

131 FERC ¶ 61,032
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

New York Independent System Operator, Inc.

Docket No. EL10-33-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued April 15, 2010)

1. On January 8, 2010, the New York Independent System Operator, Inc. (NYISO) submitted a petition for a declaratory order (petition) seeking a ruling from the Commission concerning whether the New York Power Authority's (NYPA) ownership of certain Grandfathered Transmission Congestion Contracts (Grandfathered TCCs) terminated when the original generating unit at the Charles Poletti Power Plant in Astoria, Queens, in New York City ceased to operate on January 31, 2010.¹ As discussed below, the Commission grants NYISO's petition for a declaratory order and finds that NYPA's ownership of the Grandfathered TCCs did not terminate when the original Poletti generating unit ceased to operate.

I. Background and Details of the Filing

2. On January 8, 2010, NYISO filed a petition for a declaratory order seeking a ruling by the Commission concerning whether NYPA's ownership of certain Grandfathered TCCs pursuant to two grandfathered agreements should continue after the original generating unit at the Charles Poletti Power Plant ceased to operate on January 31, 2010. NYISO states that the grandfathered agreements at issue are two firm

¹ While the petition is pending, NYISO also requests a temporary waiver of tariff provisions that govern its tariff's obligations to offer TCCs at a fixed price at the expiration of a grandfathered TCC and/or to release, through TCC auctions, the capacity represented by expired grandfathered TCCs. As discussed below, because we find that the subject Grandfathered TCCs have not terminated, the request for waiver is dismissed as moot.

point-to-point transmission service agreements executed on April 23, 1999 between the Transmission business unit of NYPA as “Transmission Provider” and the Marketing and Economic Development business unit of NYPA as “Transmission Customer” (NYPA Agreements) for a total of 600 MW.² The first, for 422 MW, provides for service between a Point of Injection (POI) at NYPA’s Niagara Power Project and a Point of Withdrawal (POW) at the East Fishkill Substation located on the northern portion of Consolidated Edison Company’s (Con Edison) system in NYISO’s Zone G. The second, for 178 MW, provides for service between a POI at NYPA’s St. Lawrence – FDR Project and a POW also at the East Fishkill Substation.³

3. NYPA is an instrumentality of the State of New York and thus is generally exempt from jurisdiction under the Federal Power Act. It is a transmission-owning member of NYISO that sells electricity primarily at wholesale at cost-based rates. NYPA administers energy-based economic development programs through which it supplies NYPA-generated hydropower and market-purchased power and other benefits to New York businesses pursuant to statute for the purpose of mitigating energy costs and supporting the State’s economic development goals. NYPA supplies electricity and related energy services to a broad array of energy consumers, including State and local government entities, community-owned electric systems and rural electric cooperatives, New York businesses and other energy consumers.

4. NYISO states that, at NYISO formation, NYPA received Grandfathered TCCs for 422 MW of transmission service from the Niagara Power Project to Load Zone J and for 178 MW of transmission service from the St. Lawrence Project to Load Zone J pursuant to the two NYPA Agreements. NYISO states that the holder of the Grandfathered TCCs receives congestion rents for all congested hours over the path and in the number of megawatts specified in Attachment L of the NYISO OATT, which lists those transmission agreements that predate the establishment of NYISO and that were converted into Grandfathered TCCs.⁴ NYISO states that the NYISO OATT provides that the conversion of these agreements into Grandfathered TCCs did not change the terms

² Contract Nos. 189 and 190 in the NYISO Open Access Transmission Tariff (OATT) Attachment L.

³ NYISO states that a third grandfathered agreement entered into between NYPA and Con Edison in 1989 (1989 Agreement) provides transmission service for these 600 MW between the East Fishkill Substation and Load Zone J (New York City). However, NYISO states that “[t]he termination of this 1989 agreement is not tied to Poletti’s retirement.” Petition at 5.

⁴ Petition at 6, n.7.

and conditions of the underlying agreements, and thus the termination clauses found in the underlying transmission agreements act to terminate the associated Grandfathered TCCs.

5. NYISO states that NYPA uses the 600 MW of Grandfathered TCCs to serve the Southeast New York (SENY) government loads listed in Appendix A of the petition, including, among other entities, the City of New York, the Metropolitan Transportation Authority, the Port Authority of New York & New Jersey, and the New York City Housing Authority. NYISO states that NYPA's total SENY load is about 1800 MW, for which it holds an additional 1200 MW of TCCs, and that NYPA holds power contracts with its SENY load for service through at least 2017.⁵

6. NYISO states that, in 2000, NYPA and Con Edison agreed to transfer ownership of the 600 MW of Grandfathered TCCs for transmission of Niagara/St. Lawrence energy between East Fishkill and Load Zone J from NYPA to Con Edison (2000 Agreement).⁶ NYISO states that pursuant to this 2000 Agreement, Con Edison reimburses NYPA for the cost of congestion over several TCC paths, including up to 600 MW of energy transmitted pursuant to the NYPA Agreements.

7. NYISO states that, upon the expiration of the Grandfathered TCCs listed in Attachment L, the NYISO tariffs originally required that NYISO immediately release the associated transmission capacity into the next available auction to support the sale of new TCCs.⁷ However, as a result of NYISO's filings to comply with Order No. 681,⁸ NYISO states that it now permits holders of Grandfathered TCCs to convert those rights, upon their expiration, to Fixed Price TCCs with a duration of up to ten years.⁹ If the holder chooses to convert those rights to Fixed Price TCCs, then the associated transmission capacity is not sold into the auction but is retained as Fixed Price TCCs by the original holder of the Grandfathered TCCs. If not purchased as Fixed Price TCCs, the capacity is sold into the next TCC auction.

⁵ Petition at 8.

⁶ Petition at 5 (citing *Agreement Between Consolidated Edison Company of New York, Inc. and New York Power Authority* (May 11, 2000)).

⁷ Petition at 6.

⁸ *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, FERC Stats. & Regs. ¶ 31,226, *reh'g denied*, Order No. 681-A, 117 FERC ¶ 61,201 (2006).

⁹ NYISO OATT Attachment M, Section 2.A.

8. Both NYPA Agreements contain a termination provision that provides that service will:

“[T]erminate on the earlier of (1) December 31, 2017; (2) when [NYPA] no longer has an obligation to serve Southeast New York (SENY) governmental customers; or (3) when both the Indian Point No. 3 Nuclear Power Plant¹⁰ and the Charles Poletti Power Plant are retired or sold.”¹¹

This language is also reflected in Attachment L of the NYISO OATT, which lists the expiration date of both agreements as December 31, 2017 but states in footnote 7 that “NYPA’s TCCs allocated to their SENY Governmental Load Customers will terminate on the earlier of December 31, 2017 or when NYPA no longer has an obligation to serve any of the SENY Loads or the retirement or sale of both IP#3 and Poletti.”

9. NYISO states that the original generating unit at the Charles Poletti Power Plant, which is located in Astoria, Queens, New York City, in existence at the time the NYPA Agreements were executed was a nominal 825 MW NYPA-owned oil and gas generating unit. NYISO states that, pursuant to a stipulation that NYPA executed in 2002 before the New York State Board on Electric Generation Siting and the Environment (Siting Board), NYPA was allowed to construct a new, more efficient 500 MW combined cycle generating unit essentially at the same physical location (immediately adjacent to the original unit) if it ceased operation of the original unit by February 1, 2008, which deadline was later extended to January 31, 2010.¹² NYISO states that NYPA began operating the new 500 MW combined cycle unit in 2005,¹³ and that the original unit and the new combined cycle unit are located on the same plot of land and share the same administration building, site management personnel, and natural gas delivery facilities.¹⁴

¹⁰ The Indian Point No. 3 Nuclear Power Plant was sold to a subsidiary of the Entergy Corporation in 2000. *Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear FitzPatrick, LLC*, 92 FERC ¶ 61,281 (2000).

¹¹ NYISO OATT, Original Sheet No. 133.

¹² NYISO states that the stipulation provided for up to a two-year extension if NYISO certified each year that the original unit was needed to ensure 80 percent of projected New York City (in-City) demand would be met with in-City resources, with a hard deadline of January 31, 2010. Petition at 8 (citing Case 99-F-1627 *Application by the New York Power Authority for a Certificate of Environmental Compatibility and Public Need...*, Supplemental Joint Stipulation, September 12, 2002, p.8).

¹³ Petition at 8.

¹⁴ Petition at 10.

Accordingly, the original unit ceased operations on January 31, 2010, as provided in the stipulation.

A. Petition for Declaratory Order

10. NYISO contends that there is a substantial question whether the closure of the original Poletti generating unit terminated the NYPA Agreements and NYPA's ownership of the Grandfathered TCCs. NYISO therefore requests a ruling by the Commission as to whether the closure of the original Poletti generating unit constitutes the "retirement" of the "Charles Poletti Power Plant" within the meaning of the NYPA Agreements, thereby terminating the NYPA Agreements and NYPA's ownership of the Grandfathered TCCs. NYISO states that if the unit's closure does not constitute "retirement" of the "Charles Poletti Power Plant," NYPA will be permitted to retain the 600 MW of Grandfathered TCCs at issue until at least December 31, 2017. By contrast, NYISO states that if the unit's closure does constitute "retirement" of the "Charles Poletti Power Plant," then NYPA will have to exercise its option to convert the transmission capacity associated with the agreements into Fixed Price TCCs pursuant to Attachment M of the NYISO OATT in order to retain them. If NYPA declines to exercise this option, then NYISO states that it would be obligated by its tariffs to release the transmission capacity the Grandfathered TCCs represents into the next TCC auction to support new TCCs.

11. NYISO maintains that it is a not-for-profit independent entity with no direct stake in the outcome of this proceeding. NYISO states that it seeks a Commission resolution of this issue in time to conduct the autumn Centralized TCC auction and, therefore, requests issuance of a declaratory order by June 1, 2010.

12. NYISO asserts that the Commission's principles of tariff construction are useful in analyzing the question at hand, quoting:

“[w]hen presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the tariff or contract itself, and only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence. Extrinsic evidence (which may include the parties' course of performance) is admissible to ascertain the intent of the parties when the intent has been imperfectly expressed in ambiguous contract language, but is not admissible either to contradict or alter express terms.”¹⁵

¹⁵ *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34 (2007) (citing *Nicole Gas Production Ltd.*, 105 FERC ¶ 61,371 (2003)).

In addition, NYISO states that, according to Commission precedent, tariff language is deemed to be ambiguous when it is “reasonably susceptible to different constructions or interpretations.”¹⁶

13. NYISO asserts that the meaning of the termination clause in the NYPA Agreements cannot be ascertained from the language of the agreements themselves, and therefore it is necessary to ascertain NYPA’s intention when it entered into the NYPA Agreements. NYISO acknowledges that ceasing to operate the original Poletti unit could be interpreted as a retirement of the “plant” within the commonly accepted meaning of the term “retirement,” assuming that the original Poletti unit constitutes the entirety of the Poletti plant. NYISO states that this interpretation is reinforced by the fact that the only generating unit at the Poletti site when the NYPA Agreements were written was the original Poletti unit. However, NYISO contends that it is also reasonable to adopt the view that the new combined-cycle unit is so closely related to the original Poletti unit, both in proximity and purpose, that it is, in effect, an extension of the original power plant. NYISO asserts that this view is reinforced by the fact that, but for the construction of the new, 500 MW unit at the Poletti site, NYPA would not close the original Poletti unit at this time, and the original February 2008 target date for discontinuing the operation of the original unit followed shortly the expected in-service of the new unit. Further, NYISO states that both the original and new units are not only located on the same plot of land, but also share the same administration building, site management personnel, and natural gas delivery facilities. Therefore, NYISO contends that the plain language of the NYPA does not yield a clear answer, and it is necessary to ascertain NYPA’s intention when it entered into the agreements.¹⁷

14. Finally, NYISO asserts that the underlying public interest policy that supported the grandfathering of the original transmission agreements – to alleviate congestion costs for certain governmental SENY loads – still exists. NYISO states that NYPA continues to have the obligation to serve those SENY loads, and a determination that these

¹⁶ *Id.* (citing *Koch Gateway Pipeline Co. v. Federal Energy Regulatory Commission*, 136 F.3d 810, 814 (D.C. Cir. 1998)).

¹⁷ NYISO also requests that the Commission grant a limited waiver to the extent necessary to allow NYISO to treat the Grandfathered TCCs as remaining in effect for the purposes of all upcoming TCC auctions while this petition for declaratory order remains pending and until such time as the NYISO is prepared to prospectively implement a Commission determination that the Grandfathered TCCs should be released, if the Commission makes such a determination. Given that we grant the petition, and find that the Grandfathered TCCs have not expired, there is no need for a tariff waiver, and the request is, therefore, dismissed as moot.

Grandfathered TCCs are terminated under Attachment L could significantly increase the hedging costs associated with that load. Accordingly, NYISO states that it seeks a declaratory order clarifying the status of NYPA's Grandfathered TCCs under the grandfathered agreements once NYPA closes the original Poletti unit in January 2010.

II. Notice and Responsive Pleadings

15. Public notice of the January 8, 2010 filing was issued in the *Federal Register* on January 15, 2010, with comments due on or before February 8, 2010. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely filed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Motions to intervene were filed by Consolidated Edison Solutions, Inc.; Dynegy Power Marketing, Inc., Dynegy Northeast Generation, Inc., and Sithe/Independence Power Partners, L.P. (collectively, Dynegy); JP Morgan Ventures Energy Corporation; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, Constellation); New York Municipal Power Agency (NYMPA) and Municipal Electric Utilities Association of New York State (MEUA); New York Association of Public Power; Exelon Corporation; and Mirant Energy Trading, LLC, Mirant New York, LLC, and Mirant Bowline, LLC (collectively, Mirant). Motions to intervene and comment were filed by NYPA and the City of New York (the City); Consolidated Edison Company of New York, Inc. (Con Edison); and Long Island Power Authority and its operating subsidiary, LIPA (collectively, LIPA). Protests were filed by Independent Power Producers of New York, Inc. (IPPNY); DC Energy, LLC (DC Energy); and Shell Energy North America (U.S.), L.P. (Shell Energy).

16. NYPA and the City, NYISO, and DC Energy each filed a motion for leave to answer and an answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

A. Comments

17. In their comments, NYPA and the City argue that the Commission should grant NYISO's petition because the conditions precedent for releasing the Grandfathered TCCs as stated in the termination provision have not been met based on the plain meaning of the tariff language. NYPA and the City assert that there has been no retirement of the Charles Poletti Power Plant merely because the less efficient generating unit on the Poletti site was replaced with a new, more efficient generating unit on the same site. NYPA and the City argue that the old and new units are inextricably linked because the closure of the former unit was an explicit condition of the Siting Board granting a certificate for the new unit. NYPA and the City state that the Siting Board's approval of the new unit provided for construction of the new combined-cycle unit as a replacement

of the old oil and gas unit in order to realize environmental and air quality benefits, reliability benefits, and market benefits. NYPA and the City also support their contention that the Charles Poletti Power Plant consists of both the old and new units by pointing to numerous public documents referring to the new unit as the “Poletti Expansion” or “Poletti Project.” Furthermore, NYPA and the City argue that the physical characteristics of the new unit support the notion that the Poletti facility includes the new unit, since the two units are located on the same plot of land and share the same administration building, site management personnel, and natural gas delivery facilities.

18. In addition, NYPA and the City argue that extrinsic evidence shows that NYPA intended to hold TCCs on behalf of its SENY customers beyond the unit replacement. NYPA and the City state that NYPA was the only party to the underlying transmission agreements, and NYPA never envisioned that replacing the older, inefficient unit with a more efficient unit would trigger the termination provision, thereby terminating TCCs vital to the same customers that are paying for the new resource. NYPA and the City state that the purpose of the termination provision was to avoid a situation where NYPA was in possession of, and financially responsible for, TCCs even though it no longer served SENY customers, and NYPA did not intend that the underlying OATT reservation would be terminated by the replacement of the generating unit at the Poletti site while it still serves SENY customers. NYPA and the City assert that NYPA intends to hold the TCCs as long as it continues to serve SENY customers and maintains generation in New York City, as it has done in the past to protect customers from congestion charges to reflect their historical contribution to the embedded costs of the system. NYPA and the City urge the Commission to avoid any interpretation that would punish NYPA and SENY customers for the act of replacing the old oil and gas unit with a new, cleaner, more efficient combined-cycle unit at the same site.

19. NYPA and the City also argue that release of the TCCs would have a detrimental impact on NYPA’s SENY customers and would create an unjust and unreasonable result. NYPA and the City state that the economic value of the TCCs to NYPA’s SENY customers is significant and estimates the net impact of losing the TCCs to be approximately \$40 million for 2010 and potentially more than \$300 million through December 31, 2017. NYPA and the City argue that reading the termination provision in isolation and out of context could create rate shock for these customers. Should the Commission find the termination provision ambiguous, NYPA and the City urge the Commission to allow NYPA’s SENY customers to continue to pay for the embedded cost of the system and keep the TCCs until they expire on December 31, 2017.

20. In its comments, Con Edison states that NYISO’s interpretation of the NYPA Agreements appears to be reasonable and addresses the interests of the governmental customers by allowing governmental customers to transition to future arrangements in an orderly fashion given the certain termination date of December 31, 2017. Con Edison

asserts that the public interest would be served by the Commission granting the relief requested by NYISO.

21. In its comments, LIPA urges the Commission to find that the decommissioning of the original Poletti unit does not constitute retirement of the Poletti plant, and therefore, NYPA's Grandfathered TCCs have not been terminated. LIPA notes that NYISO, Con Edison, and NYPA acknowledge that the new generating equipment is located on the Poletti site and serves to replace the original Poletti unit and that the administrative building, site management personnel, and fuel delivery facilities have not changed. LIPA also asserts that Con Edison and NYPA are uniquely situated to understand and articulate their own intentions in drafting the subject termination provisions, and the Commission should afford appropriate weight to the apparent agreement of the parties regarding continuation of the NYPA Agreements.

B. Protests

22. IPPNY and DC Energy argue in their protests that the closure of the Poletti unit constitutes a retirement of the Poletti unit, considering the plain meaning of the term "retirement" and NYISO's and NYPA's usage of the term in describing the closure of the Poletti unit in various documents. On this basis, they assert that the NYPA Agreements and related TCCs terminated. DC Energy further argues that enforcing the plain meaning of the NYISO OATT is consistent with Commission policy and cites cases designed to demonstrate that the Commission is reluctant to extend the terms of grandfathered agreements.¹⁸ IPPNY also asserts that NYISO is incorrect in claiming that the public interest that supported grandfathering of the original transmission agreements was to alleviate congestion costs for certain SENY customers. It asserts that the Commission approved the grandfathering not as a way to reduce costs but "as an acceptable method to recognize long-term firm commitments in existence on the date the ISO commences operations."¹⁹

23. DC Energy and IPPNY also argue that the closure of the Poletti generating unit constitutes a retirement because the combined cycle unit and original oil and gas unit deliver power to different locations and because the combined cycle unit was not intended to replace Poletti. IPPNY states that Poletti is electrically connected to the 345 kV East 13th Street substation in Manhattan and the combined cycle unit is connected to the 138 kV Astoria West substation in Queens. Therefore, it asserts, the points of interconnection for the two projects are at two distinct substations, voltage levels, and

¹⁸ *Citing Niagara Mohawk Power Corp.*, 96 FERC ¶ 61,363 (2001); *order on clarification*, 100 FERC ¶ 61,247 (2002).

¹⁹ Protest of IPPNY at 7.

boroughs of New York City, and within separate Consolidated Edison load pockets. In addition, IPPNY states that there is no single connection between the original unit's points of interconnection and the combined cycle unit's points of interconnection. Finally, in response to NYISO's statement that it is reasonable to adopt the view that the new unit is an "extension of Poletti," IPPNY asserts that NYPA did not intend to build the combined cycle unit to replace the original unit; rather, its decision to close the original Poletti unit was a concession to environmental groups to expedite the permitting process for the new unit, and nowhere in its permit applications or stipulations to the Siting Board for the new unit did NYPA make any assertion that the new unit was intended as a replacement for the original Poletti unit.

24. DC Energy also contends that two other issues should be resolved by the Commission in response to NYISO's request for a declaratory order: (1) whether NYPA has the right pursuant to NYISO OATT Attachment M to convert the Grandfathered TCCs to Fixed Price TCCs; and (2) whether the grandfathered TCCs associated with the 1989 Agreement have also terminated. DC Energy asserts that Attachment M requires an entity to be a Load-Serving Entity (LSE) in order to have the right to obtain Fixed Price TCCs, and it is not clear whether NYPA is considered a LSE²⁰ or whether NYPA properly notified NYISO of a decision to obtain Fixed Price TCCs.²¹ DC Energy also asserts that if the NYPA Agreements have terminated, then the 600 MW of downstream TCCs associated with the 1989 Agreement must terminate as well.²² DC Energy

²⁰ Section 2A.1 of Attachment M states: "Any LSE that had transmission rights under an [Existing Transmission Agreement (ETA)] in effect on November 19, 1999 that was listed in Table 1A of Attachment L to this OATT (as it may be amended), but has since expired, shall have a right to obtain Fixed Price TCCs with the same POI and POW associated with that ETA. An LSE is defined under section 1.16a of NYISO's OATT as: "an entity, including a municipal electric system and an electric cooperative, authorized or required by law, regulatory authorization or requirement, agreement, or contractual obligation to supply Energy, Capacity and/or Ancillary Services to retail customers located within the [New York Control Area (NYCA)] including an entity that takes service directly from the ISO to supply its own load in the NYCA."

²¹ Section 2A.1 of Attachment M requires that "an LSE must notify the [NYISO] and the Transmission Owner that was (or is) a party to the ETA, in writing, of its decision to obtain Fixed Price TCCs prior to a deadline to be established by the [NYISO]" and that NYISO set the deadline on a date prior to the beginning of the Centralized TCC Auction for the Capability Period in which the ETA expires or terminates.

²² DC Energy asserts that NYISO OATT Attachment K requires that the grandfathered customer maintain the entire grandfathered path from the source at the POI to the load at the POW, such that once the NYPA Agreements terminated, the

(continued...)

therefore requests the Commission to direct NYISO to: (1) clarify whether NYPA has met the Attachment M requirements for converting its Grandfathered TCCs to Fixed Price TCCs, and if NYISO concludes that NYPA may purchase Fixed Price TCCs, direct such election to occur prior to March 15, 2010; and (2) clarify whether the 600 MW of grandfathered TCCs associated with the 1989 Agreement have also terminated by making a subsequent filing no later than March 15, 2010. DC Energy requests that the Commission issue an order no later than March 15, 2010 so that any remaining capacity associated with the Grandfathered TCCs can be available for Round 6 of the ongoing Spring 2010 Initial TCC Auction.

25. In its protest, Shell Energy states that it agrees with the relief requested by DC Energy in its protest and urges the Commission to declare that the Grandfathered TCCs have terminated.

C. Answers

26. In their answer, NYPA and the City respond to IPPNY's argument, that the technical specifications of the interconnection for the combined cycle unit show that the Poletti unit is retired, by arguing that the point of interconnection is irrelevant. NYPA and the City argue that the Grandfathered TCCs at issue have no relation to the Poletti points of interconnection. Finally, NYPA and the City assert that no market participant subsidizes NYPA's TCCs, contrary to IPPNY's claim.

27. NYPA and the City also argue that DC Energy and IPPNY confuse the central issue by citing documents referring to the "retirement" of the original Poletti "unit," when no one disputes that the original Poletti unit has ceased operations. NYPA and the City assert that the critical question, which the documents cited by protestors fail to shed light on, is whether the Poletti facility in its entirety can be considered retired when a new combined cycle unit operates there and will continue to operate for years to come to serve SENY customers who paid for the new unit. NYPA and the City respond to DC Energy's discussion of cases involving the extension of grandfathered transmission agreements by asserting that the discussion is irrelevant because no one has suggested extending the terms of the NYPA Agreements. NYPA and the City also argue that DC Energy's discussion of additional issues, such as whether NYPA qualifies for Fixed Price TCCs, are irrelevant because they are outside the scope of the petition and therefore this proceeding.

downstream 600 MW of grandfathered TCCs from East Fishkill to Zone J also terminated. If these grandfathered TCCs have terminated, DC Energy states that the capacity associated with these TCCs also should be released into the NYISO TCC auctions.

28. In its answer, NYISO urges the Commission to decline to address the two additional issues raised in DC Energy's protest as outside the scope of the declaratory order proceeding. NYISO argues that neither issue was presented by NYISO or needs to be addressed in order for the Commission to answer the question presented.

29. In its answer, DC Energy contends that inconsistencies in NYISO's filings require making the 1989 Agreement public in order to determine whether the 1989 Agreement was encompassed by the grandfathering of the NYPA Agreements and whether it is subject to the termination provision featured in the NYPA Agreements. DC Energy requests that the Commission require NYISO to make public the 1989 Agreement.

III. Discussion

30. As the parties correctly state, when presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the language of the tariff or contract itself and, only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence of intent.²³ Extrinsic evidence (which may include the parties' course of performance) is admissible to ascertain the intent of the parties when the intent has been imperfectly expressed in ambiguous contract language, but is not admissible either to contradict or alter express terms.²⁴ A tariff or contract is ambiguous when it is "reasonably susceptible [to] different constructions or interpretations."²⁵

31. NYISO's position is that the meaning of the termination clause in the underlying Service Agreements cannot be ascertained from the language of the Agreements themselves, because the same language, "Charles Poletti Power Plant," can be given two different interpretations, and that it is therefore necessary to ascertain NYPA's intention, when it entered into the underlying Service Agreements at issue here, as to the conditions that would effectuate their termination.²⁶

32. In contrast to NYISO, DC Energy and IPPNY argue that the plain meaning of the word "retirement" renders the termination provision unambiguous. They argue that the

²³ *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34 (2007) (citing *Nicole Gas Production Ltd.*, 105 FERC ¶ 61,371 (2003)).

²⁴ *Id.*

²⁵ *Mississippi River Transmission Corp.*, 96 FERC ¶ 61,185 (2001) (quoting *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C. Cir. 1979)).

²⁶ Petition at 10-11.

closure of the original generating unit constitutes a “retirement” of that unit and that, as a result, the NYPA Agreements terminated on January 31, 2010, upon the retirement of the original Poletti unit. However, protestors focus only on the term “retirement” without adequately considering NYISO’s assertion that the term “Charles Poletti Power Plant,” to which the term “retirement” relates, is ambiguous. As NYPA and the City observe in their answer, it is undisputed that, by ceasing operations, the original oil and gas Poletti generating unit was “retired” as scheduled on January 31, 2010.²⁷ The interpretation of the termination provision, rather, turns on what the parties to the agreements meant by the term “Charles Poletti Power Plant,” and, more specifically, whether “retirement” of the “Charles Poletti Power Plant” refers only to the cessation of operations by the original generating unit or by all generating units on the Poletti site.

33. The Commission agrees with NYISO that the subject termination provision is ambiguous because the term “Charles Poletti Power Plant” can be given two interpretations. The Commission looks first to the language of the NYPA Agreements, confining its analysis to the four corners of each document, and finds that it is reasonable to interpret the clause “when...the Charles Poletti Power Plant [is] retired” to mean either (1) when the original Poletti generating unit ceases to operate, or (2) when all generation at the Poletti site ceases. The NYPA Agreements do not define the term “Charles Poletti Power Plant” or what it means to be “retired.” There was only one generating unit operating at the time the NYPA Agreements were executed, so the term “Charles Poletti Power Plant” could have been intended to refer only to that single generating unit in existence at the time of the drafting such that cessation of operations at that unit would cause the termination of the NYPA Agreements. However, a generation “plant” typically can consist of one or more generation units, some of which may be replaced or modified over time.²⁸ So the term “Charles Poletti Power Plant” could have been intended to refer to the Poletti facility site without limitation to just that original unit as long as the facility at that site is generating power, including any generating units currently operating. Because the same contract language can be given the foregoing two interpretations, the Commission finds that the termination provision of the NYPA Agreements is ambiguous.

34. Having found the termination provision is ambiguous, the Commission may consider extrinsic evidence of the intent of the parties in order to determine the meaning

²⁷ NYPA Answer at 2 and 5.

²⁸ See, e.g., United States Energy Information Administration, Electricity Terms (**Plant**: A facility at which are located prime movers, electric generators, and auxiliary equipment for converting mechanical, chemical, and/or nuclear energy into electric energy. A plant may contain more than one type of prime mover.) <http://www.eia.doe.gov/cneaf/electricity/page/glossary.html>.

of the provision. While NYPA's statements of intent are not contemporaneous with the execution of the NYPA Agreements and the contracts are atypical in that the parties are business units of the same entity (NYPA's Transmission business unit and its Marketing and Economic Development business unit), NYPA is the sole party to the contract and we will give weight to its statements of intent as extrinsic evidence to assist us in our analysis.

35. NYPA and the City state that NYPA's intent behind the termination provision was to avoid a situation where NYPA was in possession of, and financially responsible for, TCCs even though it no longer served SENY customers. This interpretation is consistent with and supported by the second triggering event listed in the termination provision, which provides that service under the agreement shall terminate "when Transmission Customer no longer has an obligation to serve Southeast New York governmental customers." NYPA and the City also state that NYPA did not intend for the NYPA Agreements to be terminated by the replacement of an older, inefficient generating unit by a cleaner, more efficient unit, thereby terminating TCCs vital to the same customers paying for the new resource.

36. NYPA supports its position that it did not intend the NYPA Agreements and associated Grandfathered TCCs to terminate under these circumstances by pointing to its practice of holding TCCs to protect its customers from congestion charges. NYPA states that its practice has been to hold TCCs to protect its customers from congestion charges and that it intends to hold the TCCs at issue in this case as long as it continues to serve SENY customers through generation in New York City, or until December 31, 2017. The 2000 Agreement between NYPA and Con Edison is also persuasive in this regard: even though NYPA voluntarily relinquished TCCs to Con Edison in that agreement, it nonetheless ensured that its SENY customers would be protected from congestion costs (as they would have been if it had continued to hold the TCCs itself) by providing that Con Edison would reimburse it for actual congestion exposure. NYPA's statements as to its consistent practice of using TCCs to protect its SENY customers from congestion charges and the 2000 Agreement show that NYPA intended the NYPA Agreements to remain in force, and therefore for it to continue to hold TCCs, for as long as NYPA continues to serve its SENY customers. Thus, it is not reasonable to believe that NYPA would have intended the termination provision to take effect in the situation where it would still continue to be serving SENY customers. Moreover, we agree with NYISO that the effect on congestion costs of the associated grandfathering of any related TCCs was a public interest factor supporting grandfathering of the original transmission agreements and that the public interest of alleviating congestion costs for SENY loads still exists.

37. In addition, NYPA's treatment of the new generating unit as a replacement for the original unit is consistent with its contention that it never intended the Grandfathered TCCs to terminate merely because the less efficient generating unit on the Poletti site was

replaced with a new, more efficient generating unit on the same site serving the same customers. NYPA constructed the new unit on the same power plant site as the original unit, using the same administration building, site management personnel, and natural gas delivery facilities. As discussed further below, while protestors argue that the old and new units do not share the same points of interconnection, the Poletti facility continues to serve SENY customers through the new generating unit. Furthermore, NYPA and the City state that the closure of the original unit was an explicit condition of the Siting Board granting a certificate for the new unit, and that the Siting Board granted approval for the new unit as a replacement of the old oil and gas unit in order to realize environmental and air quality benefits, reliability benefits, and market benefits.

38. IPPNY's assertion, that NYPA's decision to close the old unit was not to replace it but was purely a concession to environmental groups to expedite the permitting process for the new unit, is irrelevant. The reasons why NYPA made that decision do not inform whether the retirement of the old unit constituted a retirement of the Poletti "Plant" under the subject agreement, which is the sole issue in this case. The more germane question is whether NYPA intended the NYPA Agreements to prematurely terminate (i.e., before December 31, 2017) when the original unit ceased operations despite the fact that power needed to supply its SENY customers continued to be supplied from the Poletti site by the new generating unit. The fact that NYPA continues to serve SENY customers with its new unit at the same site is consistent with NYPA's statement that it did not intend the termination provision to be triggered by the construction of the new unit since the new unit achieves NYPA's continued objective to serve SENY customers. Indeed, the stipulation NYPA entered into in 2000 reflects the importance of continued operation of generation at the Poletti site to serve SENY customers since postponement of retirement of the original Poletti unit until the new 500 MW replacement unit was in service was contingent on NYISO certifying each year that the continued operation of the original unit was needed to ensure that the New York City Installed Capacity (ICAP) Requirement would be met.²⁹ By replacing 500 MW of the original unit's 825 MW capacity,³⁰ the new unit continued the Poletti facility's role in supplying needed ICAP to help meet the in-City minimum ICAP requirement.³¹

²⁹ Petition at 8.

³⁰ However, because the original Poletti unit actually was permitted to operate at only a 30 percent capacity factor when it was retired, the new 500 MW Poletti unit, without such restrictions, actually increased the generation output at the Poletti site. *See* NYPA Comments at 13.

³¹ As recounted in a March 16, 2007 letter from NYISO to NYPA, the New York State Siting Board's October 2, 2002 Order authorizing NYPA to construct and operate

(continued...)

39. The Commission finds that the available extrinsic evidence demonstrates that NYPA intended for the NYPA Agreements to continue until either NYPA no longer serves SENY customers or until December 31, 2017. Accordingly, we find that the construction of a new generating unit on the same site as the original unit did not terminate the NYPA Agreements. The Commission interprets the clause “when...the Charles Poletti Power Plant [is] retired” to refer to the cessation of all generation on the Poletti site rather than merely the cessation of operations of the original generating unit. As a result, with the construction and operation of the new 500 MW unit at the Poletti facility, the retirement of the original generating unit at that site did not terminate the NYPA Agreements and the associated Grandfathered TCCs.

40. Further, the Commission finds unpersuasive DC Energy’s and IPPNY’s reliance on various documents in which NYISO and NYPA describe the “retirement” of the original generating unit to support DC Energy’s and IPPNY’s claim that the NYPA Agreements terminated when original Poletti unit was retired on January 31, 2010. As discussed above, it is undisputed, but not dispositive of the issue in the case, that the original generating unit was retired. As NYPA and the City state in their answer, the critical question is whether the Poletti Power “Plant” in its entirety can be considered retired when a new combined cycle unit operates there and will continue to operate for years to come to serve SENY customers. Indeed, these various documents do not even consistently or specifically refer to the closure of the Poletti “Power Plant” or “plant” by January 31, 2010. For example, these documents also variously refer to the retirement or closure of: the “825 (Nominal) MW Generator Unit at the Charles A. Poletti Site,”³² “NYPA’s Poletti generating unit,”³³ the “Poletti Project,” or simply “Poletti,”³⁴ and the

the new 500 MW unit required NYPA to seek a determination from NYISO whether closure of the Existing Poletti Facility as of February 1, 2008, will cause “the aggregate in-City electrical generating capacity (exclusive of the Existing Poletti Facility) . . . to be less than 80% of the total in-city projected peak demand . . . for the summer of 2008.” In that March 16, 2007 letter, NYISO stated that closure of the original (“Existing”) Poletti unit on February 1, 2008, would cause that aggregate in-City capacity to fall below the 80 percent requirement for the summer of 2009. *See Answer of DC Energy, Attachment F.*

³² Answer of DC Energy, Attachment A.

³³ Answer of DC Energy, Attachment B.

³⁴ Answer of DC Energy, Attachment D.

“existing Charles Poletti generating facility” or the “old 825 MW Charles Poletti generating facility.”³⁵

41. We also find unsupported DC Energy’s cursory dismissal of the fact that the new unit is located at the same site and uses the same administrative buildings and personnel as “irrelevant.”³⁶ It is undisputed that, after the original unit ceased operations, and the new unit continued to operate at that same site, the Poletti site property remained in NYPA’s ownership, and the Poletti site’s administrative buildings and ancillary and gas delivery facilities and personnel remained the same -- all components of what may commonly be referred to as a generating “plant” -- such that it is reasonable to find that the Poletti “Plant” remains in service.

42. Protestors also argue that the new combined cycle unit cannot be considered to be an extension of or the same as the original “Poletti Power Plant” for purposes of the termination provision because the new combined cycle unit and original unit do not have the same points of interconnection and serve different customers. The new 500 MW replacement unit or its related interconnection need not be exactly the “same” as the original unit for purposes of applying the termination provision; the only issue is whether the Poletti “Power Plant” remains in service. Moreover, as NYPA and the City state in their answer, NYPA could have changed the point of interconnection for the old Poletti unit at any time while it was in operation without triggering the termination provision, so the new point of interconnection for the replacement unit is not determinative. Additionally, there is no evidence showing that merely changing the point of interconnection of the Poletti facility such that different specific customers are served is relevant to whether the NYPA Agreements terminate as long as NYPA continues serving the SENY load. The NYPA Agreements do not contain any provisions that preclude a change in the specific SENY customers being served by the Poletti Plant, as all references to NYPA customers are expressed broadly as “SENY customers.”³⁷ Whether power is being delivered to customers in Manhattan or Astoria, “SENY customers” are still being served by NYPA’s Poletti generating facilities. Therefore, the Commission rejects protestors’ contentions.

³⁵ Answer of DC Energy, Attachment G.

³⁶ Answer of DC Energy at 12.

³⁷ It would not make sense to have the termination of the NYPA Agreements turn on whether the identical SENY customers are being served by the Poletti facility because that would place the power to terminate the NYPA Agreements in the hands of individual customers who may decide to terminate or alter their own respective contractual arrangements with NYPA.

43. Finally, DC Energy's argument that Commission precedent demonstrates reluctance to extend the terms of grandfathered agreements is irrelevant. As NYPA and the City respond in their answer, in this case no party has suggested extending the terms of the NYPA Agreements. Here, the question is solely whether the NYPA Agreements have terminated.

44. Given that we find that the NYPA Agreements have not terminated, we do not find it necessary to address DC Energy's arguments regarding NYPA's ability to obtain Fixed Price TCCs and the possible termination of TCCs associated with the 1989 Agreement. As previously noted, given our findings herein, there is no need for any tariff waiver, and therefore the request for a temporary waiver is dismissed as moot.

The Commission orders:

NYISO's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.