HUNTON & WILLIAMS LLP
RIVERFRONT PLAZA, EAST TOWER
951 EAST BYRD STREET
RICHMOND, VIRGINIA 23219-4074

TEL 804 • 788 • 8200
FAX 804 • 788 • 8218

MEMORANDUM

TO: Robert E. Fernandez, Esq. **DATE:** April 10, 2013

FROM: Hunton & Williams LLP

Enforceability of NYISO Netting Practices

You asked us to review the billing and payment provisions of the New York Independent System Operator, Inc. ("NYISO") tariffs and provide an analysis of the enforceability of the NYISO's netting and setoff practices in the event that a NYISO Market Participant[1] seeks protection under the United States Bankruptcy Code (the "Bankruptcy Code").[2] You also asked us to provide an analysis of the impact of recent revisions to the NYISO tariffs that establish that the NYISO takes title to the products that are the subject of the transactions that it administers.[3]

In reviewing these issues, we have examined the relevant provisions of the NYISO's tariffs and organic agreements, including those that establish that the NYISO takes title to the products that are the subject of the transactions it administers, as well as relevant state and federal law.

Part I of this memorandum provides a summary of our analysis. Part II provides background information regarding this question. Part III discusses the laws of setoff and recoupment. Part IV provides an analysis of these laws applied to the NYISO's current tariffs and market structure. Finally, Part V indicates our view that a bankruptcy court likely would enforce the NYISO's netting practices and concludes that the NYISO taking title in the transactions it administers further supports that outcome.

I. EXECUTIVE SUMMARY

The Bankruptcy Code preserves for a creditor its state law right of setoff but requires the creditor to establish that the claim and debt the creditor seeks to offset are mutual. When determining

[1] Capitalized terms used but not otherwise defined in this memorandum shall have the meanings given to them in the NYISO Market Administration and Control Area Services Tariff ("Services Tariff") or the NYISO Open Access Transmission Tariff ("OATT").

[2] The legal analysis of this issue remains the same whether a Market Participant becomes a debtor in bankruptcy under chapter 7, 9, or 11 of the Bankruptcy Code.

[3] We do not undertake to advise of any changes that might arise after the date of this memorandum.

whether debts are "mutual," which is not defined by the Bankruptcy Code, courts frequently examine whether: (i) the debts are between the same parties, (ii) the parties stand in the same right, and (iii) the parties act in the same capacity.

The NYISO acts as a central counterparty in settling Market Participant transactions.[4] The NYISO tariffs establish that the payment obligations for the transactions arise between the NYISO and each Market Participant individually.[5] In the event a Market Participant fails to perform its obligations under any transaction, the NYISO has the sole right and authority under its tariffs to pursue recovery of those amounts from the defaulting Market Participant.[6] In the event the NYISO is unable to recover on any such default, the resulting bad debt losses are allocated pro rata to all Market Participants.[7]

Absent a revision to the Bankruptcy Code, it is not possible to completely foreclose an argument that the NYISO's ability to mutualize bad debt losses among Market Participants runs counter to a finding of mutuality in the transactions that it administers. Nevertheless, our analysis of applicable case law leads us to conclude that a bankruptcy court properly applying relevant precedent and the policies underlying the Bankruptcy Code likely would find that the requisite mutuality exists to support the NYISO's netting practices because these transactions reduce to a set of bilateral payment obligations between the NYISO and each Market Participant. A bankruptcy court likely would consider these bilateral payment obligations the decisive factor in finding mutuality between the NYISO and each Market Participant to permit the NYISO to offset obligations owed by the NYISO to a bankrupt Market Participant against the obligations owed to NYISO by the Market Participant. Taking title to the products bought and sold in the markets it administers further strengthens the NYISO's ability to enforce its netting practices in a bankruptcy proceeding because it clarifies that the NYISO is the central counterparty and primary obligor in each of the transactions in which it is engaged.

II. BACKGROUND

The Federal Energy Regulatory Commission ("FERC") issued Order No. 741 in October 2010 ("FERC Credit Rule"). The FERC Credit Rule prescribes new regulations applicable to ISOs/RTOs aimed at improving credit practices in organized wholesale electric markets. One of these regulations is intended to address a concern that a bankruptcy court, in the event of a Market Participant bankruptcy proceeding, might not uphold the routine netting practices of ISOs/RTOs and would decline to enforce otherwise applicable rights of setoff.

The NYISO's tariffs, like most ISO/RTO tariffs, provide for the NYISO to net payments owed by the NYISO to a Market Participant against payments owed by the Market Participant to the

[4] *See* Services Tariff § 7.1, OATT § 2.7.1.

[5] Id.

[6] *See* Services Tariff § 7.5.3(i) providing in pertinent part that "in the event of a default, the ISO shall have the sole and exclusive right to initiate debt collection procedures against a Customer on account of any such default."

[7] *See* OATT, Attachment U, § 27.3.

NYISO. If a bankruptcy court did not uphold the netting practices of the ISO/RTO in a bankruptcy proceeding, then the ISO/RTO could be required to pay the full amount owed to the bankrupt Market Participant without first deducting from that amount any payments the Market Participant owed to the ISO/RTO. The ISO/RTO could then be left with an unsecured claim in the bankruptcy proceeding for the amount owed from the Market Participant that likely would be paid at substantially less than the full value. The NYISO would then mutualize the resulting bad debt loss among remaining Market Participants in accordance with its tariffs.

In an effort to avoid such an outcome, the FERC Credit Rule directed each ISO/RTO to implement one of the following four options:

1. Establish a single counterparty to all Market Participant transactions by taking title to the products bought and sold in the ISO/RTO-administered market;
2. Require each Market Participant to grant the ISO/RTO a security interest in its ISO/RTO receivables;
3. Establish another method of supporting netting, approved by FERC, that provides a similar level of protection to the market; or
4. Establish credit requirements based on a Market Participant's gross obligations.

The NYISO complied with the FERC Credit Rule by revising its tariffs to clearly provide that it takes title to the products that are the subject of the transactions it administers.

III. OVERVIEW OF THE LAWS OF SETOFF AND RECOUPMENT IN BANKRUPTCY

A. The Right of Setoff

i. Overview

The right of setoff arises under state law and allows parties that owe each other money to apply their mutual debts against each other avoiding "the absurdity of making A pay B when B owes A."[8] Generally, the right of setoff develops from debts arising from separate transactions between the same parties.[9] The Bankruptcy Code preserves for a creditor its state law right "to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case … against a claim of such creditor against the debtor…."[10] but adds additional requirements. In order for a creditor to assert a right of setoff under section 553(a) of the Bankruptcy Code, the following conditions must be met: "(1) the creditor holds a 'claim' against the debtor that arose before the commencement of the case; (2) the creditor owes a 'debt' to the

[8] *Citizens Bank v. Strumpf*, 516 U.S. 16, 18 (1995).

[9] *See In re Malinowski*, 153 F.3d 130, 133 (2nd Cir. 1998).

[10] 11 U.S.C. § 553(a).

debtor that also arose before the commencement of the case; (3) the claim and debt are 'mutual;' and (4) the claim and debt are each valid and enforceable."[11]

Once a creditor asserts a right of setoff under section 553(a), section 506(a) of the Bankruptcy Code provides that a claim subject to setoff "is a secured claim … to the extent of the amount subject to setoff."[12] Thus, the preservation of a creditor's setoff rights significantly improves that creditor's position with respect to other creditors.

ii. The Requirement of Mutuality

The most frequently litigated element of Section 553(a) of the Bankruptcy Code is the requirement that the claim and debt to be offset are mutual.[13] Indeed, the FERC Credit Rule was motivated in part by an expressed concern that a bankruptcy court may not uphold ISO/RTO netting practices in the event a creditor asserts that the debts between an ISO/RTO and its Market Participant lack mutuality.

We believe that a bankruptcy court properly applying legal precedent would adhere to the language of the Bankruptcy Code and focus on whether a payment obligation exists between the parties. Taking title in the transaction provides additional support for the bankruptcy court to find that the requisite mutuality exists.

Although the Bankruptcy Code does not define the term "mutual," when determining whether debts are mutual, courts frequently examine whether: (i) the debts are between the same parties, (ii) the parties stand in the same right, and (iii) the parties act in the same capacity.[14] There are several categories of transactions where courts have found mutuality to be lacking. Against this background, we analyze the requirements for mutuality in the context of the NYISO's tariffs and market structure in Part IV below.

a. Whether the Debts are Between the Same Parties

The first requirement for mutuality is that the debts are due to and from the same parties.[15] This issue often arises in the case of a triangular setoff, which, as a general rule, fails to satisfy the requirement of mutuality. A triangular setoff occurs when one party, A, attempts to set off debt

---

[11] 5 *Collier on Bankruptcy* ¶ 553.03 (15th ed. 2008).

[12] 11 U.S.C. § 506(a)(1).

[13] 11 U.S.C. § 553(a).

[14] *See In re Semcrude, L.P.,* 399 B.R. 388 (Bankr. D. Del. 2009) (finding that "[t]he authorities are also clear that debts are considered 'mutual' only when 'they are due to and from the same persons in the same capacity.' *Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 149 (2d Cir. 2002) (citing *Scherling v. Hellman Elec. Corp.* (*In re Westchester Structures, Inc.*) 181 B.R. 730, 740 (Bankr. S.D.N.Y. 1995). Put another way, mutuality requires that 'each party must own his claim in his own right severally, with the right to collect in his own name against the debtor in his own right and severally.' *In re Garden Ridge*, 338 B.R. 627,633-34 (Bankr. D.Del. 2006) (*quoting Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1036 (5th Cir. 1987))").

[15] *Id.* (citing *Westinghouse*, 278 F.3d 138 at 149).

owed to a second party, B, against debt owed to A by a third party, C. Mutuality is lacking because B and C are not the same parties, and A owes no direct obligation to C. In such an example, courts have refused to permit setoff because of the favorable treatment of a creditor exercising setoff rights against a debtor at the expense of other creditors, which conflicts with the general policy in bankruptcy of equal distribution to similarly situated creditors.

By way of example, a recent decision from the United States Bankruptcy Court for the District of Delaware found mutuality to be lacking even though the party that owed the creditor money – C in the above example – was a subsidiary of the debtor and the parties had a contractual agreement permitting such triangular setoff.[16] The court held that under the contract, the creditor attempting to exercise setoff - A in the above example - lacked the ability to collect its debt directly from the debtor. At best, A had the right to reduce its payment to the debtor based on amount owed to A by C. The bankruptcy court held that the debts were therefore not mutual because the payment obligation to A ran from the debtor's subsidiary, C, not the debtor.[17] To permit setoff in that circumstance would place A ahead of, and reduce available assets for distribution to, the debtor's other creditors.

b. Whether the Parties Making the Obligations Stand in the Same Right for Each Obligation

The second requirement for mutuality is that the parties to the obligations must stand in the same right for each debt. Thus, mutuality is lacking when a creditor attempts to set off an obligation that it owes to a bankrupt debtor against an obligation the bankrupt debtor owes jointly to the creditor and a third party. In this situation, the parties do not stand in the same right for each obligation. There is no mutuality because the money owed by the debtor is not owed only to the creditor but it is also owed to a different party (i.e., the third party).[18] Similar to the situation of a triangular setoff, allowing a setoff where the parties stand in different rights may harm the rights of a third party.

c. Whether the Parties Making the Obligations Act in the Same Capacity for Each Obligation

The third requirement for mutuality is that the parties to the debts must act in the same capacity for each debt. Mutuality is lacking where a party attempts to set off debt owed by it in one

[16] *Semcrude*, 399 B.R. at 388; *see also In re Lehman Bros., Inc.*, 458 B.R. 134 (Bankr. S.D.N.Y. 2011) (denying right of a creditor to offset debt owed Lehman Bros. against debt owed to the creditor's affiliate pursuant to a netting agreement entered into prior to the bankruptcy filing).

[17] *Semcrude,* 399 B.R. at 397. Notably, the court did not reach the issue of whether a guaranty by the debtor of its subsidiary's debt to the creditor would satisfy the requirement of mutuality.

[18] *See Gray v. Rollo*, 85 U.S. 629 (1873) (holding that Gray and Gaylord (A and B) could not offset a debt owed to an insurance company (C) against debt owed by C to Gray and his brother (A and D)).

capacity against debt owed to it in another capacity.[19] The most common example of lack of capacity in this context arises when a debtor owes a loan to a bank and the same bank holds funds deposited by the debtor in a fiduciary capacity (e.g., as a trustee or escrow agent). When the debtor files for bankruptcy, the bank often will attempt to set off the debtor's money that it holds as a fiduciary against the money the debtor owes the bank under its loan. In this scenario, mutuality is lacking because the bank is acting in its own capacity with respect to the loan with the debtor – the initial obligation – but is acting in a fiduciary capacity with respect to the debtor's funds held by the bank in trust – the return obligation.[20]

B. Recoupment

Like setoff, the equitable defense of recoupment allows a creditor to offset its obligations against a debtor's claim. Unlike setoff, however, mutuality is not a statutory requirement for recoupment. Recoupment by its nature requires that the countervailing obligations arise out of a single or related set of transactions.[21] The premise underlying recoupment is that it would be inequitable to permit a debtor to enjoy the benefits of a transaction without also meeting its obligations.[22] To the extent that a Market Participant's payables and receivables arise out of the same set of transactions, a bankruptcy court may permit recoupment, without the need to analyze the "mutuality" of the obligations. Thus, while setoff involves two independently enforceable obligations, recoupment is more in the nature of a defense to the other party's claim and serves to reduce the amount of that claim.

The Bankruptcy Code does not contain a specific recoupment provision, but the doctrine has developed through court decisions, producing two distinguishable tests. The United States Courts of Appeal for the Third Circuit and the Tenth Circuit, on the one hand, have adopted the stricter of the two tests known as the "single integrated transaction" test.[23] Under this test, recoupment applies if both debts arise out of a single integrated transaction "so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations."[24] On the other hand, the D.C. Circuit, the Ninth Circuit, and the First Circuit apply a broader test known as the "logical relationship" test. Under this test, recoupment may apply to a number of events "depending not so much upon the immediateness of their connection as upon

[19] *See, e.g.*, *In re Mastroeni*, 57 B.R. 191 (Bankr. S.D.N.Y. 1986) (holding that mutuality was lacking where a bank sought to setoff deposits of the debtor held in an Individual Retirement Account, with the bank as trustee pursuant to a custodian agreement, against unsecured loan payments owed to the bank by the debtor, where the bank acted as a lender, not a trustee).

[20] *Id.*

[21] *See New York State Elec. & Gas Corp. v. McMahon (In re McMahon)*, 129 F.3d 93, 96 (2d Cir. 1997) ("New York law requires recoupment to arise out of the same set of transactions as the claim.").

[22] *See e.g.*, *Conoco, Inc. v. Styler (In re Peterson Distrib., Inc.)*, 82 F.3d 956 (10th Cir. 1996).

[23] *See In re Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065 (3d Cir. 1992).

[24] *Anes V. Dehart* (*In re Anes)*, 195 F.3d 177, 182 (3d Cir. 1999); *see also In re Peterson Distributing, Inc.,* 82 F.3d 956 (10th Cir. 1996).

their logical relationship."[25] While some Circuits, including the Second Circuit, have not officially adopted either test, we believe that a bankruptcy court would likely enforce the NYISO's netting of a Market Participant's purchases and sales within a particular NYISO market (e.g., Energy, TCC, Capacity, Virtual Transactions) based on the equitable defense of recoupment under either standard.

IV. THE NYISO AND SETOFF AND NETTING

A. NYISO Setoff and Netting Provisions

Both the Services Tariff and the OATT provide that "if for any settlement period the ISO is required to pay any amount to the Customer and the Customer is required to pay any amount to the ISO under this ISO OATT or the ISO Services Tariff, such amounts shall be netted, and the party owing the greater aggregate amount shall pay to the other party the difference between the amounts owed. Additionally, all outstanding payment obligations under this ISO OATT and the ISO Services Tariff between the ISO and the Customer may be netted, offset, set off, or recouped. . . ."[26] In practice, the NYISO calculates discrete payment obligations for each Market Participant by market (e.g., Energy, TCC, Capacity, Virtual Transactions). Within the Energy market, the NYISO nets charges and credits resulting from a Market Participant's day-ahead, real-time, and ancillary service transactions.

The NYISO establishes separate credit requirements for each of its markets based on an estimate of the Market Participant's position within that market at the end of the billing period. Except in certain limited circumstances, the NYISO does not reduce a Market Participant's credit requirement for one market to account for the amount the NYISO expects to owe the Market Participant in another market.[27] For example, the NYISO might expect a Market Participant active in the Energy, ICAP, and TCC markets to generate net obligations to the NYISO for Energy and ICAP, but expect the NYISO to owe the Market Participant for TCCs. In that case, the NYISO would establish credit requirements for the Market Participant's expected obligations to the NYISO related to its participation in the Energy and ICAP markets without any reduction based on the amount the NYISO estimates it would owe the Market Participant for participating in the TCC market.

B. Mutuality and the NYISO

Under the Services Tariff and the OATT, Market Participants make payments to the NYISO

[25] *Holyoke Nursing Home, Inc. v. Health Care Fin. Admin. (In re Holyoke Nursing Home, Inc.)*, 372 F.3d 1 (1st Cir. 2004); *Sims v. H.H.S. (In re TLC Hospitals, Inc.)*, 224 F.3d 1008, 1012 (9th Cir. 2000); *U.S. v. Consumer Health Services of Am., Inc.*, 108 F.3d 390 (D.C. Cir. 1997).

[26] Services Tariff § 7.1.2, OATT § 2.7.1.2.

[27] Prior to the issuance of the FERC Credit Rule, NYISO permitted limited netting across markets under its credit rules by allowing customers, upon request, to elect to treat their net receivables for the billing period as cash collateral. In compliance with the FERC Credit Rule, the NYISO now requires a customer requesting this treatment to provide a first priority lien security interest in its net receivables. *See* Services Tariff § 26.6.1.4

and/or receive payments from the NYISO, and the NYISO utilizes an ISO Clearing Account to facilitate such transactions.[28] On a weekly basis the NYISO invoices Market Participants indicating net amounts owed by or to the NYISO for transactions in the NYISO-administered market during the prior weekly period.

We believe that a bankruptcy court analyzing the NYISO's request to set off obligations would find the requisite mutuality exists because the transactions reduce to a set of bilateral relationships between the NYISO and each Market Participant, as reflected in the weekly invoices. In other words, the payment obligation of each Market Participant runs to and from the NYISO, not to any other Market Participant or third-party, and the NYISO acts as a central counterparty for those transactions.

Other factors that reflect that the NYISO is the primary obligor include, for example, that credit support provided by Market Participants is given in the name and for the benefit of the NYISO. In the event a Market Participant defaults on a payment obligation, the NYISO is authorized by its tariffs to apply a Market Participant's collateral to reduce and/or recover its overdue payment obligation. The NYISO also is obligated by its tariffs to pursue available remedies to recover any further amount owed.[29] Finally, when the NYISO pursues a judgment against a Market Participant for a bad debt, the NYISO brings suit in its own name and right as the counterparty to the service agreement between the NYISO and the Market Participant. The NYISO is the only party with standing to pursue a Market Participant default.

i. NYISO Netting is Limited to Debts Between the Same Parties

As discussed above, in a triangular setoff, one party, A, attempts to set off debt owed to a second party, B, against debt owed to A by a third party, C. The NYISO's netting practices are distinguishable from a triangular setoff because the NYISO, in issuing settlement invoices, only nets obligations owed directly between the NYISO and a specific Market Participant, and does not net obligations between the NYISO and any other party, including any affiliate of the Market Participant.[30] Accordingly, the obligations between the NYISO and any particular Market Participant are bilateral, and the corresponding setoff would not impact the rights of any third-party.

ii. The Parties Stand in the Same Right

While Market Participants ultimately share in any NYISO losses, a Market Participant's obligations to the NYISO for its purchases are not joint obligations. The OATT allows the NYISO to draw from its working capital fund to facilitate timely payment to Market Participants

[28] *See* Services Tariff § 7.1.3, OATT § 2.7.1.3.

[29] *See* OATT, Attachment U, §27.1, providing, in pertinent part, "[a]t such time that the ISO's Chief Financial Officer concludes that the ISO does not reasonably expect payment in full from a defaulting [customer] within an acceptable time period, then the ISO's Chief Financial Officer shall declare that the net unpaid obligation is a bad debt loss [...] and the ISO shall pursue available remedies for customer defaults under the ISO Tariffs."

[30] *See* Services Tariff § 7.1.2, OATT § 2.7.1.2.

and maintain the liquidity of the NYISO-administered markets in the event of a payment default by a Market Participant.[31] The NYISO's working capital fund operates essentially as a loss reserve account that is pre-funded by Market Participants. The NYISO also maintains a bank line-of-credit that it may use to protect market liquidity and pay Market Participants on time. In general, the NYISO seeks to mutualize a bad debt loss from its Market Participants only after the NYISO has pursued remedies in its own name against a defaulting Market Participant. The NYISO will then replenish its working capital fund with the monies it recovers through the exercise of its remedies, or, when necessary, from the mutualization of the loss to all Market Participants in accordance with the terms of the tariffs.[32] Although Market Participants share in losses under the Services Tariff and the OATT, the NYISO tariffs only create bilateral obligations between the NYISO and each individual Market Participant.

iii. The NYISO Operates in the Same Capacity in Each Transaction

Courts have found that mutuality is lacking where a party attempts to set off debt owed by it in one capacity against debt owed to it in another capacity.[33] This situation is distinguishable from the relationship between the NYISO and its Market Participants because the NYISO acts in the same capacity on both sides of market transactions. The NYISO's role is consistent across all transactions. Thus, as the NYISO operates in the same capacity on both sides of the transactions reflected in monthly invoices, this element of mutuality should be satisfied.

C. Setoff and Recoupment in Bankruptcy

In the event that a bankrupt Market Participant has payables and receivables with the NYISO, the equitable defense of recoupment likely would provide an independent basis for the NYISO to net those obligations. As discussed above, unlike setoff, mutuality is not a statutory requirement for recoupment. To the extent that a NYISO Market Participant's payables and receivables arise out of the same set of transactions, a bankruptcy court may permit recoupment, without the need to analyze the "mutuality" of the obligations. While a bankruptcy court has not yet ruled on whether recoupment applies to transactions under an ISO/RTO tariff, bankruptcy courts have applied recoupment to a set of related transactions under a single contract in a regulated industry.[34]

---

[31] *See* OATT, Attachment U, § 27.3, providing, in pertinent part, "[w]henever all or any portions of any settlement invoices remain unpaid to the ISO after the invoice due date, the ISO, at its discretion, may utilize the Working Capital Fund to maintain the liquidity of the New York wholesale energy markets and pay all [customers] who are owed monies in their settlement invoices under the ISO Tariffs."

[32] *See* OATT, Attachment V, § 28.6.2.

[33] *Mastroeni*, 57 B.R. at 191.

[34] For example, numerous courts have considered whether recoupment applies to Medicare/Medicaid "Provider Agreements" entered into by a health care provider, a fiscal intermediary, and the Department of Health and Human Services ("HHS"). The provider receives monthly advances from the fiscal intermediary based on cost estimates for various Medicare/Medicaid services provided under the provider's agreement. At the end of the year, HHS audits the provider and frequently an overpayment results. HHS then instructs the fiscal intermediary to withhold future monthly payments to recoup the overpayment. The majority of bankruptcy courts conclude that HHS may continue to recoup overpayments, even if the provider files bankruptcy. *See, e.g.,*

If a bankruptcy court were to determine that a Market Participant's activities in different NYISO-administered markets constitute separate sets of transactions such that the NYISO could not recoup a Market Participant's payables against its receivables across markets (for example, net payables in the Energy market with receivables in the TCC market), the court likely would still uphold the NYISO's right to recoupment within each market.[35] Even under the stricter "single integrated transaction" test, a bankruptcy court would likely permit recoupment based on the NYISO's historic netting practice and the specific language of the tariffs that permit netting. The NYISO's tariffs do not permit a Market Participant to aggregate all credits within a period and demand payment without netting the credits against charges during the same period. Following this reasoning, a bankruptcy court would likely conclude that it would be inequitable for a Market Participant to enjoy the benefits of its credit transactions without meeting its obligations for its charge transactions within a single market.

V. CONCLUSION

The Services Tariff and the OATT specify that payment obligations are between the NYISO and the Market Participants and payments are owed to or from the NYISO. Our analysis of applicable case law leads us to conclude that a bankruptcy court likely would consider these payment obligations the decisive factor in finding mutuality between the NYISO and its Market Participants. The recent revisions to the NYISO's tariffs to provide that the NYISO takes title to the products that are the subject of the transactions it administers further support a finding that the NYISO is permitted to set off obligations owed by a bankrupt Market Participant against amounts owed to the Market Participant in accordance with its historic netting practices. Taking title in the products purchased and sold in the NYISO-administered markets reinforces the position that mutual obligations run from the NYISO to each Market Participant under the NYISO's tariff provisions and further demonstrates that the NYISO is the true counterparty and primary obligor in each of the transactions in which it is engaged.

VI. USE OF MEMORANDUM

A copy of this memorandum may be shown to the Commodity Futures Trading Commission for information purposes only, and a complete copy of this memorandum may be posted on the CFTC's website in connection with NYISO's application for an exemption pursuant to Section 4(c) of the Commodity Exchange Act, as amended.

We note that we have found no case law directly on point. We further note that courts exercising jurisdiction under the Bankruptcy Code are courts of equity, and have the express power to issue any order or process necessary to carry out the purpose and provisions of the Bankruptcy Code. A court's decision regarding matters addressed in this memorandum will be based on its own

---

Ravenwood Healthcare, Inc. v. Dept. of Health & Mental Hygiene, Case No. MSG-06-3059, 2007 U.S. Dist. LEXIS 40796 (D. Md. 2007) (discussing line of cases). For a more detailed description of the Medicare reimbursement process, see 42 U.S.C. § 1395(g) (2006).

[35] As explained in Section IV.A. the NYISO establishes separate credit requirements for each of its markets and nets only a Market Participant's activities within the same market when determining the Market Participant's credit requirements.

analysis and interpretation of the factual evidence before the court and the applicable legal principles. This memorandum is not an empirical prediction as to the outcome of any future litigation, but rather provides our informed legal analysis as to the proper application of applicable law to the facts set forth herein and relied upon for purposes of this memorandum.

Hunton & Williams, LLP.