128 FERC ¶ 61,086
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

July 24, 2009

In Reply Refer To:
New York Independent System Operator, Inc.
Docket No. ER09-1204-000

New York Independent System Operator, Inc.
10 Krey Boulevard
Rensselaer, NY 12144

Attention: Mollie Lampi,
Assistant General Counsel

Reference: Notification of Tariff Implementation Error and Request for a Limited Tariff Waiver

Dear Ms. Lampi:

1. On May 27, 2009, the New York Independent System Operator, Inc. (NYISO) filed to report that its settlement software did not appropriately provide congestion relief to New York State Electric & Gas Corporation (NYSEG) when NYSEG scheduled a series of transactions using its seven (7) MW Grandfathered Right during the months of June 2005 through March 2009. NYISO also informed the Commission of the steps it has taken to resolve this error and requested a limited waiver, to the extent necessary, of Attachment K of its Open Access Transmission Tariff (OATT), to permit NYISO not to correct invoices for the 37 affected service months for which NYISO has issued finalized customer invoices. As discussed below, the Commission finds that there is no need for a waiver of section 3.1 of Attachment K of NYISO's OATT to permit NYISO not to correct invoices for the past periods at issue; nor will the Commission order NYISO to correct these invoices, and we deny a request by a party to correct them.

2. At NYISO's start-up, transmission customers with existing Transmission Wheeling Agreements (TWA) were given the choice to either retain their existing TWAs (grandfathered rights) or convert those rights to Transmission Congestion Contracts (grandfathered TCCs). Under the provisions of Attachment K of NYISO's OATT, a transmission customer that retained its grandfathered rights could inject and withdraw power at the Point of Injection and Point of Withdrawal identified in the underlying TWA and Attachment L, Table 1 of the OATT, without having to pay (or be paid, if congestion was negative) the Congestion Component of the Transmission Usage Charge (TUC), provided that the transaction was scheduled in the Day-Ahead Market.

3. NYISO states that in June 2005 an undetected software error occurred while NYISO was modifying the manner by which energy prices were stored for external proxy buses. As a result of this error, NYISO's settlement code failed to provide the appropriate relief for the congestion component of the TUC to one transmission customer [New York State Electric & Gas Company, or NYSEG] when NYSEG scheduled its 7 MW Grandfathered Rights. Specifically, the TUC for NYSEG's transactions should not have contained a congestion charge.

4. NYISO states that its staff discovered the error in April 2009 and corrected the settlement code on April 22, 2009. NYISO adjusted the invoices for July 2008 through March 2009, which were still open for review, challenge, and correction pursuant to NYISO's OATT. However, invoices for the 37 service months of June 2005 through June 2008 had been finalized, and therefore, according to section 7.2A of its OATT, could not be corrected absent an order from the Commission or a court of competent jurisdiction.[1] NYISO states that it informed NYSEG and the other seven Transmission Owners who were also affected by this error, as well as the Market Participant members of NYISO's Billing and Accounting Working Group on April 22, 2009. NYISO states that it informed various Commission staff of this issue on April 23, 2009 and April 24, 2009.

5. The software error resulted in overbilling of NYSEG for approximately $33,000 for each of the affected service months. NYISO states that correcting the series of transactions scheduled by NYSEG by refunding the inappropriately charged congestion, would require the NYISO to open and correct finalized settlements for all NYISO

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[1] *See* NYISO OATT section 7.2A. Section 7.2A establishes the process and timeframe for review, challenge, and correction of Transmission Customer invoices. For purposes of Section 7.2A, "finalized" 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.

Transmission Owners as well. NYISO urges the Commission to consider the detrimental impact that revising calculations included in thirty-seven monthly customer invoices would have on the finality of previously issued invoices upon which NYISO Market Participants rely, as well as the relatively limited financial impact of this error on NYSEG. NYISO argues that the TUC assessed on these transactions, which included the Congestion Component, have been visible to the NYSEG for the entire period of this settlement error. Moreover, NYISO states that the affected transmission customer failed to identify the settlement error pursuant to the NYISO's invoice correction process as set out in Section 7.2A of NYISO's OATT.

6. Finally, NYISO requests waiver, to the extent necessary, of Attachment K of the OATT to avoid correcting the invoices of all affected customers as a result of NYISO's improper calculation of congestion charges for the 37 month period. In the alternative, if the Commission requires NYISO to adjust the finalized settlements of NYSEG and the eight transmission owners from whom resettlement funds would be recovered, NYISO requests that it be allowed to provide this congestion relief as a lump-sum recalculation in a manual adjustment on the future invoices of the affected parties. NYISO states that this method would not cause significant administrative hardship or cost.

7. Public notice of NYISO's filing was issued on June 2, 2009 with interventions and protests due on or before June 17, 2009. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. The Long Island Power Authority and Long Island Lighting Company (collectively "LIPA") and Niagara Mohawk filed comments. New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) filed a joint protest (collectively NYSEG). LIPA filed an answer to the protest of NYSEG, NYSEG filed an answer to LIPA and Niagara Mohawk, and NYISO filed a response to NYSEG, LIPA and Niagara Mohawk.

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

9. In its comments, LIPA asserts that the Commission should require clarification from NYISO as to the specific tariff waiver it is requesting. LIPA states that on page 6 of its pleading NYISO appears to be seeking waiver so as not to recalculate finalized settlements, but on page 9, NYISO states that "the settlement/tariff inconsistency needs to be resolved." Finally, LIPA believes on pages 7 and 8 that NYISO suggests, but does not request, that the Commission can direct NYISO to recalculate the otherwise finalized settlements and proposes a "lump sum" invoice adjustment to do so.

10. LIPA asserts that the Commission should treat all final settlements for the time period associated with this filing the same. LIPA notes that the June 2005 through March 2009 period in this filing overlaps the periods of four separate instances in which NYISO has requested various waivers of its tariff so that its closed settlements remain closed.[2] LIPA states that market participants were affected differently by each of these errors, and asserts that resettlement would have benefitted certain market participants in some cases, and would have been detrimental in others. According to LIPA, the June 2005 through March 2009 period identified for this immediate error has overlaps for each of the four previously identified tariff errors for which the Commission recently determined no recalculation of settlements was required. LIPA states that recalculating this error, while not recalculating the other identified tariff implementation errors, would have the effect of contravening the prior Commission actions on concurrent tariff implementation errors and prejudice those parties who had previously accepted NYISO and the Commission's determination on the finality of settlements for these periods.

11. Finally, LIPA argues, in the event the Commission determines that recalculation of prior statements is appropriate for this tariff error, the methodology for the recalculation must be explained fully. LIPA asserts that the "lump-sum" adjustment methodology put forth by NYISO in its filing does not provide sufficient details to assess how it would calculate such an adjustment and how the adjustment would be allocated among transmission owners. LIPA contends that the calculation of the lump-sum adjustment as well as the choice for the basis for allocating such adjustment can materially affect whether such remedy remains just and reasonable and not unduly preferential or discriminatory in its application.

12. In its comments, Niagara Mohawk states that it opposes correcting the closed settlements because extraordinary circumstances are not present. Niagara Mohawk states that a majority of NYISO stakeholders have viewed the possibility of uncorrected errors as an acceptable trade-off for the benefits of financial certainty. Niagara Mohawk argues that software coding errors are inherent in major computer programs and are to be expected from time to time, and asserts that it would be highly disruptive if every such error became the basis for reissuing invoices. Niagara Mohawk contends that all market participants understand that after the time agreed upon, invoicing errors whatever their source will not be subject to correction, and Niagara Mohawk believes strongly that the currently settled expectations should not be upset based on the facts presented here. Niagara Mohawk notes that the Commission has determined that only in "extraordinary

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[2] LIPA cites Docket No. ER09-405-000 (Feb. 9, 2009) (126 FERC ¶ 61,100 (2009)), in which the Commission deferred ruling on a waiver request until additional information is provided, and ER09-972-000 (May 20, 2009) in which the Commission granted requests for four waivers.

circumstances" where the "need for accuracy outweighs concerns of financial certainty and significant injustice would result in the absence of Commission action" will it direct that finalized invoices be reopened to make corrections for past errors.[3]

13. Niagara Mohawk opposes NYISO's proposed "lump-sum" adjustment if it is required to recalculate prior settlements. Niagara Mohawk calls the proposed remedy ill-considered, and asserts that it would render an unfair and inequitable result for Niagara Mohawk and for New York ratepayers who would ultimately bear those costs. Niagara Mohawk states that it does not have a mechanism to revise charges to past customers, and therefore NYISO's proposed remedy would result in the "corrected" amounts being invoiced to current customers rather than the customers who benefited as a result of the error and who should rightfully be assessed these charges.

14. Niagara Mohawk asserts that no tariff waiver is actually required here. Niagara Mohawk asserts that the provisions in Section 7.2A that provide customers with the assurance that their finalized invoices are in fact final are independent of Attachment K of the NYISO OATT. Niagara Mohawk states that the fact that section 7.2A provides that finalized invoices "shall not be subject to further correction" implicitly contemplates that errors in implementation of other OATT requirements (such as the NYISO's failure to implement Attachment K correctly) will occur, the financial consequences of which will not be corrected after a date certain. Niagara Mohawk states that it is important to recognize the separate and distinct function of the finality provisions of the NYISO OATT.

15. In its protest, NYSEG states that NYISO has not corrected NYSEG's invoices for the 37 months of June 2005 through June 2008. NYSEG asserts that it has paid erroneous congestion charges totaling approximately $1.25 million. NYSEG notes that, although NYISO's tariff allows the Commission to grant relief by issuing an order allowing NYISO to correct the past invoices, NYISO has instead chosen to request a waiver of Attachment K tariff provisions so that it would not have to correct past invoices. NYSEG states that, from its standpoint, the $1.25 million in improper charges does not have "relatively limited financial impact."

16. NYSEG also asserts that NYISO's waiver request does not satisfy the Commission's standard for granting waivers. NYSEG states the Commission considers four factors when deciding whether to grant a tariff wavier: (1) whether the error was made in good faith; (2) whether the waiver is of limited scope; (3) whether the waiver resolves a concrete problem that needs to be remedied; and (4) whether the waiver will

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[3] *Niagara Mohawk Power Corporation*, 123 FERC ¶ 61,314 (2008) (Niagara Mohawk).

have undesirable consequences, such as harming third parties.[4] While NYSEG states that it does not dispute that the request satisfies the first two of the four factors, NYSEG asserts that NYISO fails to satisfy the last two factors. NYSEG asserts that the waiver will not resolve the problem that needed to be remedied because the flaw in the settlement code has already been repaired. Additionally, NYSEG argues that the tariff waiver would result in undesirable consequences to a third party, namely NYSEG, because it has been improperly invoiced for over $1.25 million in erroneous congestion charges. Moreover, NYSEG states the Commission has hesitated to grant tariff waivers in the past when the waiver would deny those harmed by error a remedy.[5]

17. NYSEG states that section 7.2A of the OATT clearly allows for reopening of finalized invoices by stating:

> For purposes of this Section 7.2A, "finalized" 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.

NYSEG notes that NYISO's tariffs intentionally preserved the option for market participants to request that the Commission direct NYISO to correct erroneous invoices. NYSEG asserts that a Commission order allowing NYISO to refund the amounts owed to NYSEG would be consistent with prior Commission orders granting the NYISO tariff waivers to make corrections so that NYISO could give refunds to parties harmed by errors in the NYISO market.[6] NYSEG additionally maintains that the Commission only denies requests for remedies for tariff violations where the errors at issue were trivial.[7] NYSEG asserts that granting this waiver would leave NYSEG without a remedy, and would not account for NYSEG's grandfathered rights. NYSEG states that NYISO is prohibited by the filed rate doctrine from charging rates for its services other than those properly filed with the appropriate federal regulatory authority. NYSEG states that the courts have ruled that the primary purpose of the filed rate doctrine is predictability, and

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[4] *See, ISO New England, Inc.* 117 FERC ¶ 61,171 (2006).

[5] *New York Independent System Operator, Inc.,* 126 FERC ¶ 61,100 (2009).

[6] *See e.g., New York Independent System Operator, Inc.,* 115 FERC ¶ 61,026 (2006).

[7] *See, New York Independent System Operator Inc*., 125 FERC ¶ 61,005 (2008) (The Commission granted NYISO a tariff waiver to excuse it from rerunning settlements for five transactions totaling $3,500).

that by mistakenly charging NYSEG for congestion, NYISO has charged NYSEG a rate other than the filed rate, and denied NYSEG the predictability that is the primary purpose of the filed rate.

18. Further, NYSEG disputes NYISO's claim that refunds are not called for here because a tariff waiver "will assure customers that their finalized invoices are in fact final." NYSEG notes that the Commission has ordered refunds well past the time of the violation.[8] Going further, NYSEG states that it is the "general policy" of the Commission to grant full refunds when invoicing errors and tariff violations occur.[9] NYSEG states that only eight market participants, the New York transmission owners, are affected, and the information required to remedy the error is readily available. NYSEG asserts that market prices will not be affected, nor will it be necessary for markets to be resettled or for the NYISO to second-guess decisions made by market participants.

19. The Commission will not order NYISO to reopen its invoices in order to refund erroneously billed congestion charges to NYSEG, nor does the Commission believe that approval of a waiver of Attachment K of NYISO's OATT is necessary for NYISO to honor the provisions of its tariff related to the finality of invoices. NYISO's OATT specifies the process and timeframe for review, challenge and correction of a transmission customer's invoices.[10] Specifically, for the errors that occurred from June 2005 through December 2006, NYSEG had approximately nineteen months from the date the initial invoice to challenge NYISO's invoices. For errors that occurred from January 2007 through June 2008, NYSEG had approximately ten[11] months to challenge the invoices. After this time, these invoices are considered "finalized" and not subject to further correction unless ordered by the Commission or a court of competent

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[8] *Citing, Niagara Mohawk*, 123 FERC ¶ 61,314, (2008) (The Commission granted Niagara Mohawk's request to reopen NYISO's invoices from March 2005 to August 2005).

[9] *Citing, Consolidated Edison Co. of New York, Inc., v. FERC*, 347 F.3d 964 (D.C. Cir. 2003), and *Town of Concord v. FERC*, 955 F.2d 67 (D.C. Cir. 1992).

[10] *See* NYISO OATT Section 7.2A.

[11] In an order issued December 18, 2006, in Docket No. ER07-156-000, NYISO's review period for invoices was shortened from approximately 19 months to approximately 10 months, effective January 1, 2008. In an order issued December 10, 2008 in Docket No. ER09-193-000, NYISO's review period for invoices was further shortened to approximately eight months, effective January 1, 2009.

jurisdiction.[12] This provision in NYISO's OATT was negotiated by NYISO's stakeholders and reflects their decision on the appropriate balance of the need for accuracy in invoices with the need for financial certainty.[13]

20. The Commission, however, in the event of extraordinary circumstances, has reopened finalized invoices when it has determined that significant injustice would result in the absence of Commission action.[14] In this case, the Commission agrees with Niagara Mohawk and LIPA that extraordinary circumstances do not exist.[15] There is no dispute that the errors were clearly visible on NYSEG's invoices, and that NYSEG's failure to carefully review its invoices for the 46-month period was a primary reason that the error was not discovered earlier. Further, the only entity other than NYISO who could have discovered the error was NYSEG.

21. While NYSEG cites the June 30, 2008 Order issued in *Niagara Mohawk Power Corporation* (Niagara Mohawk) to demonstrate that the Commission has ordered refunds well past the time of violation, the Commission believes that this case is distinguishable from the instant proceeding. In *Niagara Mohawk*, the errors arose uncharacteristically at the end of the market settlement process, when incorrect data was introduced into allegedly "corrected" bills. In the instant case, the incorrect information was listed on the actual invoices themselves. In addition, in *Niagara Mohawk*, the utility had only a 25-day review period to detect the errors submitted by NYISO; in this case, NYSEG had at least seven months to protest the errors of some of the invoices and a year to protest the other invoices. Finally, as stated previously, careful review of the invoices by NYSEG would have revealed the billing errors.

22. We also find, contrary to NYSEG's assertions, that the filed rate doctrine is not violated here. Both OATT section 7.2A and section 3.1 of Attachment K of NYISO's OATT make up the filed rate. In order to give proper effect to both provisions, it is necessary that section 7.2A, which provides that finalized invoices "shall not be subject to further correction" applies in conjunction with the billing provisions of Attachment K so that finalized invoices will, absent an order form the Commission or a court of competent jurisdiction, be final. One purpose of the filed rate doctrine is rate

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[12] *Id*.

[13] *See Niagara Mohawk*, 123 FERC ¶ 63,120 at P 25.

[14] *Id*.

[15] While the Commission agrees with NYSEG's assertions regarding the need for incentives to ensure accurate billing on the part of NYISO, NYISO reports that it has taken steps to correct these errors from occurring in the future.

predictability for customers.[16] Section 7.2A gives NYISO's transmission customers the assurance that, after the specified timeframe for review, challenge and correction, their invoices are final unless the Commission or a court orders a change. Providing this financial certainty to customers is fully consistent with the filed rate doctrine.

23. With regard to the parties' discussion of the appropriate methodology to issue refunds, this discussion is moot because the Commission is not ordering refunds. In summary, the Commission finds that there is no need for a waiver of Attachment K of NYISO's OATT, and that no re-calculation of invoices for the service months of June 2005 through June 2008 is appropriate under the governing tariff provisions.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[16] *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992); *Columbia Gas Transmission Co.*, 831 F.2d 1135, 1141 (D.C. Cir. 1987).