

126 FERC ¶ 61,292
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Electric & Gas Corporation

Docket No. EL09-26-000

ORDER ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued March 30, 2009)

1. In this order, we establish settlement judge procedures in response to a petition for declaratory order filed by New York State Electric & Gas Corporation (NYSEG).

I. Background

2. On December 23, 2008, NYSEG filed a petition for declaratory order requesting that the Commission require the New York Independent System Operator, Inc. (NYISO) to rebill allegedly inaccurate invoices NYISO issued to NYSEG for purchases of energy totaling approximately \$20 million from 1999 to February 2008. NYSEG states that the inaccurate invoices resulted from metering errors at various metering facilities. NYSEG asserts that these metering errors were only identified recently.

3. NYSEG claims that, to date, NYISO has declined to rebill the invoices because the NYISO Services Tariff contains a provision which prohibits NYISO from resettling energy market invoices absent a Commission or court order (i.e., a claims limitation clause). NYSEG contends that NYISO's position is that NYISO has no choice in the matter because the claims limitation clause requires a Commission order before any action can be taken on the invoices.

4. NYSEG states that it is not asking NYISO to reissue bills for the relevant periods because NYSEG understands that it would not be a practical resolution. Instead, NYSEG requests that NYISO be required to work with NYSEG and Niagara Mohawk Power Corporation d/b/a National Grid (National Grid), the other party involved in the metering errors, to estimate the appropriate energy values, agree on load information, and then rely on published NYISO prices to estimate the amounts owed NYSEG from National Grid. After this process is completed, NYSEG claims that NYISO could then rebill the resulting amounts to NYSEG and National Grid.

5. NYSEG asserts that the nature of the metering errors made them difficult to detect and extraordinary in their scale and frequency. NYSEG contends that National Grid's meters and its metering procedures have resulted in a pattern of errors. Moreover, NYSEG argues that National Grid has received a corresponding windfall with no corresponding costs that would justify the excess amounts it has received from NYSEG and its customers. Accordingly, NYSEG states that extraordinary circumstances justify a Commission order requiring NYISO to rebill certain charges to prevent injustice to NYSEG and its customers who will be credited with a majority of the funds received from the reissued bills.

II. Notice of Filing and Responsive Pleadings

A. Notice and Interventions

6. Notice of NYSEG's petition was published in the *Federal Register*, 74 Red. Reg. 706 (2009), with interventions and protests due on or before January 22, 2009. Timely intervention requests were filed by the New York Power Authority, Public Service Commission of the State of New York, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Central Hudson Gas & Electric Corporation, and Long Island Power Authority and Long Island Power Authority. Timely motions to intervene and comments were filed by NYISO, National Grid, and the New York Municipal Power Agency (NYMPA) and Municipal Electric Utilities Association of New York (MEUA) jointly. On February 6, 2009, NYSEG and National Grid filed answers.

B. Comments and Protests

7. NYISO requests that the Commission deny NYSEG's petition for several reasons. First, NYISO states that its customers rely on the financial certainty afforded by finalized metering data. NYISO asserts that its tariffs establish specific time periods for reviewing and challenging metering data, and customers have the responsibility to review their own metering data thoroughly during the prescribed review period. Moreover, NYISO states it is concerned that Commission action could inadvertently harm the energy service companies (ESCOs) in National Grid's service territory. NYISO avows that these ESCOs were not involved in any way with the metering errors underlying NYSEG's petition. However, NYISO claims that, depending on the outcome of the Commission's decision, the ESCOs may be required to bear unexpected costs related to invoices finalized years ago.

8. NYISO states that NYSEG and National Grid can resolve this issue without a Commission order. NYISO asserts that it has attempted unsuccessfully to facilitate a compromise among the parties. NYISO argues that any action by the Commission could harm the settled expectations of other NYISO customers and undermine the customers' incentive to address settlement issues within the time frames prescribed in NYISO's tariffs. Accordingly, NYISO states that the Commission should order the parties to

resolve this matter between themselves and that it stands ready to continue to assist the parties in reaching an amicable resolution.

9. Finally, NYISO asserts that, if despite its concerns, the Commission decides to grant NYSEG's petition, NYISO requests that the Commission only require it to rebill NYSEG and National Grid in the manner described in NYSEG's petition.

10. In their comments, NYMPA and MEUA state that they have two concerns with regard to NYSEG's petition. First, NYMPA and MEUA assert that if the Commission grants NYSEG's request, NYISO's transmission customers should not be responsible for any of the costs associated with National Grid's recalculated payments to NYSEG. NYMPA and MEUA also contend that the Commission should direct NYISO to work with New York transmission operators and market participants to develop a quality assurance program that will allow NYISO to improve the quality of the metering data used to calculate the Commission-jurisdictional transmission rates that NYISO customers pay.

11. National Grid argues that NYSEG's claims are without merit and urges the Commission to deny NYSEG's petition. Specifically, National Grid alleges that the affidavits of NYSEG's own witnesses demonstrate that approximately 85 percent of the alleged measurement errors and 70 percent of the alleged overbilling is the direct result of NYSEG's own metering errors. National Grid states the kind of adjustments that NYSEG demands reach far outside NYISO's time limits for correcting billings and require a showing of "extraordinary circumstances." However, National Grid argues that these circumstances do not meet the definition of "extraordinary" prescribed by the Commission in *Niagara Mohawk Power Corporation*.¹

12. National Grid avers that in *Niagara Mohawk*, the errors arose atypically at the very end of the market settlement process, when incorrect data was introduced into supposedly "corrected" bills. In the instant case, National Grid states the errors were in the initial metering data itself: the situation for which NYISO invoice review periods and dispute time limits are specifically designed to address. National Grid asserts that in *Niagara Mohawk*, the utility only had a 25-day review period to detect highly unusual errors; in this instance, National Grid contends that NYSEG had the entire normal 12- to 24-month NYISO settlement and dispute period (before January 2007) and the two-month settlement and dispute period (after January 2007) to detect the errors. Furthermore, National Grid claims that approval of NYSEG's petition would require the reopening of finalized invoices that are many years old where the metering records were in most instances available to NYSEG and could have been discovered with reasonable diligence.

¹ *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314 (2008) (*Niagara Mohawk*).

13. National Grid states that, counter to NYSEG's claims otherwise, there is no injustice to NYSEG or its ratepayers that would justify abandoning the finality of NYISO's well-established settlement process. Rather, National Grid believes that granting NYSEG's petition would render meaningless the NYISO Service Tariff provisions related to the finality of customer invoices and the policy considerations underlying those provisions. National Grid alleges that, under NYSEG's interpretation, each New York transmission owner would be encouraged to comb through metering errors going back to the inception of NYISO and demand "rebilling" on any meter that had accumulated significant errors. Moreover, National Grid states that NYSEG's proposed rebilling process is not realistic because it would inevitably lead to either a full resettlement of the NYISO markets over an entire decade or an unjust, unreasonable and arbitrary reallocation of revenues.

C. Answers

14. In its answer, NYSEG states it would like to clarify information presented by National Grid in its comments to the Commission. NYSEG claims it is misleading for National Grid to allege that NYSEG was responsible for 85 percent of the metering errors at issue in this proceeding and that NYSEG lacked diligence in reviewing its invoices. NYSEG alleges that National Grid was in fact responsible for the majority of the errors when measured by data-hours. Likewise, NYSEG contends that National Grid itself did not identify any of the errors described in the petition which proves how difficult these errors were for anyone to detect. NYSEG further argues National Grid's comments overstate any challenges NYISO would face should the Commission grant NYSEG's requested relief. NYSEG avers that it does not seek a "re-invoicing" or a "resettlement" of NYISO energy markets for the time periods concerned, but rather a rebilling between the parties. Finally, NYSEG states the disagreement cannot be involved without Commission intervention because previous attempts to resolve the matter between the parties have failed.

15. National Grid states that NYISO comments regarding billing finality cogently explain why the Commission should deny NYSEG's request. However, National Grid rejects NYISO's suggestion that the Commission should order the parties to resolve this matter among themselves. First, National Grid asserts that there is no process in place to settle NYISO market invoices other than the process reflected in NYISO's tariff. National Grid alleges that the sole exception to these rules is governed by extraordinary circumstances test established by the Commission in *Niagara Mohawk*, which is not met in these circumstances. Second, National Grid asserts that any ordered negotiation between the parties would not provide customers with financial certainty. Finally, National Grid contends that this matter is a legal issue that rests solely and exclusively with the Commission for its determination in accordance with the parameters set forth in *Niagara Mohawk*.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,² the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2008), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept NYSEG's and National Grid's answers because they have provided information that assisted us in our decision-making process.

B. Settlement Judge Procedures

18. In its comments, NYISO indicates that it believes that National Grid and NYSEG could and should settle this matter between themselves, and states that it stands ready to provide the parties with assistance. We agree that, with NYISO's assistance, the parties may be able to amicably and successfully reach a settlement of this matter. The Commission further believes that settlement would be facilitated by the presence of a settlement judge. Therefore, we direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁴ The settlement judge shall report to the Chief Judge and the Commission within 30 days of appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge may provide parties with additional time to continue their settlement discussions.

² 18 C.F.R. § 385.214 (2008).

³ 18 C.F.R. § 385.603 (2008).

⁴ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

The Commission orders:

(A) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Judge is hereby directed to appoint a settlement judge within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(B) Within thirty (30) days of the appointment of the settlement judge, the judge shall file a report to the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge may provide the parties with additional time to continue their settlement discussions, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.