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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.)))	Docket No. ER19__
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IMPLEMENTATION AGREEMENT

Pursuant to Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, and Part 35 of the Federal Energy Regulatory Commission’s (“Commission”) regulations, 18 C.F.R. § 35, *et seq.*, and Section 4.1.9.3 of the New York Independent System Operator Inc. (“NYISO”) Market Administration and Control Area Services Tariff (“Services Tariff”), Astoria Generating Company L.P., operating under Eastern Generation, LLC (collectively “AGC”) and the NYISO (each individually a “Party” and collectively the “Parties”) hereby submit this Implementation Agreement fully resolving issues related to the compensation and terms and conditions under which AGC will construct a new Ultra Low Sulfur Diesel (“ULSD”) fuel oil system in order to accommodate the conversion of units 3 and 5 at the Astoria Generating Station to fire No. 2 ULSD in lieu of No. 6 fuel oil (“Fuel Oil”). The conversion of generating units 3 and 5 to ULSD is required in order to allow the Astoria Generating Station to be in compliance with Chapter 2 of Title 15 of the Rules of the City of New York, while also furthering its compliance with New York State Reliability Council’s Local Reliability Rule G.2 (Loss of Generator Gas Supply - New York City) (“Rule G.2”). This Implementation Agreement establishes a mechanism whereby AGC and the Loads in the Con Edison Transmission District will split the prudently incurred capital costs associated with constructing key elements of the ULSD fuel oil system, including a four million gallon above ground ULSD tank farm (consisting of two 2M

gallon storage tanks) at the Astoria Generating Station, foundations, steel containment systems, drainage and pump systems, piping systems, and a fire detection system (the “Project”).

As this Implementation Agreement is fair, reasonable and in the public interest, the Parties urge prompt approval by the Commission of this Implementation Agreement without condition or modification to be effective as of October 9, 2019.

SECTION ONE

PROJECT IMPLEMENTATION AND COST RECOVERY

- 1.1 Capital investments for the Project must be made in furtherance of AGC’s phasing out the use of No. 6 Fuel Oil to comply with New York City regulations and converting its storage tanks and related infrastructure to accommodate ULSD. Planning for and making these investments is scheduled to occur during the next two years in order to be operational by November 1, 2022. Planning, engineering, and site preparation is underway.
- 1.2 “Recoverable Project Costs” are those amounts to be paid to AGC pursuant to this Section 1 for the costs of the Project. Recoverable Project Costs have been calculated based on an assumed total project cost of \$42.9 million (not including any remediation costs, which shall not be reimbursable). Recoverable Project Costs shall be the costs incurred for the new ULSD fuel oil system and storage tanks, including design and engineering, permitting, site preparation, pile driving, concrete foundation construction, cleaning, refurbishment and repurposing of existing oil pipelines connecting the existing depot to the Astoria Generating Station, installation of tank and secondary containment system, installation of auxiliary systems, boiler front modifications to permit burning of ULSD, commissioning and tuning.
- 1.3 The amount of the Recoverable Project Costs shall be fixed at \$500,000 per month if the

total cost of the Project (“Project Cost”) is \$42.9 million.

1.4 The term of this Implementation Agreement is 84 months, commencing the month after this Implementation Agreement is accepted for filing by the Commission.

1.5 Upon completion of construction, testing, commissioning, and AGC acceptance, AGC will submit to the NYISO documentation demonstrating its actual construction costs. AGC agrees to provide supporting documentation and information as requested by the NYISO. The actual construction cost will be reconciled against the projected cost as follows:

1.5.1 If the actual construction cost of the Project is less than \$42.9 million, the \$500,000 monthly payment will be reduced, in accordance with the following formula:

- (1) Subtracting the actual Project Cost from \$42.9 million;
- (2) Dividing the result of (1) by \$42.9 million;
- (3) Multiplying the result of (2) by \$500,000; and
- (4) Multiplying the result of (3) by the ratio of the term of the Implementation Agreement in months over the number of months remaining in the term of the Implementation Agreement at the time this calculation is made.

The amount resulting from steps (1) - (4) above will be subtracted from the NYISO's \$500,000 monthly payment to AGC for each of the months remaining in the term of the Implementation Agreement.

1.5.2 If the actual construction cost of the Project is more than \$42.9 million, the \$500,000 monthly payment will be increased, in accordance with the following formula:

- (1) Subtracting \$42.9 million from the lesser of \$48 million or the actual Project Cost;

- (2) Dividing the result of (1) by \$42.9 million;
- (3) Multiplying the result of (2) by \$500,000; and
- (4) Multiplying the result of (3) by the ratio of the term of the Implementation Agreement in months over the number of months remaining in the term of the Implementation Agreement at the time this calculation is made.

This incremental amount will be added to the NYISO's \$500,000 monthly payment for each of the months remaining in the term of the Implementation Agreement.

- 1.6 During the first winter period after construction of the Project is complete, AGC will procure a spot barge for, at minimum, the time period specified in Section 1.6.1 below. The cost of procuring the barge is not included in the Recoverable Project Costs and will be separately reimbursed. The rules defining AGC's obligation to procure a spot barge and permitted cost recovery for the barge are set forth in this section 1.6:

1.6.1 The barge will remain at the Astoria Generating Station from December 5, 2022 through March 15, 2023.

1.6.2 Upon consultation among the Parties, and subject to agreement by AGC and NYISO, the barge procurement period may be amended to commence earlier, or to extend past March 15, 2023, or both.

1.6.3 The barge must have a minimum capacity of 30,000 barrels of No. 2 ULSD and meet all applicable federal, state, and city regulations.

1.6.4 "Barge Costs" consist of the cost of renting the barge, the cost of tug charters, and the cost of oil testing/inspections. AGC will submit documentation demonstrating

its actual Barge Costs to the NYISO. AGC agrees to provide supporting documentation and information as requested by the NYISO.

- 1.6.5 AGC will recover Barge Costs (“Recoverable Barge Costs”) as follows: AGC will recover 50% of Barge Costs for the barge procurement period specified in Section 1.6.1 of this Implementation Agreement pursuant to this Implementation Agreement and Sections 4.1.9 and 7.2 of the Services Tariff. AGC will bear the remaining 50% of Barge Cost. In the event the Parties determine, in accordance with Section 1.6.2 of this Implementation Agreement, that AGC should extend the period for which it procures the barge, AGC will recover 100% of the additional Barge Costs pursuant to this Implementation Agreement and Sections 4.1.9 and 7.2 of the Services Tariff, and other provisions of the Services Tariff, to the extent applicable.
- 1.6.6 The Parties will meet after the conclusion of the first winter period to discuss whether a barge should be procured in future years, and to determine the appropriate allocation of Barge Costs between AGC and the Loads in the Con Edison Transmission District. If there is agreement to do so, the Parties will discuss the need for changes to the cost recovery terms. Unless and until there is agreement on revised terms, the above cost recovery terms will apply.
- 1.6.7 AGC shall procure at least the level of assets required in Sections 1.6.1, 1.6.2, or 1.6.3 of this Implementation Agreement while the spot barge is chartered. If AGC later decides to materially reduce the assets it procures, it shall notify the NYISO in writing at least 30 calendar days before relaxing such requirements and provide detailed justification for such reduction.

- 1.6.8 AGC shall provide its current barge and fuel agent agreements to the NYISO.
- 1.7 AGC shall not be permitted to recover property taxes, operation and maintenance costs, or other expenses related to the Project except as a component of the Recoverable Project Costs.
- 1.8 In the event AGC makes a corporate decision to deactivate any of its dual-fuel generating units at the Astoria Generating Station (*i.e.*, AGS Units 3 and 5) during the 84-month recovery period, or if any of the aforementioned generating units, a fuel oil tank or the fuel forwarding system suffer a catastrophic failure (as defined in the NYISO Tariffs) over the same period, then AGC will immediately inform NYISO. NYISO will stop paying and AGC will cease recovering the costs for the ULSD system at the Astoria Generating Station. AGC will reimburse amounts previously paid by the NYISO, as follows:
- 1.8.1 If AGC makes a corporate decision to deactivate one unit, or if a catastrophic failure prevents one unit's operation, AGC will immediately inform NYISO so that NYISO can stop paying and will cease recovering 50% of the remaining Reimbursable Project Costs as of the date on which the unit ceases operating.
- 1.8.2 If AGC makes a corporate decision to deactivate two or more units, or if a catastrophic failure prevents two or more units' operation, AGC will immediately inform NYISO so that NYISO can stop paying and will cease recovering any of the remaining costs as of the date on which the second unit ceases operating.
- 1.8.3 In the event of a deactivation described in Section 1.8.1 or 1.8.2, the reimbursement of payments previously made by the NYISO shall be as follows:

<u>Year</u>	<u>Reimbursement Percentage</u>	<u>Reimbursement Percentage</u>
	<u>- One Unit Deactivated</u>	<u>- Two Units Deactivated</u>

NYISO Agreements --> Service Agreements --> Implementation Agreement fuel oil NYISO & Astoria Generating

2020	50%	100%
2021	50%	100%

2022	37.5%	75%
2023	25%	50%
2024	12.5%	25%
2025	12.5%	25%
2026	0%	0%

1.8.4 If AGC returns a unit that it decided to deactivate, or that catastrophically failed, to service prior to the end of the 84-month period, the NYISO's obligation to pay one-half of the \$500,000 monthly payment (as adjusted on a pro-rata monthly basis) will resume from the date that unit recommences participation in the NYISO's markets and will continue for a number of months that would equal, in total, 84 months. No interest or other carrying charges will accrue on any portion of the outstanding balance owed during the deactivation period.

1.9 If AGC makes a corporate decision to repower a generating unit, no cost recovery will occur during the repowering construction period. Cost recovery will resume once the repowered unit commences participation in the NYISO's markets and will continue for a number of months that would equal, in total, 84 months. No interest or other carrying charges will accrue on the outstanding balance owed during the repowering construction period. If one unit is repowered, 50% of the tank costs would be impacted by this provision; if two or more units are repowered, 100% of the tank costs would be impacted by this provision.

1.10 For purposes of this Section 1, a "corporate decision" shall mean and include: (i) a decision by AGC's management or parent, including, but not limited to, a decision to deactivate one or more generating units for economic reasons; or (ii) any other decision within AGC's control.

- 1.11 In the event AGC deactivates any of the generating units or ceases oil burning capability because of a change in law or circumstances outside AGC's control (other than due to a catastrophic failure, which is addressed in Section 1.8 above), AGC shall immediately inform the NYISO, there will be no reimbursements by AGC of any amounts previously paid by the NYISO, but future payments - starting the month after the resource becomes unavailable - will be adjusted as follows (the revised monthly payments shown below are based on the expectation of an initial monthly payment of \$500,000; in the event the initial monthly payment is different from \$500,000, the monthly payments will be revised using the provided adjustment percentages):

<u>Reduction</u>	<u>Percentage Adjustment</u>	<u>Revised NYISO Monthly Payment</u>
2020	10%	\$450,000
2021	20%	\$400,000
2022	30%	\$350,000
2023	40%	\$300,000
2024	50%	\$250,000
2025	60%	\$200,000
2026	70%	\$150,000

- 1.12 In the event there is a catastrophic failure of a fuel oil tank and/or related equipment, and AGC decides to rebuild the facility, it shall not recover more than the initial actual construction cost from Loads in the Con Edison Transmission District.
- 1.13 In the event there is a catastrophic failure of a fuel oil tank and/or related equipment, and AGC decides not to rebuild the facility, insurance proceeds specific to the physical damage to the facility shall first be used to cover any remaining actual construction costs, as described in Section 1.5, above. After payment of the remaining actual construction costs,

80% of any remaining physical damage insurance proceeds shall be paid to the NYISO,
provided that the insurance proceeds paid to the NYISO shall not exceed the amount that

NYISO paid to AGC as Recoverable Project Costs. Insurance proceeds payable to the NYISO shall not include amounts recovered from business interruption insurance coverage or environmental remediation insurance coverage.

SECTION TWO

PAYMENT

- 2.1 The NYISO will pay AGC the Recoverable Project Costs monthly using the NYISO's normal billing cycle, commencing the month after this Implementation Agreement is accepted by the Commission.
- 2.2 The NYISO will pay AGC the Recoverable Barge Costs monthly using the NYISO's normal billing cycle, commencing the month after AGC first provides documentation to the satisfaction of the NYISO of its actual Barge Costs in accordance with Section 1.6 of this Implementation Agreement.
- 2.3 The NYISO will allocate Recoverable Project Costs and Recoverable Barge Costs paid to AGC pursuant to this Implementation Agreement, in accordance with the provisions of Section 6.1.7 of the NYISO Open Access Transmission Tariff ("OATT") that are in effect at the time this Implementation Agreement is executed, to all load withdrawals in the Consolidated Edison Transmission District except for withdrawals to supply station power based on each Load Serving Entity's ("LSE's") load ratio share.
 - 2.3.1 Recoverable Project Costs, paid pursuant to Section 2.1 of this Implementation Agreement, will be allocated based on each LSE's load ratio share for each month during which the NYISO is obligated to pay Recoverable Project Costs under this Implementation Agreement.

2.3.2 All Recoverable Barge Costs paid pursuant to Section 2.2 of this Implementation Agreement shall be allocated based on each LSE's load ratio share for the period during which the barge is in place at the Astoria Generating Facility.

2.3.3 Refunds and Insurance Proceeds paid to the NYISO in accordance with this Implementation Agreement shall be refunded to all load withdrawals in the Consolidated Edison Transmission District except for withdrawals to supply station power based on each LSE's load ratio share. Refunds shall be allocated based on each LSE's load ratio share for the period during which refunds are issued, using the same load ratio share basis that the ISO uses to allocate the Recoverable Project Costs or Recoverable Barge Costs.

SECTION THREE

EXPIRATION/AMENDMENT

- 3.1 Except for outstanding payment obligations under Sections 1.8.4, 1.9 and 2 hereof, this Implementation Agreement shall expire on October 31, 2026. Notwithstanding the immediately preceding sentence, the Parties are free to enter into negotiations to extend the duration of this Implementation Agreement.
- 3.2 The Parties shall retain all rights under the FPA, under Section 4.1.9 of the Services Tariff, and under all other provisions in the Services Tariff, to the extent applicable, as discussed in Sections Six and Seven of this Implementation Agreement.

SECTION FOUR

SECTION 4.1.9 OF THE NYISO SERVICES TARIFF

- 4.1 This Implementation Agreement constitutes the full and complete agreement of the Parties

with respect to the subject matter addressed herein, and supersedes all prior negotiations, understandings, and agreements, whether written or oral, between the Parties with respect

to the subject matter described herein. The Parties also agree that this Implementation Agreement does not affect or change any provisions of the Services Tariff, including Section 4.1.9. They further agree that AGC's compensation for the conversion of units 3 and 5 at the Astoria Generating Station to fire No. 2 ULSD in lieu of Fuel Oil shall occur solely in accordance with this Implementation Agreement.

4.2 Where there are differences between Section 4.1.9 of the Services Tariff and the terms of this Implementation Agreement, the terms of this Implementation Agreement shall govern.

4.3 All references within this Implementation Agreement to Section 4.1.9 of the Services Tariff refer to the provisions of Section 4.1.9 as they exist as of the date this Implementation Agreement is executed.

SECTION FIVE

COMMISSION ORDER

5.1 To the extent the Commission accepts this Implementation Agreement subject to a condition or modification, each Party shall have the right to withdraw from this Implementation Agreement, which withdrawal may be exercised in such Party's sole discretion.

SECTION SIX

FILING RIGHTS

6.1 No Party will make a Section 205 filing or a Section 206 filing seeking to amend the terms of this Implementation Agreement, or seeking a rate or a revised rate to compensate AGC for burning Fuel Oil in furtherance of Rule G.2 during the term of this Implementation Agreement, unless the Parties, by mutual consent, agree to modify the terms and conditions

of this Implementation Agreement. This Implementation Agreement has been negotiated at arm's-length by Parties of equal bargaining power, and it is the intent of the Parties that

this Implementation Agreement is subject to the “public interest” standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (“Mobile Sierra doctrine”) to the full extent legally permissible and as interpreted in *Morgan Stanley Capital Group Inc. v. Pub. Util District No. 1*, 128 S. Ct. 2733 (2008), *NRG Power Marketing LLC v. Me. Pub. Utils, Comm’n*, 130 S. Ct. 693 (2010) and *Dominion Transmission Inc. v. FERC*, 533 F.3d 845 (D.C. Cir. 2008).

- 6.2 For the sole purpose of settling the compensation matters described herein, this Implementation Agreement represents a fair and reasonable negotiated settlement that is in the public interest. The term of this Implementation Agreement shall not limit or restrict the arguments that the Parties may put forth or the positions that the Parties may take in any future proceeding before the Commission that are not specifically agreed to herein.

SECTION SEVEN

EFFECTIVE DATE AND GENERAL RESERVATIONS

- 7.1 This Implementation Agreement shall become effective upon an order accepting for filing approving the Implementation Agreement. If the Commission accepts the Implementation Agreement without modification, no Party will request rehearing or otherwise appeal or support rehearing requests or appeals by others.
- 7.2 This Implementation Agreement is an integrated whole and is expressly conditioned on the Commission’s acceptance of all provisions herein without modification or condition. Notwithstanding the foregoing, if the Commission’s approval of this Implementation Agreement is conditioned on a modification of this Implementation Agreement or on any

other condition, such modification or condition shall be considered to be accepted unless a
Party objecting to such condition or modification serves written notice on the other Party

of its intent to seek rehearing of the order approving the Implementation Agreement as modified or conditioned within a period of 10 days from the date of such order. Should Commission approval be subject to condition or modification of this Implementation Agreement, each Party shall then have the right, as determined in its sole discretion, to withdraw as a signatory of the Implementation Agreement.

- 7.3 Commission approval of this Implementation Agreement shall constitute the requisite waiver of any and all otherwise applicable Commission regulations, to the extent necessary, to permit implementation of the provisions of this Implementation Agreement.
- 7.4 This Implementation Agreement is made upon the express understanding that it constitutes a negotiated agreement and, except as otherwise expressly provided for herein, no Party shall be deemed to have approved, accepted, agreed to, or consented to any principle or policy relating to rate design, rate calculation, or any other matter affecting or relating to any of the compensation, charges, classifications, terms, conditions, principles, or issues associated with this Implementation Agreement. This Implementation Agreement shall not be deemed to be a “settled practice” as that term was interpreted and applied in *Public Service Commission of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980), and shall not be the basis for any decision with regard to the burden of proof in any future litigation. This Implementation Agreement shall not be cited as precedent, nor shall it be deemed to bind either Party in any future proceeding including, but not limited to, any Commission proceeding, except in any proceeding to enforce this Implementation Agreement.
- 7.5 The discussions among the Parties and other entities that have produced this Implementation Agreement have been conducted on the explicit understanding, pursuant to Rules 602(e) and 606 of the Commission’s Rules of Practice and Procedures, that all

offers and any comments on these offers are privileged and not admissible as evidence against any participant who objects to their admission and that any discussions of the Parties and other entities with respect to offers of settlement is not subject to discovery or admissible in evidence.

- 7.6 Headings in this Implementation Agreement are included for convenience only and are not intended to have any significance in interpretation of this Implementation Agreement.
- 7.7 Signatures may occur by counterparts. Such signatures shall have the same effect as if all signatures were on the same document.

SECTION EIGHT

SUPPORT OF FULL SETTLEMENT

- 8.1 The Parties agree that this Implementation Agreement resolves all issues related to the manner in which AGC will be compensated for conversion of units 3 and 5 at the Astoria Generating Station to fire No. 2 ULSD in lieu of Fuel Oil.

Respectfully submitted,

ASTORIA GENERATING COMPANY, L.P.

By: 

Dated: 8/6/2019

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

By: 

Dated: 8-7-2019