

149 FERC ¶ 61,257
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

GDF Suez Energy Resources, NA

Docket No. EL14-89-000

v.

New York Independent System Operator, Inc., and
Consolidated Edison Company of New York, Inc.

ORDER GRANTING COMPLAINT

(Issued December 18, 2014)

1. On August 8, 2014, GDF Suez Energy Resources, NA (Suez) filed a complaint (Complaint) against New York Independent System Operator, Inc., (NYISO) requesting that the Commission issue an order requiring NYISO to reopen and resettle billings for electricity supplied by NYISO during the November/December 2012 billing periods, and to refund over-charges paid by Suez, with interest. In the alternative, Suez requests that the Commission grant waiver of NYISO's Market Administration and Control Area Service Tariff (Services Tariff) to require NYISO to resettle the bills and make refunds. For the reasons discussed below, the Commission grants the Complaint.

I. Background

2. Suez is a non-residential retail electricity supplier and load serving entity under the state of New York's retail access program and purchases the electricity for its retail customers from NYISO. During the period at issue, Suez provided electric generation service at retail to 55 Water Street in lower Manhattan (55 Water Street), a commercial office building.¹ Consolidated Edison Company of New York, Inc. (Con Ed), a regulated public utility in New York State, delivered the electricity to 55 Water Street, and served as the metering authority.

¹ The building at 55 Water Street is owned by New Water Street Corporation, but for simplicity we will refer to 55 Water Street throughout this order.

3. At the end of October 2012, Superstorm Sandy hit Manhattan and caused significant flooding and outages, including outages at 55 Water Street. For the November 2012 and December 2012 billing periods, NYISO issued initial settlement invoices to Suez on December 7, 2012 and January 8, 2013, respectively. The initial settlement invoices were based on estimated meter data² for 55 Water Street that Con Ed had provided to NYISO because actual meter data was unavailable due to the flooding in lower Manhattan caused by Superstorm Sandy.³ Suez paid the NYISO invoices in full.

4. Section 7.2.3 of the NYISO Services Tariff allows NYISO to use estimated meter data to issue its initial invoices.⁴ Any charges based on estimates are required to be trued-up by NYISO after NYISO has obtained the actual information. However, section 7.2.3 further provides that NYISO shall only true-up charges based on meter data prior to the deadline for finalizing meter data in section 7.4 of the Services Tariff. Section 7.4.1.1.4 provides that meter data is “finalized” at a maximum of 150 days after the initial invoice.⁵ Section 7.4 provides that “finalized” data and invoices shall not be subject to

² The estimated meter data was based on 55 Water Street’s historical usage. Con Ed Answer at 3.

³ Suez Complaint at 4; Con Ed Answer at 3.

⁴ NYISO, NYISO Tariffs, NYISO Market Administration and Control Area Services Tariff, 7.2 MST Billing Procedures and Payments (2.0.0), § 7.2.3. Section 7.2.3 provides:

The ISO may use estimates, including estimated meter data, in whole or in part to settle a weekly or monthly invoice in accordance with ISO Procedures. The ISO shall use meter data submitted to the ISO in accordance with Article 13 of this ISO Services Tariff. Any charges based on estimates shall be subject to true-up invoices subsequently issued by the ISO after the ISO has obtained the requisite actual information, provided that the ISO shall only true-up charges based on meter data prior to the deadline for finalizing meter data established in Section 7.4 of this ISO Services Tariff. A trued-up charge shall include interest amounts calculated at the rate set forth in Section 7.3 of this ISO Services Tariff from the weekly or monthly due date for the charge until the date of payment of the trued-up amount for that charge.

⁵ *Id.* 7.4 MST Billing Disputes (2.0.0), § 7.4.1.1.4. Section 7.4.1.1.4 provides:

(continued ...)

further correction, including by NYISO, “except as ordered by the Commission or a court of competent jurisdiction.”⁶

5. Beginning in April 2013, Con Ed began working with 55 Water Street and its consultant, Energy Watch, to review and revise the estimated meter data. The 150-day meter data finalization deadline of section 7.4.1.1.4 expired in May 2013, for the December 2012 invoice, and expired in June 2013, for the January 2013 invoice.⁷ On

The meter authority shall provide to the ISO any final updates or corrections to LSE bus metering data within one hundred thirty (130) days from the date of the initial invoice. The ISO shall then post any updated and corrected LSE bus metering data within one hundred thirty-five (135) days from the date of the initial invoice. Customers may then review, comment on, and challenge the LSE bus metering data for an additional ten (10) days. Following this review period, the ISO shall have five (5) days to process and correct the LSE bus metering data, after which it shall be finalized.

⁶ *Id.* § 7.4.

⁷ Although the Complaint notes that the first paragraph of section 7.4.1.1 provides that “settlement information” is subject to challenge by a customer and correction by NYISO for errors at any time “up to five (5) months” from the date of the initial invoice, that provision further expressly states that the challenge and correction process is “subject to” the “requirements and limitations” of, *inter alia*, the meter data finalization procedure of section 7.4.1.1.4. Accordingly, contrary to the Complaint, because the Complaint only deals with the issue of correcting meter data, the five-month “settlement information” challenge process of the first paragraph of section 7.4.1.1 does not apply here. The relevant provision here is section 7.4.1.1.4, which provides a 10-day window ending a maximum of 145 days from the date of the initial invoice for customers to challenge “updated and corrected” metering data which NYISO is required to post within 135 days of the initial invoice (which did not occur here). After the conclusion of the 10-day review period, NYISO then has five days to “process and correct” the meter data, after which time the meter data is “finalized” -- a total maximum period of 150 days after the date of the initial invoice. Although the challenge process of section 7.4.1.1.4 does not apply here because it relates only to challenges to “updated and corrected” meter data, that provision does establish “the deadline for finalizing meter data established in Section 7.4 of [the] ISO Tariff” referred to in section 7.2.3, beyond which NYISO is barred by section 7.2.3 from updating or correcting estimated meter data used in an initial invoice. Regardless, the parties appear to read “5 months” as being the same as 150 days.

June 27, 2013 and August 24, 2013, approximately a month and a half after the 150-day meter data finalization period had expired for each invoice and the metering data had been “finalized,” Con Ed issued corrected meter data for each invoice.⁸ Suez requested both NYISO and Con Ed to modify the invoices to include the corrected data;⁹ however, NYISO refused because section 7.4 prohibits NYISO from reopening and resettling billings after the deadline unless ordered by the Commission or a court of competent jurisdiction, and, although Con Ed corrected its transmission invoices, it noted that Suez paid NYISO for the electric energy as part of the settlement process, not Con Ed.¹⁰

II. Complaint

6. Suez states that neither NYISO nor Con Ed will rebill or reimburse Suez absent a Commission order because the deadline for finalizing meter data has passed.¹¹ Suez asserts that it was unaware that the estimated meter data was incorrect until Con Ed issued the corrected data after the deadline for finalizing meter data had passed, and that therefore it was unable to challenge the initial invoice.¹² Suez claims that NYISO’s initial invoices overstated 55 Water Street’s usage by approximately 9.7 gigawatt hours, or by more than 260 percent, which Suez estimates is approximately \$700,000.¹³ Suez therefore cites Section 7.4 of the Services Tariff and requests that the Commission order NYISO to reopen and resettle the billings for electricity supplied by NYISO during the

⁸ The corrected meter data Con Ed later submitted was not “actual” meter data but was the result of an agreement with 55 Water Street and its consultant, Energy Watch, on bill calculations. Con Ed Answer at 5. In her affidavit, Con Ed’s witness Yvonne Giaramita states that the corrections were estimates based on the parties’ consideration of factors including: (1) the damage caused by Superstorm Sandy; (2) the speed at which electric service was restored; and (3) meter readings once the building became fully powered. She states that this included assessing and repairing the damage to electric facilities at 55 Water Street, replacing over 20 meters, estimating the usage, and determining the appropriate load factor to estimate 55 Water Street’s demands. *Id.* Attachment (Affidavit of Yvonne Giaramita) at 7.

⁹ Suez Complaint at 6.

¹⁰ Con Ed Answer at 20.

¹¹ Suez Complaint at 4; *see also id.*, Attachments 4 and 5.

¹² *Id.* at 5-6, 9-10.

¹³ *Id.* at 3.

November/December 2012 billing periods and to refund over-charges paid by Suez, with interest, or, in the alternative, to order Con Ed to reimburse Suez for such over-charges, with interest.¹⁴ In the alternative, Suez requests that the Commission waive the provisions of section 7.4 and require NYSIO to resettle the bills for the November/December 2012 billing periods and issue refunds with interest.¹⁵

7. Suez asserts that the Commission has previously ordered NYISO to pay refunds to correct a billing error.¹⁶ It explains that, in *Niagara Mohawk*, the Commission decided that it will reopen finalized invoices in extraordinary circumstances in which it has determined that significant injustice would result in the absence of Commission action, and that it will balance the need for accuracy in invoices with the need for financial certainty.¹⁷ Suez asserts that the fact that Con Ed did not supply the corrected consumption data until after the close of the market settlement process was an extraordinary circumstance. Suez contends that significant injustice would result absent Commission action because Suez was over-charged for electricity supplied during the November/December 2012 billing period through no fault of its own. Suez avers that the revised bills will simply put affected entities in the same position they would have occupied if the correct bill had been issued by NYISO in the first instance.¹⁸

8. Suez claims that failure to issue such an order would yield an unjust and unreasonable result in which Suez would have paid too much for energy purchases during the billing period, while others would have paid too little due to the incorrect estimated data.¹⁹ Suez emphasizes that the estimate was not corrected until after the end of the market settlement and correction process, and that it had no opportunity to challenge the

¹⁴ *Id.* at 1, 7.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 7-8 (citing *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314, at P 25 (2008) (*Niagara Mohawk*); *Exelon Corporation v. PPL Electric Utilities Corporation and PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,065 (2005)).

¹⁷ *Id.* at 10; *Niagara Mohawk*, 123 FERC ¶ 61,314 at P 25.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 8-9.

invoice after the corrected data had been submitted.²⁰ It notes that Commission action is the only way in which Suez can avoid being adversely affected by the incorrect data.

9. In the alternative, Suez requests that the Commission grant waiver of NYISO's Services Tariff to require NYSIO to resettle the bills and make refunds. Suez states that the Commission has granted waivers of applicable provisions in the NYISO Services Tariff in order to allow correction of errors where (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties.²¹ Suez asserts that NYISO issued the erroneous invoices in good faith, relying on Con Ed's estimates, and that Suez sought to correct the problems as soon as Con Ed submitted the corrections. Suez states that the waiver is of limited scope because it only applies to the November/December 2012 billing periods. Suez states that this is a concrete problem because the erroneous invoice caused Suez to overbill its customer, 55 Water Street. Suez asserts that the waiver will not have any undesirable consequences because the waiver will simply enable NYISO to issue revised invoices for electricity supplied during the November/December 2012 billing periods based on accurate settlement data.²²

III. Notice of Complaint and Answers

10. Notice of the Complaint was published in the *Federal Register*, 79 Fed. Reg. 48,738 (2014), with interventions, protests, and respondents' answers due on or before September 2, 2014. On September 2, 2014, NYISO and Con Ed filed answers to the Complaint.

11. In their answers, both NYISO and Con Ed assert that the Commission should deny Suez's Complaint and alternate request for waiver. NYISO argues that the use of estimated meter data should have been apparent to Suez and that Suez should have challenged the data before the finalization deadline.²³ NYISO contends that this case is

²⁰ *Id.* at 9-10.

²¹ *Id.* at 12 (citing *New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,061, at P 19 (2014); *New York Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,147, at P 8 (2013); *New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,108 (2012)).

²² *Id.* at 12-13.

²³ NYISO Answer at 6.

distinguishable from *Niagara Mohawk* because Suez was on notice and had the full time period prescribed by the NYISO Services Tariff to review its invoices including the meter data.²⁴ NYISO further asserts that granting Suez's request would upset NYISO's customers' settled expectations regarding "finalized" invoices and because additional NYISO customers will be affected if the request is granted. NYISO states that a majority of NYISO stakeholders viewed the possibility of uncorrected errors as an acceptable trade-off for the benefits of financial certainty when they approved the settlement time limits in 2006.²⁵ NYISO also contends that Suez's Complaint is procedurally defective because it does not meet the criteria for a formal complaint under Rule 206 of the Commission's Rules of Practice and Procedure because Suez has not alleged that NYISO violated its Services Tariff.²⁶

12. Con Ed similarly argues that Suez had actual notice that the initial invoices were based on estimates and could have raised its concerns within the settlement window. Con Ed asserts that, for that reason, Suez cannot demonstrate the "extraordinary circumstances" required to have the bills reopened. Con Ed states that, on December 20, 2012 and January 17, 2013, Suez received Electronic Data Interchange transactions for the November/December 2012 billing periods, respectively, stating that usage data for those periods were estimated. Con Ed states that Suez also knew the invoices were based on estimates because Suez noticed that the Retail Access Information System did not provide any hourly usage information for the November/December 2012 billing periods and, when Suez asked Con Ed why there was no hourly usage information, Suez was told that the lack of information was due to Superstorm Sandy.²⁷ Con Ed also argues that Suez had the burden to challenge the invoices within the 5-month settlement window of the Services Tariff, but failed to do so. Further, Con Ed asserts that it did not benefit from Suez paying the estimated bills and that it has reduced its transmission and distribution charges to 55 Water Street to reflect the actual conditions.²⁸

13. Con Ed argues that the Commission has stated that Section 7.4 is "a limited exception to the general rule that, once the deadline for correcting bills has passed, the

²⁴ *Id.* at 10.

²⁵ *Id.* at 7-11.

²⁶ *Id.* at 2.

²⁷ Con Ed Answer at 4.

²⁸ *Id.* at 5, 21.

bills are final.”²⁹ Con Ed distinguishes *Niagara Mohawk*, arguing that, here, Suez had a reasonable opportunity within the five month billing period to discover the error.³⁰ Con Ed likens the present case to cases where the Commission denied requests to reopen billing, citing *New York Independent System Operator*³¹ where the error was listed on the invoice itself, and *New York State Electric & Gas Corp.*,³² where the error was discoverable, but difficult to detect.³³ In both cases, Con Ed notes, the Commission declined to find extraordinary circumstances. Con Ed further argues that neither Suez nor 55 Water Street will suffer significant injustice if the Commission declines to order refunds because they had actual notice of the erroneous invoices. Further, Con Ed asserts that it is unfair and unreasonable for market participants to have to pay refunds for events that happened two years ago for which they were not the cause.³⁴ Con Ed also argues that the \$700,000 refund amount in question is not so large that the Commission should depart from its traditional analysis.

14. Finally, Con Ed argues that the Commission should deny Suez’s request for waiver because Suez did not challenge the invoices within the window established by section 7.4 when Suez knew they were based on estimates, which Con Ed asserts is a strong equitable consideration against finding good faith. Con Ed also urges the Commission to reject Suez’s alternative request that Con Ed pay refunds because Con Ed did not benefit from Suez paying the estimated bills, Con Ed exercised due diligence in its efforts to recover from Superstorm Sandy and to piece together 55 Water Street’s consumption data, and because of the importance of finality of bills.³⁵

²⁹ *Id.* at 7 (citing *New York State Elec. & Gas Corp.*, 142 FERC ¶ 61,151, at P 22 (2013)).

³⁰ *Id.* at 8, 14.

³¹ *New York Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 (2009), *reh’g denied*, 133 FERC ¶ 61,028 (2010).

³² *New York State Elec. & Gas Corp.*, 133 FERC ¶ 61,094 (2010), *reh’g denied*, 142 FERC ¶ 61,151 (2013).

³³ Con Ed Answer at 11.

³⁴ *Id.* at 17.

³⁵ *Id.* at 21.

IV. Commission Determination

15. We grant the Complaint and order NYISO to reopen and resettle the invoices using the corrected meter data that Con Ed provided on June 27, 2013, and August 24, 2013, and to provide Suez with refunds of the overcharges with interest, as requested. In *Niagara Mohawk* the Commission ordered the reopening and correction of NYISO's "finalized" data and invoices under section 7.4 of the Services Tariff when the Commission determined that there were extraordinary circumstances and that significant injustice would result in the absence of Commission action.³⁶ Here, we find that Superstorm Sandy was an extraordinary event, causing substantial damage in New York City. In this case, Superstorm Sandy caused the loss of actual meter data. As a result, Con Ed was unable to use actual data to correct the initial invoices, and instead the parties had to use other means to correct the invoices³⁷ – which delayed the issuance of corrected data until after the 150 day "finalization" deadline.

16. We also find that significant injustice would result absent Commission action because Suez had no recourse for the failure of Con Ed to submit corrected meter data needed for NYISO to issue corrected invoices within the required 150-day meter data finalization period of the Services Tariff. Despite Con Ed's and NYISO's arguments to the contrary, we find that Suez had no obligation under the Services Tariff to challenge the estimated meter data in order to receive corrected bills based on corrected meter data because section 7.2.3 affirmatively requires NYISO to correct and true-up estimated meter data, whether or not there is a challenge to those estimates. Indeed, the use of estimated meter data was not an "error" that could be challenged because section 7.2.3 of the Services Tariff expressly permits NYISO to use estimated data in issuing initial invoices.

17. Furthermore, even if Suez had attempted to challenge either the estimated meter data or the failure to correct the estimated meter data within the 150-day deadline set by the Services Tariff, Con Ed did not have the corrected meter data available until approximately a month and a half after the respective deadlines under section 7.4.1.1.4 for finalizing the meter data had passed. Accordingly, the meter data could not have been corrected in time to prevent the original estimated meter data from being "finalized" after 150 days – irrespective of whether Suez had submitted a challenge within the 150-day period. Consequently, because Con Ed did not submit corrected data until after the

³⁶ *Niagara Mohawk*, 123 FERC ¶ 61,314 at P 25.

³⁷ Con Ed Answer, Attachment (Affidavit of Yvonne Giaramita) at 7.

section 7.4 deadline for finalizing the meter data, pursuant to section 7.2.3, NYISO could not correct the estimated meter data or true-up charges based on that corrected meter data, as otherwise required by section 7.2.3, before that deadline, and therefore was barred from doing so after that deadline passed. Further, for the foregoing reasons, the Commission orders cited by NYISO and Con Ed where the Commission denied requests to reopen NYISO billings are distinguishable.

18. Therefore, in the extraordinary circumstances caused by Superstorm Sandy, Suez, through no fault of its own and without any Services Tariff procedure to obtain relief, cannot be correctly billed and receive appropriate refunds absent Commission action. Under these extraordinary circumstances, the Commission finds that significant injustice would result in the absence of the requested Commission action. The Commission, therefore, grants the Complaint and orders NYISO to reopen and correct the invoices, resettle billings, and provide appropriate refunds with interest, as requested.

The Commission orders:

(A) The Complaint is hereby granted, as discussed in the body of this order.

(B) NYISO is hereby directed to reopen and resettle Suez's billings for the November/December 2012 billing periods based on the corrected meter data supplied by Con Ed, and to refund over-charges paid by Suez, with interest, calculated pursuant to 18 C.F.R. § 35.19a (2014), within thirty (30) days of the date of this order, as discussed in the body of this order.

(C) NYISO is directed to file a refund report detailing the principal amounts plus interest paid to Suez within forty five (45) days of the date of the order.

By the Commission. Commissioner Moeller is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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GDF Suez Energy Resources, NA

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MOELLER, Commissioner, *concurring*:

As discussed in today's order, the extraordinary circumstances presented by Suez's complaint warrant reopening and correcting NYISO's invoices, to avoid the significant injustice that would result absent Commission action.

In the event that meter data is unavailable or erroneous and appropriate corrections cannot be made within five months of issuance of initial invoices, NYISO is unable to correct its own invoices. Instead, NYISO depends on action by the Commission or relevant court whenever invoice corrections are needed after its five-month deadline has elapsed. This is true even in cases where, as here, the relevant parties recognize that NYISO's estimated meter data are faulty but cannot submit appropriate replacement data within five months. In this case, while the Commission's order will provide refunds to Suez, it does so over two years after Superstorm Sandy occurred; NYISO could have provided relief to Suez more quickly had its tariff permitted it to use the corrected meter data ConEd provided only 1.5 months after NYISO's five-month deadline had elapsed.

While this particular case highlights concerns in NYISO, similar difficulties could occur elsewhere, as practices for addressing meter data problems vary markedly among the RTOs/ISOs. Therefore, I encourage all RTOs/ISOs, and in particular NYISO, to work with their stakeholders to ensure that they have transparent processes for correcting invoices and provide market participants with sufficient time to remedy lost or invalid meter data.

Philip D. Moeller
Commissioner