to the Linden VFT TWR and HTP TWR Proceedings and all of the Opponents were parties to the NJBPU Complaint Proceeding. None of the Opponents sought rehearing or clarification of the Ruling.

Linden VFT and HTP elected to convert the Firm TWRs for their MTFs to Non-Firm TWRs at the end of last year to avoid their respective RTEP transmission upgrade cost allocations and must now accept this lower form of non-firm service and, with it, can no longer provide its customers with the ability to sell ICAP from PJM to New York City across these MTFs. As IPPNY demonstrated in its Complaint, the NYISO's Services Tariff requires that external resources that seek to use MTFs to deliver ICAP from PJM to New York City must demonstrate that service over the MTFs must not be subject to curtailment by PJM. Thus, it is now incontrovertible that resources seeking to use Linden VFT's and HTP's MTFs to withdraw ICAP from PJM into New York City are subject to recall or curtailment by PJM and are therefore not able to qualify under the NYISO's Services Tariff to sell ICAP into New York City.

Therefore, the Commission should reject the Opponents' arguments because the NYISO's claims directly contravene the Commission's Linden VFT TWR and HTP TWR Orders while Linden VFT, NYPA and HTP are collaterally estopped from challenging these two Orders. Likewise, the Opponents' arguments that Firm TWRs are not required for firm service over MTFs from PJM to New York City and therefore resources in PJM are eligible to deliver ICAP over MTFs without Firm TWRs are an impermissible collateral attack on the

Order," respectively); *N.J. Bd. Of Pub. Utilities v. PJM Interconnection, L.L.C. et al.*, 163 FERC ¶ 61,139, at P 59 (2018) (rehearing pending) ("NJBPU Complaint Proceeding" and "NJBPU Order," respectively).

Commission's NJBPU Order. The Commission should also rule that Linden VFT and NYPA/HTP are barred under the doctrine of judicial estoppel from arguing that their MTFs can continue to deliver firm ICAP and energy from PJM to Zone J post-Conversion because their arguments now are entirely inconsistent with the arguments they made to the Commission last year which formed a basis for the Commission's Ruling.

If the Commission does not reject the Opponents arguments for the reasons discussed above, the Commission should reject them on their merits because the Opponents have misinterpreted the NERC TLR Procedures and PJM OATT. First, contrary to the Opponents arguments, as a threshold matter, the PJM OATT clearly establishes that ICAP cannot be delivered over an MTF to an external control area unless the MTF has Firm TWRs. Second, curtailment priority over an MTF with Non-Firm TWRs is equivalent to curtailment priority of Non-Firm Point-to-Point Service. Third, NERC's TLR Procedures are not the sole authority for PJM curtailment decisions; PJM has a separate obligation to curtail service over these MTFs for reliability on its system under its tariff and by Commission order. Fourth, even if, *arguendo*, Opponents were correct that PJM could curtail only pursuant to NERC's TLR Procedures, curtailment of service over an MTF with Non-Firm TWRs would be subject to TLR Level 3 curtailment priority as the Commission previously has correctly ruled, not Level 5 as argued by the Opponents.

I. THE COMMISSION SHOULD REJECT OPPONENTS' ARGUMENTS BECAUSE THEY DIRECTLY CONTRAVENE PAST COMMISSION ORDERS, THEY ARE AN IMPERMISSIBLE COLLATERAL ATTACK ON COMMISSION ORDERS AND THEY ARE BARRED UNDER THE DOCTRINE OF JUDICIAL ESTOPPEL.

In the NYISO Answer and Linden VFT and NYPA/HTP Protests, the Opponents argued that Firm TWRs do not define the firmness and curtailment priority of transmission service across an MTF and are not needed for a customer to deliver firm energy and ICAP across the

Linden VFT MTF from PJM to NYISO Zone J.¹² As discussed below, the Opponents' arguments directly contravene the Commission's Non-Firm Service Subject to Curtailment Ruling, a ruling for which Linden VFT, NYPA and HTP zealously advocated in numerous pleadings to the Commission, relevant parts of which are quoted below in Point C. In addition, as the time to seek rehearing of the Non-Firm Service Subject to Curtailment Ruling has long expired, the Commission should rule the Linden VFT and NYPA/HTP arguments are an impermissible collateral attack on the Linden VFT TWR and HTP TWR Orders and Opponents arguments are an impermissible collateral attack on the NJBPU Order, all of which are barred by the doctrine of collateral estoppel. The Commission should also rule that Linden VFT, HTP and NYPA are barred by the doctrine of judicial estoppel from challenging the Ruling because they made contrary arguments to the Commission on which the Commission relied in ruling that these MTFs could avoid hundreds of millions of dollars in RTEP transmission upgrade cost allocations if they elected to convert their Firm TWRs to Non-Firm TWRs and accept a lower form of service subject to curtailment for reliability, operational problems or economic reasons in New Jersey or elsewhere on the PJM system.

A. The Opponents' Arguments Directly Contravene Commission Orders.

In the Linden VFT TWR and HTP TWR Proceedings, the Commission fully addressed the quid pro quo that must follow as a necessary corollary to allowing Linden VFT and HTP to avoid hundreds of millions of dollars in RTEP cost allocations. Specifically, finding in the Linden VFT TWR Order that the Conversion would impose no additional obligation on PJM and in fact was less burdensome in that "PJM will no longer have to guarantee that its transmission system can support such use," the Commission held, post-Conversion, "PJM can shut off flows if

¹² NYISO Answer at 17; Linden VFT Protest at 9-11; NYPA/HTP Protest at 12-13.

those flows jeopardize reliability or cause operational problems in New Jersey or elsewhere on the PJM system.”¹³ The Commission further established, “[a]s of the effective date of Linden’s conversion of its Firm TWRs to Non-Firm TWRs, PJM is no longer required to provide firm service and can curtail non-firm service whenever necessary to preserve reliability.”¹⁴ The Commission’s determinations in the HTP TWR Proceeding and rejecting the NJBPU and Independent market Monitor’s (“IMM”) arguments in the NJBPU Complaint Proceeding mirror these findings.¹⁵

While the NYISO was clearly aware of the Linden VFT TWR and HTP TWR Orders given that it referenced the Conversions pursuant to these Orders in its Answer,¹⁶ the NYISO otherwise ignored the Linden VFT TWR and HTP TWR Orders entirely. It did not attempt to address, much less rebut, IPPNY’s demonstration that the Commission’s determinations in these Orders are dispositive to the issues raised in this proceeding, and thus, the NYISO is prohibited from permitting capacity sales from PJM to New York City over the Linden VFT MTF. Likewise, as demonstrated in Point B *infra*, its faulty reasoning that the Commission’s determinations in the NJBPU Order constituted *dicta* do not withstand scrutiny. The NYISO has flouted three Commission orders that clearly established ICAP deliveries over the Linden VFT MTF (and, for that matter, the HTP MTF were such sales ever to occur without being mitigated) are subject to curtailment for reliability, operational problems or economics thereby harming the PJM and NYISO markets and needlessly laying both systems exposed to increased reliability

¹³ See Linden VFT TWR Order at P 25.

¹⁴ *Id.* at P 32.

¹⁵ See HTP TWR Order at P 50; NJBPU Order at PP 56, 59, n.100. As noted *supra*, the Commission’s determinations in these three proceedings are collectively referred to herein as the Ruling.

¹⁶ See NYISO Answer at 8.

risks. Its actions cannot be sanctioned. Thus, the Commission expeditiously should issue an order directing NYISO to correctly apply its Services Tariff and proscribe further ICAP sales from PJM to New York City across the Linden VFT MTF.

B. The Opponents Are Barred By The Doctrine of Collateral Estoppel From Seeking to Relitigate the Commission’s Non-Firm Service Subject to Curtailment Ruling.

The doctrine of collateral estoppel bars the Opponents from relitigating the Commission’s Non-Firm Service Subject to Curtailment Ruling. “Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided provided the issue was actually litigated and determined, and the determination was essential to that judgment.”¹⁷ “In the absence of new or changed circumstances requiring a different result, ‘it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.’”¹⁸ The Commission has ruled that “[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.”¹⁹

The Opponents’ assertions that Firm TWRs are not needed for an MTF to deliver firm ICAP and energy to New York City essentially argue that the Commission was wrong in its HTP TWR, Linden VFT TWR and NJBPU Orders that service over an MTF with only Non-Firm TWRs is non-firm service subject to curtailment and interruption. For example, citing to the paragraph of the NJPBU Order in which the Commission reaffirmed its Ruling, NYPA/HTP

¹⁷ *Entergy Servs., Inc.*, 127 FERC ¶ 61226, at P 10 n. 12 (2009) (citing *Norfolk and Western Ry. Co. v. United States*, 768 F.2d 373 at (D.C. Cir. 1985)).

¹⁸ *Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 40 (2007).

¹⁹ *Coral Power L.L.C. et al*, 125 FERC ¶ 61,176, at P 13 (2008).

clearly recognized that their arguments were contrary to the Commission’s Non-Firm Service Subject to Curtailment Ruling: “[c]ontrary to IPPNY’s claims and past statements from the Commission, Path 2 service on the MTF under a Firm Reservation enjoys TLR 5 status when paired with long-term firm point-to-point service acquired to the MTF on Path 1, and cannot be curtailed by PJM in favor of PJM load.”²⁰

The NYISO also recognized in its Answer that its arguments were contrary to the Commission’s Non-Firm Service Subject to Curtailment Ruling but attempted to cast the Commission’s ruling, at least in the NJBPU Proceeding, as “non-binding *dicta*,” that addressed an issue found outside the scope of the proceeding.²¹ The NYISO’s argument is nonsense. The only issue that IPPNY raised in its comments on the NJBPU’s complaint that the Commission determined was beyond the scope of the NJBPU’s complaint was whether the NYISO violated its Services Tariff by allowing the import of ICAP over MTFs with Non-Firm TWRs.

Contrary to the NYISO’s argument, the Commission’s reaffirmation of, and reliance on, its Non-Firm Service Subject to Curtailment Ruling in Paragraphs 56 and 59 of the NJBPU Order addressed core issues resolved in the NJBPU Complaint; by definition, it is most assuredly not *dicta*. Specifically, in Paragraph 56, the Commission’s Ruling was determinative in its rejection of the NJBPU’s argument made in its complaint that the PJM Tariff is unjust and unreasonable because PJM’s cost allocation provisions in Schedule 12 of its OATT do not allocate costs to Linden VFT and HTPs MTFs. The Commission ruled that Schedule 12 is just

²⁰ NYPA/HTP Protest at 15 (emphasis added). Initially NYPA and HTP implied that the Non-Firm Subject to Curtailment Ruling was not relevant to whether their MTFs are eligible to deliver ICAP to NYISO. See NYPA/HTP Protest at 8 (asserting that “IPPNY bases its conclusion entirely on generic definitions of Firm and Non-Firm service, as well as statements from Commission orders that were not made in the context of assessing ICAP eligibility under the NYISO Tariff.”).

²¹ As noted *supra*, the NYISO did not address the Commission’s determinations in the Linden VFT TWR and HTP TWR Orders.

and reasonable because it appropriately allocates costs only with respect to a firm service that PJM must plan its system to provide, and Linden VFT's and HTP's conversion from Firm TWRs to Non-Firm TWRs meant that their service is now non-firm.²² Specifically, the Commission ruled:

We do not find these provisions unjust and unreasonable. The Merchant Transmission Facilities and Con Edison no longer have firm transmission service, as Linden and Hudson have converted their Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights and Con Edison has terminated its firm transmission service agreements. PJM, as a result, can curtail or interrupt Linden's and Hudson's service into NYISO when such service degrades or impedes the reliability of the system or for economic reasons because they are now using either non-firm transmission service or Non-Firm Transmission Withdrawal Rights. And since PJM does not plan its system to provide transmission service for these now non-firm transmission service and Non-Firm Transmission Withdrawal Rights customers, it will no longer need to plan and develop its system to guarantee non-interruptible service over these lines. Schedule 12 of the PJM Tariff, therefore, appropriately does not directly allocate Transmission Enhancement Charges to Linden and Hudson because they either no longer hold Firm Transmission Withdrawal Rights, or are no longer assigned cost responsibility pursuant to the PJM Tariff because the Con Edison transmission service agreements have been terminated.²³

If the Commission had accepted the Opponents' arguments made for the first time in response to IPPNY's Complaint that deliveries over Linden VFT continue to be firm despite its relinquishment of Firm TWRs, the Commission would likely have granted this aspect of the NJBPU's complaint.

Similarly, the Commission's reaffirmation of, and reliance on, its Non-Firm Service Subject to Curtailment Ruling in Paragraph 59 and footnote 100 of the NJBPU Order is not *dicta*

²² NJBPU Order at P 56.

²³ *Id.* (citations omitted).

because it was determinative to the Commission’s rejection of the IMM’s arguments and the NJBPU Complaint. In the first three sentences of Paragraph 59, the Commission rejected the IMM’s arguments in support of NJBPU’s complaint “that the PJM Tariff is unjust and unreasonable to the extent that it permits Linden’s use of firm transmission service along with Non-Firm [TWRs] in the same manner as if Linden retained its Firm [TWRs].”²⁴ The IMM raised this argument to the extent that the PJM OATT, by its terms, would allow Linden VFT to escape RTEP cost allocation by converting to Non-Firm TWRs even though Linden VFT would continue to have firm service for deliveries over its MTF from PJM to NYISO Zone J. Its argument, if granted, would have required an amendment to Schedule 12 to impose RTEP cost allocation on Linden VFT if, in fact, service over its MTF continued to be firm despite its loss of Firm TWRs.

The Commission rejected the IMM’s argument by reaffirming its Non-Firm Service Subject to Curtailment Ruling that the service would be non-firm subject to curtailment if Firm TWRs were relinquished. The Commission ruled:

The premise of these arguments is that Merchant Transmission Facilities can receive the same service and benefits by subscribing to firm transmission service to the PJM border as they did when they held Firm Transmission Withdrawal Rights, without receiving an RTEP cost allocation. We do not agree with this premise. As we have explained in our prior orders, the Linden and Hudson conversion of Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights means that PJM can curtail or interrupt the withdrawal service for reliability and economic reasons, irrespective of the priority of any upstream firm transmission service.²⁵

²⁴ *Id.* at P 58.

²⁵ *Id.* at P 59 (citing Linden VFT TWR Order at PP 25, 32 (“[T]he Linden facility is fully controllable by PJM so that PJM can shut off flows if those flows jeopardize reliability or cause operational problems in New Jersey or elsewhere on the PJM system.”)).

The Commission further ruled:

[U]nder the PJM Tariff, withdrawals scheduled using Non-Firm Transmission Withdrawal Rights have rights similar to those scheduled using non-firm point-to-point transmission service. Thus, while Firm Transmission Withdrawal Rights are subject to TLR level 5 curtailment priority, Non-Firm Transmission Withdrawal Rights are subject to TLR level 3 curtailment priority.²⁶

Thus, the issue of whether the Conversion of Firm TWRs to Non-Firm TWRs “means that PJM can curtail or interrupt the withdrawal service for reliability and economic reasons, irrespective of the priority of any upstream firm transmission service” was “actually litigated and determined, and the determination was essential” to the Commission’s ruling on the NJBPU’s complaint.

Indeed, as noted *supra*, the only part of Paragraph 59 in which the Commission responded to IPPNY’s comments is the last sentence: “Whether parties holding upstream firm transmission service and Non-Firm Transmission Withdrawal Rights can receive capacity payments from the NYISO can be determined only by examination of the NYISO tariff and is outside the scope of this complaint.”²⁷ It is absurd to argue that this sentence means that the Commission’s Non-Firm Subject to Curtailment Ruling reaffirmed in Paragraph 56 and in the first three sentences of Paragraph 59 and footnote 100 is *dicta*.

The NYISO also asserted in its Answer that “[w]hile the NYISO certainly considered the Commission’s earlier statements, the NYISO concluded that they reflected non-binding *dicta*, and did not impact the application of the TLR Procedure to the Zone J MTFs or the implications

²⁶ *Id.* at P 59 n.100 (citations omitted).

²⁷ *Id.* at P 59.

under Section 5.12.2.1 of the Services Tariff.”²⁸ It is unclear what “earlier statements” the NYISO intended to reference, but to the extent that the NYISO is referring to the Commission’s Non-Firm Service Subject to Curtailment Ruling that it established in its Linden VFT TWR and HTP TWR Orders, that Ruling is clearly not non-binding *dicta* in those orders. The Commission’s Ruling in its Linden VFT TWR and HTP TWR Orders was the basis for its decision that RTEP costs should not apply to MTFs that relinquish their Firm TWRs in those orders because the owners of these MTFs have accepted a lower form of service subject to curtailment for reliability, operational problems or economics, just as it was in its NJBPU Order.

The main point in IPPNY’s comments on the NJBPU Complaint was that, due to the Non-Firm Service Subject to Curtailment Ruling, which the Commission made in its HTP and Linden VFT TWR Orders, deliveries over Linden VFT’s and HTP’s MTFs are non-firm subject to curtailment and therefore do not qualify as ICAP under the NYISO Services Tariff. The NYISO, NYPA, HTP and Linden VFT all filed answers in opposition to IPPNY’s comments.²⁹ They had the opportunity to rebut IPPNY’s argument by arguing that the Non-Firm Service Subject to Curtailment Ruling was incorrect, but they chose not to do so. The NYISO merely argued that IPPNY was incorrect that deliveries would not qualify as ICAP without providing any explanation or making any attempt to challenge the accuracy and completeness of the facts that supported the Commission’s Ruling.³⁰

²⁸ NYISO Answer at 20.

²⁹ Docket No. EL18-54-000, *supra*, Motion for Leave to Answer and Answer of the New York Power Authority (Mar. 12, 2018); Docket No. EL18-54-000, *supra*, Motion for Leave to Answer and Answer of Hudson Transmission Partners, LLC (Mar. 12, 2018); Docket No. EL18-54-000, *supra*, Motion for Leave to Answer and Answer of Linden VFT, LLC (Mar. 12, 2018); Docket No. EL18-54-000, *supra*, Answer to Comments of the New York Independent System Operator, Inc. (Mar. 12, 2018) (“NYISO Answer to Comments”).

³⁰ NYISO Answer to Comments at 5-6.

None of the Opponents requested rehearing or clarification of the Commission’s Non-Firm Service Subject to Curtailment Ruling. None of the Opponents requested rehearing or clarification of the Commission’s rulings in paragraphs 56 and 59 of its NJBPU Order that, due to the conversion from Firm TWRs to Non-Firm TWRs, PJM “can curtail or interrupt [Linden VFT’s and HTP’s] service into NYISO when such service degrades or impedes the reliability of the system or for economic reasons because they are now using either non-firm transmission service or Non-Firm Transmission Withdrawal Rights,” PJM “will no longer need to plan and develop its system to guarantee non-interruptible services over these lines,” and “[a]s we have explained in our prior orders, the Linden and Hudson conversion of Firm Transmission Withdrawal Rights to Non-Firm Transmission Withdrawal Rights means that PJM can curtail or interrupt the withdrawal service for reliability and economic reasons, irrespective of the priority of any upstream firm transmission service.”³¹ As the time to seek rehearing of the Linden VFT TWR, HTP TWR and NJBPU Orders has long expired, the Opponents are too late to challenge the Ruling now for the first time in their responses to IPPNY’s Complaint and, thus, Linden VFT and NYPA/HTP’s challenge is an impermissible collateral attack on the Linden VFT TWR and HTP TWR Orders and the arguments of all Opponents are an impermissible collateral attack on the NJBPU Order, all of which are barred by the doctrine of collateral estoppel.³²

The Commission should reject any attempt by the Opponents to claim that “new or changed circumstances” require the Commission to reverse or ignore its Non-Firm Service

³¹ NJBPU Order at P 56.

³² See *California Independent System Operator Corp.*, 104 FERC ¶ 61,128, at P 13 (2003) (rejecting arguments that could have been made on rehearing, but were not, as an impermissible collateral attack on the Commission’s prior order on rehearing); *Utilicorp United Inc.*, 93 FERC ¶ 61,303, 62,046 (2000) (holding that the failure of a party to seek rehearing of a determination made by the Commission in a prior order bars that party from challenging the Commission’s determination at a later phase in the proceeding).

Subject to Curtailment Ruling in the context of IPPNY’s Complaint. The NYISO acknowledged that the Commission did not agree that “Merchant Transmission Facilities can receive the same service and benefits by subscribing to firm transmission service to the PJM border as they did when they held Firm Transmission Withdrawal Rights, without receiving an RTEP cost allocation.”³³ The NYISO quoted the Commission’s ruling in paragraph 59 of its NJBPU Order that “the Linden and Hudson conversion of Firm [TWRs] to Non-Firm [TWRs] means that PJM can curtail or interrupt the withdrawal service for reliability and economic reasons, irrespective of the priority of any upstream firm transmission service.”³⁴ The NYISO asserted that “it appears that the Commission may not have been aware that in the application of NERC’s TLR Procedure to the Zone J MTFs it is the firmness of ‘out service’ not ‘facility service’ that is controlling.”³⁵ The NYISO further asserted that “[t]he views expressed by the Commission concerning the relationship between TWRs and curtailment priorities did not have the benefit of a factual record demonstrating the fact that the firmness of the TWRs would not be taken into account when PJM evaluates transactions across the Zone J MTFs under the NERC TLR Procedure. The NJBPU Order did not address these details.”³⁶

The NYISO, Linden VFT, HTP and NYPA, which now attack the Commission’s Non-Firm Service Subject to Curtailment Ruling for the first time in their answer and protests to IPPNY’s Complaint, were all parties to the NJBPU Complaint docket and all had a full and fair opportunity to raise this “factual record”³⁷ in their comments in the NJBPU docket, either in

³³ NYISO Answer at 19 (quoting NJBPU Order at P 59 n. 100).

³⁴ *Id.* (quoting NJBPU Order at P 59).

³⁵ *Id.* at 20.

³⁶ *Id.*

³⁷ IPPNY demonstrates in Point II below that the Opponents’ arguments regarding this “factual record” are flawed and lack merit.

response to IPPNY's comments or in a rehearing request of the Commission's NJBPU Order. The Opponents made clear that their arguments in response to IPPNY's Complaint are contrary to the Commission's Ruling in the NJBPU Order, yet they chose not to seek rehearing of the Commission's order.

None of the Opponents asserted that their "factual record" of how curtailment is performed under NERC TLR Procedures over MTFs is new information that was not known prior to the Commission's establishment of its Non-Firm Service Subject to Curtailment Ruling in its Linden VFT TWR, HTP TWR and NJBPU Orders. As noted above, they had the opportunity to respond to IPPNY's argument by arguing that the Commission's Non-Firm Service Subject to Curtailment Ruling was incorrect in their comments or in requests for rehearing, but they chose not to do so. The NYISO merely made conclusory statements that IPPNY was incorrect that deliveries over the MTFs without Firm TWRs would not qualify as ICAP under the NYISO Services Tariff. The NYISO did not provide any explanation to support its statements or make any attempt to ensure that the Commission had the "benefit" of this "factual record." Nor did the Opponents even attempt to justify in their responses to IPPNY's Complaint their decisions not to raise this "factual record" in their comments in the NJBPU complaint proceeding or in requests for rehearing.

Linden VFT, HTP and NYPA also could have provided the Commission "the benefit" of this "factual record" in their numerous pleadings filed last year in multiple dockets in furtherance of their attempt to avoid allocation of RTEP costs to their MTFs. They chose not to do so for obvious reasons, because to do so would have short circuited their arguments that they should not be allocated RTEP costs. As demonstrated in their arguments quoted below in Section C, they argued to the Commission that conversion of their Firm TWRs to Non-Firm TWRs would

mean service over their MTFs would be non-firm subject to curtailment, which is the same position that IPPNY advocated in its Complaint and they now challenge. The Commission agreed with their prior arguments and its Non-Firm Service Subject to Curtailment Ruling was the basis for its decision that RTEP costs should not apply to MTFs that relinquish their Firm TWRs in its Linden VFT TWR, HTP TWR and NJBPU Orders.

The implications of the Commission accepting Opponents' arguments are significant. Assuming, *arguendo*, they are correct that service over an MTF with Non-Firm TWRs using Firm Point-to-Point service has the same firm curtailment priority as service over an MTF having Firm TWRs, it would effectively mean that Linden VFT's and HTP's conversion from Firm TWRs to Non-Firm TWRs was merely a change in name of the same service. It would mean that HTP, NYPA and Linden VFT were incorrect and misled the Commission in their arguments to the Commission to avoid RTEP cost allocation that relinquishment of their Firm TWRs would mean service over their MTFs would be non-firm subject to curtailment. It would mean that NYPA and HTP were wrong and misled the Commission in their assertions to the Commission that their rights to deliver ICAP to New York City would be lost if they converted their Firm TWRs to Non-Firm TWRs. Commission acceptance of the Opponents' arguments would also mean that the basis for the Commission's rulings in its HTP and Linden VFT TWR Orders that HTP and Linden VFT would avoid RTEP cost allocations by converting their Firm TWRs to Non-Firm TWRs was wrong, and, therefore, the Commission was wrong to rule that Linden VFT and HTP should not be allocated RTEP costs.

C. The Commission Should Rule that Linden VFT and HTP/NYPA Are Estopped from Changing Their Position Under the Doctrine of Judicial Estoppel and Reject Their Protests.

The United States Supreme Court ruled that the purpose of the doctrine of judicial estoppel is “to protect the integrity of the judicial process,” by prohibiting parties from

“playing ‘fast and loose with the courts’” by “‘deliberately changing positions according to the exigencies of the moment.’”³⁸ The Court ruled that while the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle, nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case.³⁹ “First, a party’s later position must be ‘clearly inconsistent’ with its earlier position.”⁴⁰ Second, “the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled.’”⁴¹ Third, “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”⁴²

The positions taken by Linden VFT and HTP/NYPA in their Protests in this proceeding indisputably meet all three of these factors. They are playing “fast and loose” with the Commission, and, therefore should be estopped from denying that delivery service over the Linden VFT and HTP MTFs that now only have Non-Firm TWRs is non-firm service subject to curtailment, and thus, these MTFs can no longer be used by entities in PJM to deliver ICAP to New York City. In desperate attempts to avoid their RTEP cost allocations which they alleged would put them out of business if they were required to pay them, all three parties argued last year in numerous pleadings to the Commission in various dockets challenging PJM’s RTEP cost allocation methodology that they should be permitted to convert their Firm TWRs to Non-Firm

³⁸ *New Hampshire v. Maine*, 532 U.S. 742, at 749-750 (2001) (citations omitted).

³⁹ *Id.* at 750 (citations omitted).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

TWRs because the conversion would reduce the quality of service over their MTFs to non-firm service which would be subject to curtailment and interruption by PJM. They argued that they should no longer be allocated RTEP costs because such costs apply only to firm service for which PJM must plan its system. They asserted to the Commission in their pleadings that even if they avoided the allocation of RTEP costs by converting from Firm TWRs to Non-Firm TWRs, the conversion would still be harmful to their businesses because service over their MTFs would be non-firm and therefore subject to curtailment and interruption by PJM. HTP and NYPA also asserted to the Commission that the loss of Firm TWRs would cause the HTP MTF to lose its right under the PJM OATT to be used to deliver ICAP to the New York City.

To demonstrate the utter duplicity in their positions, following below, IPPNY presents to the Commission a sampling of these arguments made by HTP, NYPA and Linden VFT, in their own words, to the Commission in numerous pleadings.

In its emergency motion for interim relief from a delegated Commission Staff order making effective proposed RTEP cost allocations that Linden VFT argued imposed significant costs on Linden VFT's MTF Linden VFT argued:

Linden VFT is facing imminent financial harm that cannot be cured by a later Commission order. Without facing insolvency, Linden VFT cannot continue to pay ever-increasing levies imposed by PJM arising as other parties give up transmission rights and their contributions are diverted onto it, particularly because Linden VFT will recognize not a single dollar of additional revenue as a result of BLC. To stop the bleeding, *Linden VFT will be forced to terminate its Firm Transmission Withdrawal Rights ("FTWRs"), which would be expected to significantly reduce the value of the service that Linden VFT provides.*⁴³

Linden VFT's Vice President testified that:

⁴³ Docket No. ER17-950-000, *PJM Interconnection, L.L.C.*, Emergency Motion for Interim Relief, Request for Rehearing and Settlement Judge Procedures, and Request for Shortened Response Period and Expedited Action of Linden VFT, LLC (May 24, 2017) at 2 (emphasis added).

If you compare Linden VFT's gross revenues from TSR holders to the RTEP charges that Linden VFT is facing as a direct result of the BLC Reallocation Order, Linden VFT is now suffering greater than \$1 million in losses per year, without even taking into consideration any of Linden VFT's operating and other administrative expenses identified above. Unless the Emergency Motion is granted quickly, these losses will be unsustainable and will either threaten Linden VFT's financial viability or require Linden VFT to change its business model and terminate its FTWRs, perhaps irrevocably. Consequently, Linden VFT is taking the necessary steps to avoid the BLC Reallocation, including filing the Emergency Motion and starting the process with PJM to terminate its FTWRs, *which would constitute a significant, harmful, and possibly permanent change to Linden VFT's business model.*⁴⁴

Similarly, in its comments in support of PJM's filing of an unexecuted Interconnection Service Agreement ("ISA") among PJM, Linden VFT and Public Service Electric and Gas Company ("PSEG") that amends the original ISA by reducing Linden VFT's Firm TWRs to Non-Firm TWRs, Linden VFT argued:

After all, Linden VFT's election to have a lesser level of interconnection service will *increase* Linden VFT's exposure to congestion and potential curtailments of its power withdrawals and *eliminate* the need for PJM to plan for those power withdrawals. In fact, Linden VFT believes the election may significantly reduce the value of its project.⁴⁵

In its September 8, 2018 complaint against Public Service Electric and Gas Company ("PSEG") and PJM in the Linden VFT TWR Proceeding seeking to convert the Linden VFT MTF's service level from Firm TWRs to Non-Firm TWRs, Linden VFT argued:

TWRs are akin to Point-to-Point Transmission Service, and the Tariff explicitly permits holders of Firm Point-to-Point Transmission Service to have Non-Firm Transmission Service. Moreover, Schedule 16 of the PJM Tariff specifically contemplates

⁴⁴ *Id.* Exhibit A, Affidavit of Mark Mellana at ¶ 6 (emphasis added).

⁴⁵ Docket No. ER17-2267-000, *PJM Interconnection, L.L.C.*, Supporting Comments of Linden VFT, LLC (Aug. 30, 2017) at 3.

Linden VFT offering customers service associated with Non-Firm TWRs. Until now, there was no need for the PJM Tariff to explicitly include a specific right for MTFs to reduce the quality of their TWR service from Firm to Non-Firm without requiring an amendment of an interconnection service agreement or consent of the Interconnected Transmission Owner. *Such an election would automatically increase the MTF's exposure to congestion and potential curtailments of power withdrawals and eliminate the need for PJM to plan for those power withdrawals. In fact, it is entirely possible that such a reduction in withdrawal right would reduce the value of the MTF's project.*⁴⁶

In its November 13, 2017 answer in the same proceeding to arguments proffered by Monitoring Analytics, LLC, which serves as the IMM for PJM, that Non-Firm TWRs are treated the same way as Firm TWRs with respect to RTEP cost allocations, Linden VFT specifically emphasized the fact that the sale of capacity to New York required *two* components of service arguing:

. . . Non-Firm TWRs are certainly not “exactly the same” as Firm TWRs, regardless of what transmission service Linden VFT or its customers currently have to get to Linden VFT's facilities. *There are two components of service under the PJM Tariff that are, and will continue to be, necessary for Linden VFT to export energy and capacity to NYISO: (a) transmission service to Linden VFT's facilities; and (b) TWR service to get to the NYISO border.* With respect to the first segment, Linden VFT's customers have *always* obtained their own transmission service to get to Linden VFT's facilities. Now, Linden VFT is simply exploring the possibility of obtaining from PJM the transmission service to its facility for the benefit of Linden VFT's customers, and Linden VFT would then assign to its customers that service, *in an effort to market a bundled product to its customers.* In the absence of Linden VFT arranging for transmission service to its facility for its customers, Linden VFT's customers would simply continue to obtain their own transmission service as they have done previously. In short, the *only change* that would occur if Linden VFT procures transmission service to its facility is the identity of the party initially obtaining such service, *i.e.*, Linden VFT obtaining it on

⁴⁶ Docket No. EL17-90-000, *Linden VFT, LLC v. Pub. Serv. Elect. and Gas Co. et al.*, Complaint and Request for Fast Track Processing and Motion for Expedition, or in the Alternative, Stay of Certain RTEP Charges for Linden VFT, LLC (Sept. 18, 2017) at 20 (emphasis added).

behalf of its customers, rather than its customers directly procuring it from PJM themselves.

With respect to the second component of service necessary to export to NYISO, Linden VFT is specifically seeking to reduce the service level of its TWRs from Firm to Non-Firm. As Linden VFT would only hold Non-Firm TWRs after the conversion, it would face an increased risk that its exports over its facility to the NYISO border would be subject to interruption.

In short, the IMM ignores both (a) the fact that the *only change* to the transmission service to Linden VFT would be the identity of the party initially obtaining such service (*i.e.*, Linden VFT as opposed to its customers), *which has no import*; and (b) *the fact that TWR service would substantively be reduced from Firm to Non-Firm, increasing Linden VFT's risk of curtailment.*⁴⁷

Similarly, in response to the IMM's comments in the HTP TWR Proceeding arguing that long-term firm transmission service to HTP's bus is equivalent to TWR service to the PJM-NYISO Border, Linden VFT argued:

Firm point-to-point transmission service from PJM to Linden VFT's point of interconnection with PJM is not functionally equivalent to Firm TWRs to the NYISO-PJM border. They are distinct and separate services and in fact, relate to service over different segments (*i.e.*, transmission service is provided to the Linden bus, while the TWRs are provided over Linden VFT's facilities to the PJM-NYISO border). PJM plans the transmission system to accommodate Firm TWRs, *but if Firm TWRs are relinquished, PJM no longer plans the system to accommodate exports, which means that service to the PJM-NYISO border remains subject to interruption.*⁴⁸

In its answer to a motion for clarification and request for rehearing of the Commission's Linden VFT TWR Order, Linden VFT argued:

The PJM Transmission Owners' request for clarification is directly inconsistent with the plain language of the Commission's Order. Even the PJM Transmission Owners concede that "the Order is

⁴⁷ Docket No. EL17-90-000, *supra*, Answer of Linden VFT, LLC (Nov. 13, 2017) at 4-5 (emphasis added).

⁴⁸ Docket No. EL17-84-000, *supra*, Response of Linden VFT, LLC (Nov. 3, 2017) at 10 (emphasis added).

clear.” The Commission’s finding that “[u]nder Schedule 12...RTEP project costs would no longer be allocable to Linden as of the effective date of Linden’s conversion from Firm TWRs to Non-Firm TWRs” is unambiguous and needs no clarification. *The Commission explains the basis for its determination, noting that an MTF’s “cost responsibility assignments for RTEP projects are calculated based on that facility’s Firm TWRs” and that “[a]s of the effective date of Linden’s conversion of its Firm TWRs to Non-Firm TWRs, PJM is no longer required to provide firm service and can curtail non-firm service whenever necessary to preserve reliability.*”⁴⁹

HTP asserted to the Commission that it would lose the ability to withdraw capacity from PJM and deliver it to the NYISO if it converted its Firm TWRs to Non-Firm TWRs.

Specifically, in its comments in support of PJM’s filing of an unexecuted Interconnection Service Agreement among PJM, Linden VFT and PSEG that amended the original ISA by reducing Linden VFT’s Firm TWRs to Non-Firm TWRs, HTP argued to the Commission:

Specifically, Linden seeks to convert its 330 MW of Firm Transmission Withdrawal Rights (“FTWRs”)—which includes the right to schedule energy *and capacity* withdrawals—into less valuable Non-Firm Transmission Withdrawal Rights (“Non-Firm TWRs”)—which includes the right to *schedule energy only*. The conversion of the FTWRs into Non-Firm TWRs in the Linden ISA merely documents the fact that Linden has relinquished its right to schedule capacity withdrawals using FTWRs out of the PJM market into the New York Independent System Operator, Inc. (“NYISO”) over the Linden line.⁵⁰

...

As discussed herein, all Transmission Withdrawal Rights—i.e., Firm or Non-Firm—have the right to schedule energy withdrawals from PJM. *However, FTWRs—the the [sic] Firm rights—also include the right to schedule capacity withdrawals from PJM.*⁵¹

...

⁴⁹ Docket No. EL17-90-000, *supra*, Answer and Motion for Leave to Answer of Linden VFT, LLC (Jan. 31, 2018) at 5 (citations omitted; emphasis added).

⁵⁰ Docket No. ER17-2267-000, *supra*, Comments in Support of PJM Filing of Hudson Transmission Partners, LLC (Aug. 30, 2017) at 2 (emphasis added).

⁵¹ *Id.* at 3 (emphasis added).

A. The Singular Difference between FTWRs and Non-Firm TWRs is the Right to Schedule Capacity Withdrawals Out of PJM

Linden is relinquishing its right to schedule capacity associated with its 330 MW of Transmission Withdrawal Rights under the Linden ISA. Linden by relinquishing its FTWRs, is giving up the curtailment rights associated with firm service, as described below. *These are benefits for which Linden previously paid but that apparently it no longer desires.* The distinction between FTWRs and Non-Firm TWRs is this, which Linden is free to relinquish, as it did by way of its June 28 letter. The PJM Tariff defines “Firm Transmission Withdrawal Rights” (*i.e.*, FTWRs) as:

The rights to schedule energy and capacity withdrawals from a Point of Interconnection of a Merchant Transmission Facility with the [PJM] Transmission System. . . . Withdrawals scheduled using Firm Transmission Withdrawal Rights have rights similar to those under Firm Point-to-Point Transmission Service.

In contrast, the PJM Tariff defines “Non-Firm Transmission Withdrawal Rights” (*i.e.*, Non-Firm TWRs) as:

The rights to schedule energy withdrawals from a specified point on the [PJM] Transmission System. . . . Withdrawals scheduled using Non-Firm Transmission Withdrawal Rights have rights similar to those under Non-Firm Point-to-Point Transmission Service.

As noted above, the defining difference under the PJM Tariff between the two rights is the right of FTWRs to schedule capacity withdrawals from the PJM system. Both include the right to schedule energy withdrawals from the system. As the PJM Tariff states, Non-Firm TWRs have rights similar to “Non-Firm Point-to-Point Transmission Service,” which the PJM Tariff defines as being “scheduled on an as-available basis and is subject to Curtailment or Interruption.” FTWRs, in contrast, are treated like Firm Point-to-Point Transmission Service, and are not on an “as-available basis” and “subject to Curtailment.”⁵²

. . .

⁵² *Id.* at 4-5 (emphasis added).

This reduction in Linden’s level of service is, as the PJM Tariff points out, analogous to downgrading from Firm Point-to-Point Transmission Service to Non-Firm Point-to-Point Transmission Service, with its lower level of service and lower curtailment priority, which likewise has no adverse effect on the reliability and operation of the PJM transmission system.⁵³

HTP made similar statements to the Commission in its answer to PSEG’s answer to the Commission’s Order initiating the FPA Section 206 HTP TWR Proceeding. HTP stated:

Under its Existing ISA, HTP has Transmission Withdrawal Rights (“TWRs”) that are both Firm and Non-Firm. Under the PJM Tariff, Firm TWRs (“FTWRs”) give the holder the “rights to schedule energy and capacity withdrawals” from PJM. Non-Firm TWRs, on the other hand, give the holder only the “rights to schedule energy withdrawals” from PJM. *The difference between FTWRs and Non-Firm TWRs, therefore, is the capacity component of withdrawals.* HTP had the right to schedule 673 MW of energy withdrawals under its Existing ISA, and only 320 MW of capacity withdrawals (using FTWRs). PJM has confirmed on numerous occasions, in writing, that HTP has 673 MW of Non-Firm rights, and therefore the right to schedule up to 673 MW of energy withdrawals from PJM, under the Existing ISA.⁵⁴

...

Following discussion with PJM and PSEG, on June 2, 2017, HTP submitted a letter to PJM seeking to reduce the quality of its service under the Existing ISA by relinquishing the Firm component of its TWRs (i.e., the 320 MW of FTWRs) and retaining only the Non-Firm component (the remaining 673 MW of Non-Firm TWRs). *As a result, HTP no longer has the right to schedule capacity withdrawals from PJM using FTWRs.*⁵⁵

...

Because HTP has assumed full market and financial responsibility for the Hudson Line, HTP has made the conscious decision to reduce the quality of its service in the Amended ISA by relinquishing its FTWRs and retaining only Non-Firm TWRs, even though HTP originally paid over \$300 million to obtain the FTWRs. *Although there will continue to be benefits associated with the Hudson Line, those benefits will no longer include the*

⁵³ *Id.* at 8-9.

⁵⁴ EL17-84-000, *supra*, Motion for Leave to Answer and Answer of Hudson Transmission Partners, LLC (Oct. 29, 2017) at 6 (emphasis added).

⁵⁵ *Id.* at 7 (emphasis added).

*right to schedule capacity withdrawals across the Hudson Line using FTWRs, those benefits will no longer include the right to make firm withdrawals, and PJM will no longer include HTP's FTWRs in its transmission expansion planning under the PJM Operating Agreement.*⁵⁶

NYPA, which has a long-term contract with HTP for transmission capacity on HTP's MTF, also made assertions to the Commission reflecting its acknowledgement that Firm TWRs are required to deliver capacity to New York over HTP's MTF. In its comments in support of PJM's filing of an unexecuted Interconnection Service Agreement among PJM, HTP and PSEG that amended the original ISA by reducing HTP's Firm TWRs to Non-Firm TWRs, NYPA argued to the Commission that:

NYPA is contractually entitled to HTP's 320 MW of FTWRs under a long-term transmission capacity purchase agreement with HTP, *and originally pursued the FTWRs based on an understanding that the FTWRs would enable NYPA's HTP transmission capacity to participate as a locational resource in the generation capacity market administered by the [NYISO].* For various reasons including, principally, the mitigation of NYPA's supply offers into the Zone J auction, NYPA has not been able to secure meaningful revenues from the HTP line's participation in the NYISO capacity market, rendering NYPA's FTWRs practically worthless.⁵⁷

...

As originally contemplated, the FTWRs were intended to enable a portion of NYPA's HTP capacity to participate and earn revenues in the NYISO's Zone J capacity market, and were provided as a valuable right in exchange for NYPA's payment for "but for" transmission upgrades. Currently, however, the NYISO's Buyer-Side Mitigation rules require that the HTP resource is bid in to the NYISO capacity market at a price referenced to a hypothetical marginal unit. As a result, the HTP MTF has cleared only minimal capacity to date and is not expected to clear additional capacity in the near term. The potential loss of revenue from this capacity position substantially reduces the overall value of exporting

⁵⁶ *Id.* at 20-21 (emphasis added).

⁵⁷ Docket No. ER17-2073-000, PJM Interconnection, L.L.C., Motion to Intervene and Supportive Comments of the New York Power Authority (July 26, 2017) at 2 (emphasis added).

capacity from PJM to NYISO, and makes the general usefulness of the HTP MTF as a capacity resource substantially diminished. Given that the economic scheduling of energy is currently the only meaningful revenue stream associated with NYPA's use of HTP, and energy transactions do not require FTWRs, HTP's FTWRs provide NYPA with little to no value.⁵⁸

In response to the PJM Transmission Owners' request for rehearing of the HTP TWR Order, NYPA zealously defended the Commission's ruling that RTEP costs are no longer allocable to HTP because HTP's conversion to Non-Firm TWRs meant that service is non-firm and curtailable by PJM. Specifically, NYPA argued:

The HTP TWR Order requires no clarification. *The Commission knew what it meant when it held that "[a]s of the effective date of HTP's conversion of its Firm TWRs to Non-Firm TWRs, PJM is no longer required to provide firm service and can curtail non-firm service Under Schedule 12, therefore, [Regional Transmission Expansion Plan ('RTEP')] upgrade costs would no longer be allocable to HTP."* This statement is consistent with Opinion No. 503, and with Schedule 12 of the PJM Tariff, both of which preclude PJM from assessing RTEP cost allocations on MTFs that do not have FTWRs.⁵⁹

In its HTP and Linden VFT TWR Orders, the Commission accepted the positions of HTP, NYPA and Linden VFT detailed above, ruling that Linden VFT's and HTP's conversion from Firm TWRs to Non-Firm TWRs would allow them to avoid the allocation of RTEP costs *because* conversion, by definition, meant HTP and Linden VFT would accept that their MTFs would then become subject to curtailment for reliability, operational problems or economic reasons in New Jersey or elsewhere on the PJM system. As Linden VFT itself established in response to rehearing requests of the Linden VFT TWR Order, the Commission's order is

⁵⁸ *Id.* at 19-20.

⁵⁹ EL17-84-000, *supra*, The New York Power Authority's Motion to Dismiss or, in the Alternative, Answer to the Request for Clarification of the PJM Transmission Owners, and Motion for Leave to Answer to the Request for Rehearing of Public Service Electric and Gas Company (Jan. 31, 2018) at 3 (citations omitted) (emphasis added).

unambiguous that the basis for its determination that RTEP costs no longer apply is that RTEP upgrades support firm service and the conversion to Non-Firm TWRs means that PJM will no longer provide firm service “and can curtail non-firm service whenever necessary to preserve reliability.”⁶⁰ Specifically, the Commission ruled in its HTP TWR Order:

Under Schedule 12 of the PJM tariff, a merchant transmission facility’s cost responsibility assignments for RTEP projects are calculated based [sic] that facility’s Firm TWRs. As the Commission has explained, the reason that the costs of RTEP projects are allocated to merchant transmission facilities with Firm TWRs is that PJM is required to provide firm service to those facilities and therefore those facilities are responsible for contributing to facilities necessary to support that firm service:

PJM is required to provide reliable service up to the Firm Transmission Withdrawal Rights held by these customers. In order to provide such rights, PJM must require the construction of RTEP upgrades. The Merchant Transmission Facilities can avoid these costs if instead of opting for Firm Transmission Withdrawal Rights, they opt only for Non-Firm Transmission Withdrawal Rights under the tariff.⁶¹

*As of the effective date of HTP’s conversion of its Firm TWRs to Non-Firm TWRs, PJM is no longer required to provide firm service and can curtail non-firm service whenever necessary to preserve reliability.*⁶² Under Schedule 12, therefore, RTEP upgrade costs would no longer be allocable to HTP.⁶³

The Commission made the same ruling on the same day with respect to Linden VFT in its Linden VFT TWR Order, further specifying, “the Linden facility is fully controllable by PJM so

⁶⁰ Docket No. EL17-90-000, *supra*, Answer and Motion for Leave to Answer of Linden VFT, LLC (Jan. 31, 2018) at 5 (citing HTP TWR Order at P 50).

⁶¹ *Id.* (citing Opinion No. 503, 129 FERC ¶ 61,161 at P 80).

⁶² *Id.* (emphasis added) (citing PJM OATT, Schedule 12 § (b)(i) (3.0.0). See PJM OATT § I, OATT Definitions L-M-N, 14.0.0, Non-Firm Transmission Withdrawal Rights. See also PJM OATT § II, Point-to-Point Transmission Service.)

⁶³ *Id.*

that PJM can shut off flows if those flows jeopardize reliability or cause operational problems in New Jersey or elsewhere on the PJM system.”⁶⁴

After having had their cake (a Commission determination allowing them to avoid their RTEP cost allocations), Linden VFT, HTP and NYPA now seek to eat it too by unabashedly taking the direct opposite position in this proceeding and now arguing that the conversion to Non-Firm Service did not reduce the quality of their service nor make it subject to curtailment. Such blatant duplicity cannot be countenanced.

As their arguments in response to IPPNY’s Complaint are clearly inconsistent with their earlier positions, they previously succeeded in persuading the Commission to accept their earlier positions in the Linden VFT and HTP TWR Orders and they would derive an unfair advantage by changing their position to allow them to continue delivering ICAP over their MTFs to New York City to the detriment of IPPNY’s members, the PJM and NYISO markets and the reliability of both systems, the Commission should rule that they are judicially estopped from raising these arguments in this proceeding.

II. THE COMMISSION SHOULD REJECT THE OPPONENTS’ ARGUMENTS THAT MTFs WITHOUT FIRM TWRs ARE ELIGIBLE TO DELIVER ICAP TO THE NYISO PURSUANT TO THE NERC TLR PROCEDURES AND PJM OATT

As discussed above, the NYISO and Linden VFT argued that, pursuant to NERC and NAESB TLR Procedures,⁶⁵ Firm TWRs are unnecessary to withdraw firm energy and ICAP from PJM across an MTF to New York City because the curtailment priority of such service is

⁶⁴ Linden VFT TWR Order at PP 25, 32.

⁶⁵ The NYISO relies on the affidavit of Mr. Aaron Markham which it claims supports its Answer. As established by Mr. Piascik’s answering affidavit, Mr. Markham’s positions contain numerous flaws. Equally important, Mr. Markham fails to take into account the Commission’s Ruling. It was incumbent upon the NYISO to provide Mr. Markham with this information in order for his assessment of this matter to bear weight. Either the NYISO failed to do so or Mr. Markham had no response to the Commission’s Ruling. Either way, the conclusions in his affidavit are further tainted by the absence of any response to the Commission’s Ruling.

based solely on the firmness of the Point-to-Point Transmission Service from points within PJM to the MTF's POR (*i.e.*, the upstream service the Commission expressly found in the NJBPU Order was inconsequential in this context).⁶⁶ Linden VFT argued that Schedule 16 of the PJM OATT states that TWRs “do not provide any priority with respect to the reservation, scheduling, curtailment or interruption of transmission service over the Linden VFT Facility pursuant to this Schedule,” and that the only curtailment of point-to-point transmission service would be ‘as required by NERC Standards and the Joint Emergency Operating Protocol.’”⁶⁷ Linden VFT also argued that the PJM OATT does not prohibit the export of ICAP over MTFs that have converted their Firm TWRs to Non-Firm TWRs.⁶⁸

Linden VFT, NYPA and HTP additionally argued that, pursuant to Schedules 16 and 17 of the PJM OATT, TWRs (whether Firm or Non-Firm) have no relevance to the firmness and associated curtailment priority because the curtailment priority of service over an MTF is based solely on the firmness of the Point-to-Point Transmission Service from points within PJM to the MTF's POR.⁶⁹ NYPA and HTP argued that customers can schedule Firm Reservations to deliver firm energy and ICAP to Zone J over MTFs with only Non-Firm TWRs because TWRs are an interconnection service, not a transmission service, and nothing in the PJM OATT requires a customer to have Firm TWRs to make a Firm MTF Reservation to schedule Firm transmission service across an MTF to New York City.⁷⁰

⁶⁶ See NJBPU Order at P 59 (specifying the conversion to Non-Firm TWRs authorized PJM to curtail or interpret withdrawal service for reliability or economic reasons “*irrespective* of the priority of *any* upstream firm transmission service”) (emphasis added).

⁶⁷ Linden VFT Protest at 4.

⁶⁸ *Id.* at 14.

⁶⁹ Linden VFT Protest at 14; NYPA/HTP Protest at 15.

⁷⁰ NYPA/HTP Protest at 10, 12-13.

The Commission should reject the Opponents arguments because they misinterpret the NERC standards as well as the NERC documents specific to the Linden VFT MTF and they further misinterpret the PJM OATT by selectively quoting text that appears favorable to their arguments while ignoring other pertinent parts that contradict their arguments. Their interpretation, if accepted, would render the purpose and distinction between Firm TWRs and Non-Firm TWRs meaningless. When read holistically and logically, the PJM OATT clearly provides the following:

Firm TWRs are necessary to export ICAP over an MTF to NYISO Zone J. This is demonstrated by the parallel definitions of, and distinctions between, Firm TWRs and Non-Firm TWRs and Firm Linden VFT Reservations and Non-Firm Linden VFT Reservations.⁷¹ As IPPNY demonstrated in its Complaint, the PJM OATT establishes two key distinctions between Firm TWRs and Non-Firm TWRs and Firm Linden VFT Reservations and Non-Firm Linden VFT Reservations: (1) Firm TWRs and Firm Linden VFT Reservations are defined as allowing the right to schedule “energy and capacity withdrawals”⁷² from an MTF’s point of interconnection, *i.e.*, its POR to the external control area, *i.e.*, its POD, while Non-Firm TWRs and Non-Firm TWRs allow the scheduling of energy withdrawals only from the POR to the POD;⁷³ and (2) Firm TWRs and Firm Linden VFT Reservations have similar rights as Firm Point-to-Point Transmission Service and therefore provide the right to schedule energy and capacity on a firm basis while Non-Firm TWRs and Non-Firm Linden VFT Reservations have

⁷¹ For convenience, IPPNY’s discussion focusses solely on Linden VFT and the relevant provisions governing service over its MTF in Schedule 16 of the PJM OATT. IPPNY’s discussion applies equally to HTP’s MTF as the provisions in Schedule 17 that govern service over HTP’s MTF are largely identical to Schedule 16.

⁷² PJM OATT § 1, Definitions E-F at 8.

⁷³ *Id.* § 1, Definitions L-M-N at 15.

similar rights as Non-Firm Point-to-Point Transmission Service⁷⁴ and therefore provide the right to schedule energy only on a non-firm, as available basis.⁷⁵

Section 232.2 of the PJM OATT provides that an MTF that is granted Firm TWRs must shoulder its share of RTEP related costs to maintain the continued right to schedule capacity across its transmission path. PJM's Manual 35: Definitions and Acronyms defines Capacity as "Megawatts of Capacity for both firm energy delivered to load located electrically within the Interconnection and firm energy delivered to the border of the PJM RTO for receipt by others," confirming that capacity is the delivery of firm energy.

NYPA/HTP's argument that Firm TWRs "are not a transmission service product" and "do not confer a right to schedule transmission service on the PJM Transmission System or on the MTF" fails to recognize that the PJM OATT establishes that TWRs have rights similar to Point-to-Point Transmission Service. Therefore, while Firm TWRs are obtained as part of the MTF's interconnection process, they are a form of transmission service that grant customers of the MTF the right to deliver firm energy and capacity from the MTF's POR to its POD. An MTF with Firm TWRs must allocate Firm Reservations to a customer to allow it to schedule capacity and energy from the MTF's POR to its POD.⁷⁶ In contrast, an MTF with only Non-Firm TWRs may allocate only Non-Firm Reservations to a customer to allow it to schedule only energy from the MTF's POR to its POD.

⁷⁴ Non-Firm Point-to-Point Transmission Service is *scheduled on an as-available basis and is subject to Curtailment or Interruption* as set forth in Part II of the OATT, section 14.7.

⁷⁵ NYPA/HTP's argument that Firm TWRs "are not a transmission service product" and "do not confer a right to schedule transmission service on the PJM Transmission System or on the MTF" is a red herring. No party is challenging NYPA's ability to schedule transmission service on its MTF. However, NYPA cannot confer to its customers that which NYPA itself, post-Conversion, no longer has.

⁷⁶ Section 4.2.1 of Schedule 16 of the PJM OATT provides: "Submission of Scheduling Requests: A Linden VFT Transmission Customer holding a Linden VFT Reservation has the right to submit requests for Firm Linden VFT Schedules or Non-Firm Linden VFT Schedules commensurate to the Linden VFT Reservations held by that entity."

Thus, post-Conversion, Linden VFT and HTP can no longer allocate Firm Reservations to their customers, which means their customers cannot schedule firm energy and capacity over their MTFs. With their Non-Firm TWRs, Linden VFT and HTP can allocate only Non-Firm Reservations, which means their customers can schedule only non-firm energy subject to curtailment. As discussed in Point I.A above, this is exactly what the Commission ruled in its Linden VFT TWR, HTP TWR and NJBPU Orders. As IPPNY documented in Point I.C above, HTP and NYPA argued to the Commission in support of their request to avoid RTEP cost allocations that HTP's relinquishment of Firm TWRs would mean the loss of the right to schedule firm energy and capacity withdrawals across its MTF. The Commission's Non-Firm Subject to Curtailment Ruling and HTP's and NYPA's initial positions on this matter were correct. In addition to being procedurally barred, HTP's and NYPA's changed position is substantially wrong and must be rejected.

NYPA/HTP and Linden VFT attempt to obfuscate this correct reading of the PJM OATT by arguing that Sections 2.3 and 4.5 of Schedule 16 provide that Firm TWRs are unnecessary to schedule firm service over an MTF from its POR to POD. Section 2.3, which states in its second sentence that TWRs "do not provide any priority with respect to the reservation, scheduling, curtailment or interruption of transmission service over the Linden VFT Facility pursuant to this Schedule," does not support their argument. The first sentence of this section provides that the awarding of TWRs is governed by Section 232 of the OATT and any subsequent transfer is governed by another section in Schedule 16. Consistent with the first sentence, the second sentence simply means that priority is governed by other sections of the PJM OATT. The Opponents' argument is illogical because it would read out of the OATT the critical distinctions between Firm TWRs and Non-Firm TWRs.

Nor does Section 4.5 support the Opponents' argument. Three sentences in Section 4.5, read together, establish PJM's obligation to curtail service:

1. In the event that a Curtailment or interruption of Linden VFT Schedules is required to maintain reliable operation of the Linden VFT Facility and the systems directly and indirectly interconnected with the Linden VFT Facility, any such Curtailment implemented by the Transmission Provider shall be based upon the priority of the associated Linden VFT Reservations.
2. The Transmission Provider shall curtail Linden VFT Schedules over the Linden VFT Line as required by NERC Standards and the Joint Emergency Operating Protocol for the Linden VFT Scheduled Line which is posted on the PJM website.
3. The Transmission Provider shall curtail Linden VFT Schedules over the Linden VFT Facility for reliability of the Transmission System pursuant to the separately reserved Transmission Service over the Transmission System pursuant to Part II or Part III of the Tariff to the Linden VFT Facility and the Transmission Provider's Manuals.

Linden VFT's, NYPA/HTP's argument that the second and third sentences control how PJM must curtail service is flawed. The sentences must be read in harmony and not in contradiction to each other. Each one of these sentences provides a separate basis of authority for PJM to curtail service. If service is non-firm under any one of the three, PJM must curtail based on non-firm priority. Linden VFT's and the NYISO's argument that the curtailment priority of service over an MTF is governed by NERC TLR Procedures is, therefore, incorrect as PJM has a separate obligation under its tariff, apart from TLR event considerations, to curtail service to maintain reliability on its system.

If curtailment priority from the POR to the POD was governed by the firmness of Point-to-Point service to the POR, there would have been no reason to include the first sentence in this section. The inclusion of both the first and third sentences appropriately recognizes that the

priority of a “Linden VFT Reservation” can be different than the priority of the “separately reserved Transmission Service over the Transmission System pursuant to Part II or Part III of the Tariff.” It recognizes that customers schedule both paths separately and that the firmness of the two paths can be different but both paths must confer firm rights for capacity to be able to be sold across the MTFs to New York. If the Linden VFT Reservation from the POR to the POD is Firm and the separate transmission service over the transmission system to the POR is Non-Firm Point-to-Point, curtailment priority is Non-Firm priority pursuant to the third sentence and only non-firm energy could be delivered across the MTF. Linden VFT’s consultant agrees with this point. He testifies that “[i]f point-to-point transmission service to Linden VFT was not firm, that curtailment choice would become meaningful and would in turn impact the eligibility of the External ICAP resource to obtain ICAP credit in NYISO. What the NYISO focuses on is deliverability to the NYCA border. That is why the NYISO requires Long-Term Firm PtP Service to the MTF, which Linden VFT has.”⁷⁷

The point Mr. Marczewski misses is that, as discussed above, where Linden VFT has only Non-Firm TWRs for its MTF which is the case post-Conversion, any Linden VFT Reservations for service from the POR to the POD must also be Non-Firm. If the Linden VFT Reservation from the POR to the POD is Non-Firm and the separate transmission service over the transmission system to the POR is Firm Point-to-Point, curtailment priority is Non-Firm priority pursuant to the first sentence. Moreover, as Mr. Piascik avers in his Answering Affidavit, the absence of Firm TWRs means both the service from the POR to the POD and the Point-to-Point Service to the POR are Non-Firm and service across the MTF will be curtailable

⁷⁷ Linden VFT Protest, Marczewski Aff. at ¶ 18.

at a NERC TLR event Level 3b, if the energy is needed to serve load, to address a reliability or operational issues, or if the energy can be dispatched for economics on the PJM system.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the Opponents arguments in response to IPPNY's Complaint and expeditiously issue an order granting the Complaint and ordering the relief requested therein.

Respectfully submitted,

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Dated: September 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the foregoing document by electronic mail or first-class mail upon each person designated on the official service list compiled by the Secretary to the Commission in this proceeding.

David B. Johnson
David B. Johnson

Dated: September 5, 2018

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Independent Power Producers of New York, Inc.,)	
)	
)	
Complainant,)	
)	
v.)	Docket No. EL18-189-000
)	
New York Independent System Operator, Inc.,)	
)	
)	
Respondent.)	

ANSWERING AFFIDAVIT OF THOMAS M. PIASCIK

1. My name is Thomas M. Piascik. I am employed as Senior Project Manager of Tangibl Group, Inc. (“Tangibl”). My business address is 201 King of Prussia Road, Suite 650, Radnor, PA 19087. My primary work at Tangibl is performing power system modeling, system reliability studies, and transmission planning studies for electric utilities, municipalities, electric cooperatives, independent power producers and transmission owners. I have experience performing these tasks in both the PJM Interconnection, L.L.C. (“PJM”) and New York Independent System Operator, Inc. (“NYISO”) markets. In connection with this work, I am familiar with PJM’s rules governing firm and non-firm transmission withdrawal rights (“Firm TWRs” and “Non-Firm TWRs,” respectively) as well as PJM’s rules governing firm and non-firm Point-to-Point Transmission Service.
2. I write this Answering Affidavit in support of Independent Power Producers of New York, Inc.’s (“IPPNY”) Answer to the August 20, 2018 Answer of the NYISO (“NYISO Answer”) to the IPPNY Complaint filed against the NYISO on July 31, 2018 in the

above-referenced docket. Specifically, my Affidavit answers assertions made in the NYISO Answer, including in the Affidavit of Mr. Aaron Markham, Director of Grid Operations at NYISO (the “Markham Affidavit”), attached to the NYISO Answer.

3. I provided my professional experience and credentials as part of my original affidavit in support of the IPPNY Complaint.
4. As IPPNY established in its Complaint and as supported by the PJM Independent Market Monitor (“IMM”) in its August 20, 2018 Comments on the IPPNY Complaint, the export of capacity from PJM to the NYISO over Merchant Transmission Facilities (“MTFs”) that have converted their Firm TWRs to Non-Firm TWRs, such as those owned by Linden VFT, LLC (“Linden VFT”) and Hudson Transmission Partners, LLC (“HTP”), is not permitted under the PJM Open Access Transmission Tariff (“OATT”).¹
5. The NYISO implicitly acknowledges that customers using Linden VFT’s and HTP’s MTFs are authorized to transmit only energy, not capacity, across their systems because these MTFs now have only Non-Firm TWRs. However, the NYISO asserts that the energy that flows from PJM to the MTFs and across the MTFs to the NYISO at the Point of Delivery (“POD”) is “firm enough” to be considered as a capacity product under the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”). Pointing to the Markham Affidavit, which the NYISO asserts supports its positions in its Answer, the NYISO argues that securing Firm Point-to-Point Transmission Service from PJM’s system to the MTF’s Point of Receipt (“POR”) provides a level of “energy firmness” across the MTF such that it would be treated by PJM and North America Electric Reliability Council (“NERC”) Standards as a firm, non-curtable transaction

¹ This and other capitalized terms herein have the meanings given in the PJM OATT.

- except in an extreme event or NERC Transmission Loading Relief (“TLR”) event Level 5. Mr. Markham argues that securing Firm Point-to-Point transmission across the first leg of the two-part transmission path (a service he characterizes as “out service,” a term that is not contained in PJM’s tariff) is sufficient to ensure that the energy delivered to the NYISO constitutes a capacity qualifying product under the NYISO Services Tariff and that the second leg of the path (which he alone designates as “facility service”) has no bearing on the transaction’s curtailment priority.
6. The NYISO’s and Mr. Markham’s assertions are incorrect because they misinterpret PJM’s OATT and the NERC Standards as well as ignore the Commission’s orders ruling that PJM can curtail energy deliveries from PJM to NYISO Zone J over MTFs owned by Linden VFT and HTP if the energy is needed to serve load, to address a reliability or operational issues, or for economics on the PJM system.² As I discuss below, the PJM OATT specifically requires any Point-to-Point Transmission Service (even if it is designated as firm) to be treated as non-firm when it is matched with a Non-Firm MTF Reservation. Thus, it is wrong to characterize any part of the service using the MTF as firm if the MTF Reservation itself is non-firm. Beyond that, even if the first leg of the path to the POR could be considered firm, the NERC transmission scheduling practices, as further discussed herein, provide that a transmission path consisting of multiple “legs” cannot be considered firm if any one of the legs is non-firm. The NYISO does not dispute that the second leg of the path from the POR to the POD is non-firm now that

² *Linden VFT, LLC v. Pub. Serv. Elec. & Gas Co. & PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,264, at P 25 (2017), *settlement judge procedures established*, 164 FERC ¶ 61,034 (2018) (“Linden VFT Order”); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262, at P 43 (2017), *settlement judge procedures established*, 164 FERC ¶ 61,034 (2018) (“HTP Order”); *N.J. Bd. Of Pub. Utilities v. PJM Interconnection, L.L.C. et al.*, 163 FERC ¶ 61,139, at P 59 (2018) (rehearing pending) (“NJBPU Order”).

Linden VFT and HTP have only Non-Firm TWRs, and, thus, the NERC transmission scheduling practices require that the entire transaction be treated as non-firm subject to curtailment priority TLR event Level 3b. This is separate and apart from the more onerous and restrictive curtailment capabilities of PJM itself in accordance with the Linden VFT and HTP Orders and as further explained in the NJBPU Order. My Affidavit does not address the Commission's Orders as they are addressed directly as part of IPPNY's Answer.

A Non-Firm VFT Reservation Means Service over the MTF is Non-Firm under the PJM OATT

7. For ease of review, I reference herein only the relevant provisions in Schedule 16 "Transmission Service on the Linden VFT Facility." However, the same language is provided in "Schedule 17 Transmission Service on the Hudson Line," and, therefore, the same process and procedures apply to both Linden VFT's and HTP's MTFs.
8. Linden VFT's conversion of Firm TWRs to Non-Firm TWRs (the "Conversion") has eliminated its ability to allow their customers to schedule capacity across its transmission path. By definition, Linden VFT cannot transfer rights to its customers it no longer possesses. Thus, post-Conversion, Linden VFT forfeited the ability to provide its customers with Firm Linden VFT Reservation rights pursuant to Section 1.1.1 of Schedule 16 (which allows the scheduling of both capacity and energy on a firm basis) and instead Linden VFT can now only provide its customers with Non-Firm Linden VFT MTF Reservation rights pursuant to Section 1.1.2 of Schedule 16 (which allows the scheduling of energy only).

9. Mr. Markham's assertion that Firm Point-to-Point Transmission Service to the Linden VFT MTF's POR creates an energy-only product that becomes firm enough to qualify as NYISO capacity in Zone J because, under the NERC Standards, it is only subject to curtailment during an extreme event or NERC TLR event Level 5, is wrong. Mr. Markham fails to recognize that pursuant to Section 3.3.2 of Schedule 16 of the PJM OATT, the firmness of the Point-to-Point service to the POR that is held by a Non-Firm Linden VFT MTF Reservation holder is irrelevant because the Non-Firm Linden VFT Reservation is controlling with respect to curtailment. Section 3.3.2 states: ***Non-Firm Linden VFT Reservations: "The terms and conditions of Non-Firm Point-to-Point Transmission Service in Part II of the Tariff shall apply to any and all Non-Firm Linden VFT Reservations."***
10. Thus, even if the Point-to-Point transmission service they have secured to the POR is Firm, that service must be treated as Non-Firm Point-to-Point service. This means that not only is it subject to curtailment earlier than a NERC TLR Level 5 event, it is also subject to curtailment as a Non-Firm service pursuant to Section 14.7 of the PJM OATT. Section 14.7 states: ***"The Transmission Provider reserves the right to Curtail, in whole or in part, Non-Firm Point-To-Point Transmission Service provided under the Tariff for reliability reasons when an emergency or other unforeseen condition threatens to impair or degrade the reliability of the Transmission System or the systems directly and indirectly interconnected with Transmission Provider's Transmission System."***
11. In summary, the forfeiture of Firm TWRs means both the "out service" and, contrary to Mr. Markham's foundational argument, "facility service" paths must be treated as Non-Firm and any transaction across these MTFs will be curtailable at a NERC TLR event

Level 3b and/or by PJM in accordance with the Commission's HTP, Linden VFT and NJBPU Orders for system reliability, operational problems or economic reasons in New Jersey or at any other location within the PJM system and therefore cannot and do not meet the eligibility requirement under the Services Tariff to qualify as a capacity supplier as explained by Mr. Mark Younger in his affidavit attached to IPPNY's Complaint.

Curtailment Priority of Service over the Linden VFT MTF is TLR Level 3 under NERC Standards

12. Mr. Markham's contention that NERC Standards require that the entire path over the MTF be subject to TLR event level 5 curtailment priority is wrong.
13. It is helpful to understand how a Variable Frequency Transformer ("VFT") operates. A VFT is a form of a phase-shifting transformer that regulates flow on an Alternating Current ("AC") transmission line. It is a discrete transmission element that allows for controllable flow across a transmission path, much like a phase-angle regulator (or "PAR") that is commonly found in the Eastern Interconnection. Although a VFT is a controllable element like a phase-shifting transformer or PAR, it is different from a Direct Current ("DC") line in that there is no rectification to DC and inversion back to AC, and, as will be explained below, it is treated differently than a DC line by the NERC Interchange Distribution Calculator ("IDC").
14. It is also helpful to understand flowgates and e-Tags. A flowgate is a single transmission element, or group of transmission elements, intended to model MW flow impact relating

to transmission limitations and transmission service usage.³ Generally, a transmission element (or elements) becomes a flowgate as a result of its becoming overloaded by the contingent loss of another transmission element. Under these conditions, it may be necessary to initiate TLR procedures to relieve the condition. The NERC TLR Procedure is an Eastern Interconnection-wide process that allows Reliability Coordinators to mitigate potential or actual operating security limit violations while respecting transmission service reservation priorities.⁴ The NERC Book of Flowgates (“BoF”) is a database of flowgates relied upon by the IDC as it uses TLR levels to define the severity of the loading on the transmission system as well as actions that will be taken by the IDC to relieve the overloading.⁵ Transmission Distribution Factors (“TDFs”) represent the impact of a transaction on a given flowgate and are used to determine which transactions are eligible for TLR curtailment in the IDC. The transmission of electric power in wholesale markets is scheduled using a NERC-administered system of electronic data tagging, where each transaction is assigned a tag or “e-Tag.” In addition to interchange schedule coordination, e-Tag data is used to assist Reliability Coordinators in identifying transactions that must be curtailed to relieve overloads when transmission constraints occur.⁶ When controllable elements are introduced into the transmission system, NERC updates its BoF using Change Orders.

15. It is clear from the following Change Orders that the NERC eTags associated with transactions across the Linden VFT MTF recognize the separate and distinct POR and

³ NERC Interchange Distribution Calculator (IDC) User Manual, https://www.naesb.org/pdf4/weq_bps021813w3.docx

⁴ *Transmission Loading Relief (TLR) Procedure*, NERC, <https://www.nerc.com/pa/rrm/TLR/Pages/default.aspx>.

⁵ NERC Interchange Distribution Calculator (IDC) User Manual.

⁶ Docket No. RM11-12-000, *Availability of E-Tag Information to Commission Staff*, Comments of NERC (June 27, 2011).

PODs on either side of the MTF. Figure 1 presents a graphical representation of the Linden VFT MTF for the purposes of understanding the NERC eTags described in the relevant change order.

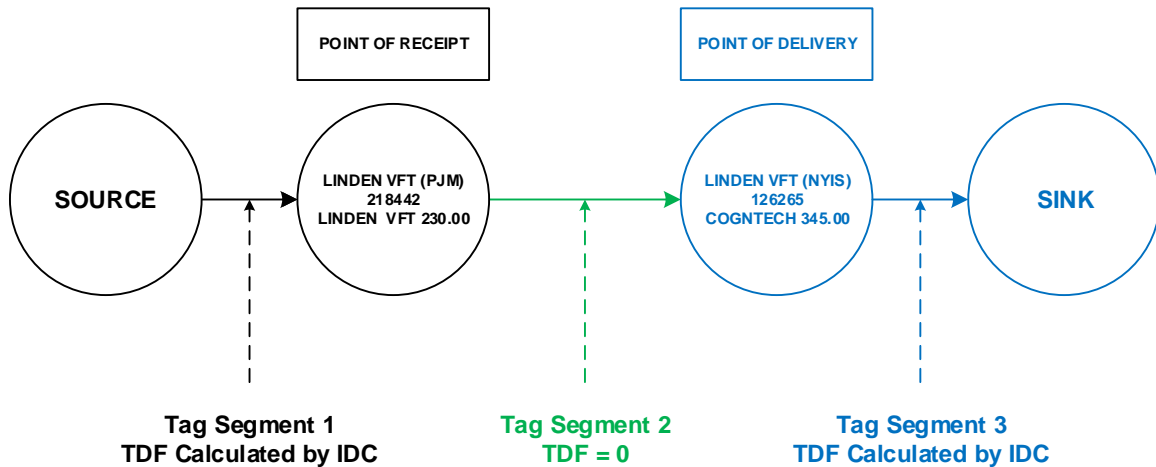


Figure 1
Linden VFT MTF

16. What follows is quoted from “Phase Shifters and DC Ties in the IDC (2009),” specifically Section 2.2, Submittal of eTags over Phase Shifters:

The manner in which a customer submits an eTag over an interface that contains phase shifters will determine how the TDF on the transaction is determined in the IDC. To accurately capture the phase shifter path, there should be a specific POR/POD available to indicate that the customer wants to flow energy over the phase shifters. If there are multiple phase shifters on an interface, it is not expected that the customer could select which specific phase shifter would be utilized for the flow.

...

“However, if the customer submits an eTag . . . and does select the specific POR/POD associated with the phase shifter, the IDC would know this tag will flow over the phase shifter *and will subsequently break this tag into three segments prior to any*

internal calculation processing for a TLR. The three segments are:

- (1) From the Source to the Phase Shifter
- (2) Across the Phase Shifter
- (3) ***From the Phase Shifter to the Sink.***

If any of the separate segments of the tag are impacted by a TLR, then the entire tag is curtailed accordingly.⁷ (Emphasis added)

Section 2.2 is determinative. The three segments described above are in series, and if one of the segments is not firm (in this case, the segment across the Linden VFT MTF to the POD as described below in the excerpt from NERC Change Order #302), then firm transactions cannot be scheduled across the Linden VFT MTF unless Linden VFT holds Firm TWRs for its MTF.

17. Pursuant to “NERC Change Order #302, Linden Variable Frequency Transformer (VFT) model in IDC (Sept. 2, 2009),” the POR and POD are at different locations:

POR: PJM
POD: Linden

The IDC will automatically create two pseudo-CA points to represent the Linden VFT [MTF]. These will be “LINDEN VFT (PJM)” on bus #218442 (LINDEN_VFT 230.00) and “LINDEN VFT (NYIS)” on bus #126265 (COGNTECH 345.00). Tags through the Linden VFT [MTF] will be segmented. When the tag flows from PJM to NYIS through the Linden VFT [MTF], the segments will be:

- Segment 1: “Source” to “LINDEN VFT (PJM)” (AC path with TDF calculated by the IDC)
- Segment 2: “LINDEN VFT (PJM)” to “LINDEN VFT (NYIS)” (IDC assigned TDF = 0%)

⁷ *Pace Shifters and DC Ties in the IDC*, NERC (June 2009), https://www.nerc.com/comm/OC/IDCWG%20Related%20Files%20DL/IDC_Phase_Shifter_GUI_User_Guide_Ver_1.0.pdf (emphasis added).

- **Segment 3: “LINDEN VFT (NYIS)” to “Sink” (AC path with TDF calculated by the IDC)**

... the TDF of such tag on a flowgate is the sum of the TDFs on all three segments.”⁸

NERC Change Order #302 also states:

“PJM anticipates that the modeling of these transactions in the IDC will most closely follow the modeling described in Change Order #289 Changing Neptune DC Line Model.”⁹

18. However, a look at the Neptune DC Line between PJM and the NYISO shows a construct that is indisputably different than the clearly defined, three-segment structure applied to the Linden VFT MTF with respect to POR, POD and eTags, making PJM’s “anticipated” modeling faulty in practice. Please refer to Figure 2:

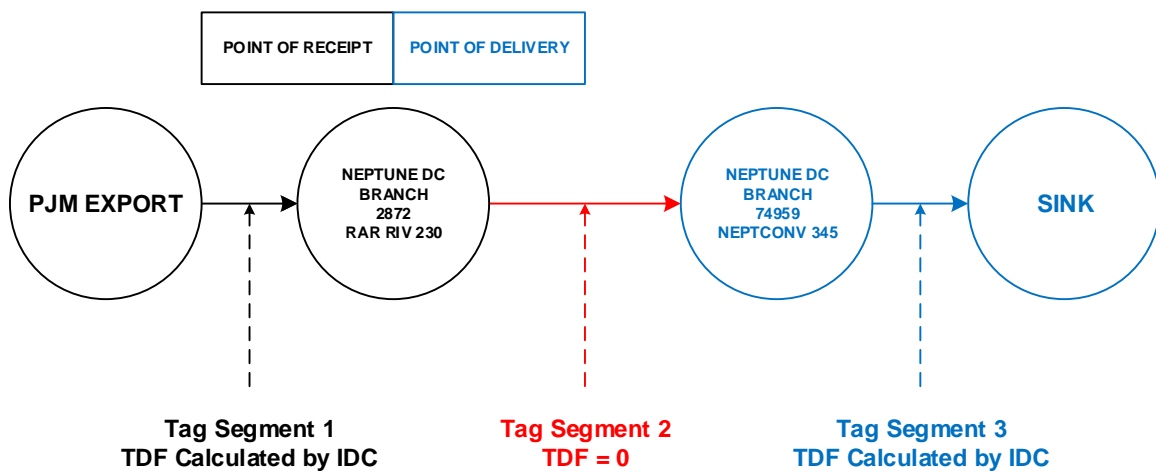


Figure 2
Neptune DC Line

⁸ *Change Order #302*, NERC (Sept. 2, 2009), at 2, <https://www.nerc.com/comm/OC/Pages/IDCWG/IDC-Change-Orders.aspx> (emphasis added).

⁹ *Id.* at 1.

19. Unlike the Linden VFT MTF, the POR and the POD are at the same location as described in “NERC Change Order #240, Add PJM-NYISO DC Tie Line Representation for Neptune DC Tie (July 3, 2007)”:

POR: PJM
TP (POR): PJM
POD: NEPT
TP (POD): PJM¹⁰

20. The construct with respect to POR and POD does not change from that in NERC Change Order #240 and did not change with the subsequent issuance of “NERC Change Order #289, Changing Neptune DC Line Model, (May 19, 2009),” which simply changed the transaction sink running from the pseudo control area from New York to specify more precisely Long Island.¹¹
21. In other words, if PJM is operating the Linden VFT MTF in a manner that corresponds to the IDC modeling for Neptune as originally described in NERC Change Order #240 and modified in Change Order #289, its approach conflicts with (i) the specific provisions of the PJM OATT, including Schedule 16; (ii) NERC requirements for phase-shifting transformers; and (iii) the express provisions of NERC Change Order #302. NERC Change Order #302 for the Linden VFT MTF clearly specifies a distinct and different POR and POD location with respect to eTags. These distinct and different POR and POD locations recognize the separate tag segment for the Linden VFT facility leg of the

¹⁰ *Change Order #240*, NERC (July 3, 2007), https://www.nerc.com/comm/OC/IDC%20Change%20Orders%20DL/CO-240_Add_PJM-NYISO_DC_Line_Representation_for_Neptune_DC_Tie.pdf.

¹¹ *Change Order #289*, NERC (May 19, 2009), https://www.nerc.com/comm/OC/IDC%20Change%20Orders%20DL/CO-289_Changing_Neptune_DC_Line.pdf.

transmission path from PJM to NYISO (*i.e.*, the POR to the POD, which importantly is the facility itself without which there would be no connection to New York).

22. In paragraph 5 of the Markham Affidavit, Mr. Markham states that “. . . transactions across the Zone J MTFs are curtailed based solely on whether a capacity exporter has LTFPTP from points within PJM to a Zone J MTF’s bus.” Again, Mr. Markham is incorrect. The Zone J MTF’s bus, in the case of the Linden VFT MTF, is at LINDEN VFT (NYIS) Bus Number 126265 or COGNTECH 345.00. This is the POD for transactions across the Linden VFT MTF to New York. The POR for transactions across the Linden VFT MTF is LINDEN VFT (PJM) Bus Number 218442 or LINDEN_VFT 230.00. The energy-only exporter referred to above may have LTFPTP to the Linden VFT MTF (*i.e.*, the POR), but, as I explain above, firm transactions can no longer be scheduled across the Linden VFT MTF (from the POR to the POD as detailed above) given Linden VFT’s decision to forfeit its Firm TWRs for its MTF. Indeed, in paragraph 27 of his affidavit, Mr. Markham acknowledges that non-firm exports would be curtailed first.
23. In paragraph 18 of the Markham Affidavit, Mr. Markham states that “. . . PJM must make curtailment determinations under the TLR Procedure using the NERC IDC.” As provided in Section 2.2, with respect to the IDC, if any segment of a NERC eTag is impacted by a TLR, then the entire eTag is curtailed. In paragraph 19 of the Markham Affidavit, Mr. Markham states that “. . . it is my understanding that the curtailment procedures PJM is obliged to apply to exports under the NERC rules (and its own rules) look only to the firmness of PJM ‘out service’ arrangements.” Mr. Markham is incorrect. For transactions across the Linden VFT MTF, the POD *into New York* is at LINDEN

VFT (NYIS) Bus Number 126265 (COGNTECH 345.00) and the POR is at LINDEN VFT (PJM) Bus Number 218442 (LINDEN_VFT 230.00). Even if exports from PJM have LTFPTP to the POR on the Linden VFT MTF *within PJM*, firm transactions, as I explained above, cannot be scheduled across the Linden VFT MTF (*i.e.*, from the POR *to the POD*) now that Linden VFT elected to convert its MTF's Firm TWRs to Non-Firm TWRs. Furthermore, if any segment of a NERC eTag is impacted by a TLR, then the entire eTag is curtailed. With non-firm service over the Linden VFT facility (Tag Segment 2), as explained in the IPPNY Complaint, the entire eTag for the Linden VFT MTF is vulnerable to curtailment under less severe system conditions (e.g. TLR 3b) than firm service (TLR 5). Again, this doesn't even consider PJM's separate curtailment rights for economics pursuant to the Linden VFT Order.

24. In paragraph 20 of the Markham Affidavit, Mr. Markham states that “. . . the flow over the Zone J MTFs does not need to be visible in the IDC.” In paragraph 21 of the Markham Affidavit, Mr. Markham states that “. . . the MTF ‘facility service’ (*i.e.*, the portion of the transmission path over the MTF itself) has no impact on any system constraints and is not considered when PJM follows the TLR Procedure which is appropriate based on the impacts to the transmission system.” He bases this statement on the fact that “. . . the ‘facility service’ portion, is assigned a Transmission Distribution Factor of zero.” These statements are incorrect. First, the assignment to the “facility service” of a Transmission Distribution Factor of zero is due to the MTF being “controllable” by PJM and not due to any assumed level of transmission firmness. Because the MTF is now capable of only scheduling Non-Firm transmission across its system, this controllable and Non-Firm status will take priority over Transmission

Distribution Factor levels and curtailment will occur at TLR event Level 3b just as with any other Non-Firm transactions. Second, as demonstrated in “NERC Change Order #302, Linden Variable Frequency Transformer (VFT) model in IDC (Sept. 2, 2009),” the flow over the Linden VFT MTF is separated into three segments that are visible in the IDC. As discussed above, ***“[i]f any of the separate segments of the tag are impacted by a TLR, then the entire tag is curtailed accordingly.”***

25. This concludes my Affidavit.

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Independent Power Producers of)
New York, Inc.,)
)
 Complainant,)
)
 v.)
)
New York Independent System)
Operator, Inc.,)
)
 Respondent.)

Docket No. EL18-189-000

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

Executed on September 5, 2018

Thomas M. Piascik
Thomas M. Piascik