

138 FERC 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Seneca Power Partners, L.P.	Docket No.	EL12-6-000
v.		
New York Independent System Operator, Inc.		

ORDER DISMISSING IN PART, AND DENYING IN PART, COMPLAINT

(Issued March 22, 2012)

1. On October 26, 2011, Seneca Power Partners, L.P. (Seneca)¹ filed a complaint (Complaint) against the New York Independent System Operator, Inc. (NYISO) alleging that NYISO, in its implementation of the mitigation measures in Attachment H of its Market Administration and Control Area Services Tariff (Services Tariff), improperly determined the reference levels for Seneca's 58 MW gas-fired generation facility in Batavia, New York (Batavia). Seneca sells capacity, energy, and ancillary services from its Batavia generator in the NYISO market.

2. Seneca requests that the Commission order NYISO to follow the terms and conditions of its Services Tariff, adjust Batavia's reference levels to reflect Seneca's verifiable costs, and adjust payments for the time period Seneca alleges that the incorrect rate has been in effect. For the reasons discussed below, the Commission denies in part and dismisses in part the Complaint.

¹ Seneca is a wholly-owned subsidiary of Alliance Energy Group, LLC.

I. Background

Relevant Tariff Provisions

3. Attachment H (i.e., section 23) of the Services Tariff² sets forth market power mitigation measures to mitigate the market effects of conduct that would substantially distort competitive outcomes in the NYISO markets. Section 23.3 identifies the criteria for imposing mitigation measures. Specifically, sections 23.3.1 and 23.3.2, respectively, identify the conduct and market impact thresholds used by NYISO to determine whether bids by market participants should be mitigated. Further, as relevant to this Complaint, section 23.3.1.2.3 provides conduct and impact thresholds for mitigating rest-of-state³ generators that are operating for reliability purposes outside of NYISO's economic evaluation process. The thresholds for generators operating for reliability purposes are based on comparing the generator's bid components with its reference levels as determined by NYISO specific to each generator. In accordance with these provisions, a generator's bid is mitigated and NYISO substitutes the generator's bid components with the reference levels when the bid components exceed the reference levels by amounts specified in section 23.3.1.2.3.3.

4. Section 23.3.4.1 identifies three methods of calculating reference levels: (i) the lower of the mean or median of the Generator's accepted bids over a certain period, exclusive of certain enumerated bids; (ii) the mean of the locational based marginal price (LBMP) at the generator's location during certain hours, excluding certain enumerated LBMP's; or (iii) a level determined in consultation with the Market Party.⁴ Section 23.3.1.4.1.3 states that the reference level for a generator's energy bid is intended to reflect the generator's marginal costs. It further states that NYISO's determination of a generator's marginal costs under the third method shall include an assessment of the Generator's incremental operations costs in accordance with a specific formula,⁵ and

² Under the Commission's e-Tariff system, Attachment H is section 23, *Market Mitigation Measures*, of the Services Tariff.

³ Rest-of-state refers to generators located outside of the New York City constrained area.

⁴ Here, the Market Party representing Batavia is Seneca.

⁵ Section 23.3.1.4.1.3 of Attachment H provides that the following formula is to be used when the reference level is determined by consultation with the Market Party: ((heat rate* fuel costs) + (emissions rate * emissions allowance price) + (other variable operating and maintenance costs)).

such other factors or adjustments as NYISO shall reasonably determine to be appropriate based on data as may be furnished by the Market Party or otherwise available to NYISO.

5. Section 23.3.1.4.2 states that, if sufficient data do not exist to calculate a reference level on the basis of the first two methods, or if NYISO determines that none of the three methods are applicable to a particular type of bid component, or an attempt to determine a reference level in consultation with a Market Party has not been successful, or if the reference level produced does not reasonably approximate a Generator's marginal cost, NYISO shall determine a reference level on the basis of various parameters, including NYISO's estimate of the costs or physical parameters of an electric facility, taking into account available operating costs data, appropriate input from the Market Party, and the best information available to NYISO; or an appropriate average of competitive bids of one or more similar electric facilities, with certain formulae applicable to particular bids, such as incremental bids for new capacity, start-up cost bids, minimum generation, and so forth.⁶ As a result of NYISO's inability to determine reference levels in consultation with Seneca, it conducted an independent evaluation consistent with these procedures.

II. Summary of the Complaint

6. Seneca alleges that NYISO is violating its Services Tariff and engaging in unduly discriminatory conduct in improperly deriving and unilaterally modifying the reference prices used by NYISO to compensate Seneca's Batavia generator, which has been identified as needed for reliability. As a result, Seneca states that Attachment H procedures are applied to its generator nearly every time it is scheduled to run.⁷ Seneca argues that over the past year, NYISO has disregarded the cost data submitted by Seneca to establish reference prices upon which Seneca's mitigation and compensation are based.⁸

⁶ Section 23.3.1.4.7.2, for example, states that NYISO may review fuel type and fuel price information submitted by market parties to test the accuracy of the information submitted in order to prevent market clearing prices and guarantee payments from being incorrectly calculated. Of relevance here, section 23.3.1.4.7 of Attachment H states that NYISO shall use the "best information available" to it to adjust reference levels to reflect appropriate fuel costs. Section 23.3.1.4.7.1 states that the Market Party may contact NYISO for an adjustment in the generator's reference level when the generator's fuel type or fuel price changes.

⁷ Seneca October 26, 2011 Complaint at 2.

⁸ *Id.* at 3.

7. Seneca argues that since 2010, NYISO has sought to dictate the plant's operating characteristics without regard to the design of the Batavia generator, and that NYISO has continuously denied the recovery of its verifiable costs of operation, specifically gas commodity prices, gas transportation costs, minimum generation run time, and production operation and maintenance (O&M) costs.⁹

8. Seneca states that its Batavia generating plant, which has operated since 1992, was designed to operate in a base-load configuration under a PURPA¹⁰ contract. When the contract terminated, Seneca states that it transitioned to an intermediate service merchant facility, but the economics did not, and do not, justify modification to include features of a generating facility specifically designed for cycling. Seneca states that Batavia operates only a few hundred hours per year primarily to support reliability as either a Day-Ahead Reliability Unit (DARU) or in NYISO's Supplemental Resource Evaluation (SRE).¹¹ The result, it asserts, is that the operating costs per hour at Batavia are higher than those of a plant designed for cycling and it is unable to recover its costs. Seneca asserts that, through 2009, NYISO administered its tariff consistent with Batavia being dispatched to operate consistent with its designed operating characteristics. According to Seneca, in 2010, NYISO significantly altered the way it interprets its tariff and vigorously challenged Seneca on the components of the Batavia reference levels that Seneca is disputing in the Complaint. Each reference level component is discussed in detail in the sections below.

III. Notice of Filing and Responsive Pleadings

9. Notice of Seneca's Complaint was published in the *Federal Register*, 76 Fed. Reg. 68,745 (2011), with interventions and protests due on or before November 28, 2011.

10. Dynegy Power Marketing, LLC, GenOn Energy Management, LLC and GenOn Bowline, LLC, Astoria Generating Company, L.P., and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. filed timely motions to intervene. Independent Power Producers of New York, Inc. (IPPNY) and TC Ravenswood LLC (TC Ravenswood) filed timely motions to intervene and comments in support of the Complaint.

⁹ *Id.* at 11.

¹⁰ See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended in scattered sections of 16 U.S.C.).

¹¹ A resource may be committed to operate for reliability by NYISO or at the request of the local transmission owner out of economic merit order as a DARU or through the SRE as system conditions require.

11. On November 28, 2011, NYISO filed an answer to the Complaint. Also on November 28, 2011, the New York State Department of Public Service (New York Commission) filed a notice of intervention and answer. On December 13, 2011, Seneca filed an answer to NYISO's answer. On December 13, 2011, NYISO submitted an answer to the comments and TC Ravenswood's request for a technical conference.

12. On January 6, 2011, NYISO filed a motion for summary judgment arguing that Seneca has the burden of proving the allegations in its Complaint,¹² and that Seneca has not shown that there are genuine issues of fact material to the disposition of its Complaint. NYISO states it showed in its answer that Seneca has not established that NYISO acted in violation of its process under Attachment H, nor has Seneca provided a factual basis to support its allegations.

13. On January 19, 2011, Seneca filed a response to NYISO's motion for summary judgment summarizing the prior arguments made by Seneca and arguing that Seneca has met its burden to show issues of material fact exist and that NYISO's motion for summary judgment should, therefore, be denied.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We will accept Seneca's response to NYISO's answer because it provided information that assisted us in our decision-making process.

16. We reject the request for a technical conference as unnecessary to the disposition of the issues raised by the Complaint. We also find that a factual hearing is not necessary.¹³ Such a hearing is necessary only when material issues of fact are in dispute

¹² NYISO January 6, 2012 Motion at 2 (citing *Astoria Gas Turbine Power LLC v. New York Independent System Operator, Inc.*, 131 FERC ¶ 61,205, at P 19 (2010) (citing 16 U.S.C. § 824e(b) (2006))).

¹³ See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79, 295 U.S. App. D.C. 407 (D.C. Cir. 1992) (the Commission has
(continued...))

that cannot be resolved on the basis of the written record.¹⁴ We find that the written record provides a sufficient basis upon which to resolve the issues presented in this case.

B. Substantive Matters

17. The issue in dispute is whether NYISO has violated its Services Tariff in its derivation of reference prices for Batavia. Seneca objects to NYISO's derivation of three components of the reference levels for the Batavia generator in particular: (1) fuel cost components; (2) minimum run time; and (3) operating and maintenance expenses. NYISO states that it sets the reference levels for Batavia based on its marginal costs using data supplied by Seneca as well as other data. The Commission denies in part and dismisses in part the complaint and the requested relief for the reasons discussed below.

1. Reference Level Process and Due Process

a. Complaint

18. Seneca argues that it is entitled to a reasonable opportunity to recover its costs. To this end, Seneca argues that the current Attachment H process does not allow Seneca to recover its verifiable costs of operation or a return on its investment. Seneca argues that, each time the Batavia unit runs, its bids are mitigated to reference levels that are too low. Seneca asserts that NYISO's refusal to recognize Seneca's verifiable costs in determining Batavia's reference levels results in unjust and unreasonable rates.¹⁵

19. Seneca argues that the way in which NYISO and the Market Monitoring Unit (MMU)¹⁶ have dealt with Seneca in the Attachment H process has denied it due

discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592, 286 U.S. App. D.C. 367 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

¹⁴ See, e.g., *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970, 268 U.S. App. D.C. 257 (D.C. Cir. 1988); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 219 U.S. App. D.C. 273 (D.C. Cir. 1982); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128, 134 U.S. App. D.C. 229 (D.C. Cir. 1969).

¹⁵ Seneca October 26, 2011 Complaint at 25.

¹⁶ The MMU is the external independent market monitor for NYISO and operates in accordance with section 30 (Attachment O) of the Services Tariff.

process.¹⁷ Seneca states that it protests, objects, and appeals through the Services Tariff process, but NYISO's action is unilateral in nature. Seneca argues that NYISO's alleged "act now, maybe fix later" attitude is a violation of the Tariff and is inconsistent with due process and fair dealing. Seneca argues that, because NYISO reviews its submitted costs each time they are submitted, Seneca experiences delays in receiving funds.

20. Seneca claims that NYISO's continuous challenges to various components of Batavia's costs are unwarranted as no circumstances have changed to warrant any adjustment.¹⁸ Seneca claims that continuous review is costly and time consuming.

b. NYISO's Answer

21. NYISO states that, in accordance with Attachment H, it determines reference levels for Batavia either by evaluating marginal cost data submitted by Batavia or on the basis of the best information available because there is limited competitive bid data available since the unit does not run sufficiently under competitive conditions.¹⁹ Citing the Services Tariff as well as prior Commission orders, NYISO states that it does not include a generator's fixed costs in the determination of the reference level as their inclusion is not consistent with expected bidding behavior in a competitive market.²⁰ NYISO states that Seneca has not established that NYISO has acted in violation of its tariff obligations. NYISO also states that Seneca has not shown that NYISO has violated the process for setting reference levels and that parties should continue the reference level consultation process specified in the Services Tariff.

22. NYISO states that in accordance with the Services Tariff it initially attempted to determine Batavia's reference level through the consultation process and that Batavia is responsible for providing NYISO with its operating costs. NYISO states that Seneca incorrectly states that the tariff "requires" it to take cost data provided by Seneca and incorporate it into the reference level.²¹ NYISO states that section 23.3.1.4 of the Services Tariff does not require that NYISO substitute a Market Party's assessment for its own regarding the validity of the data and that such an interpretation would reduce the

¹⁷ Seneca October 26, 2011 Complaint at 34-37.

¹⁸ *Id.* at 31-32.

¹⁹ NYISO November 28, 2011 Answer at 4 (citing Services Tariff §§ 23.3.1.4.1.3 and 23.3.1.4.2).

²⁰ *Id.* at 13.

²¹ *Id.* at 15 (citing Seneca October 26, 2011 Complaint at 25).

market monitoring functions to the role of a rubber stamp which NYISO says is inconsistent with the purpose of the market power mitigation measures.²² NYISO states that together with the Market Monitoring Unit it is responsible for an independent assessment and determination of the generator's marginal costs in order to determine the reference level. In citing to the Services Tariff, NYISO states that it can assess "such other factors or adjustments as the ISO shall reasonably determine to be appropriate," and is therefore not constrained by the Market Party's assessment.

23. NYISO states that it is required to continuously review and make adjustments to reference levels to ensure they continue to reflect the marginal cost of the unit. NYISO states that it regularly monitors and adjusts the reference level as data underlying the marginal costs of the unit changes or as new data becomes available.

24. In addition, NYISO states that Market Parties may initiate consultation with NYISO or submit additional information at any time and that NYISO will adjust reference levels accordingly in accordance with the provisions of Attachment H. NYISO also references the process by which Market Parties may challenge reference levels and mitigation for Rest-of-State generators needed for reliability.

c. Comments in Support of the Complaint

25. In addition to supporting Seneca's Complaint, TC Ravenswood argues that NYISO's allegedly improper implementation of its Services Tariff with respect to the calculation of reference prices and violation of operating characteristics is not unique to Seneca. TC Ravenswood states that it has experienced similar issues as well as delays in resolving them. TC Ravenswood states that it may also have to seek Commission assistance in resolving its specific issues should the Commission grant the Complaint.

26. TC Ravenswood also argues that other generators need NYISO to implement its Services Tariff properly, transparently and in a non-discriminatory manner. Therefore, TC Ravenswood asks the Commission to convene a technical conference or other Commission administered proceeding to clarify precisely how reference prices should be calculated with respect to certain generic and recurring cost items and types.

27. Similarly, IPPNY asserts that NYISO arbitrarily excludes actual incurred costs from reference prices and that this exclusion is not unique to Seneca. IPPNY states that, on numerous occasions, IPPNY's members have reported similar difficulties in receiving accurate reference levels from NYISO. IPPNY also states that IPPNY members have independently confirmed to IPPNY that NYISO routinely and systematically rejects documented cost data submitted by generators in favor of numbers of its own creation.

²² *Id.* at 15 (citing Services Tariff § 23.1.1).

IPPNY argues that, by reducing reference levels below a generator's actual verifiable costs, NYISO is imposing an unjust and unreasonable rate on the generator that, by definition, does not provide a reasonable opportunity for marginal cost recovery. IPPNY urges the Commission to direct NYISO to recognize actual, verifiable costs when calculating reference prices going forward.

d. NYISO's Response to Comments

28. NYISO states in answer to TC Ravenswood's and IPPNY's comments that their comments should be ignored by the Commission because they do not provide cost or other information relevant to the calculation of reference levels for Seneca's Batavia generator.²³ NYISO further states that TC Ravenswood's assertions about the reference levels for its own generators amounts to a separate complaint and must be rejected by the Commission. NYISO also urges the Commission to forego the technical conference sought by TC Ravenswood as it is aimed at addressing issues beyond those issues raised in the Complaint.

e. Commission Determination

29. The Commission finds that NYISO has properly determined Batavia's reference levels in accordance with the process set forth in Attachment H by evaluating marginal cost data submitted by Seneca; and, in the absence of necessary data, using the best information available. As discussed below, we find that NYISO properly attempted to ascertain Batavia's reference level by requesting specific information from Seneca and, in the absence of required information, properly resorted to proxy data. Therefore, as to this issue, we deny Seneca's Complaint.

30. We find that Seneca has incorrectly interpreted NYISO's obligations under Attachment H. Attachment H provides the process by which NYISO is to determine reference levels for each generator. NYISO is to determine reference levels first based on the generator's accepted bids and competitive market prices or in consultation with the Market Party as discussed earlier. Section 23.3.1.4.2 of Attachment H, states that "[i]f sufficient data do not exist to calculate a reference level on the basis of either of the first two methods, or if the ISO determines that none of the three methods are applicable to a particular type of Bid component, or an attempt to determine a reference level in consultation with a Market Party has not been successful, or if the reference level produced does not reasonably approximate a Generator's marginal cost," NYISO shall determine a reference level on the basis of: (1) *NYISO's estimate of the costs or physical parameters of an electric facility*, taking into account available operating costs data, appropriate input from the Market Party, and the best information available to NYISO; or

²³ NYISO December 13, 2011 Response at 1-2.

(2) an appropriate average of competitive bids of one or more similar electric facilities.²⁴ The record shows that Batavia does not have a competitive history of operating economically for NYISO make a determination regarding reference levels. According to Seneca, Batavia at this time is not economically dispatched.²⁵ Therefore, NYISO must resort to the consultative process of section 23.3.1.4.2 in order to determine Batavia's reference levels.

31. We also find that the record is clear that NYISO has worked with Seneca to obtain verifiable information regarding Batavia's costs. However, unlike Seneca's and IPPNY's characterization, the language in (1) above does not obligate NYISO to necessarily accept the information submitted by the Seneca at face value and rely only on that data. It only requires NYISO to take "appropriate" information from the Market Party into account. NYISO still must ensure that the reference levels accurately represent the marginal costs of the generator. Seneca alleges that NYISO acted unilaterally and disregarded information provided by Seneca in calculating the reference levels of the Batavia unit; however, Seneca has failed to demonstrate that NYISO did not take such data under consideration. Regarding fuel costs, under Attachment H, section 23.3.1.4.7.2, NYISO must review the information submitted by the market parties and verify its reasonableness. Section 23.3.1.4.2.1 states that NYISO must "tak[e] into account available operating costs data, appropriate input from the Market Party, and the best information available." The quoted text necessitates a review by NYISO of the information it is receiving and what information is "appropriate" or constitutes the "best information available" in the context of calculating reference levels according to section 23.3.1.4.2 is up to NYISO. We find that based on NYISO's representations of the actions and data it reviewed as noted above, NYISO did so and, where appropriate, looked to additional information beyond what Seneca provided to determine the reference price parameters.

32. We further find that Seneca has not shown that it has not been afforded an opportunity to provide necessary information, nor has it shown that NYISO has not conducted proper reviews of the information it has submitted for the derivation of the reference levels. Rather, we find Seneca's repeated claims of "unilateral action" by NYISO to be unsupported and contradicted by the record; the record before the Commission demonstrates that NYISO has acted appropriately pursuant to its Services Tariff in reviewing, requesting additional information from Seneca, and determining the

²⁴ According to the record, NYISO does not have sufficient competitive bid data history because Batavia operates primarily for reliability purposes and is not typically dispatched economically in the market.

²⁵ Seneca December 13, 2011 Answer at 7.

reference levels for Batavia such as with regard to the fuel transportation costs. The Attachment H consultation process, which we find NYISO followed, does not permit NYISO to act unilaterally, and instead must take into account the input of multiple sources of information, including that provided by Seneca. On other reference level components that are disputed by Seneca in this Complaint, NYISO has not taken any action, such as with regard to O&M costs and minimum run time. We, therefore, deny these parts of the Complaint.

2. Reference Level Components

a. Fuel Cost Components

i. Complaint

33. According to the Complaint, the Batavia plant takes delivery of gas from an 11-mile pipeline formerly owned by Seneca. Seneca states that in 2010 it transferred the pipeline to an affiliate of Seneca's, Alliance Energy Transmission, LLC (AET) and that it incorporated the natural transportation rate previously approved by NYISO that was in effect at the time into a contract with the pipeline (Seneca/AET Contract).²⁶ Seneca asserts that, in late 2010, NYISO found that the transportation rate was no longer appropriate and reduced it to a lower local distribution rate. Seneca states that, after NYISO proposed to reduce the transportation rate, Seneca objected to the reduction and provided a copy of the Seneca/AET Contract.²⁷ Seneca states that it also provided other examples of contract and tariff based rates similar to that reflected in the Seneca/AET Contract, including a contract between AG-Energy, L.P., another Seneca affiliate, and St. Lawrence Gas (attached as Exhibit E to the Complaint) (AG-Energy/St. Lawrence Gas Contract).²⁸

34. Seneca argues that, it is inappropriate and a violation of the Services Tariff for NYISO to substitute a portion of a gas transportation rate for the existing contract rate set forth in the Seneca/AET Contract.²⁹ Seneca argues that NYISO must use fuel type and price information provided by market parties to develop the generator reference levels unless the information is inaccurate, not timely submitted, or if the information is false or

²⁶ Seneca October 26, 2011 Complaint at 15. The Seneca/AET Contract is included as Exhibit A to the Complaint.

²⁷ *Id.* at 16-18.

²⁸ *Id.* at 18.

²⁹ *Id.*

misleading. Seneca asserts that its contract is accurate, was timely submitted and that the pricing did not contain false or misleading information and that NYISO was, therefore, required to recognize it. Seneca complains that the sole reason NYISO rejected the contract transportation rate is that the contract was executed with an affiliate of Seneca's.³⁰ Seneca argues that NYISO must restore the pricing reflected in the contract. Seneca also states that the rates in its contract are comparable to those of other similarly situated entities. Seneca states that this information was provided to NYISO, but NYISO refused to recognize the rate in the contract. Seneca argues that the affiliate relationship is irrelevant to the analysis that NYISO is allowed to conduct under Attachment H.³¹

35. With regard to the natural gas commodity component, Seneca states that NYISO reduced its Natural Gas Commodity Basis Adjustment Factor.³² Seneca states that NYISO includes an adjustment factor in Batavia's reference price that takes into account the commodity cost at the location at which Seneca takes delivery from Dominion Transmission, Inc. (Dominion) to its 11-mile AET pipeline. Seneca states that, because Dominion delivered into the AET pipeline at a point in a constrained portion of Dominion's system, in 2006 NYISO agreed to add an adjustment to the lower-priced gas commodity index price it was using. Seneca states that NYISO determined that this basis adjustment was a fair representation of the average over/under of index versus actual cost under normal circumstances. Seneca states that, in 2006, NYISO also agreed with Seneca to adjust for a gas balancing penalty rate to reflect the penalty imposed for an assumed level of gas imbalances due to increased usage when the plant was dispatched for reliability support. Seneca states that a 2008 review confirmed the use of the reference price components; however, in 2011, NYISO eliminated the balancing provision based on its review of actual usage data supplied by Seneca for the period 2006 through 2009.

ii. NYISO's Answer

36. NYISO states that it cannot accept on its face the gas transportation price set forth in the Seneca/AET Contract because it does not provide a breakdown between fixed and variable costs and, if there was a variable rate, it would need to be verified since the contract is not an arm's-length agreement. NYISO states that Seneca and its commonly-controlled affiliate AET have elected to structure the inter-affiliate charge as a variable cost, in an attempt to recover all of the costs of the pipeline (both fixed and variable) in Batavia's reference levels. NYISO states that nothing in the Complaint establishes that

³⁰ *Id.* at 27.

³¹ *Id.* at 29.

³² *Id.* at 14-15.

the gas delivery cost should be exempt from the marginal cost principle that underlies determining reference levels.

37. NYISO states that Seneca's reading of the requirements of section 23.3.1.4.7.4 of the Services Tariff, i.e., that NYISO must use fuel information submitted by parties unless it is inaccurate, not timely submitted, or misleading, does not provide the Market Party with a license to make any fuel-related cost it submits binding on NYISO. NYISO states that the tariff's fuel indexing provisions are designed to enable owners to reflect in their bids, and for NYISO to reflect in reference levels, costs that vary daily. NYISO states that, in accordance with the Reference Level Software, Market Parties are able to submit changes directly through this system to parameters including sales taxes, pipeline transport costs, local distribution costs, and fuel acquisition brokerage fees. However, NYISO states that the local delivery charge is not a cost component that varies on a daily basis. NYISO states that the fuel price/type indexing rules do not provide authority for Seneca to re-introduce on a daily basis the per dekatherm rate in the Seneca/AET Contract. NYISO states that the Seneca/AET Contract is not the best information available on the variable gas transportation cost for Batavia.³³ NYISO states that it rejected Seneca's proposal to use the Seneca/AET Contract rate as inaccurate and overstated and also Seneca's attempts to reintroduce the unchanged contract rate pursuant to section 23.3.1.4.7, *et al.*³⁴

38. NYISO also states that the cost basis of the Seneca/AET Contract's variable rate would need to be verified because it is between affiliated parties. NYISO observes that the same person signed the contract on behalf of both parties. NYISO states that Seneca has refused the NYISO Market Mitigation and Analysis Department's repeated requests to provide such cost support. NYISO cites copies of memoranda provided by Seneca in the Complaint that show the Market Mitigation and Analysis Department's attempts to verify the marginal local gas transportation charges. NYISO also states that it was willing to consider basing the reference level on National Fuel Gas Distribution Corporation (NFGDC) charges to AET, but AET refused to provide information concerning that contract. NYISO goes on to state that it is noteworthy that the Seneca/AET Contract includes a variable cost component but includes no fixed charges "in most circumstances."³⁵

³³ NYISO November 28, 2011 Answer at 18 (citing *Reference Level Software User's Guide*, Appendix B).

³⁴ *Id.* at 19.

³⁵ *Id.* at 4 and 7.

39. NYISO states that Seneca's argument for refusing to provide marginal cost support is that the Seneca/AET Contract is on file with the New York Commission and is therefore subject to its jurisdiction and is binding on NYISO's determination of reference levels. NYISO counters by asserting that the fact the Seneca/AET Contract is on file with the New York Commission does not provide NYISO with necessary variable cost data and that using variable cost data from AET would not conflict with any holding of the New York Commission.

40. NYISO states that it is incumbent on Seneca to come forward with the variable cost data. In the absence of such variable cost data from Seneca, NYISO states that it has no alternative in accordance with the tariff but to use proxy data³⁶ such as proxy data from the Niagara Mohawk system. NYISO also states that the current figure used in the reference level computation is consistent with those of the comparable pipelines that Seneca points to in its complaint.³⁷

iii. The New York Commission's Response

41. The New York Commission asserts that the Commission should reject Seneca's arguments and not base its analysis of the gas transportation price component of the reference price on Seneca's contracts with its affiliates. The New York Commission states that the first gas transportation contract Seneca relies upon in support of its proposed reference price input is between itself and its AET affiliate, which has not been reviewed or approved by the New York Commission.³⁸ The New York Commission maintains that contracts between affiliates are unreliable indicators of the price either a market or regulation would yield.³⁹ The New York Commission further states that reference prices are based on marginal costs and that fixed costs are not appropriately included in reference prices.⁴⁰ The New York Commission argues that Seneca has either failed to demonstrate that the gas transportation rate Seneca pays its affiliate does not include fixed costs, or that Seneca has not sought to reflect fixed costs in the reference price through its proposed gas transportation rate component.

³⁶ *Id.* at 8 (citing Services Tariff §§ 23.3.1.4.2 and 23.3.1.4.2.1).

³⁷ *Id.* at 24-25 (citing Seneca October 26, 2011 Complaint at Exhibit B).

³⁸ New York Commission November 28, 2011 Response at 3.

³⁹ *Id.*

⁴⁰ *Id.* at 5.

42. The New York Commission also argues that the AG-Energy/ St. Lawrence Gas Contract, reflects circumstances that are different from Seneca's circumstances.⁴¹ The New York Commission states that it reviewed the contract, reduced the price, and noted that the contract reflects the fixed cost of building the pipeline covered by the contract. This contract then, according to the New York Commission, should not be relied upon by Seneca as evidence for the gas transportation rate that should be reflected in the reference price. The New York Commission also states that the prices set in the second contract reflect the price of service over a dedicated pipeline of different length, vintage, and in a different location from the pipeline to Seneca.⁴² Therefore, the prices in each would not be analogous.

43. In sum, the New York Commission states, these gas transportation contracts should not be relied upon by the Commission in its analysis of the transportation price.

iv. Seneca's Answer

44. Seneca also argues that no substantive changes have been made since NYISO's 2008 reference level changes that would affect the rate for gas transportation service and that NYISO does not identify any substantive change to the factual circumstances that would result in a lowering of the gas transportation rate; Seneca states that NYISO does not discuss in its responses why the rate was acceptable in 2008 but not in 2010.

45. In response to NYISO's claim that the gas transportation rate must be based on a marginal cost of the gas transportation pipeline, Seneca argues that pipeline ratemaking is not based on the marginal costs of operating the pipeline. Seneca states that it is not aware of customers of other local distribution companies in New York calculated on the basis of the marginal costs of the pipeline. Therefore, Seneca argues that it would be unduly discriminatory and result in unjust and unreasonable rates, to require Seneca to prove its affiliate's marginal costs when no other entity purchasing transportation from a local distribution company is required to do so.⁴³ Seneca further argues that NYISO fails to explain why it focuses on the affiliate relationship while ignoring other evidence as to the appropriateness of the gas transportation rate as a valid reference level.

46. In response to the New York Commission, Seneca notes that the New York Commission's own ratemaking in the state does not employ marginal cost pricing for pipeline rates. Seneca also objects to the New York Commission's statements that the

⁴¹ *Id.*

⁴² *Id.* at 6.

⁴³ Seneca December 13, 2011 Answer at 7.

pipeline in the Seneca/AET Contract is of “a different length, vintage, and in a different location” than that in the AG-Energy/St. Lawrence Gas Contract. Seneca counters that the pipelines were constructed at approximately the same time and the length of the St. Lawrence Gas pipeline is about thirty percent shorter than the Seneca pipeline.

v. Commission Determination

47. We find that Seneca has not supported the use of its claimed fuel costs for Batavia’s reference level, or that the current reference level is unjust or unreasonable, or that NYISO has implemented the Attachment H tariff provision incorrectly.

48. With regard to the natural gas commodity component, Seneca states that NYISO includes an adjustment factor in Batavia’s reference price that takes into account the commodity cost at the location at which Seneca takes delivery from Dominion Transmission, Inc. (Dominion) to its 11-mile AET pipeline. Seneca states that, because Dominion delivered into the AET pipeline at a point in a constrained portion of Dominion’s system, in 2006, NYISO agreed to add an adjustment to the lower-priced gas commodity index price it was using. Seneca states that NYISO determined that this basis adjustment was a fair representation of the average over/under of index versus actual cost under normal circumstances. Seneca states that, in 2006, NYISO also agreed with Seneca to adjust for a gas balancing penalty rate to reflect the penalty imposed for an assumed level of gas imbalances due to increased usage when the plant was dispatched for reliability support. Seneca states that a 2008 review confirmed the use of the reference price components; however, in 2011, NYISO eliminated the balancing provision based on its review of actual usage data supplied by Seneca for the period 2006 through 2009.

49. Seneca takes issue with NYISO’s elimination of the gas balancing penalty component of the commodity rate. The only apparent basis for Seneca’s position is that NYISO and Seneca had agreed to the penalty cost component in 2006. However, it is NYISO’s obligation pursuant to Attachment H to verify reference level data. Because Seneca and NYISO agreed to use a specific set of data in 2006 as the “best available information” for the reference levels at that time does not preclude NYISO from updating these data with more up-to-date and accurate data when calculating future reference levels. The record shows that NYISO relied on information supplied by Seneca to update this component of the reference level. NYISO cites communications between NYISO and Seneca demonstrating that NYISO requested additional cost support from Seneca’s parent company Alliance.⁴⁴ NYISO further highlights that Seneca’s Complaint does not

⁴⁴ NYISO November 28, 2011 Answer at 5-7 (addressing and citing Exhibit B to the Complaint).

show that responsive marginal cost information was provided to NYISO in answer to its requests.⁴⁵ Based on NYISO's answer and our review of the information in Exhibit B to the Complaint, which is marked confidential by Seneca, we find that Seneca has not provided any information in its Complaint to demonstrate that NYISO's elimination of the gas balancing penalty is unjust and unreasonable. Therefore, we will deny this portion of the complaint.

50. With regard to the transportation component, the record shows, as discussed below, that Seneca has not provided the information that is necessary to allow NYISO to calculate the marginal transportation cost that could be included in Batavia's reference level. This obligation to provide necessary information rests with Seneca. If Seneca fails to provide the necessary information, NYISO must, in accordance with Attachment H, use the best information available to it including the use of proxy data. We discuss below why we find that NYISO implemented its tariff in a just and reasonable manner in rejecting the Seneca/AET Contract transportation rate provided by Seneca.

51. We find that it was appropriate for NYISO not to use the gas transportation rate in the Seneca/AET Contract rate as the reference level component for gas transportation costs. Seneca argues that the Seneca/AET contract incorporates the same rate previously approved by NYISO and incorporated into the reference price, along with an annual inflationary adjustment factor. We find that that only demonstrates that NYISO has operated under the Attachment H process properly by making adjustments to a reference level component when NYISO was presented with proper information to do so. That is not the case here. The only evidence of Seneca's variable gas transportation costs that Seneca provided was its contract rate in the Seneca/AET contract. However, the Seneca/AET Contract is an affiliate contract⁴⁶ that is actually signed by the same person for both sides of the transaction.⁴⁷ The New York Commission states, and we agree, that affiliate relationships are a poor indicator of competitive market outcomes and not reliable evidence of what the gas transportation rate component of the reference price should be and that Seneca has not shown that the Seneca/AET Contract does not include fixed costs. Further, the New York Commission found that the transfer is an intercompany transaction that does not change the ultimate ownership of the pipeline.⁴⁸ We conclude that NYISO was not under an obligation to accept this contract rate without further verification. The Commission has held that "[i]f costs are incurred through an

⁴⁵ *Id.* at 7.

⁴⁶ We also note that the Seneca/AET Contract is not filed with the Commission.

⁴⁷ *See* Seneca October 26, 2011 Complaint at Exhibit A.

⁴⁸ *Id.* at Exhibit F (NYPSC Declaratory Ruling, Nov. 17, 2009).

affiliate transaction, we cannot presume prudence or assume such an arm's-length relationship.”⁴⁹ Instead, the Commission has, for example, looked to a range of market prices for comparable transactions during the same time period.⁵⁰ The Commission, therefore, agrees with the New York Commission that the Seneca/AET contract is not reliable evidence of what the gas transportation rate component of the reference price should be due to the affiliated nature of the contract.

52. While Attachment H provides that NYISO must “take into account” data provided by the generator when determining reference levels, NYISO is still obligated to ensure the data is verifiable and appropriate for that purpose.⁵¹ It is on this basis that we also reject the claim by IPPNY that NYISO does not have discretion to modify the fuel cost data submitted by Seneca. We find that it was within NYISO’s discretion under Attachment H to reject a rate in a contract with an affiliate as evidence of the generator’s variable costs and to look to other data to establish the gas transportation cost component of the reference level that may occur in competitive conditions. One way to establish that cost level would be to ascertain the actual cost of service of the AET pipeline. Seneca has structured the rate of the Seneca/AET Contract as a variable cost to Batavia; however this does not preclude NYISO from verifying the accuracy of the information under Attachment H due to the nature of this contract among affiliates. The record shows that NYISO has attempted to obtain such information on the costs underlying the rate contained in the Seneca/AET Contract and that Seneca has not responded to NYISO with the requested data. Given the absence of actual cost data, we find it was appropriate for

⁴⁹ *Indiana and Michigan Municipal Distributors Ass’n and City of Auburn*, 62 FERC ¶ 61,189, at 62,238 (1993), *order on reh’g*, 65 FERC ¶ 61,087 (1993), *aff’d sub nom.*, *Indiana Municipal Power Agency v. FERC*, 56 F.3d 247 (D.C. Cir. 1995).

⁵⁰ *Id.*; *see also Mid-America Pipeline Co., LLC*, 124 FERC ¶ 63,016, at P 975 (2008).

⁵¹ *See Services Tariff* § 23.3.1.4.7.4. Under section 23.3.1.4.7.2, NYISO screens fuel type and fuel price information. NYISO may use “automated processes and/or require manual review of fuel type and fuel price information submitted by Market Parties to test the accuracy of the information.” *Services Tariff* § 23.3.1.4.7.2. Following screening, section 23.3.1.4.7.4 provides that “NYISO shall use fuel type and fuel price information submitted by the generator after completing the automated and/or manual screening processes to test for accuracy in accordance with section 23.3.1.4.7.2.” *Services Tariff* § 23.3.1.4.7.4. The requirement is for NYISO to use information submitted by the Market Party as a check on the automated or manual screening processes conducted and not as a substitute.

NYISO to substitute a fuel transportation cost figure based on competitive rates of non-affiliate pipelines, represented here by the Niagara Mohawk rate data.

53. Seneca objects to NYISO's use of the Niagara Mohawk rate data, asserting that it is preposterous to compare the 11-mile line to a LDC system. Instead, Seneca asserts that its contract rate with AET is similar to rates charged by other, similarly-situated pipelines, citing the AG-Energy/St. Lawrence Gas Contract it submitted, which Seneca claims has a similar rate structure and rate to the Seneca/AET Contract.⁵² The New York Commission states in its response that it recently reviewed the AG-Energy/St. Lawrence Gas Contract, reduced the price, and concludes that the AG-Energy/St. Lawrence Gas Contract is not analogous to the Seneca/AET Contract because the prices set in that contract reflect the price of service over a dedicated pipeline of different length, vintage, and in a different location from the pipeline to Seneca. Based on these facts, we find that it would be inappropriate to use the AG-Energy/St. Lawrence Gas Contract as a proxy.

54. IPPNY further claims that Attachment H contemplates that the generator may submit changes to its fuel cost component to reflect real time changes to fuel prices and that this process does not permit NYISO to make changes to timely adjustments. We disagree. We find that this case does not pertain to real time daily changes made by a Market Party to fuel cost changes in the context of these tariff provisions. The instant proceeding is dealing with the verification for accuracy of information by NYISO to support a reference level—a distinctly different matter. The Services Tariff and the reference level software interface used by market participants specifically permit “timely” submittals of proposed fuel type and fuel price changes for NYISO to include in current reference levels. These provisions also provide for accuracy screening by NYISO and provide protections to market participants to ensure that mitigation is imposed correctly.⁵³

55. Based on the evidence presented and our discussion above, Seneca has not demonstrated that the gas transportation charges contained in the Seneca/AET Contract are appropriate for calculating the gas transportation cost used in determining reference levels for Batavia. As discussed above, the Seneca/AET affiliate contract rate is inherently unreliable evidence and Seneca has not provided information on the costs of its affiliate pipeline to NYISO for verification that the costs proposed by Seneca represent an appropriate level of variable gas transportation costs. Without further information about the make-up of the costs underlying the contract, the Commission cannot determine if the contract rate is in fact, the “best information available” of

⁵² Seneca October 26, 2011 Complaint at 28-29 and Exhibit E.

⁵³ Services Tariff §§ 23.3.1.4.7.5 - 23.3.1.4.7.7.

Batavia's variable costs. Further, we found above that NYISO's use of a proxy pipeline per mmBTU rate (Niagara Mohawk) was appropriate in light of the absence of better information. Therefore, we deny this aspect of the complaint.

b. Minimum Run Time

i. Complaint

56. Seneca further claims that NYISO improperly determined a minimum run time for the Batavia unit. In calculating the minimum run time, Seneca states that NYISO erred in only considering an LM 6000 combined cycle plant when Seneca operates a GE Frame 6 industrial gas turbine and therefore, the minimum run time does not reflect the operating characteristics of Seneca's unit.⁵⁴ Seneca argues that the minimum run time for Batavia should remain unchanged.

ii. NYISO's Answer

57. NYISO states that Seneca does not provide evidence that NYISO or the Market Monitoring Unit have reached a conclusion that the minimum run time should be reduced, and further Seneca does not provide cost justification that it should be at Seneca's desired level. NYISO states that it questions the minimum run time as compared to similar generators that operate under competitive conditions. NYISO's Market Monitoring Unit witness LeeVanSchaick states that Seneca mischaracterizes the Market Monitoring Unit's position that minimum run times may be allowed to increase to help the generator manage the cost of cycling.⁵⁵ He states that an example of this would be when a generator that runs economically during the day, but is uneconomic for certain hours overnight, may extend its minimum run time by hours to remain on overnight if the cost to shut down and start up again in the morning is greater than the cost to remain on. Therefore, offering at an increased minimum run time could enable the generator to avoid being shut down overnight. However, the Market Monitoring Unit states that in reviewing Batavia's scheduling information from May through September 2011 he determined that Batavia's reference level costs for operating during the eight-hour periods when not needed for reliability significantly exceeded the energy and ancillary services revenues during these periods. He therefore determined that it would be more cost effective for Batavia to reduce its minimum run time accordingly.⁵⁶ Additionally, the Market Monitoring Unit states that, while Batavia may have been originally designed

⁵⁴ NYISO November 28, 2011 Answer at 20-22.

⁵⁵ *Id.* at 29 (citing Seneca October 26, 2011 Complaint at 21).

⁵⁶ *Id.* at 30 and LeeVanSchaick Aff. at ¶ 17-21.

to operate more consistently, this in itself is not a valid rationale for a specific minimum run time. He states that generators typically become intermediate or peaking units as they age and are superseded by newer efficient technologies and therefore Batavia should be cycled off overnight if it is inefficient to operate.

58. NYISO also states that Seneca mischaracterizes the Market Monitoring Unit's analysis by asserting that it looked only at LM 6000 turbines as a proxy when in fact the Market Monitoring Unit considered data on a number of Frame 6 units in New York and New England. NYISO states that run time offer data indicates that these generators have minimum run times substantially less than Seneca's.⁵⁷ NYISO also states that Seneca has not responded to requests for information to quantify start-up costs or other factors to justify a shorter run time. NYISO adds that it has indicated its willingness to adjust start-up cost reference levels accordingly.⁵⁸ Therefore, NYISO states that the record before the Commission does not support locking in a 24-hour minimum run time. NYISO asks that the Commission direct Seneca to cooperate with NYISO to determine an appropriate minimum run time and related cycling costs.

iii. Seneca's Answer

59. Seneca argues in its answer that NYISO does not refute that Seneca is unable to recover its costs of operation as a result of the reference prices set by NYISO. Seneca also objects to the use of an economist, and not an operational expert, by NYISO to determine how a generating plant should be operated and its costs determined. Seneca argues that economic theory should not dictate physical plant operations and ignores the effects of cycling.

iv. Commission Determination

60. While the evidence shows that NYISO has discussed a reduction in the minimum run time with Seneca, according to NYISO, it has not yet changed the minimum run time.⁵⁹ We encourage Seneca to be more forthcoming with data in order for NYISO to complete its analysis such that Seneca and NYISO may agree on an appropriate minimum run time for Batavia. Accordingly, we find that this issue is not ripe for

⁵⁷ *Id.* at 31 (citing LeeVanSchaick Aff. at ¶ 25-29).

⁵⁸ *Id.* at 30.

⁵⁹ NYISO November 28, 2011 Answer at 22-23, 28; *see also* NYISO January 6, 2012 Motion at 5. Seneca notes in its January 19, 2012 Answer that NYISO has not to date changed the minimum run time. *See* Seneca January 19, 2012 Answer at 2.

determination in this proceeding and, therefore, we dismiss this part of the Complaint without prejudice.

c. Operating and Maintenance Expenses

i. Complaint

61. Seneca argues that, since 2010, the NYISO has challenged various components of the reference prices associated with the variable operations and maintenance expense rates despite the fact that the costs remained unchanged since NYISO last reviewed them.⁶⁰ Seneca further takes issue with NYISO's review of the costs associated with scheduled major maintenance events, the methodology used to calculate maintenance intervals and a shift by NYISO from incorporating the costs into the reference prices on a fired hour basis to a per start basis.⁶¹ Seneca claims that incorporating costs on a per start basis is inconsistent with the operating characteristics of the unit.

62. Seneca notes, however, that while NYISO ultimately restored the reference levels for O&M, Seneca is under-recovering its costs. Therefore, Seneca argues that NYISO's attempts to lower the cost recovery are improper and that NYISO should instead be increasing recoverable costs based on a study done by the manufacturer of the Batavia turbine-generator, General Electric, who was retained by Seneca to perform an independent analysis of the variable operations and maintenance costs and of major maintenance expenses for Batavia (GE Study).⁶²

ii. NYISO's Answer

63. NYISO states that the Complaint does not point to specific operations and maintenance line items on which NYISO and Seneca are in disagreement, and also points to instances in the Complaint where NYISO adjusted specific data when information was supplied to the Market Mitigation and Analysis Department (MMA)⁶³ by Seneca.

⁶⁰ Seneca October 26, 2011 Complaint at 18.

⁶¹ *Id.* at 19-20.

⁶² *Id.* at 20. The GE Study is included in the Complaint in Exhibit H.

⁶³ The MMA is internal to NYISO and operates in accordance with section 30.3 (Attachment O) of the Services Tariff.

64. Instead, NYISO states that Seneca relies on the GE Study that it furnished to NYISO less than two weeks prior to the instant Complaint.⁶⁴ NYISO states that additional support is required from Seneca prior to incorporating costs from the GE Study. Specifically, NYISO states that support is needed to substantiate the additional labor costs to calculate the study's claimed cost per fired hour, as well as chemicals, maintenance, and data relating to the cost normalization methodology, to arrive at the overall cost per fired hour. NYISO also states that it needs an explanation as to the claimed differences between Batavia and the GE reference unit. NYISO therefore concludes that the Complaint is premature and does not support an order directing NYISO to modify Batavia's reference levels on the basis of the GE Study. Accordingly NYISO asks the Commission to reject Seneca's request to incorporate the costs proposed in the GE Study into Batavia's reference levels without further inquiry and to instruct Seneca to cooperate with NYISO in the ongoing efforts to review the cost data.

iii. Commission Determination

65. The Commission dismisses this portion of the Complaint as premature because NYISO is still evaluating the study.⁶⁵ We disagree with Seneca that NYISO is required to accept the study as proof that it is under-recovering its expenses without the requisite review by NYISO under Attachment H. We direct the parties to continue the consultation process as laid out in Attachment H for review of the GE Study and incorporation of the cost data, where appropriate, into the reference levels.

The Commission orders:

The Complaint is hereby dismissed in part and denied in part as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶⁴ NYISO November 28, 2011 Answer at 2 (stating that NYISO was provided with the GE Study on October 18, 2011).

⁶⁵ Seneca also notes in its January 19, 2012 Answer that NYISO has not to date changed the O&M costs. *See* Seneca January 19, 2012 Answer at 2.