

123 FERC ¶ 61,314
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Niagara Mohawk Power Corporation

Docket No. EL08-40-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued June 30, 2008)

1. On February 13, 2008, Niagara Mohawk Power Corporation (Niagara Mohawk) filed a petition for a declaratory order (Petition), requesting that the Commission order the New York Independent System Operator Corporation (NYISO) to adjust certain invoices issued between January and August 2007, for energy purchases which took place between March and August 2005. In this order, the Commission grants the Petition and orders the NYISO to adjust the relevant invoices.

I. Petition For Declaratory Order

2. Niagara Mohawk states that it is filing the subject petition because the NYISO has declined to adjust certain inaccurate invoices issued between January and August 2007 for the purchase of energy between March and August 2005. Niagara Mohawk states that those invoices reflected certain duplicative consumption data introduced by Niagara Mohawk late in the NYISO billing cycle through a computer software error in the program that assembled the power consumption data for Niagara Mohawk's customers. Niagara Mohawk states that, under the circumstances, the affected market participants did not challenge the accuracy of the invoices within the period allowed for such challenges by the NYISO's Market Administration and Control Area Services Tariff (Services Tariff), and the NYISO has declined to reissue invoices based on corrected data. Niagara Mohawk requests that the Commission issue a declaratory order directing the NYISO, consistent with the NYISO tariff, to revise the invoices to eliminate the impact of the erroneous consumption data.

A. Background

3. Niagara Mohawk states that it is a subsidiary of National Grid USA, and delivers electricity and natural gas to retail customers in upstate New York. It has placed its

transmission facilities under the operational control of the NYISO. Niagara Mohawk obtains energy and ancillary services from markets administered by the NYISO to meet, in part, its retail load obligations.

4. Niagara Mohawk further states that transmission owners, including Niagara Mohawk, provide metering data for the customers connected to its transmission and distribution facilities who purchase electricity from load-serving entities (LSE). The NYISO uses this data to determine, in real time, the quantities of energy and ancillary services purchased by each LSE. This provision of information is mandated by the NYISO's Transmission Owners Agreement.

B. Tariff Process

5. Section 7.4 of the NYISO Services Tariff sets forth the process by which this metering data is provided to the NYISO. Shortly after the end of each month, the NYISO submits to its customers an initial invoice for each of the services provided to that customer over the past month. The charges detailed in these initial invoices may be based, in whole or in part, on estimates. The Services Tariff provides specific procedures by which incorrect invoices may be corrected.

6. Under the procedures for services rendered between October 2002 and December 2006, invoices are subject to correction or adjustment for twelve months from the date of the initial invoice. Following issuance of any such corrected or adjusted invoice by the NYISO, customers have four months to review the accuracy of the corrected invoice. If the corrected invoice is not challenged within that four month window, it becomes final and not subject to further adjustment by the NYISO. If a customer does challenge the invoice within the specified period, the NYISO is obligated to investigate the challenge and resolve the dispute within two months and up to six months if the NYISO determines that extraordinary circumstances require a longer evaluation period. The NYISO is not limited to the scope of customer challenges in its review of a challenged corrected invoice and may review and correct any other elements and intervals of the corrected invoice. If the NYISO determines that additional corrections or adjustments to the challenged invoice are necessary, the NYISO is obligated to provide customers with notice of the details of the corrections or adjustments and shall then provide customers twenty-five extra days to review the additionally-corrected invoices.¹ If no errors in the implementation of the corrections or adjustments are found within the twenty-five day

¹ Niagara Mohawk notes that in 2006, as a result of its stakeholder process, the NYISO filed tariff amendments shortening the review period for the final invoice from thirty days to twenty-five days. The Commission accepted both proposals for filing. *See New York Independent System Operator Corp.*, Unpublished Letter Order, Docket No. ER06-783-000 (July 12, 2006); *New York Independent System Operator Corp.*, Unpublished Letter Order, Docket No. ER07-156 (Dec. 18, 2006).

period, the NYISO will issue a finalized invoice. Finalized invoices may no longer be corrected or adjusted by the NYISO, unless ordered to do so by this Commission, or a court of competent jurisdiction.

C. Metering Error

7. Niagara Mohawk provides the declaration of Mr. Lee Klosowski, the Director of Customer Choice for Niagara Mohawk, describing the metering error which led to the instant filing.² According to Mr. Klosowski, in 2005, customers in Niagara Mohawk's service territory had one of two types of meters: (1) interval meters, which report time-of-day usage patterns, and (2) dial meters, which simply report total usage over a specified time period. Because hourly consumption data is required to calculate prices for purchases and sales in the NYISO's markets, but the dial meters did not provide specific time-of-day usage data, Niagara Mohawk allocated the power consumed over the course of a monthly billing cycle to specific hours during that cycle based on a load profile of an average customer in the specific customer's class. Niagara Mohawk then used a computer software program to aggregate the readings from the two types of meters and, after application to a load profile, to report this consumption data to the NYISO so that the NYISO could issue bills to the LSEs that serve those customers. In 2006, Niagara Mohawk replaced the interval meters of approximately 147 customers in rate class SC-3 (medium commercial and industrial customers).

8. Niagara Mohawk asserts that on October 6, 2006, the NYISO informed Niagara Mohawk that extraordinary circumstances exist regarding the March 2005 settlement, and extended the time period to post the draft invoice for that month from two months to six months, i.e., to February 2007. Between September 2006 and January 2007, the NYISO requested that Niagara Mohawk provide it with final, updated LSE load data for March through November 2005 so that the NYISO could rerun its invoices. Niagara Mohawk asserts that: "When [Niagara Mohawk] recompiled those data for resubmission to the NYISO, [Niagara Mohawk] incorrectly included duplicative power consumption data for certain customers in the SC-3 customer class with recently replaced interval meters. This inaccuracy resulted from a programming error in [Niagara Mohawk's] computer system used in the data compilation."³ As a result, it states, the consumption data reported by Niagara Mohawk to the NYISO for service received by these customers from March through November 2005 "overstated the consumption for the load served by some LSEs (primarily [Energy Service Companies] ESCOs), and understated the consumption for the load served by other LSEs (including [Niagara Mohawk] and NYPA)."⁴ Mr. Klosowski

² Petition, Attachment 6.

³ Petition at 8-9, n.9; *see also* Petition, Attachment 6, Klosowski Declaration at 5.

⁴ Petition at 9.

states that, during its standard review of the NYISO settlements file, Niagara Mohawk corrected any observed instances of duplicative consumption prior to sending the file to the NYISO, but that the review process was not sufficiently comprehensive to identify the systematic double counting and, therefore, did not correct all instances that double counting occurred.⁵

9. Niagara Mohawk explains that the NYISO posted final invoices for the March 2005 service on January 5, 2007, subject to the twenty-five day review period by customers. This data was then included in invoices issued in February 2007. Niagara Mohawk includes the following schedule for review of the relevant invoices for services during April through August 2005.

Service Month⁶	Posting Date for Review of Final Invoice	Issuance of Final Invoice
April 2005	March 5, 2007	April 5, 2007
May 2005	April 3, 2007	May 4, 2007
June 2005	February 5, 2007	March 6, 2007
July 2005	June 5, 2007	July 6, 2007
August 2005	July 5, 2007	August 6, 2007

Niagara Mohawk states⁶ that the initial bills and true-ups issued for the relevant months in 2005 and 2006 were based on accurate consumption data and provided customers with four to twelve months to review them. It states that the revised invoices issued in 2007 included incorrect consumption data for the first time, but customers only had twenty-five days in which to review them.

10. Niagara Mohawk asserts that as a result of the incorrect consumption data, the NYISO undercharged certain load in service class SC-3 (approximately 147 customers with replaced meters) by approximately \$7 million, which included an under-bill to Niagara Mohawk's commodity service customers of approximately \$3.9 million, and an under-bill to NYPA of approximately \$2.9 million. In the case of Niagara Mohawk, "the

⁵ Petition, Attachment 6, Klosowski Declaration at 5.

⁶ Niagara Mohawk's witness Klosowski states that, at the time the error was discovered in August 2007, the time period to review invoices for September through November 2005 had not passed and that the invoices for these months have been corrected. Petition, Attachment 6, Klosowski Declaration at 7.

benefits of the reduced NYISO charges accrued entirely to its state jurisdictional retail customers.”⁷

11. Niagara Mohawk states that none of the parties noticed the mistake until August 2007. After two customers informed Niagara Mohawk of the error in August 2007, Niagara Mohawk asserts that it promptly informed the NYISO and sought to submit corrected metering data to the NYISO for the period at issue. Niagara Mohawk asserts that the NYISO declined to issue corrected invoices because final invoices had been issued and the time period provided under the Services Tariff for correction of errors had expired and as a result, the NYISO lacked authority under its tariff to make corrections.

D. Niagara Mohawk’s Arguments In Support Of Its Petition

12. Niagara Mohawk asserts that the NYISO accepted the corrected consumption data that it provided in September 2007 and issued corrected invoices for September 2005 and subsequent months. However, according to Niagara Mohawk, the NYISO nevertheless declined its corrected energy consumption data for the period between March and August 2005, and did not reissue customer invoices for that period based on corrected data. Niagara Mohawk states that the NYISO took the position that this result was required by the provisions of the Services Tariff establishing deadlines for the identification of billing errors and the issuance of corrected invoices. According to Niagara Mohawk, the NYISO apparently concluded that because the erroneous consumption data was reflected first in revised invoices issued to correct unrelated errors identified during the four-month bill review period, customers had only “a period of twenty-five (25) days ... to review the corrected settlement information and provide comments to the ISO regarding the implementation of those corrections or adjustments,”⁸ and any errors not identified within that period could not be corrected.

13. Niagara Mohawk argues that, under these circumstances, the NYISO’s position is not compelled by the language of its tariff. Moreover, it asserts, this result is unjust and unreasonable, and especially inappropriate in the circumstances of this case. According to Niagara Mohawk, Section 7.4 of the Services Tariff explicitly qualifies the finality of the deadlines for the review and correction of bills. In applying the discretion afforded by this provision, Niagara Mohawk argues, it would be appropriate for the Commission to take into account when in the multi-stage billing process an error was introduced. If incorrect data were reflected in an initial invoice that a customer has twelve months to review or a revised invoice that is subject to review for four months, according to Niagara Mohawk, it would be appropriate to require the customer to review the data within the time provided or to suffer the consequences of its lack of diligence.

⁷ *Id.* at 11.

⁸ Petition at 11, *citing* NYISO Services Tariff § 7.4.1.C.

14. In this case, however, Niagara Mohawk asserts, the erroneous data were introduced for the first time at the final stage of the process, when customers have only twenty-five days to review what are supposed to be “corrected” invoices. In this unusual circumstance, according to Niagara Mohawk, the Commission can and should take into account the limited duration of the review period. Niagara Mohawk also urges the Commission to consider the fact that the twenty-five day review period was intended to allow customers to examine the changes made to correct previously discovered errors in the billing process and not the more complex task of identifying new errors introduced into the billing process near its completion. To the extent the NYISO relied on the fact that its billing process ordinarily provides its customers several opportunities over the course of sixteen months and twenty-five days to identify errors and report them to the NYISO, Niagara Mohawk asserts, it failed to appreciate that in this instance the incorrect data that led to the incorrect bills was not introduced into the NYISO’s billing process until the very end of the process. Niagara Mohawk argues that these circumstances merit the Commission's discretionary allowance provided by the Services Tariff.

II. Notice, Interventions and Responsive Pleadings

15. Notice of Niagara Mohawk’s Petition in Docket No. EL08-40-000 was published in the *Federal Register* on February 21, 2008, 73 Fed. Reg. 10,755 (2008), with interventions and protests due by March 14, 2008. An errata notice was issued on February 22, 2008, correcting the caption in the original notice. Timely motions to intervene were filed by New York Power Authority (NYPA), New York State Electric & Gas Corporation, and Rochester Gas & Electric Corporation. Timely motions to intervene with comments in support of the Petition were filed by Pro-Energy Development, LLC (Pro-Energy), Fluent Energy Corporation (Fluent), and Hess Corporation (Hess). The NYISO filed a timely motion to intervene with comments.

16. The NYISO states that it strongly disagrees with Niagara Mohawk’s assertion that NYISO has the discretion to modify finalized customer invoices. The NYISO asserts that section 7.4 of its Services Tariff and section 7.2A of its Open Access Transmission Tariff (OATT) prevent it from adjusting invoices which have been finalized absent an order from the Commission or a court of competent jurisdiction. The NYISO states that Niagara Mohawk seeks such an order, and the NYISO does not take a position on the merits of Niagara Mohawk’s request. The NYISO does, however, urge the Commission that, in considering the Petition or any similar request to reopen finalized customer invoices, the Commission carefully consider the importance to the NYISO’s customers of both accuracy and financial certainty that was established by the current restriction on changes to finalized invoices, a process that promotes the finality of prior settlements that is vitally important to the effective functioning of the NYISO markets.

17. The NYISO asserts that although Niagara Mohawk and the other affected customers had access to the NYISO’s web-based reconciliation application, none of the parties brought the mistake to the NYISO’s attention in the relevant time frame. The

NYISO claims that customers' responsibilities during the final twenty-five day period for review revised customer settlement information are clear and well understood. Further, the NYISO states that it provides email notices to all customers prior to each twenty-five day period reminding them of this responsibility. Nevertheless, it states, neither Niagara Mohawk nor the other affected customers identified the metering errors in question during the final twenty-five day review period. The NYISO states that, by the time the mistake was brought to its attention, the invoices had been finalized.

18. The NYISO states that its tariff contemplates the instant situation, where a mistake is introduced as part of the process of correcting an earlier mistake. It asserts that this is why the NYISO tariff provides for a twenty-five day review period following issuance of the final invoice. It states that neither Niagara Mohawk or the other affected customers identified the error during the twenty-five day review period. The NYISO asserts that it lacks authority to modify finalized invoices outside of this review period, and has never requested to do so. Further, it asserts that the tariff process at issue here was the result of an extensive stakeholder process that considered the possibility that a settlement error may be discovered after the timeframe provided by the tariff to make corrections to customer settlements. According to the NYISO, it would seek such action only in "extraordinary cases" where "significant injustice" would result if the problem were not corrected. Finally, the NYISO asks that if the Commission grants the petition, the NYISO be provided with adequate time to adjust the affected invoices, and such process would likely take six months.

19. Pro-Energy filed comments in support of the Petition, stating that given the complexity of the NYISO's settlements process, the NYISO has been forced on several occasions to request that the Commission extend the settlement deadline to "enable it to address factors that it felt were necessary to ensure that financial obligations were properly allocated among market participants."⁹ It noted that the instant Petition represents such a situation. Pro-Energy argues that it is necessary to look at the impact on the market participants that were undercharged and would be facing additional charges if the error was corrected. In this instance, it asserts, the greatest financial burden will be on Niagara Mohawk itself, along with NYPA. Pro-Energy states that it is one of the parties which notified Niagara Mohawk of the mistake in the first place and asserts that because the information reported to it was correct, there was no immediate indication of the error. Pro-Energy states that the parties sought to resolve the problem, but the window for challenging invoices closed before the matter was resolved and only the Commission may extend that window.

20. Fluent also filed comments in support of the Petition. It noted that it provides technical services to energy service companies and other end-users, including the

⁹ *Motion to Intervene and Comments of Pro-Energy Development LLC* at 4, Docket No. EL08-40-000 (Mar. 13, 2008).

management and execution of transactions associated with electricity purchases from the NYISO-administered markets. It states that in the instant situation, there was a “disconnect” between the billing information reported to the NYISO and that reported to energy service companies. Fluent states that duplicate usage was reported only to the NYISO, which resulted in overstated final bill adjustments, whereas the usage reported to the market participants was correct. Fluent goes on to state that while Niagara Mohawk was taking measures to ensure that this problem did not continue to occur, the time frame for challenging the final NYISO invoices for the period in question passed. It asserts that, due to the nature of the error, no parties were able to submit a timely objection to these close-outs. Further, it asserts that while Niagara Mohawk would be the party that suffers the greatest negative impact from the relief requested, it is pursuing this matter nonetheless. Fluent asserts that directing the NYISO to “re-spin” the invoices with the corrected figures would support this admirable step to correct these errors as well as the underlying mission of ensuring that the markets are administered in a fair and equitable fashion.

21. Hess filed comments in support of the Petition, noting that it was one load-serving entity over-billed as a result of the billing mistake at issue in this proceeding. Hess explains that the invoices for the period at issue were calculated using inaccurate energy consumption data that caused the load for certain retail customers to be double-counted which resulted in the LSEs providing service to those retail customers being over-billed for purchased energy while other LSEs were under-billed. It agrees with Niagara Mohawk’s analysis of the NYISO’s tariff, noting that the tariff explicitly allows for corrections of finalized invoices if the Commission so orders. Therefore, according to Hess, the relief requested by Niagara Mohawk is consistent with the NYISO’s tariff. Hess notes that good cause exists for the Commission to order the NYISO to correct the billing error. It also asserts that the Commission’s refusal to order such correction may result in a violation of the filed rate doctrine, as the NYISO would then charge a rate which is inconsistent with its tariff, since the tariff does not permit customer load to be double-counted for billing purposes.

III. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

B. Commission Determination

23. Although Niagara Mohawk argues that the NYISO’s position “was not compelled by the language of its tariff,” we disagree. NYISO’s tariff is clear on this point. The relevant sections of the NYISO’s tariff provide:

“[F]inalized” data and invoices shall not be subject to further correction, including by the ISO, **except as ordered by the Commission** or a court of competent jurisdiction; *provided, however*, that nothing herein shall be construed to restrict any stakeholder’s right to seek redress from the Commission in accordance with the Federal Power Act.¹⁰

The above-cited tariff section also provides for additional review of the challenged invoices by affected customers:

If the ISO determines that corrections or adjustments to a challenged invoice are necessary and can quantify them with reasonable certainty, the ISO shall provide all Customers with the details of the corrections or adjustments within the timeframe established in this Section 7.4.1.C and shall then provide a period of twenty-five (25) days for Customers to review the corrected settlement information and provide comments to the ISO ...

If no errors in the implementation of corrections or adjustments are identified during the twenty-five (25) day Customer comment period, the ISO shall issue a finalized close-out Settlement ... in the next regular monthly billing invoice. If an error in the implementation of a correction or adjustment is identified during the twenty-five (25) day Customer comment period, the ISO shall make such further corrections as are necessary to address the error and shall then provide one additional period of twenty-five (25) days for Customers to review and comment on the implementation of those further corrections. The ISO shall then make any final corrections that are necessary and shall issue a finalized Close-Out Settlement in the next regular monthly billing invoice.¹¹

Accordingly, we find that the NYISO correctly interpreted its tariff as precluding the NYISO’s ability to make further adjustments to finalized invoices except pursuant to an order by this Commission (or a court of competent jurisdiction).

24. The Commission finds that, in the specific circumstances at hand, it is appropriate to order the NYISO to adjust the invoices for the period March through August 2005 to correct for the effects of the erroneous data on which they were computed. To refrain from doing so would yield an unjust and unreasonable result, requiring some customers to pay too much for energy purchases over the relevant periods, while others would pay too little due to erroneous billing data. This is an unusual situation in which untimely action by the market participants was not due to failure on their part to act once the errors were discovered, but rather by the unusual nature and timing of the errors. We do not

¹⁰ Services Tariff § 7.4 (emphasis added); *see also* OATT § 7.2.

¹¹ Services Tariff § 7.4.1.C.

believe that Niagara Mohawk's customers should be faulted for failing to challenge the errors in the final invoices within the final twenty-five day period because they had no basis to believe that the data Niagara Mohawk provided to the NYISO included anything other than updates of previously-supplied consumption data corrected for certain, limited duplicate data Niagara Mohawk had found. In fact, however, the data contained additional duplicative consumption data for the approximately 147 customers with the recently replaced interval meters and such data was not submitted as the result of any prior challenge by a customer. Accordingly, they had no notice that the final invoices were based on this other, erroneously changed data which, as Niagara Mohawk observes, was not introduced into the NYISO billing process until the very end of that process. We note that Niagara Mohawk also failed to detect these duplicate data errors even though it had several months to review the data. When they became aware of the errors, the customers informed Niagara Mohawk and Niagara Mohawk promptly informed the NYISO. The NYISO issued corrected invoices for the period beginning September 2005, but invoices for months prior to September 2005 could not be corrected because the twenty-five day time period provided by the NYISO's tariff precluded such correction by the NYISO at that point. Under the circumstances, the Commission believes it is reasonable to order the NYISO to correct the invoices for all months affected by the errors, rather than limit such corrections to invoices issued after September 2005.

25. In its comments, the NYISO urges the Commission to balance the need for accuracy in invoices with the need for financial certainty. It states that it would only seek to reopen finalized invoices in extraordinary circumstances where significant injustice would result, and defers to the Commission as to the appropriate outcome in this instance. The Commission finds that, in the extraordinary circumstances of this case, the need for accuracy outweighs concerns of financial certainty and significant injustice would result in the absence of Commission action.

26. The NYISO requests that, if the Commission grants the petition, the NYISO be provided with adequate time to adjust the affected invoices. It estimates that the process would likely take six months. We find good cause to grant the NYISO's request and will allow the NYISO six months from the date of this order to correct and reissue the affected invoices. Customers shall have the twenty-five day period set forth in section 7.4.1.C of the NYISO Service Tariff to review and challenge the corrected invoices.

The Commission orders:

(A) The petition for declaratory order is granted, as discussed in the body of this order.

(B) The NYISO is permitted six months from the date of this order to correct and reissue the subject invoices. Customers shall have the twenty-five day period set forth in section 7.4.1.C of the Services Tariff to review and challenge the corrected invoices.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.