

133 FERC ¶ 61,094  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

New York State Electric & Gas Corporation

Docket Nos. EL09-26-000  
EL09-26-001

ORDER ON CONTESTED SETTLEMENT, RESERVED ISSUE, AND REHEARING

(Issued October 28, 2010)

1. On December 23, 2008, the New York State Electric & Gas Corporation (NYSEG) filed a petition in the above-captioned proceeding requesting that the Commission issue a declaratory order directing the New York Independent System Operator, Inc. (NYISO) to correct its invoices to the market participants in NYSEG and Niagara Mohawk Power Corporation *d/b/a* National Grid (National Grid) subzones that were affected by certain metering errors between 1999 and 2008. The Commission set NYSEG's petition for Settlement Judge procedures in an order issued March 30, 2009.<sup>1</sup> On September 21, 2009, NYSEG filed a Settlement Agreement and Offer of Partial Settlement (Settlement) which would resolve the issue of the methodology to be used to calculate and issue corrected invoices, but which reserved for party briefing and Commission decision the issue of whether NYISO should be directed to correct the invoices in the first place. The Settlement was contested. We find that, based on the facts of record and upon consideration of the arguments of the parties in their briefs on the reserved issue, correction of the invoices at issue is not appropriate and will not be ordered. Accordingly, as discussed below, we deny NYSEG's petition for declaratory order and reject the Settlement as moot.

2. On April 21, 2009, the New York Municipal Power Agency (NYMPA) and the Municipal Electric Utilities Association of New York (MEUA) (collectively NYMPA/MEUA) filed a request for clarification or rehearing of the Commission's March 30, 2009 Order. We deny the request for clarification/rehearing as moot, as discussed below.

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<sup>1</sup> *New York State Electric & Gas Corp.*, 126 FERC ¶ 61,292 (2009) (March 30, 2009 Order).

## I. Background

### A. Petition for Declaratory Order

3. In its petition for declaratory order, NYSEG requested that the Commission require NYISO to rebill certain charges to correct for the NYISO incorrectly invoicing NYSEG for purchases of energy dating back to 1999 and totaling approximately \$20 million. NYSEG asserted that the inaccurate invoices resulted from metering errors at six various metering facilities and that these metering errors were only identified recently. NYSEG contended that National Grid's meters and metering procedures have resulted in a pattern of errors.

4. NYSEG stated that, while the time period under NYISO's Market Services Tariff (Services Tariff or tariff) for NYISO to correct the invoices had long passed and the invoices were "finalized" as defined in the Services Tariff, section 7.4 of the tariff provides that customers may appeal to the Commission for redress and that NYSEG was seeking such redress in its petition. In support, NYSEG relied on the following underscored language of section 7.4 of NYISO's Services Tariff:

For purposes of this Section 7.4, "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.<sup>2</sup>

5. Several parties, including National Grid, NYISO, and NYMPA/MEUA, filed protests and comments on NYSEG's petition. On March 30, 2009, the Commission issued an order establishing Settlement Judge procedures. The Commission stated that, with NYISO's assistance, the parties might be able to settle this matter.<sup>3</sup> The Commission also opined that settlement would be facilitated by the presence of a settlement judge to guide the process.<sup>4</sup>

### B. Settlement Agreement

6. The Settlement sets forth a joint stipulation of facts not in dispute (Joint Stipulation) and a methodology for calculating and issuing refunds (Stipulated Methodology) specifying that NYISO will include interest, as ordered by the

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<sup>2</sup> NYISO Services Tariff, § 7.4 (emphasis provided).

<sup>3</sup> March 30, 2009 Order, 126 FERC ¶ 61,292 at P 18.

<sup>4</sup> *Id.*

Commission.<sup>5</sup> The Settlement also sets forth a Reserved Issue for Commission disposition after briefing by the parties. The Reserved Issue is:

Whether, based upon the agreed upon facts in the Joint Stipulation and any other fact or consideration deemed relevant by the Commission, the Commission should direct NYISO to correct NYISO's invoices to market participants in certain NYSEG and National Grid subzones that were affected by metering errors identified in the Joint Stipulation.

The Settling Parties state that NYSEG has agreed not to pursue its claims over errors associated with three of the meters<sup>6</sup> described in NYSEG's December 23, 2008 petition. However, NYSEG will still pursue its claims of meter errors totaling approximately \$21.5 million, of which approximately \$5 million is interest.<sup>7</sup>

7. On October 13, 2009, notice of the Settlement was issued in the *Federal Register*.<sup>8</sup> In accordance with the schedule established in the notice, parties filed comments on the Settlement and briefs on the Reserved Issue. In the "Report of Settlement Judge on Contested Settlement" issued December 22, 2009,<sup>9</sup> the Settlement Judge noted that the Settlement was contested and, therefore, was before the Commission for its consideration.

## II. Joint Stipulation

### A. NYISO Billing Settlement System and Process

8. In the Joint Stipulation, the Settling Parties set out the evolution of the NYISO billing and settlement process from NYISO's inception in 1999 to the current system in

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<sup>5</sup> The parties protesting the settlement agreement itself were not parties to the underlying settlement discussions so they did not file statements in support of the stipulated facts. However, these parties did use information in the Joint Stipulation to argue their respective positions. Their opposition was in the nature of a limited one to the Stipulated Methodology itself and not to the facts. Also, these parties do not contest that the claimed errors, in fact, occurred.

<sup>6</sup> The Ausable-Stickney Bridge, Andover-Palmiter, and Willow-Bishop Hill meters.

<sup>7</sup> The principal amount of NYSEG's claim is approximately \$16 million, of which \$11 million resulted from NYSEG's own metering errors.

<sup>8</sup> 74 Fed. Reg. 53,492-53,493 (2009).

<sup>9</sup> *New York State Electric & Gas Corp.*, 129 FERC ¶ 63,025 (2009).

operation since 2007.<sup>10</sup> The NYISO Services Tariff, as approved by the Commission, establishes the process and timeframes for review, challenge, and correction of customer settlement information contained in a monthly settlement invoice. NYISO's settlement process, and any proposed changes to it, were fully vetted by NYISO's market participants and filed with the Commission under section 205 of the Federal Power Act (FPA).

9. Prior to October 1, 2002, NYISO's tariff allowed 24 months for NYISO to review settlement information and make corrections to the initial invoice, followed by a 12-month customer review period. From October 1, 2002 to December 31, 2006, NYISO's tariff allowed 12 months for NYISO to review settlement information, followed by a four-month customer review period.

10. Beginning January 1, 2007, both NYISO and its customers had a single, concurrent time period in which to review settlement information. From January 1, 2007 through December 31, 2008, that concurrent time period (excluding generator, tie-line, and subzone load metering data) was seven months. Beginning January 1, 2009, the concurrent time period (excluding generator, tie-line, and subzone load metering data) was shortened to five months. Since January 1, 2009, the review period for a supplier or meter authority to review and challenge generator, tie-line, and subzone load metering data is 55 days.

#### **B. Joint Stipulation Metering Errors and Metering Requirements**

11. In the Joint Stipulation, the Settling Parties stipulated to the facts surrounding the metering requirements and obligations for transmission owners in NYISO's system since NYISO began operations in November 1999. Like the other stipulated facts summarized, the non-settling parties also appear to agree on these stipulated facts as summarized below.

12. At NYISO's inception, NYISO and the New York Transmission Owners (NYTO), including NYSEG and National Grid, signed the Transmission Owners Agreement (TOA).<sup>11</sup> Under the TOA, each NYTO must submit billing-quality metering data to NYISO from the interchange and generation meters in its own transmission district.<sup>12</sup>

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<sup>10</sup> Settling Parties, Joint Stipulation at 9-12 (citing NYISO Revenue Metering Requirements Manual, § 1.2). Like the other stipulated facts summarized, the non-settling parties also appear to agree on these stipulated facts.

<sup>11</sup> NYISO's TOA can be located at: [www.nyiso.com/public/webdocs/documents/regulatory/filings/1999/11/iso\\_to\\_agreement\\_clean.pdf](http://www.nyiso.com/public/webdocs/documents/regulatory/filings/1999/11/iso_to_agreement_clean.pdf), ISO Transmission Owners Agreement.

<sup>12</sup> A NYTO's Transmission District is the geographical area served by that NYTO.

NYSEG and National Grid are the meter authorities for the NYISO meters in their respective transmission districts. A meter authority is an entity designated by NYISO to be responsible for NYISO's electric revenue metering system's calibration, maintenance, operation, and reporting of metered data.<sup>13</sup> Meter authorities are required to provide accurate, timely, and reliable data to NYISO.<sup>14</sup>

13. Finally, the Settling Parties stipulated to the facts surrounding the metering errors at issue in the proceeding:

**1. Snyder Lake-Hoag**

14. National Grid operates the Snyder Lake-Hoag meter. NYSEG reports losses of \$7,331,512.38 from 1999 to August 2007 for this meter. From the inception of NYISO in November 1999 until August 2007, the Snyder Lake-Hoag meter data was submitted to NYISO with reverse polarity and, for certain time periods, the data understated energy readings. National Grid further determined that when the Snyder Lake-Hoag meter was replaced in July 2003, the scaling factor (meter multiplier) was not updated to reflect the new meter multiplier.

15. National Grid reported the revised energy data to NYISO for the open settlement periods. . NYISO corrected the open invoices at issue for the Snyder Lake-Hoag meter. However, NYISO did not correct the inaccuracies billed for the period January 2000 through July 2007 because of the time limitations in NYISO's tariffs.

**2. Cold Springs-Randolph**

16. NYSEG is the meter authority for the Cold Springs-Randolph meter. NYSEG reports losses of \$14,036,825.98, including interest, at Cold Springs-Randolph. NYSEG upgraded the meter in September 2003, but set the meter multiplier incorrectly, and did not discover its error until April 2008, when NYSEG installed redundant meter data sources and then corrected the error. NYSEG reported the correct information to NYISO for the open settlement periods of March and April 2008. NYISO did not correct the inaccurately reported and improperly billed MWh for the Cold Springs-Randolph metering point for the period September 2003 through February 2008 because of the time limitations in NYISO's tariff.

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<sup>13</sup> Settling Parties, Joint Stipulation at 5 (citing NYISO Revenue Metering Requirements Manual, § 1.2).

<sup>14</sup> *Id.* 6.

### **3. East Springfield Meter and Carrs-Corners Tie**

17. National Grid is the meter authority for the East Springfield meter. In March 2007, National Grid submitted accurate data to NYISO for the East Springfield meter. NYSEG reviewed and validated these values and National Grid reported revised meter data to NYISO during the open period for revisions to meter data. When National Grid uploaded the information to NYISO from its internal meter reporting application, however, an inadvertent error led to NYSEG being charged for additional energy in the balancing market. NYISO did not correct the error for the East Springfield metering point for the month of March 2007 because of the time limitations in NYISO's tariff.

18. The Carrs-Corners tie is an invalid interchange point; the correct metering point is the Cold Springs-Randolph 501 meter. The Carrs-Corners interchange was entered into the NYISO system by mistake at its inception in 1999. When Carrs-Corners error was discovered, NYSEG requested that this point be removed from NYISO's settlement system. However, in the process of deploying web-based reconciliation software, meter data was inadvertently assigned to the interchange for the months of December 1999 and January 2000. NYISO did not correct the inaccurately reported and improperly billed MWh for the Carrs-Corners metering point for the months of December 1999 and January 2000 because of the time limitations in NYISO's tariffs. NYSEG reports losses of \$354,593.92, including interest due to the above issues with the East Springfield meter and the Carrs-Corners invalid interchange.

#### **C. Other Metering Errors**

19. In its petition for declaratory order, NYSEG claims three other metering errors that were not discussed in the stipulated facts because NYSEG agreed in the Settlement not to pursue these claims: Ausable-Stickney Bridge Tie, Andover-Palmiter Tie, and Willow-Bishop Hill Tie. Ausable-Stickney Bridge Tie is a small distribution point under National Grid's metering authority which National Grid occasionally uses to supply backup load. From early 2002 until early 2009, National Grid did not submit information from this point to NYISO. According to NYSEG, National Grid informed NYISO that it did not check this meter on a regular basis; however, a new meter was installed on April 2009 has resolved this issue prospectively.

20. Andover-Palmiter Tie and the Willow-Bishop Hill Tie are both under National Grid's metering authority. The switches for these points are normally open, so there is no energy flow. However, NYSEG asserts that National Grid has often reported small amounts of load on these ties, even though the readings should be "0." As part of the Settlement, NYSEG states that National Grid and NYSEG have decided to raise this issue in the appropriate NYISO working group.

### **III. Reserved Issue**

21. Initial briefs on the Reserved Issue were filed by Consolidated Edison Solutions, Inc. (CES), the Independent Power Producers of New York, Inc. (IPPNY), Commission Trial Staff (Trial Staff), New York Association of Public Power (NYAPP), NYSEG, National Grid, and the Retail Electric Supply Association (RESA). Reply briefs were filed by RESA, National Grid, NYSEG, Trial Staff, and NYAPP. NRG Power Marketing, LLC (NRG) submitted comments in support of the initial brief of IPPNY.

22. NYSEG, Trial Staff, and NYAPP support the Commission ordering NYISO to correct the finalized bills and issue appropriate refunds. NYSEG and Trial Staff generally assert that: 1) the Commission should use the Stipulated Methodology to correct the metering errors and order refunds; 2) section 7.4 of NYISO's Services Tariff is not a true finality provision and should not be treated as such; 3) the Commission usually orders refunds when the filed rate<sup>15</sup> has been violated due to erroneous bills; and 4) there is no standard requiring "extraordinary circumstances" for Commission review of refund requests.

23. NYISO, National Grid, RESA, NRG, CES, and IPPNY opposed reopening finalized invoices and rebilling customers. These parties generally assert that NYSEG had the full settlement period to review the erroneous meter data and resulting invoices, and therefore, settled bills should remain closed in accordance with the settlement process developed by the stakeholders in NYISO's tariffs. The opposing parties state that there are no "extraordinary circumstances" warranting the Commission overriding NYISO's existing tariff provisions on billing finality. Finally, several of these parties state that energy service companies (ESCO) rely on metering authorities to perform their metering services accurately, and ESCOs generally cannot rebill end-use customers.

#### **A. Section 7.4's Finality Provision and the Filed Rate Doctrine**

##### **1. Parties' Arguments**

24. In its brief, NYSEG states that, unlike tariffs of other Independent System Operators (ISO) and Regional Transmission Organizations (RTO), NYISO's tariff expressly allows for the Commission to issue the requested refund order. NYSEG states that PJM Interconnection L.L.C.'s (PJM) tariff cuts off all claims after two years, while ISO New England does not contain the same generalized exception to claim limits. In contrast, NYSEG relies on the following underscored language of section 7.4 of NYISO's Services Tariff:

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<sup>15</sup> Trial Staff also states that, although the filed rate doctrine is usually raised when a utility tries to charge a rate higher than the tariff rate, here the underlying problem is that the utility has billed charges that were not calculated consistently with the on file formula rate's methodology.

For purposes of this Section 7.4, “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.<sup>16</sup>

NYSEG asserts that NYISO’s market participants decided to include this type of “safety net” tariff provision in both the NYISO Services Tariff and the OATT during NYISO’s formation. NYSEG avers that NYISO’s stakeholders have not modified these provisions over the years, despite their recognition of the value of transaction finality in most circumstances.

25. NYSEG claims that the inclusion of the “safety net” reveals the decision of those in NYISO’s market to balance the need for accuracy with the need for finality, rather than simply to endorse finality. NYSEG avers that further support for the existence of the “safety net” is that the NYISO correction period for metering errors is very short, only 55 days, whereas PJM has a two-year cut-off period. NYSEG claims that, when NYISO’s market participants shortened the revision period, they were relying on section 7.4 to provide a guarantee of accuracy if large and serious errors were to occur. NYSEG states that the circumstances in this proceeding are exactly those that section 7.4 was designed to address; that is, when the need to protect the customer through correcting inaccurate bills outweighs the importance of finality.

26. NYSEG argues that the Commission has previously granted relief under section 7.4 in *Niagara Mohawk*.<sup>17</sup> NYSEG states that, in *Niagara Mohawk*, National Grid filed a petition for declaratory order requesting that the Commission direct NYISO make refunds to customers who had been improperly over-billed.<sup>18</sup> NYSEG states that, as in this case, a software error caused National Grid to submit inaccurate data to NYISO and certain members within National Grid’s service territory had been overcharged. NYSEG avers that the Commission granted National Grid’s request for an order directing NYISO to correct the invoices, finding that “the need for accuracy outweighs concerns of financial certainty and significant injustice would result in the absence of Commission action.”<sup>19</sup> NYSEG states that, although the Commission did not set out an explicit

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<sup>16</sup> NYSEG, Initial Brief at 21 n. 85 (*citing* NYISO Services Tariff, § 7.4) (emphasis provided).

<sup>17</sup> NYSEG, Initial Brief at 33 (*citing* *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314 (2008)) (*Niagara Mohawk*).

<sup>18</sup> NYSEG, Initial Brief at 33 (*citing* *Id.* P. 3).

<sup>19</sup> NYSEG, Initial Brief at 33 (*citing* *Id.* P 25).

standard for relief under section 7.4, the facts of this proceeding are very similar to those in *Niagara Mohawk*.

27. NYSEG also cites to *Exelon* where the Commission found that:

PECO is entitled to reimbursement for the congestion charges that PJM erroneously billed to it at the Elroy substation. All parties recognize that these charges were improperly billed due to an error in the State Estimator coding. PECO also had no way of knowing through the bills issued by PJM that it was being improperly charged, since the bills contained only a single statement of congestion charges, not attributed to any specific locations.<sup>20</sup>

NYSEG notes that, like PECO, it had no practical way to know that it was being overcharged because the bills contained an aggregated statement of subzone load, not data attributable to individual meters.

28. In its brief, National Grid states the NYISO Services Tariff establishes the process and timelines for review, challenge, and correction of interchange and generator meter data and invoices. In each case, National Grid argues, if a customer does not challenge the meter data or invoice within the specified period for review, the meter data and/or invoice becomes “finalized” as defined in the Services Tariff and is not subject to further adjustment by NYISO. National Grid asserts that the financial certainty that finalized metering provides is vital to the successful and efficient operation of ISO/RTO markets. National Grid avers that NYISO’s settlement provisions, including those establishing the finality of invoices, are the culmination of extensive stakeholder discussions and reflect the stakeholders’ determination of the “appropriate balance of the need for accuracy in invoices with the need for financial certainty.”<sup>21</sup> National Grid avers that a majority of NYISO stakeholders have determined that the possibility of uncorrected errors in meter data and invoices is an acceptable trade-off for the benefits of financial certainty. National Grid claims that parties participating in NYISO’s markets have structured their risk management practices, financial decisions, and commercial approach on the expectation that both NYISO and the Commission will honor this balance.

29. National Grid states that certainty as to the settlement review periods and the resulting “finality” imposes due diligence obligations on NYISO market participants to review meter data and invoices consistent with each participant’s assessment of risk, financial exposure, and cost-benefit analysis. National Grid contends that the

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<sup>20</sup> NYSEG, Initial Brief at 34 (citing *Exelon Corp. v. PPL Electric Utilities Corp.*, 111 FERC ¶ 61,065, at P 24 (2005), *reh’g denied*, 114 FERC ¶ 61,298 (2006) (*Exelon*)).

<sup>21</sup> National Grid, Initial Brief at 18 (citing *New York Independent System Operator, Inc.*, 128 FERC ¶ 61,086 (2009) (NYISO July 24, 2009 Order)).

Commission has long recognized that settled expectations must be protected if the NYISO markets are to thrive and has made it clear that finalized invoices would be reopened and corrected only in extraordinary circumstances which do not exist here.<sup>22</sup> National Grid submits that the explicit terms of the NYISO Services Tariff and sound policy considerations compel the rejection of the 99 months of invoice corrections sought by NYSEG. National Grid argues that, to do otherwise, would substantially harm and undermine the confidence that all other market participants have in the finality of settlement information.

30. In its brief, NYAPP asserts that section 7.4 was intended to address situations such as this, where the need to protect the customer and bill accuracy outweighs the importance of finality. NYAPP asserts that the Commission has the responsibility to ensure the accuracy of rates in the NYISO markets.

31. In their respective briefs, CES, RESA, and IPPNY assert that, absent the finality provision, load serving entities (LSE) and ESCOs would be harmed financially, and the certainty of final bills would be jeopardized. CES and RESA argue that the current tariffs provide LSEs with a final bill, and once settled, LSEs have no further liabilities for electric supply costs. RESA further claims that ESCOs can only collect costs from customers while they are still customers and unless the customers of today were the same as the ones from 1999, ESCOs will not be able to collect their costs.

32. CES states that the objective for establishing a final bill was to create billing certainty and financial assurance for the various competitive market participants, recognizing the necessity of price and cost certainty for any market. CES and IPPNY aver that, if the Commission were to reopen these bills, many of the companies that would be charged for this error are not the ones responsible for the metering errors nor could they have detected the errors in a timely fashion. IPPNY argues that the Commission has recognized the vital role that billing finality and resulting financial certainty play in electric power markets.<sup>23</sup> IPPNY states that if the Commission were to reopen the bills, which largely resulted from one metering authority's failure to discover its own meter errors, "financial certainty" would be meaningless. CES and RESA further claim that retail LSEs and ESCOs could not compete effectively under such market circumstances.

33. In its brief, Trial Staff states that the Commission should require NYISO to re-invoice. Trial Staff argues that there is no dispute that the meter data used to calculate

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<sup>22</sup> National Grid, Initial Brief at 8 (citing *Niagara Mohawk*, 123 FERC ¶ 63,314 at P 24- 25).

<sup>23</sup> IPPNY, Initial Brief at 4 (citing *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289 (2006)).

the invoices was incorrect and therefore the resulting invoices were erroneous.<sup>24</sup> Trial Staff asserts that section 7.2 in NYISO's tariff requires that invoices be based on actual usage, but in this case they were not. Thus, Trial Staff contends the bills violated NYISO's tariff and the filed rate. Trial Staff states the filed rate doctrine generally "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."<sup>25</sup> Trial Staff asserts that the Commission should require rebilling because it typically orders refunds in cases where the filed rate doctrine has been violated due to erroneous bills.<sup>26</sup> For example, Trial Staff argues that in *Exelon*, PJM charged the wrong customer for congestion costs and the Commission required PJM to correct this billing error because it violated PJM's OATT.<sup>27</sup> Moreover, Trial Staff states that the Commission has required rebilling in two previous NYISO cases where it found that NYISO violated its tariff due to invoicing errors.<sup>28</sup>

34. Trial Staff asserts that, in contrast to other RTOs, there is no presumption of finality in NYISO's billing process because section 7.4 is a part of the filed rate. Trial Staff argues that NYISO's customers specifically preserved for themselves the right to request Commission review of NYISO's invoices. Trial Staff states that National Grid's claims of finality conflict with its 2008 request that the Commission exercise its authority to re-open settled invoices. Trial Staff argues that National Grid knows that section 7.4 creates no such finality because it allows aggrieved parties to go to the Commission or the courts for redress.

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<sup>24</sup> Trial Staff, Initial Brief at 11 (citing Joint Stipulation at 14).

<sup>25</sup> Trial Staff, Initial Brief at 11 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)).

<sup>26</sup> Trial Staff, Initial Brief at 11 (citing *IDACORP Energy L.P. v. FERC*, 433 F.3d 879, 882 (D.C. Cir. 2006) (*IDACORP*); *DTE Energy Trading v. Midwest Independent System Operator, Inc.*, 111 FERC ¶ 61,062, at P 28 (2005) (*DTE Energy*); *Wisconsin Electric Power Co. v. Midwest Independent System Operator, Inc.*, 114 FERC ¶ 61,005 (2006) (*Wisconsin Electric*)).

<sup>27</sup> Trial Staff, Initial Brief at 12 (citing *Exelon*, 111 FERC ¶ 61,065 at P 29).

<sup>28</sup> Trial Staff, Initial Brief at 13-14 (citing *New York Independent System Operator, Inc.*, 117 FERC ¶ 61,305 (2006) (NYISO filed changes to its OATT to implement real-time scheduling system but, in the process, inadvertently changed the Operating Reserves cost recovery mechanism from an hourly to a daily allocation). In the corresponding footnote, Trial Staff also references: *New York Independent System Operator, Inc.*, 115 FERC ¶ 61,026 (2006) (where NYISO violated the tariff between June 1, 2002 and January 31, 2005, in the course of implementing new market mitigation measures, the Commission required NYISO to revise the past invoices but not issue refunds).

35. In its brief, NYISO argues that the Commission must balance the need for accuracy with the need for financial certainty. NYISO states that the explicit time limits for invoice corrections in its tariffs were the result of extensive stakeholder negotiation. NYISO contends that these time limits reflect its stakeholders' collective judgment on the appropriate balance between a customer's interest in accurate settlements and the sometimes competing interest in the financial certainty afforded by invoices which are no longer subject to further adjustments. NYISO argues that, as the Commission has determined previously in a recent NYISO proceeding, the finality provisions are part of the filed rate, and the filed rate is not violated when customer invoices are not revised after expiration of the specified time periods in the NYISO tariffs for the review, challenge, and correction of customer invoices.<sup>29</sup> NYISO states that the settlement provisions clearly contemplate that, on occasion, an error would be discovered after the expiration of the settlement period. However, NYISO states that the parties deemed this to be a reasonable trade-off in the interest of achieving the financial certainty afforded to all customers by finalizing invoices.

36. In reply, NYSEG states that it supports Trial Staff's statements regarding the filed rate. NYSEG argues that it agrees with Trial Staff that the "safety net" provision in section 7.4 is also part of the filed rate. NYSEG claims that market participants should have been on notice that NYISO might issue refunds for inaccurate invoices or charges after the Commission decision requiring rebilling in *Niagara Mohawk*. NYSEG states the Commission should not elevate the billing cut-off provision over other tariff provisions, by concluding that finality is more important than NYISO's rate provisions. Further, NYSEG contends that a cornerstone of the FPA is that the Commission ensures that rates are just and reasonable and consistent with filed tariffs and that the Commission protects customers.<sup>30</sup> Therefore, NYSEG avers the Commission must ensure that the filed rate is charged even when settled expectations may be upset as a result.<sup>31</sup>

37. In reply, National Grid states that NYSEG and Trial Staff erroneously contend that section 7.4 and the filed rate doctrine require the correction of the metering and invoicing errors at issue in the proceeding. National Grid argues that these proponents fail to

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<sup>29</sup> NYISO, Initial Brief at 6-7, (citing NYISO July 24, 2009 Order, 128 FERC ¶ 61,086 at P 22).

<sup>30</sup> NYSEG, Reply Brief at 20 (citing *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959)) ([Commission regulation] was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.).

<sup>31</sup> NYSEG, Reply Brief at 20 (citing *Cities of Anaheim, et al. v. California Independent System Operator Corp.*, 95 FERC ¶ 61,197 (2001)) (filed rate is to be construed strictly).

distinguish controlling Commission precedent finding that the finality provisions of NYISO's tariffs are part of the filed rate. National Grid avers that the Commission very recently considered the same issue in *New York Independent System Operator, Inc.*<sup>32</sup> In that case, National Grid avers that NYSEG argued that NYISO is prohibited by the filed rate doctrine from charging rates for its services other than those properly filed with the Commission. Therefore, NYSEG requested that the Commission order the finalized invoices with incorrect congestion costs to be resettled, notwithstanding NYISO's tariff provisions rendering the invoices final. National Grid observes that the Commission rejected this argument and found that "[b]oth OATT section 7.2A and section 3.1 of Attachment K of NYISO's OATT make up the filed rate."<sup>33</sup> National Grid states the Commission further ruled that both provisions must be read together in order to give proper effect to both provisions.<sup>34</sup>

38. National Grid contends that the same considerations apply here, because enforcement of the finality provisions does not violate the filed rate doctrine. National Grid argues that enforcement of finality merely implements the filed rate. National Grid states that, in contrast, Trial Staff's approach would selectively ignore parts of the filed rate and would keep customers in a state of unending uncertainty for long periods over whether their past bills and invoices may be reopened and revised.

39. In reply, NYAPP states the Commission's refund authority is not limited by section 7.4 of NYISO's Services Tariff. NYAPP avers that this section only places a time limit within which NYISO may review a claim.

40. In its reply brief, RESA states that there has been no violation of the filed rate doctrine that warrants rebilling back 10 years. RESA argues that Trial Staff cites a number of cases in support of its position that the filed rate has been violated, yet all of these cases are inapposite and all involve actions or inactions of the RTO/ISO that led to a call for refunds.

41. In reply, Trial Staff reasserts its argument that the invoices should be re-billed because they violate the filed rate. Trial Staff avers that, under the filed rate doctrine, parties have just as much right to rely on the Commission's authority to require rebilling under section 7.4 as on any other tariff provision.

42. In its reply brief, NYISO states that NYSEG's finalized invoices are consistent with NYISO's filed rate. NYISO argues that Trial Staff's arguments regarding the filed

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<sup>32</sup> National Grid, Reply Brief at 7 (citing NYISO July 24, 2009 Order, 128 FERC ¶ 61,086).

<sup>33</sup> National Grid, Reply Brief at 7-8 (citing *Id.* P 22).

<sup>34</sup> National Grid, Reply Brief at 7-8.

rate are flawed because Trial Staff does not try to reconcile the finalization requirements of section 7.4 of the tariff with the sometimes competing requirements set forth in section 7.2 to update estimates in customer settlements with actual information as it becomes available. NYISO asserts the Commission has previously indicated that NYISO's settlement provisions must be read together with NYISO's other tariff provisions to give proper effect to both provisions.<sup>35</sup> NYISO argues that, when the two provisions are read together, it is clear that NYISO is responsible for updating estimates in customer invoices based on the actual information supplied to it within the explicit time limitations prescribed in section 7.4.

43. NYISO asserts that the parties who support rebilling rely on Commission decisions that are distinguishable from the circumstances in this proceeding. NYISO contends that they rely on *Exelon*<sup>36</sup> and *DTE Energy*,<sup>37</sup> where the Commission ordered PJM and Midwest ISO, respectively, to issue refunds when an ISO error resulted in incorrect customer settlements. However, NYISO argues that in these cases, the RTOs' tariffs did not contain explicit time periods for the resolution of errors in customer invoices similar to those found in the NYISO tariffs, so the cases are inapposite.

## 2. Commission Decision

44. In the NYISO July 24, 2009 Order, the Commission specifically rejected NYSEG's and Trial Staff's allegations that the Commission is compelled by the filed rate doctrine to require NYISO to correct billing invoices despite the passage of the time deadline of its tariff for such corrections to be made. In that order, the Commission found that the filed rate doctrine does not require it to order NYISO to correct all past errors under section 7.2 of NYISO's OATT, which includes a provision identical to section 7.4 of NYISO's Services Tariff at issue here.<sup>38</sup> The Commission stated:

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 from the Commission or a court of competent jurisdiction, be final. One purpose of the

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<sup>35</sup> NYISO, Reply Brief at 3 (citing NYISO July 24, 2009 Order, 128 FERC ¶ 61,086 at P 22).

<sup>36</sup> *Exelon*, 111 FERC ¶ 61,065.

<sup>37</sup> *DTE Energy*, 111 FERC ¶ 61,062.

<sup>38</sup> NYISO July 24, 2009 Order, 128 FERC ¶ 61,086 at P 22.

filed rate doctrine is rate predictability for customers.<sup>39</sup> 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.<sup>40</sup>

45. Likewise, section 7.4 provides notice to customers that "finalized" invoices are subject to being corrected by order of the Commission, and, thus, it is possible that the Commission may, under the appropriate circumstances, later order a correction. However, to interpret that provision as *requiring* the Commission, pursuant to the filed rate doctrine, to always reopen and correct finalized invoices would read the provision regarding Commission review and redress out of the tariff, which forms the filed rate. Accordingly, the filed rate doctrine does not require the Commission to order the subject invoices be reopened and corrected.

**B. Standard for Ordering Refunds for Correction of Finalized Invoices Under Section 7.4 of the Services Tariff**

**1. Parties' Arguments**

46. In its brief, NYSEG states the Commission has "equitable discretion concerning whether to order refunds,"<sup>41</sup> although its primary responsibility is to "afford customers a complete, permanent, and effective bond of protection against excessive rates and charges."<sup>42</sup> NYSEG contends that:

The Commission's practice has been to order full refunds of any amounts collected above the just and reasonable level, absent contrary equitable considerations. Refunds are restitutionary, rather than punitive, relief. Because the statutory goal of refunds is customer restitution, the Commission does not set refund levels based on a degree of culpability regarding overcollections. Rather, our refund task in this and other cases

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<sup>39</sup> *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).

<sup>40</sup> NYISO July 24, 2009 Order, 128 FERC ¶ 61,086 at P 22.

<sup>41</sup> NYSEG, Initial Brief at 24 (citing *Central Maine Power Co.*, 64 FERC ¶ 61,376, at 63,610 (1993)).

<sup>42</sup> NYSEG, Initial Brief at 26 (citing *Gillring Oil Co. v. FERC*, 566 F.2d 1323, 1326 (5<sup>th</sup> Cir. 1978)).

is to determine objectively the amount of overcollections that should be returned to customers.<sup>43</sup>

47. NYSEG states the Commission has considered numerous equitable factors in determining when refunds are warranted. NYSEG asserts that, in *Estate of French*, the Fifth Circuit Court of Appeals stated that these factors include: the “passage of time, amounts owed, whether the sales are still jurisdictional, whether the refunds would pass to consumers who actually paid the money, the relative size of the producer, and whether on balance there is a benefit to the public interest.”<sup>44</sup> In the specific context of RTOs/ISOs, NYSEG argues the Commission has considered: whether there was an “improper windfall,”<sup>45</sup> whether the tariff violation was merely “technical,”<sup>46</sup> and whether there was a “reasonable method to determine whether refunds are owed.”<sup>47</sup> NYSEG claims the Commission has also considered whether ordering refunds would itself create inequities or uncertainty in markets or whether customers can (or cannot) effectively revisit their economic decisions.<sup>48</sup> NYSEG states, however, that the Commission seeks to avoid the “undesirable consequences” of denying an injured party a remedy.<sup>49</sup> Finally, NYSEG asserts that, as stated previously, the equitable factors involved in this case compare favorably with *Niagara Mohawk* in which the Commission ordered refunds.

48. In its brief, National Grid states that all the invoices that NYSEG seeks to have corrected are “finalized” in accordance with the terms of the NYISO tariff. Once an invoice is finalized, National Grid contends the Commission has determined that it is only in the event of “extraordinary circumstances,” and when it has determined that a

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<sup>43</sup> NYSEG, Initial Brief at 26 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 97 FERC ¶ 61,275 at 62,185 (2001)).

<sup>44</sup> NYSEG, Initial Brief at 26 (citing *Estate of French v. FERC*, 603 F.2d 1158, 1163 (5<sup>th</sup> Cir. 1979) (*Estate of French*)).

<sup>45</sup> NYSEG, Initial Brief at 26 (citing *New York Independent System Operator, Inc.*, 110 FERC ¶ 61,244, at 62,008 (2005) (*NYISO*)). In the corresponding footnote, NYSEG also references: *Puget Sound Energy, Inc. v. Jurisdictional Sellers of Energy*, 96 FERC ¶ 63,044 (2001) (*Puget Sound*).

<sup>46</sup> NYSEG, Initial Brief at 26 (citing *NYISO*, 110 FERC ¶ 61,244 at 62,008).

<sup>47</sup> NYSEG, Initial Brief at 26 (citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 240 (2007) (*PJM*)).

<sup>48</sup> NYSEG, Initial Brief at 27 (citing *New York Independent System Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000)).

<sup>49</sup> *Id.*

“significant injustice would result in the absence of Commission action,” that it will reopen finalized invoices.<sup>50</sup> National Grid asserts that, in the only instance where the Commission has directed NYISO to reopen and correct finalized invoices, the Commission explained that its decision to do so was due to the “unusual nature and timing of the errors.”<sup>51</sup> National Grid asserts that the Commission, however, has determined that there are no extraordinary circumstances where the customer challenging final invoices had the full settlement review period in which to challenge the invoices or where the errors were discoverable during the settlement period with careful review.<sup>52</sup>

49. National Grid argues that NYSEG seeks to have 99 months of NYISO invoices issued to scores of former and current NYISO market participants reopened and corrected. However, National Grid avers that the stipulated facts show that: 1) NYSEG had the full settlement review period available to it in which to review and to challenge the metering data and invoices it now seeks to reopen; 2) the errors were visible in the meter data and available for NYSEG’s review; and 3) with careful review, NYSEG should have discovered these errors. Therefore, National Grid alleges that there is no “extraordinary circumstances” present justifying any of the corrections sought by NYSEG.

50. In its brief, NYAPP argues the Commission has the responsibility to ensure the accuracy of rates. NYAPP argues the Commission has amended invoices several times in the past, recognizing the need to provide equitable relief.<sup>53</sup>

51. In their respective briefs, CES, RESA, and IPPNY state that NYSEG has failed to prove that “extraordinary circumstances” exist for the Commission to “over-ride” the existing tariffs and order NYISO to rebill for unaccounted for energy based on the Settlement. RESA further submits that there have been no tariff violations and no other justifications under section 205 of the FPA to find that a retroactive remedy must be fashioned.

52. In its brief, Trial Staff states that the Commission does not need to resort to equity considerations in this case because the contractual provisions of the tariff detail the

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<sup>50</sup> National Grid, Initial Brief at 8 (citing July 24, 2008 Order, 128 FERC ¶ 61,086 at P 20).

<sup>51</sup> National Grid, Initial Brief at 20 (citing *Niagara Mohawk*, 123 FERC ¶ 61,314 at P 25).

<sup>52</sup> National Grid, Initial Brief at 20 (citing *Id.* P 25-26).

<sup>53</sup> NYAPP, Initial Brief at 5, (citing *Exelon*, 114 FERC ¶ 61,298 at P 14) (The Commission explained that correcting improperly billed invoices did not violate the ban on retroactive ratemaking and ordered the correction of the billing errors.).

parties' rights and remedies. Trial Staff notes that section 7.2.A of NYISO's Services Tariff details what to do if overbillings occur from inaccurate metering, by establishing a process to true-up estimates. Further, Trial Staff asserts that the Services Tariff anticipates and establishes the process governing refunds in section 7.2, allowing NYISO to net any overpayment (including interest) against current amounts due or to refund the overpayment. Trial Staff asserts that this is all the Commission needs to resolve these issues. Trial Staff further argues that section 7.4 allows the Commission to order NYISO to change otherwise "final" invoices (order refunds), thus preserving NYSEG's rights to refunds.

53. Nevertheless, Trial Staff states that the equities weigh in favor of granting refunds here because, if the equities are weighed, one common theme emerges: all of the errors in some way relate to the initial start-up operations of NYISO and therefore are not likely to recur.

54. Finally, Trial Staff contends that section 7.4 of NYISO's Services Tariff addresses the finality of bills, and, contrary to other parties' arguments, it does not contain an "extraordinary circumstances" standard for Commission review. Trial Staff contends that the Commission reviews cases such as these under its statutory just and reasonable standard.

55. In its brief, NYISO states that, in determining cases such as the one at bar, the Commission has previously indicated that finalized customer invoices should only be adjusted in the event of extraordinary circumstances where a failure to make such adjustments would result in significant injustice.<sup>54</sup> NYISO asserts that the Commission has found such extraordinary circumstances in only one instance in which the Commission determined that a NYISO customer did not have a reasonable opportunity to review and challenge its settlement information within the time period provided under the NYISO tariffs due to the unusual nature and time of the error.<sup>55</sup> NYISO argues that the Commission has since found that extraordinary circumstances did not exist where the errors were visible to the customer and the customer had the full time period provided by the NYISO tariffs to review and challenge the errors.<sup>56</sup> NYISO states the Commission should consider all the relevant factors in this proceeding in its determination of whether extraordinary circumstances exist or not.

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<sup>54</sup> NYISO, Initial Brief at 5 (citing NYISO July 24, 2009 Order, 128 FERC ¶ 61,086 at P 19-21).

<sup>55</sup> NYISO, Initial Brief at 5(citing *Niagara Mohawk*, 123 FERC ¶ 61,314 at P 24-25).

<sup>56</sup> NYISO, Initial Brief at 5-6, (citing NYISO July 24, 2009 Order, 128 FERC ¶ 61,086 at P 20-21).

56. In its reply brief, NYSEG notes that those opposed to correcting the billing errors refer to an extraordinary circumstances test, but in reality, the Commission has found “extraordinary circumstances” in only one case and used this language in only two cases. NYSEG asserts that these cases are not the only standard that can be applied when determining refunds. NYSEG also observes that opponents of rebilling imply that the extraordinary circumstances test has been applied to every adjustment NYISO has made and that these adjustments have been infrequent. NYSEG states that this is not true because the Commission has ordered NYISO, and other ISOs, on a number of occasions to adjust bills, even after the end of the billing period.<sup>57</sup>

57. In reply, National Grid reiterates arguments from its initial brief. National Grid also states the proponents of rebilling raise various equitable arguments which they believe warrant setting aside NYISO Services Tariff provisions establishing finality rather than address the Commission’s extraordinary circumstances test. National Grid claims this is because these parties know that no such extraordinary circumstances exist in this matter.

58. National Grid also states NYSEG consistently argues that there are significant similarities between this case and *Niagara Mohawk*, which supports NYSEG’s view that invoices finalized for over nine years should be reopened and reissued. National Grid avers, however, that the distinctions between these two cases far outweigh their similarities. First, National Grid states that, in *Niagara Mohawk*, the Commission itself limited the decision based on “the specific circumstances at hand . . . the unusual nature and timing of the errors.”<sup>58</sup> Next, National Grid argues that there are other facts distinguishing the two cases. National Grid avers that, unlike this case, the period to be corrected in *Niagara Mohawk* was short (only five months) and the errors were discovered by two customers shortly after the expiration of the applicable settlement period. Moreover, National Grid states that Niagara Mohawk reported the errors to the Commission and NYISO and requested rebilling. National Grid asserts this meant that the Niagara Mohawk stood to lose millions of dollars in revenue if its request was granted by the Commission. Thus, National Grid contends that in *Niagara Mohawk*, the

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<sup>57</sup> NYSEG, Reply Brief at 9. In the corresponding footnote to support its claims, NYSEG references: *KeySpan-Ravenswood, LLC v. New York Independent System Operator, Inc.*, 127 FERC ¶ 61,086 (2009) (*KeySpan*); *New York Independent System Operator, Inc.*, 117 FERC ¶ 61,305; *H.Q. Energy Services, Inc. v. New York Independent System Operator, Inc.*, 115 FERC ¶ 63,068 (2006); *New York Independent System Operator, Inc.*, 115 FERC ¶ 61,026; *New York Independent System Operator, Inc.*, 114 FERC ¶ 61,267, (2006); *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,347 (2005).

<sup>58</sup> National Grid, Reply Brief at 12 (citing *Niagara Mohawk*, 123 FERC ¶ 61,314 at P 24).

requesting company brought the case to enrich its customers; however, National Grid avers that NYSEG seeks to enrich only itself.

59. In its reply brief, NYAPP states that compelling circumstances exist in this case and necessitate Commission action to order refunds in order to prevent an unjust result.

60. In reply, RESA states that the “extraordinary circumstances” test established by the Commission must be recognized. RESA claims that, even under the criteria in *Estate of French*, NYSEG’s equitable arguments still miss the mark because the passage of time weighs heavily against rebilling, and re-billing does not benefit the public interest.

61. In reply, Trial Staff reiterates its previous arguments from its initial brief.

62. In its reply brief, NYISO asserts that Trial Staff and NYSEG question whether the Commission has established an “extraordinary circumstance” standard for deciding whether to direct revision of finalized invoices. NYISO asserts that such a standard has been established by the Commission in *Niagara Mohawk* and the Commission should uphold it.

## 2. Commission Decision

63. The Commission agrees with those parties who argue that section 7.4 of the Services Tariff reflects Commission policy that, once invoices are finalized, they should generally remain unchanged, even if later found to contain errors, so that the market participants can rely on the charges contained in the invoices. In the presence of extraordinary circumstances, the Commission has ordered the correction of finalized invoices pursuant to section 7.4, when it has determined that significant injustice would result in the absence of Commission action.<sup>59</sup> Here however, we find that, in the circumstances of this case, no significant injustice would result in the absence of Commission action and no other factors compel the Commission to direct NYISO to correct 99 months of finalized invoices.

64. Here, there were a series of minor metering errors, albeit they continued over a sufficiently long period of time to add up to a significant total dollar amount. In this situation, we find that the appropriate focus is not only on the monetary impact on NYSEG, but also on the monetary impact on other market participants of a refund of the accumulated total, which here would be unjustifiably large. We find that the appropriate remedy for the relatively minor billing errors was to correct the cause of the errors prospectively, e.g., correct the polarization and meter multiplier errors related to the Snyder Lake-Hoag meter, and take steps to ensure that these types of errors both do not reoccur and will be quickly discovered if they do reoccur. It does not result in a

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<sup>59</sup> July 24, 2008 Order, 128 FERC ¶ 61,086 at P 20 (citing *Niagara Mohawk*, 123 FERC ¶ 61,314 at P 25).

significant injustice to NYSEG to decline to order NYISO to correct slightly incorrect invoices that NYSEG itself arguably could have discovered, but each of which were so slight and caused so little harm to NYSEG as to go unnoticed for all those years. In contrast, it would cause a significant injustice to the other customers who, through no fault of their own, would now face large additional bills to permit the refunds to flow to NYSEG. Thus, we also agree with certain of the parties that *Niagara Mohawk* is distinguishable on its facts and does not compel a different result here.

65. In this regard, we also find it of importance that the parties could not agree on a methodology to allocate the undercharges to reflect the correction of the past billings as the Settlement's Stipulated Methodology is contested. The difficulty of arriving at a just and reasonable allocation methodology, and the fact that the methodology issue is contested, are factors that can be considered when determining whether to order corrections to finalized invoices.

66. Another factor we take into account is RESA's and CES's claim that retail LSEs and ESCOs are unable to collect debts after a certain amount of time, as their customers change, and the relevant charges associated with any refund to NYSEG are not collectible from new customers under their contracts. The Commission does not agree with Trial Staff's position that this is the fault of insufficient planning by RESA and CES, and that they should be ready to pay revised invoices, plus interest. It is not reasonable to expect a customer with no ability to anticipate what invoices might be in error, and what the dollar impact of the errors might be, to set aside funds to pay for the correction of such speculative errors from years in the past long after the tariff's deadline for correcting such errors has passed. Here, nearly 10 years have passed since some of the subject invoices were finalized. The Commission's exercise of its discretion to order the correction of finalized invoices after that deadline has passed should be rare and not result in imposing an onerous obligation on others.

67. NYSEG and Trial Staff argue that ordering rebilling in this situation will not result in a flood of similar petitions, because this is the only petition before the Commission with these sorts of errors. We find this argument to be speculative. In any event, we find elsewhere in this order that refunds are not appropriate in this instance for the reasons given above.

68. One of NYSEG's main arguments in favor of correcting the subject invoices and refunds is that technological limitations at the time of the errors made it difficult for NYSEG to discover the errors. We agree that detection may have been difficult, but find that this only relates to whether the equities fall against NYSEG for failing to discover the errors, given the *de minimis* dollar impact of each individual billing error. However, our decision does not rest on that issue alone; in addition to weighing the equities as to NYSEG, we have also considered the equities as to others in the market, and the potential inequity and injustice to them (in the form of large additional bills) that would result from ordering refunds.

69. We find distinguishable from the instant case the other NYISO cases generally cited by NYSEG and Trial Staff in support of their position that the Commission routinely orders refunds in cases where NYISO has violated its tariff. Three of the NYISO cases cited involve refunds as part of a settlement agreement between the parties to resolve cases pending before the Commission.<sup>60</sup> Of the other NYISO cases cited: 1) one involved a complaint over the parties' interpretation of certain provisions in NYISO's tariff in which the Commission denied the complaint, and thus did not order refunds and agreed with NYISO regarding the disputed provisions;<sup>61</sup> 2) three involved cases where the settlement periods in question were still open or the invoices were not finalized, which is not the case here;<sup>62</sup> 3) one involved a case where the Commission ultimately decided not to order refunds (although it told the parties to investigate whether refunds were appropriate);<sup>63</sup> and 4) one involved a complaint regarding NYISO's corrections to market prices in the spot energy market filed by the complainant within a few days of the computer error that sent incorrect market price signals to NYISO's markets (not billing corrections for a single customer as is the case here).<sup>64</sup>

70. Finally, NYSEG and Trial Staff also generally cite other cases (i.e. *DTE Energy*,<sup>65</sup> *Exelon*,<sup>66</sup> *Idacorp*,<sup>67</sup> *Puget*,<sup>68</sup> and *Wisconsin Electric*<sup>69</sup>) to show that the Commission has

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<sup>60</sup> *KeySpan-Rowenswood, LLC*, 127 FERC ¶ 61,086 (2009); *H.Q. Energy Services, Inc. v. New York Independent System Operator, Inc.*, 115 FERC ¶ 63,068; *New York Independent System Operator, Inc.*, 114 FERC ¶ 61,267.

<sup>61</sup> *Black Oak Energy, LLC v. New York Independent System Operator, Inc.*, 122 FERC ¶ 61,261 (2008).

<sup>62</sup> *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,347; *New York Independent System Operator, Inc.*, 115 FERC ¶ 61,026; *accord New York Independent System Operator, Inc.*, 117 FERC ¶ 61,305 (NYISO's petition for limited temporary tariff waiver stated that the close out settlements were at or near their close out periods, and, absent a Commission order granting a waiver, NYISO would have to reissue the invoices and not close out its settlements in a timely manner.).

<sup>63</sup> February 9 Order, 126 FERC ¶ 61,100 at P 17; *see also New York Independent System Operator, Inc.*, 129 FERC ¶ 61,217, at P 48 (2009).

<sup>64</sup> *NRG Power Marketing Inc. v. New York Independent System Operator Inc.*, 91 FERC at ¶ 61,346, at 62,165-66 (2000).

<sup>65</sup> *DTE Energy Trading Inc. v. New York Independent System Operator Inc.*, 119 FERC ¶ 61,109 (2007).

<sup>66</sup> *Exelon Corp*, 117 FERC ¶ 61,176 (2006).

<sup>67</sup> *IDACORP*, 433 F.3d 879.

granted refunds in previous RTO/ISO cases, but they are distinguishable because, at the time, the RTOs/ISOs in question did not have specific tariff provisions governing the time limit for invoice corrections similar to section 7.4 of the NYISO Services Tariff. Therefore, these cases do not support a different outcome from the one we reach here.

#### **IV. Settlement and Rehearing Request**

##### **A. Settlement Agreement**

71. A partial settlement agreement on NYSEG's petition for declaratory order was filed with Commission on September 21, 2009. As stated previously, the Settlement, among other things, establishes a refund methodology for the calculation and issuance of corrected invoices in the event that the Commission orders rebilling and refunds to NYSEG in the proceedings. NYSEG also agreed in the Settlement not to pursue its claims related to the Ausable-Stickney Bridge, Andover-Palmiter, and Willow-Bishop Hill meters, all of which were described in NYSEG's December 23, 2008 petition.<sup>70</sup>

72. Trial Staff, NYSEG, NYISO, NYAPP, and Contesting Parties<sup>71</sup> filed initial comments on the Settlement. Trial Staff, NYSEG, NYISO, and National Grid filed reply comments. On December 22, 2009, the settlement judge issued a report to the Commission<sup>72</sup> stating that the settlement is contested and identifying the matters at issue.<sup>73</sup>

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<sup>68</sup> *Puget Sound*, 96 FERC ¶ 63,044.

<sup>69</sup> *Wisconsin Electric*, 114 FERC ¶ 61,005.

<sup>70</sup> Settlement Agreement at P 5.

<sup>71</sup> The Contesting Parties include the Long Island Power Authority and its subsidiary, the Long Island Lighting Company (collectively, LIPA), Consolidated Edison Company of New York, Inc. (Con Edison), and Central Hudson Gas & Electric Corp. (Central Hudson).

<sup>72</sup> *Report of Settlement Judge on Contested Partial Settlement*, 129 FERC ¶ 63,025 (2009).

<sup>73</sup> The presiding ALJ did not certify the Settlement because, pursuant to *American Electric Power Service Corp.*, 100 FERC ¶ 61,346 (2002) and *City of Anaheim et al v. California Independent System Operator Corp.*, 101 FERC ¶ 61,392 (2002), a settlement judge may not certify a contested offer of settlement or make substantive findings regarding a contested offer of settlement. *Id.* P 59.

73. Because the Commission has determined above not to exercise its discretion to reopen and correct the subject invoices, we need not reach a decision on whether to approve the refund methodology in the Settlement. Accordingly, we reject the Settlement as moot.

**B. NYMPA Clarification or Rehearing Request**

74. On April 21, 2009, NYMPA/MEUA filed a request for clarification or rehearing of the Commission's order establishing settlement judge procedures. Specifically, NYMPA/MEUA sought clarification or rehearing regarding the potential for the imposition of National Grid's energy-related costs on wholesale transmission customers and the imposition of the costs associated with NYISO's participation in settlement discussions on other market participants. NYMPA/MEUA request that the Commission clarify that only the two responsible parties, NYSEG and National Grid, are required to pay the costs associated with this proceeding.

75. Because the Commission has determined above not to reopen and correct the subject invoices, NYMPA/MEUA's request for clarification or rehearing regarding the potential for the imposition of National Grid's energy-related costs on other wholesale transmission customers is denied as moot.

The Commission orders:

- (A) NYSEG's petition for a declaratory order requiring rebilling is denied.
- (B) The Settlement filed on September 21, 2009 is rejected as moot.
- (C) NYMPA/MEUA's request for clarification or rehearing regarding the potential for the imposition of National Grid's energy-related costs on other wholesale transmission customers is denied as moot.

By the Commission. Commission LaFleur is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.