UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. EL10-33-000

MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. ("NYISO") submits this motion for leave to answer, and its answer to, the *Motion to Intervene and Answer of DC Energy, LLC* ("*DC Energy Answer*")[2] and the *Motion to Intervene and Protest of Independent Power Producers of New York, Inc.* ("*IPPNY Protest*") in the above-captioned proceeding.

The NYISO's January 8 *Petition for Declaratory Order and Request for Temporary Waiver* ("*Petition"*) presented a single question for the Commission's consideration. Specifically, whether the cessation of operations at the original Charles A. Poletti generating facility, and its replacement with a new facility at the same site, constitutes the "retirement" of "Poletti" within the meaning of two grandfathered 1999 transmission agreements ("1999 Agreements") and Footnote Seven to Attachment L of the NYISO's Open Access Transmission Tariff ("OATT"). The answer will determine whether the New York Power Authority ("NYPA") may continue to hold certain Grandfathered Transmission Congestion Contracts ("TCCs") associated with the 1999 Agreements.[3] The NYISO is not a party to those agreements, has no special knowledge of the intent behind the "retirement" provision, and is a not-for-profit

[1] 18 C.F.R. §§ 385.212 and 385.213 (2009).

[2] Because Shell Energy North America has adopted the arguments contained in the *DC Energy Answer* the NYISO's response also encompasses the *Motion to Intervene and Comment of Shell Energy North America (US) L.P.*

[3] Capitalized terms that are not otherwise defined herein shall have the meaning specified in Article II of the NYISO's OATT.

independent entity with no direct stake in the outcome. Consequently, this answer does not address DC Energy's or IPPNY's arguments that Poletti should be deemed to have "retired" or NYPA's (and others') arguments that it should not.

Instead, the NYISO is submitting this answer because it opposes: (i) DC Energy's attempt to inject two new issues that are beyond the scope of this proceeding; and (ii) IPPNY's claims regarding the NYISO's request for a limited tariff waiver. If the Commission nevertheless takes up DC Energy's new issues, this answer explains why DC Energy's claims should be denied. The NYISO also seeks to correct certain inaccurate statements in both pleadings and the mischaracterizations of the NYISO's actions found in IPPNY's Protest. Finally, the NYISO supports DC Energy's request that the Commission act by March 15, 2010, or as soon as possible thereafter, to answer the question presented by the *Petition*.

I. MOTION FOR LEAVE TO ANSWER

The Commission has discretion to accept answers to responsive pleadings such as answers and protests,[4] and has often done so when it helps to clarify complex issues, provides additional information, or is otherwise helpful to the Commission's decision-making process.[5] In this case, both the *DC Energy Answer* and *IPPNY Protest* include factual misstatements and inaccurate descriptions of NYISO tariff requirements or NYISO actions. In addition, the *DC Energy Answer*, seeks to inject issues that are beyond the scope of this proceeding. The Commission should therefore exercise its discretion and accept the NYISO's answer.

[4] *See* 18 C.F.R. § 385.213(a)(2) (2009). The NYISO believes that it is submitting this answer within the time period prescribed by Rule 213(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(d). However, to the extent that the Commission deems the NYISO to have submitted this answer after the applicable deadline, the NYISO respectfully seeks permission to file this answer out-of-time.

[5] *See e.g.*, *New York Independent System Operator, Inc.*, 123 FERC ¶ 61,044 at P 39 (2008) (accepting answers to answers because they provided information that aided the Commission's decision-making process); *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting the NYISO's answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was "helpful in the development of the record. . . .").

II. ANSWER

A. Answer to DC Energy

1. The Commission Should Reject DC Energy's Attempt to Inject New Issues that Are Outside the Scope of this Proceeding

DC Energy inaccurately claims that the *Petition* raised two issues in addition to the single question that it actually presented. Specifically, DC Energy asks the Commission to: (i) direct the NYISO to analyze whether NYPA would be eligible to obtain Fixed Price TCCs in the event that its Grandfathered TCCs are deemed to have expired; and (ii) opine on whether an earlier NYPA transmission agreement (the "1989 Agreement") would also terminate if the Commission were to conclude that Poletti has retired.[6] Neither of these issues was presented by the NYISO[7] or needs to be addressed for the Commission to answer the question that was presented. Both pertain to matters that the NYISO will need to address if, and only if, the Commission determines that NYPA's Grandfathered TCCs have expired. They are therefore outside the scope of this proceeding and should not be considered at this time.

Commission precedent is clear that parties may not broaden the scope of a declaratory order proceeding by raising additional issues that go beyond the question presented.[8] DC Energy is essentially asking the Commission to issue advisory opinions and provide declaratory relief with respect to the issues that it has introduced. If DC Energy wants the Commission to address its issues it should be required to file its own petition for a declaratory order and to satisfy all relevant procedural requirements (including the requisite filing fee). At a minimum, the Commission should not act on DC Energy's issues without issuing a notice to alert non-parties,

[6] *See DC Energy Answer* at 2, 16-22.

[7] *See Petition* at 6-7.

[8] *See, e.g., Missouri River Energy Services, et. al.,* 125 FERC ¶ 61,300 at P 14 (2008); *PJM Interconnection, LLC,* 124 FERC ¶ 61,059 at P 25 (2008); *Entergy Servs., Inc.*, 104 FERC ¶ 61,336, at 62,259-60 (2003); *Duke Energy Corporation, et al.*, 94 FERC ¶ 61080, at p. 61,369 (declining to provide clarification requested by protestors on an issue that was not raised in a petition for declaratory order).

who may have interests that they could not have reasonably foreseen would be implicated in this proceeding,[9] and affording them an opportunity to comment.

2. DC Energy's Request that the NYISO Be Compelled to Analyze NYPA's Eligibility for Fixed Price TCCs Is Irrelevant and Unnecessary

If the Commission decides to consider DC Energy's Fixed Price TCC question it should decline to order the NYISO to analyze "whether NYPA qualifies as a Load Serving Entity ("LSE") with respect to the grandfathered TCCs" or otherwise satisfies NYISO tariff requirements. Section 2A.1 of Attachment M of the NYISO OATT[10] states that:

> Any LSE that currently has transmission rights under an [Existing Transmission Agreement ("ETA")] in effect on November 19, 1999 that was listed on Table 1A of Attachment L of the OATT (as it may be amended) but has not yet expired, shall likewise have a right to obtain Fixed Price TCCs with the same Point of Injection and Point of Withdrawal as that ETA after its expiration.

Contrary to DC Energy's framing of its question, the NYISO tariffs do not require a threshold demonstration that an entity is an LSE "with respect to" or "for purposes"[11] of particular TCCs associated with a particular grandfathered agreement. In reality, "any" LSE that has transmission rights under an expiring ETA is eligible in the first instance to convert them into Fixed Price TCCs. Such an LSE will, however, be subject to a separate tariff requirement that it:

> submit a written certification to the ISO stating that it expects to: (i) be legally obligated to serve the Load that it historically served under the ETA (or a portion of that Load at least equal to the number of Fixed Price TCCs that it plans to obtain under this Section 2A); and (ii) need the transmission capacity between the Point of Injection and Point of Withdrawal specified in the ETA to serve that Load.

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[9] For example, many NYISO stakeholders that have no particular interest in the specific Grandfathered TCCs addressed by the Petition would likely have an interest if these proceedings were expanded to encompass the eligibility criteria for obtaining Fixed Price TCCs.

[10] Attachment M's Fixed Price TCCs provisions are replicated in Attachment B to the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff"). For convenience, all references to Attachment M to the OATT in this answer should be understood as encompassing references to Attachment B as well.

[11] *See DC Energy Answer* at 17.

The NYISO tariffs define an LSE as "[a]n entity . . . , 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.]".

DC Energy does not appear to contend that NYPA is not an LSE, only that it might not be an LSE "with respect" to its Grandfathered TCCs. That distinction, however, is irrelevant. NYPA is clearly an LSE. It does not have a franchised service area but it is undisputed that it serves retail loads. It has traditionally done so through its Marketing and Economic Development department, which was a signatory to the 1999 Agreements.[12] NYPA has also identified itself as an LSE in the North American Electric Reliability Corporation's ("NERC's") registry.[13] There is no dispute that the 1999 Agreements are ETAs, are listed on Table 1A of Attachment L, and were in effect as of November 19, 1999.

Consequently, under the actual requirements of the NYISO tariff, NYPA would be eligible to request Fixed Price TCCs in the event that its Grandfathered TCCs expire. This is because NYPA is an LSE that currently has transmission rights under ETAs that meet the tariff requirements. If NYPA were to ever make such a request, it would need to submit the required written certification to the NYISO at that time. NYPA has not yet done so, which is consistent with its position that the Grandfathered TCCs remain in effect. The NYISO also notes NYPA's statements in this proceeding that the Grandfathered TCCs are critical to its ability to serve its Southeast New York Governmental Customers and that it has a contractual obligation to serve

[12] *See Standards of Conduct for Transmission Providers, Responsive Filing of the New York Power Authority* at 3, Docket Nos. RM01-10-000 and TS04-80-000 (filed 2/9/2004) (noting that NYPA's Marketing and Economic Development Business Unit ("MED") interfaces with its customers, when NYPA is functioning as a Load Serving Entity).

[13] *See* NERC Compliance Registry Matrix (02/24/2010), ID# NCR07161 *available at* <http://www.nerc.com/page.php?cid=3%7C25>.

them until 2017.[14] It therefore appears likely that NYPA could meet the certification requirement[15] with respect to all, or a portion of its Grandfathered TCCs.

There is clearly no reason for the Commission to direct the NYISO to conduct an analysis that its tariffs do not require, especially when NYPA appears likely to satisfy the actual requirements. In any event, the NYISO could not analyze how many Fixed Price TCCs NYPA might be eligible to receive until NYPA submits its written certification. NYPA would presumably only do so if the Commission rules that its Grandfathered TCCs have expired. The Commission should therefore reject DC Energy's attempt to force the NYISO to conduct its proposed analysis.

3. The 1989 Agreement Was Validly Grandfathered

DC Energy asserts that there is a question as to "whether the 1989 Agreement is validly grandfathered with respect to the 600 MWs of TCCs from East Fish Kill to Load Zone J."[16] If the Commission decides to consider this issue it should reject DC Energy's contention. Attachment L specifies that the 1999 Agreements each have a point of withdrawal at "Con Edison," *i.e.*, NYISO Load Zone J. The grandfathering of the 1999 Agreements must have encompassed the 1989 Agreement since the latter is the only means through which the former could be listed on Table 1A of Attachment L with Load Zone J as their point of delivery. Furthermore, the path to Load Zone J is designated in a separate grandfathered agreement.[17]

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[14] *See* NYPA Answer at 2-3.

[15] Attachment M also requires LSEs requesting Fixed Price TCCs to submit their requests by a deadline established in the ISO Procedures. If the Commission were to rule that Poletti has retired and thus that NYPA's Grandfathered TCCs must terminate, NYPA's ability to comply with this deadline would be a function of the Commission-established effective date of termination. The Commission would presumably balance legal, equitable, and market efficiency considerations when setting such a date. It might also take the view that the *Petition's* request for temporary waivers applies to the deadline for submitting a certification given the current uncertainty concerning the status of the Grandfathered TCCs.

[16] *DC Energy Answer* at 20.

[17] *See* NYISO OATT, Attachment L, Table 1A, Contract No. 217 and Note 15.

4. Attachment K to the NYISO OATT Does Not Appear to Require that Grandfathered TCCs Between East Fishkill and Load Zone J Be Terminated if the 1999 Agreements Are Deemed to Have Expired

DC Energy argues that Section 2.2 of Attachment K to the NYISO OATT dictates that the Grandfathered TCCs providing for the transmission of Niagara/St. Lawrence energy between East Fishkill and Load Zone J must terminate if the 1999 Agreements are deemed to have expired. Section 2.2 states that:

> As long as each Third Party TWA Customer retains Grandfathered Rights or Grandfathered TCCs, it must maintain all Third Party TWAs from each associated Point of Receipt of the Generator or the NYCA Interconnection with another Control Area to the corresponding Point of Delivery of the Load served by the TWA or at the NYCA Interconnection with another Control Area.

DC Energy argues that the purpose of this provision is to prevent the "grandfathered cherry picking of congestion paths" and "grandfathered transmission leg shopping."[18]

It appears that DC Energy is the first party to invoke Section 2.2 in an attempt to terminate another party's TCCs. As was noted above, DC Energy's question is outside the scope of the proceeding and has the potential to impact other stakeholders that are not on notice that their interests might be implicated here. If the Commission nevertheless decides to address the question, there are a number of other points that it would have to consider. First, it appears that Section 2.2 is not applicable because it addresses "Third Party TWA Customers" that have retained their Grandfathered TCCs, whereas NYPA has transferred the Grandfathered TCCs at issue to the Consolidated Edison Company of New York, Inc. ("Consolidated Edison.") It is also unclear whether a provision intended to prevent "grandfathered transmission leg shopping" should apply to NYPA, which appears to striving to "maintain" the 1999 Agreements, or to Consolidated Edison, which did not make the decision to replace Poletti, yet would be directly impacted if Section 2.2 were triggered. Finally, it is unclear how Section 2.2 should be

[18] *DC Energy Answer* at 21.

understood in light of subsequent tariff revisions, notably the addition of the Fixed Price TCC provisions, which would be implicated if the Grandfathered TCCs from East Fishkill to Load Zone J were deemed invalid. The need to carefully consider these, and other, issues of first impression on a complete record militates strongly against any Commission action on DC Energy's Attachment K question at this time.

5. The NYISO Supports DC Energy's Request that the Commission Issue a Ruling By March 15, 2010 or as Soon as Possible Thereafter

DC Energy requests that the Commission issue a ruling by March 15, 2010. The *Petition* requested that the Commission act by June 1, so that the NYISO could comply with the ruling in time for its Autumn 2010 Centralized TCC Auctions. DC Energy is correct, however, that if the Commission were to rule that Poletti had retired by March 15, 2010 the NYISO would expect to be in a position to release capacity associated with the Grandfathered TCCs in the latter stages of its Spring 2010 Centralized TCC Auction, *i.e.*, the later rounds where six month TCCs are made available. The sooner the Commission resolves the question presented by the *Petition*, the better it will be for the TCC markets because auction participants will face less uncertainty. The NYISO therefore supports DC Energy's call for the Commission to issue an order by March 15, without taking any position on the merits of the arguments regarding Poletti's status.[19]

B. IPPNY's Allegations of Bad Faith Have No Merit and Should Be Rejected

The NYISO asked that the Commission grant, to the extent necessary, limited tariff waivers to treat NYPA's Grandfathered TCCs as remaining in effect until the Commission acts on the *Petition*.[20] IPPNY falsely claims that this request was not made in "good faith" and

[19] As part of its request that the Commission issue an order by March 15, 2010, DC Energy also asked that the NYISO be ordered to complete any Fixed Price TCC election process within the timeframe of the Spring 2010 Centralized TCC Auctions. There is no need for the Commission to take such an action. If the Commission were to issue an order holding that Poletti had retired by March 15 the NYISO expects that it would be able to complete the Fixed Price TCC election process in time to account for it in the later stages of the Spring 2010 Centralized TCC Auctions.

[20] *See Petition* at 13.

represented favoritism on behalf of "one market participant."[21] The notion that the NYISO unfairly favored any one entity is belied by the diversity of positions that the parties in this proceeding have taken. Far more than "one market participant" argued that Poletti had not retired, including NYPA, the City of New York, the Southeast New York Customers, the Long Island Power Authority, and Consolidated Edison. The New York Municipal Power Agency, Municipal Electric Association of New York State, and New York Association of Public Power, all intervened in the proceeding but none has expressed any concern about supposed favoritism for NYPA. Neither has DC Energy.

IPPNY is also wrong to claim that the NYISO should have taken the opposite approach and requested "a waiver of those tariff provisions that would require a re-settling of the market if the Commission determined that Poletti was not retired and NYPA should have retained the Grandfathered TCCs."[22] As the *Petition* explained, the NYISO took the approach that it did because any sales of capacity associated with NYPA's Grandfathered TCCs could not practically be undone if it the Commission later determined that Poletti had not retired.[23] More specifically, if the NYISO were directed to reverse its current treatment of the 600 MW of NYPA Grandfathered TCCs and release the capacity to the auctions, or make it available to NYPA as Fixed Price TCCs, it could do so almost immediately. By contrast, if the NYISO had taken IPPNY's approach and offered the capacity in the Spring 2010 Centralized TCC Auctions for TCCs it would not be able to completely reverse course for as long as a year, *i.e.*, until all of the one year TCCs created in the auctions over the transmission capacity otherwise associated with the 600 MWs of TCCs at issue here had expired. Within the confines of the NYISO's existing tariff arrangements, there does not appear to be any way to immediately return TCCs to NYPA,

[21] *See IPPNY Protest* at 3, 4.

[22] *Id.* at 5.

[23] *See Petition* at 12.

or to immediately begin settling the TCCs, as if NYPA owned them. To comply with a Commission order to immediately restore NYPA's Grandfathered TCCs after a sale of that capacity in the 2010 Spring Centralized TCC Auction would require activities that would be very much like an oversale of New York State transmission system capacity between the Point of Injection and Point of Withdrawal currently encompassed by the Grandfathered TCCs.

The NYISO continues to believe that its proposed waiver minimizes harm to the market and better promotes market efficiency. In this case, it was also more equitable to err on the side of preserving established contract rights until it was clear that they had expired, even at the potential cost of delaying others' ability to capitalize on the new opportunities that would result from the expiration of those rights.

In short, the reality is that this proceeding involves a complex legal question that did not become apparent until much more recently than IPPNY suggests. NYPA has previously indicated to the NYISO, and has argued in this proceeding, that Poletti has not "retired" for purposes of the underlying transmission agreements. NYPA is the party with the greatest knowledge of the transmission agreements but the NYISO did not simply accept its position. The NYISO necessarily proceeded deliberately before deciding that NYPA's interpretation might not be the only reasonable one. By then it was clear that the question would be controversial, as the pleadings in this proceeding have confirmed, and would ultimately have to be resolved by the Commission.

Additional time was required to determine that a petition for declaratory order was the most appropriate vehicle for presenting the issue, since it would not put any party at a disadvantage before the Commission. If the NYISO had instead determined that Poletti had (or had not) retired, and acted accordingly, parties that took a contrary view would have had to file a Section 206 complaint and borne the statutory burden of proof. There is no reason to believe that

TCC market uncertainty would have been eliminated more quickly if the NYISO had announced its determination on January 31, 2010 and then left it to aggrieved parties to file complaints.

IPPNY's insinuations that the NYISO somehow favored NYPA are therefore both unfounded and unfair. The Commission should recognize them for what they are and reject them.

III. CONCLUSION

Wherefore, the New York Independent System Operator, Inc., respectfully requests that the Commission grant it leave to answer, accept this answer, and reject the arguments by DC Energy and IPPNY that are addressed in Section II above.

Respectfully submitted,

/s/ Ted J. Murphy
Ted J. Murphy
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March 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Washington, D.C., this 5th day of March, 2010.

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