

111 FERC ¶61,366
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

New York Independent System Operator, Inc.

Docket Nos. ER04-958-002
EL05-78-001

ORDER GRANTING REHEARING

(Issued June 7, 2005)

1. In this order, the Commission grants rehearing of the Commission order issued on March 25, 2005,¹ in which the Commission, acting pursuant to section 206 of the Federal Power Act (FPA),² instituted an investigation into “the continued justness and reasonableness” of the Long Island Power Authority’s (LIPA) wholesale transmission service charge (TSC) rates, which had been accepted in a letter order issued pursuant to delegated authority on August 2, 2004.³ Accordingly, we will terminate the section 206 proceeding and the hearing and settlement judge procedures that we initiated in the March 25 Order.

Background

2. On June 25, 2004, the New York Independent System Operator, Inc. (NYISO), on behalf of LIPA, submitted revisions to its open access transmission tariff (OATT) to revise LIPA’s TSC rates. The filing was not protested and was accepted pursuant to delegated authority on August 2, 2004.

¹ *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,359 (2005).

² 16 U.S.C. § 824e (2000).

³ *New York Independent System Operator, Inc.* (Docket No. ER04-958-001, Aug. 2, 2004) (unpublished letter order) (August 2 Letter Order).

3. On September 1, 2004, the Municipal Electric Utilities Association of New York State (MEUA), which had intervened but had not protested NYISO's filing, submitted a request for rehearing of the August 2 Order on behalf of three of its members.⁴ MEUA sought rehearing of the August 2 Order on two grounds. First, MEUA argued that revisions to LIPA's TSC rates enable LIPA to collect state taxes from municipal entities, in violation of New York State tax law. Second, according to MEUA, under LIPA's TSC rates at issue, transmission losses would be collected twice, once by the NYISO and once by LIPA.

4. The Commission denied MEUA's rehearing request in the March 25 Order. The Commission normally does not allow parties to raise new issues on rehearing, in the absence of good cause,⁵ and the Commission found that MEUA had not demonstrated that there was good cause for its failure to timely raise these issues.

5. However, in light of the concerns raised by MEUA, we instituted an investigation, under section 206 of the FPA, into "the continued justness and reasonableness" of LIPA's TSC rates, established a refund effective date, and set the matter for a trial-type evidentiary hearing. However, we held the hearing in abeyance and directed settlement judge procedures to provide the parties the opportunity to resolve the dispute expeditiously and consensually rather than through litigation.

6. On April 5, 2005, NYAPP filed an intervention on behalf of the protesters. On April 7, 2005, MEUA filed a notice of withdrawal from these proceedings.

7. On April 22, 2005, LIPA filed a request for rehearing of the March 25 Order seeking to reverse the initiation of the section 206 investigation into LIPA's TSC rates and to clarify that the Commission's review of LIPA's TSC rates is limited to a so-called comparability review. LIPA contends here that the Commission erred in initiating the

⁴ The members were the Long Island Municipal Electric Utilities of the Village of Freeport (Freeport), the Village of Greenport (Greenport), and the Village of Rockville Centre (Rockville Centre) (collectively, protesters). Freeport and Rockville Centre have terminated their membership in MEUA. While Greenport currently remains as an MEUA member, it has sent MEUA a letter stating that MEUA does not represent Greenport on legal and policy matters. The protesters are now represented in these proceedings by the New York Association of Public Power (NYAPP).

⁵ See, e.g., *Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 (2000).

instant section 206 investigation because LIPA is a non-jurisdictional utility, and its rates are subject to review only under a comparability standard, rather the just and reasonable standard of section 206 of the FPA.

Rehearing Request

8. In support of its request for rehearing, LIPA argues that the Commission erroneously identified the NYISO as the public utility whose tariff is to be reviewed, rather than LIPA, a non-jurisdictional entity. LIPA asserts that, while LIPA's revenue requirement and resulting rates are incorporated into the NYISO OATT, that is on an informational basis only, and that these rates are developed, billed, and collected by LIPA from customers using LIPA's bulk transmission system. LIPA further explains that its revenue requirement and its resulting TSC rates are not integrated or otherwise incorporated into any rate that is charged or collected by NYISO.⁶

⁶ In this regard, LIPA states:

While incorporated into the NYISO OATT on an informational basis, LIPA's revenue requirement and resulting rates are developed, billed, and collected by LIPA from customers using LIPA's bulk transmission system. LIPA bills itself the wholesale TSC for its own use of the bulk transmission system in its operations as a load-serving entity. In contrast, the NYISO does not bill, collect or receive any revenues or payments associated with LIPA's wholesale TSC assessment. In fact, the NYISO does not have an independent transmission service charge, rather each of the New York transmission owners bill and collect their own TSCs.

* * *

LIPA's wholesale TSC is a rate that is charged or collected by LIPA—not the NYISO. The NYISO has no relevant control over LIPA's development, assessment or collection of its wholesale TSC that would cause such rates to be a rate that is charged or collected by the NYISO. Moreover, the NYISO has no ability to refund any such amounts since it does not receive any monies associated with LIPA's wholesale TSC. LIPA's wholesale TSC is developed, billed and collected by LIPA with all collected revenues retained by LIPA.

* * *

(continued)

9. Second, LIPA contends that the Commission may not review its transmission revenue requirements under section 206 of the FPA because LIPA is a non-jurisdictional utility under section 201(f) of the FPA, that the Commission has consistently treated LIPA as a non-jurisdictional utility.⁷ As a matter of law, therefore, the Commission must dismiss the instant section 206 proceeding since section 201(f) categorically exempts LIPA and LIPA's TSC rates from rate regulation under section 205 or 206 of the FPA.

10. Third, LIPA contends that, in approving the NYISO OATT terms accommodating LIPA's participation in the NYISO and incorporating LIPA's TSC, the Commission recognized LIPA's non-jurisdictional status and concluded that the Commission's review of LIPA's rates would be under a comparability standard, rather than the just and reasonable standard under section 206 of the FPA. LIPA cites a number of orders,

LIPA's revenue requirement and resulting wholesale TSC is not integrated or otherwise incorporated into any rate that is charged or collected by the NYISO nor does such charge recover costs associated with any NYISO activities. Instead, LIPA's revenue requirement reflects LIPA's costs from its operation of the Long Island bulk transmission system. ... Moreover, LIPA directly bills and collects its wholesale TSC from customers using LIPA's bulk transmission system; while on the contrary, the NYISO does not bill, collect or receive any revenues or payments associated with LIPA's wholesale TSC. Accordingly, LIPA's wholesale TSC is not blended into, or an integral part of a jurisdictional NYISO rate, instead, it remains non-jurisdictional and beyond the Commission's jurisdictional authority under the FPA.

LIPA Request for Rehearing at 4, 8, 9-10. On this basis, LIPA argues that the circumstances here differ from the circumstances present in *City of Vernon, California*, 109 FERC ¶ 63,057 at P 23 (2004), *exceptions pending*, where the non-public utility's revenue requirements were an input to a jurisdictional public utility's formula rate. We agree; the two are different. In contrast to the NYISO tariff, referred to above, the California ISO Tariff at issue in *Vernon* specifically includes the Transmission Revenue Requirements of certain non-public utility transmission providers within the jurisdictional rate itself.

⁷ *New York Independent System Operator, Inc.*, 100 FERC ¶ 61,070 (2002) (*NYISO I*).

including *Central Hudson Gas and Electric Corporation*, in which the Commission stated that it does not have authority to review LIPA's revenue requirement under a just and reasonable standard and that it would apply a comparability standard.⁸

11. On May 9, 2005, NYAPP filed an answer in support of LIPA's motion to dismiss in Docket No. EL05-78-000. NYAPP states that it agrees with LIPA's argument that the section 206 proceeding should be dismissed because LIPA is a non-jurisdictional utility.

Discussion

12. We will grant LIPA's request for rehearing. Upon further consideration, we have concluded that we erred in initiating the instant section 206 proceeding. As LIPA correctly notes, we have previously found in cases such as *Central Hudson II* that LIPA is not a public utility under section 201(f) of the FPA, and also its revenue requirement and TSC rates are not integrated or otherwise incorporated into any rate that is charged by a public utility. Accordingly, LIPA's TSC rates are not subject to review under the just and reasonable standard of section 206 of the FPA. Furthermore, the protesters support LIPA's request for dismissal, and so there is no longer any issue in dispute between the parties to this proceeding. Therefore, we will grant rehearing, and we will terminate the section 206 investigation and the hearing and settlement judge procedures that we initiated in the March 25 Order.

The Commission orders:

(A) LIPA's request for rehearing of the March 25 Order is hereby granted, as discussed in the body of this order.

(B) The section 206 proceeding instituted in Docket No. EL05-78 is hereby terminated.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

⁸ 88 FERC ¶ 61,138 at 61,402-03 (1999) (*Central Hudson II*).