

142 FERC ¶ 61,151  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Electric & Gas Corporation

Docket No. EL09-26-003

ORDER DENYING REHEARING

(Issued February 27, 2013)

1. This order addresses a request for rehearing filed by New York State Electric & Gas Corporation (NYSEG) of the Commission's October 28, 2010 order (October 28, 2010 Order)<sup>1</sup> in the above matter. Specifically, the October 28, 2010 Order, among other things, denied NYSEG's petition that the Commission issue a declaratory order directing the New York Independent System Operator, Inc. (NYISO) to correct certain invoices dated between 1999 and 2008 in the NYSEG and Niagara Mohawk Power Corporation *d/b/a* National Grid (National Grid) subzones. For the reasons discussed below, we deny NYSEG's request for rehearing of that order.

**I. Background**

**A. Petition for Declaratory Order**

2. In its petition for declaratory order, NYSEG requested that the Commission require NYISO to rebill certain charges to correct for NYISO incorrectly invoicing NYSEG for purchases of energy dating back to 1999 and totaling approximately \$21 million of which approximately 25 percent is interest calculated over nine years (or approximately \$5 million). The principal amount of NYSEG's claim is approximately \$16 million, of which \$11 million resulted from NYSEG's own metering errors. NYSEG contended that National Grid's meters and metering procedures resulted in a pattern of errors. NYSEG also asserted that inaccurate invoices resulted from these metering errors at various metering facilities and that the errors were only identified recently.

---

<sup>1</sup> *New York State Electric & Gas Corporation*, 133 FERC ¶ 61,094 (2010) (October 28, 2010 Order).

3. NYSEG stated that, while the time period under section 7 of NYISO's Market Services Tariff (Services Tariff or tariff) for NYISO to correct the invoices had long passed and the invoices were therefore "finalized," section 7.4 of the Services Tariff provides that customers may still appeal to the Commission for redress and that NYSEG was seeking such redress in its petition. In support, NYSEG relied on the following emphasized 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>

4. Several parties, including National Grid and NYISO, filed protests and comments on NYSEG's petition. On March 30, 2009, the Commission issued an order establishing settlement judge procedures.<sup>3</sup>

#### **B. Contested Settlement**

5. On September 21, 2009, NYSEG filed a settlement on behalf of several parties to the proceeding (Settling Parties), which would resolve the issue of the methodology to be used to calculate and issue corrected invoices for purposes of refunds, but which reserved for briefing and Commission decision the issue of whether NYISO should be directed to correct the invoices in the first place (Settlement).

6. Exhibit 1 to the Settlement contained 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 Commission.<sup>4</sup> The Joint Stipulation set out the evolution of the NYISO billing and settlement process from NYISO's inception in 1999 to the current system in operation

---

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

<sup>3</sup> *New York State Electric & Gas Corp.*, 126 FERC ¶ 61,292 (2009) (March 30, 2009 Order).

<sup>4</sup> Because the parties who contested the settlement agreement were not parties to the underlying settlement discussions, 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 limited to the Stipulated Methodology, not the stipulated facts, and these parties did not contest that the claimed billing errors, in fact, occurred.

since 2007.<sup>5</sup> The Settling Parties stated that NYSEG will pursue its claims of meter errors totaling approximately \$21 million, of which approximately \$5 million is interest. The Settlement was contested.

7. In their comments, NYSEG, Commission Trial Staff (Trial Staff), and New York Association of Public Power (NYAPP) supported the Settlement and as to the reserved issue, urged the Commission to order NYISO to correct the finalized bills and issue appropriate refunds. NYSEG and Trial Staff generally asserted 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) it is essential for the Commission to order refunds when the filed rate has been violated due to erroneous bills; and (4) there is no standard requiring "extraordinary circumstances" for Commission review of refund requests.

8. NYISO, National Grid, Retail Energy Supply Association (RESA), NRG Power Marketing, LLC (NRG), Consolidated Edison Solutions (CES), and Independent Power Producers of New York, Inc. (IPPNY) opposed the Settlement and, therefore, as to the reserved issue, opposed reopening finalized invoices and rebilling customers. The opposing parties generally asserted 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 in NYISO's tariffs developed by the stakeholders. The opposing parties asserted that there are no "extraordinary circumstances" warranting the Commission overriding NYISO's existing tariff provisions on billing finality. Finally, several of these parties asserted that energy service companies (ESCOs) rely on metering authorities to perform their metering services accurately, and ESCOs generally cannot rebill end-use customers.

---

<sup>5</sup> 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. 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. Joint Stipulation at 10-12.

### C. The October 28, 2010 Order

9. After considering the record, the Commission in the October 28, 2010 Order denied the petition for declaratory order and rejected the Contested Settlement as moot. The Commission first held that section 7.4 of the Services Tariff provides notice to customers that “finalized” invoices are subject to correction by the Commission, but that nothing in the filed rate doctrine requires the Commission to order corrections. The Commission further held that section 7.4 reflects its policy that, once invoices are “finalized,” they should generally remain unchanged, even if errors are found later, so that market participants can rely on the charges contained in the invoices. The Commission stated that, in the presence of extraordinary circumstances, it 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 action.<sup>6</sup> However, the Commission ruled that, under 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 finalized invoices for 99 months.

10. The Commission found that, 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. The Commission found that, in this situation, 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. The Commission found that the appropriate remedy for the series of relatively minor billing errors was to correct the cause of the errors prospectively and take steps to ensure that these types of errors both do not reoccur and will be quickly discovered if they do reoccur. The Commission found that it does not result in a 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, the Commission found that 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. The Commission stated that it also agreed with certain of the parties that the 2008 *Niagara Mohawk* Order is distinguishable on its facts and does not compel a different result here.

---

<sup>6</sup> October 28, 2010 Order, 133 FERC ¶ 61,094 at P 63 (citing *New York Independent System Operator, Inc.*, 128 FERC ¶ 61,086, at P 20 (2009) (July 24, 2009 Order) (citing *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314 (2008) (2008 *Niagara Mohawk* Order)).

11. The Commission also considered a number of other factors in concluding that the invoices should not be ordered corrected. First, the Commission found 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 Commission stated that 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.

12. The Commission stated that another factor it took into account were claims of certain parties that retail Load Serving Entities (LSEs) and Energy Service Companies (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 stated that 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, the Commission observed, nearly 10 years had passed since some of the subject invoices were finalized. The Commission stated that the 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.

13. Next, the Commission rejected, as speculative, arguments that ordering rebilling in this situation will not result in a flood of similar petitions. The Commission then rejected one of the principal arguments NYSEG made in support of correcting the subject invoices and ordering refunds, i.e., that technological limitations at the time of the errors made it difficult, if not impossible, for NYSEG to discover the errors. The Commission stated that it agreed that detection may have been difficult, but found 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, the Commission continued, the Commission's decision did not rest on that issue alone; in addition to weighing the equities as to NYSEG, the Commission stated that it 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. The Commission also distinguished a number of Commission cases cited by NYSEG and Trial Staff.

14. Finally, the Commission rejected the Contested Settlement as moot because, as a result of its decision to not exercise its discretion to reopen and correct the subject invoices, the Commission did not need to reach a decision on whether to approve the refund methodology in the Settlement.<sup>7</sup>

## II. Discussion

15. As discussed more fully below, the Commission denies NYSEG's request for rehearing.

### A. Section 7.4 and Precedent on the Finality of Invoices

#### 1. NYSEG Arguments

16. NYSEG asserts that the Commission erred by choosing to elevate policy over tariff interpretation and Commission precedent. NYSEG states that, under section 7.4 of NYISO's Services Tariff, a market participant may request that the Commission order NYISO to correct finalized invoices. NYSEG asserts that, although the Commission is not required to grant this request, and the Commission's "discretion is at its zenith when deciding what remedy to apply,"<sup>8</sup> the Commission's "discretion is not without its limits."<sup>9</sup> NYSEG argues that the Commission must provide a reasoned explanation for its decision and show that it has considered all the relevant factors, that it has struck a reasonable accommodation among them, and that it has arrived at an equitable decision in the circumstances,<sup>10</sup> none of which, NYSEG contends, the Commission did in the October 28, 2012 Order.

17. NYSEG claims that, in the October 28, 2010 Order, the Commission stated it was adopting a "new policy" regarding refunds in NYISO markets and promoted this policy above the tariff provision and case law that gave rise to the policy in the first instance.

---

<sup>7</sup> *Id.* P 73.

<sup>8</sup> NYSEG Request for Rehearing at 9 (citing *Exxon Co., USA v. FERC*, 182 F.3d 30, 48 (D.C. Cir. 1999); *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992); *Wisconsin Elec. Power Co.*, 602 F.2d 452, 457 (D.C. Cir. 1979)).

<sup>9</sup> NYSEG Request for Rehearing at 9 (citing *Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999)).

<sup>10</sup> NYSEG Request for Rehearing at 9-10 (citing *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003)).

As this alleged “new policy,” NYSEG cites the following passage from the October 28, 2010 Order:

[O]nce invoices are finalized, they should generally remain unchanged, even if later found to contain errors, so that the market participants can rely on the changes 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>11</sup>

NYSEG states it is a supporter of what it characterizes as this “new policy” to advance the principles of finality and financial certainty, but when extraordinary circumstances occur and market participants face significant injustice, the need for accuracy outweighs concerns for financial certainty.<sup>12</sup>

18. NYSEG contends that section 7.4 is unique among ISO tariffs because, although it serves primarily as a finality clause, it expressly contains a “safety net” that NYSEG argues “invites” Commission intervention to grant redress in “extraordinary circumstances” if “significant injustice would occur.” NYSEG alleges that NYISO’s stakeholders have voted to reaffirm this provision even though they could have chosen to adopt a different finality clause on a number of occasions. NYSEG states that, even when NYISO shortened the period for correcting metering errors to 55 days, NYISO stakeholders maintained the safety net, which, NYSEG asserts, indicates a desire to temper finality and financial certainty with protection for market participants that might otherwise suffer harm, as here, from large and serious errors. Therefore, NYSEG argues that the Commission must give proper weight to section 7.4 in its role as a safety net as well as in its role as a finality clause. NYSEG declares that, if the Commission does not grant NYSEG redress for more than \$21 million in losses resulting from errors that were exceedingly difficult to pinpoint, the Commission must explain what purpose section 7.4 serves in NYISO’s tariff, and why it has been maintained by the NYISO stakeholders.

19. Next, NYSEG argues that the October 28, 2010 Order does not conform to the Commission’s own precedent. NYSEG takes issue with the Commission’s statement in the October 28, 2010 Order that many of the cases cited by NYSEG and Trial Staff in

---

<sup>11</sup> NYSEG Request for Rehearing at 10 (citing October 28, 2010 Order, 133 FERC ¶ 61,094 at P 63).

<sup>12</sup> *Id.* (citing 2008 *Niagara Mohawk* Order, 123 FERC ¶ 61,314 at P 25).

support of their position are inapplicable to the instant proceeding because those cases did not involve finality provisions, such as section 7.4.<sup>13</sup> NYSEG asserts:

[a]lthough it is true that the relevant ISO tariffs in those cited cases did not contain a provision *prohibiting* further correction of invoices, those tariffs *also* did not contain an *express invitation* for stakeholders to exercise their “right to seek redress” and petition the Commission for a remedy, as section 7.4 does.<sup>14</sup>

NYSEG argues that the Commission must, therefore, explain how the precedent, which involves neither a finality clause nor an exception to that clause, is inapplicable to cases brought under section 7.4, where NYSEG asserts that “the Commission is *invited* to exercise its discretion when appealed by a market participant.”<sup>15</sup>

20. Using the Commission’s November 9, 2006 order accepting a settlement in *Exelon* as an example, NYSEG states that Exelon filed a complaint against PPL Electric Utilities Corporation (PPL) and PJM Interconnection, Inc. (PJM) on behalf of the Pennsylvania Energy Company (PECO), requesting reimbursement for over \$39 million because the energy was consumed by PPL, but incorrectly billed to PECO due to an error in PJM’s computer system.<sup>16</sup> NYSEG notes that, although there was no PJM tariff mechanism inviting Commission “redress” in cases of improper billing, the Commission nonetheless ordered refunds stating, “[s]ince PECO was overcharged and had no way of knowing that they were being charged for energy properly attributable to PPL, we find that PECO is entitled to reimbursement of the overcharged amount.” NYSEG avers that the Commission should not ignore this precedent due to the presence of section 7.4 especially when that same clause “invites” the Commission to intervene to prevent injustice.

---

<sup>13</sup> NYSEG Request for Rehearing at 12 (citing *DTE Energy Trading, Inc. v. Midwest Independent Transmission Operator, Inc.*, 119 FERC ¶ 61,109 (2007); *Exelon Corp. v. PPL Utilities Corp.*, 117 FERC ¶ 61,176 (2006) (November 9, 2006 *Exelon* Order); *IDACORP Energy L.P. v. FERC*, 433 F.3d 879, 882 (D.C. Cir. 2006); *Puget Sound Energy Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 96 FERC ¶ 63,044 (2001); *Wisconsin Electric Power Co. v. Midwest Independent System Operator, Inc.*, 114 FERC ¶ 61,005 (2006)).

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

<sup>15</sup> *Id.*

<sup>16</sup> NYSEG Request for Rehearing at 12 (citing November 9, 2006 *Exelon* Order, 117 FERC ¶ 61,176).

## 2. Commission Decision

21. We deny rehearing on the issues raised by NYSEG. At the outset, NYSEG is incorrect in characterizing the October 28, 2010 Order as establishing a “new policy.” The Commission previously applied the kind of analysis used in that order in 2008 in the 2008 *Niagara Mohawk* Order,<sup>17</sup> in the July 24, 2009 Order,<sup>18</sup> and in the October 12, 2010 Order denying rehearing of the July 24, 2009 Order.<sup>19</sup> Further, the precedent the Commission applied involved a NYISO OATT provision nearly identical to section 7.4 of the Services Tariff. Thus, the Commission did not create “new policy,” but applied existing and germane precedent.

22. In addition, NYSEG’s claim that section 7.4 is a “safety net” that “invites” the Commission to order the correction of billing errors overstates the purpose of that provision and ignores the Commission’s statements that it will exercise its discretion under section 7.4 of NYISO’s Services Tariff and order corrections after the deadline of the tariff has passed only in very limited, extraordinary circumstances. Section 7.4 is a limited exception to the general rule that, once the deadline for correcting bills has passed, the bills are final. Hence, there is no reasonable expectation that the Commission will routinely grant a request to correct; such an expectation would eliminate the Commission’s discretion. As the Commission stated in the October 12, 2010 NYISO Order (denying rehearing of the July 24, 2009 NYISO Order):

the finality provisions in NYISO’s OATT were negotiated by its stakeholders and reflect their decision on the appropriate balance between the need for invoice accuracy and financial certainty. One of the benefits that goes along with rate certainty and the finality of invoices issued to market participants is the tradeoff that, at some point, incorrect bills would become final under section 7.2A of the OATT [which is identical to section 7.4 of the Services Tariff] and not subject to further correction by NYISO. . . . While section 7.2A of the OATT states that Commission or a court may order that finalized invoices be reopened, we have exercised our right to do so since the adoption of this provision of the tariff under extraordinary circumstances where significant injustice would result in the absence of Commission action. It does not appear that this provision is meant to usurp the normal timeline for NYISO and its participants to

---

<sup>17</sup> 123 FERC ¶ 61,314 at P 25.

<sup>18</sup> 128 FERC ¶ 61,086.

<sup>19</sup> *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,028 (2010) (October 12, 2010 Order).

review and finalize invoices by operating as some sort of routinely-invoked “safety net.” Moreover, the Commission has long recognized the important role that billing finality and the resulting financial certainty play in the effective functioning of RTO markets.<sup>20</sup>

23. Thus, we find that section 7.4 does not “invite” the Commission to act to order billing errors to be corrected beyond the time deadline established by the tariff, and such action is intended to take place only in narrow circumstances where the Commission finds that such extraordinary relief is merited; it is not a blank check to automatically reopen billing solely because one market participant paid too much and others paid too little at some point in the past due to a billing error.

24. Despite stating that it “generally supports” the application of the “new policy” of the October 28, 2010 Order, NYSEG appears to be claiming that the Commission should have applied a different, apparently more lenient standard, for correcting past billing errors, allegedly derived from precedent such as the November 9, 2006 *Exelon* Order.<sup>21</sup> We disagree. To NYSEG, that order is an example of the Commission ordering refunds to correct past billing errors; however, unlike the NYISO Services Tariff, the tariff in question had neither a finality clause nor an exception to that clause. In the underlying April 18, 2005 *Exelon* Order setting the case for settlement judge procedures, in finding that Exelon’s affiliate, PECO Energy Company (PECO), was entitled to reimbursement for erroneously billed charges,<sup>22</sup> the Commission stated:

[w]e find, absent any specific tariff provision establishing a time frame to dispute such errors, that no specific time frame exists within which to dispute this billing error. . . . Furthermore, based on the billing statement, PECO would have had no knowledge that it was being overcharged until PJM completed its investigation in 2003.<sup>23</sup>

Thus, where the tariff did not expressly limit when past invoices can be reopened to correct billing errors, the Commission interpreted the tariff as having no deadline to correct prior billing errors and, as equity permitted, ordered refunds “to ensure that the customer only pays the filed rate.”<sup>24</sup> The Commission’s decision in that case, therefore,

---

<sup>20</sup> *Id.* P 24 (internal citations omitted).

<sup>21</sup> November 9, 2006 *Exelon* Order, 117 FERC ¶ 61,176.

<sup>22</sup> April 18, 2005 *Exelon* Order, 111 FERC ¶ 61,065 at P 24.

<sup>23</sup> *Id.* P 26.

<sup>24</sup> *Id.* P 29.

must be read in light of that specific tariff. But, we do not agree that that case created a generally applicable policy of requiring that all past billing errors be corrected in any and all circumstances, particularly where, as here, the NYISO tariff expressly includes a deadline for correcting billing errors absent special order of the Commission – an exception which the Commission previously has interpreted as requiring the applicant to meet the test expressed in the 2008 *Niagara Mohawk* Order.

25. Further, although the Commission did not apply the same test in the *Exelon* orders that the Commission later applied in the 2008 *Niagara Mohawk* Order and other NYISO cases, the Commission in the April 18, 2005 *Exelon* Order similarly considered equity as a basis to allow refunds. Notably, in the April 18, 2005 *Exelon* Order, the Commission took into account that the claimant in that case had no way of knowing from the bills it had received that they contained errors.<sup>25</sup> In contrast, in this case, NYSEG reasonably could have discovered the billing errors as they occurred over the nine-year period.

26. The policy applied in the *Exelon* orders is, therefore, inapplicable here because the NYISO tariff expressly contains a billing correction deadline. Moreover, the Commission's action here in the October 28, 2010 Order, is fully consistent with the *Exelon* orders because the Commission has enforced the “filed rate.”<sup>26</sup> Indeed, since the deadline for correcting billing errors in NYISO's tariff passed well before NYSEG discovered the errors, much less filed its petition, the “filed rate” in the instant case became the actual billed amounts once that tariff deadline passed.

27. Accordingly, NYSEG's question – What purpose does section 7.4 serve if the Commission does not order the correction of the billing errors at issue here? – improperly assumes that the purpose of the provision is to *always* require the correction of all billing errors irrespective of the specific circumstances. Rather, the purpose of that provision is to authorize post-deadline corrections by the Commission upon request *if* the Commission finds that it is appropriate to do so, i.e., if its standard for ordering such corrections has been met. Here, in the October 28, 2010 Order, the Commission properly found that NYSEG failed to meet that standard and that circumstances did not warrant ordering the billing corrections.

---

<sup>25</sup> April 18, 2005 *Exelon* Order, 111 FERC ¶ 61,065 at PP 24, 27.

<sup>26</sup> See July 24, 2009 Order, 128 FERC ¶ 61,085 at P 22 (finding that the provisions of the NYISO OATT that, like section 7.4 of the Services Tariff, provide that invoices are final once the billing correction timeline has passed and that billing may be reopened after the deadline has passed pursuant to order of the Commission, “make up the filed rate.”).

**B. Application of Commission Standard for Ordering Billing Corrections Under Section 7.4 of the NYISO Tariff**

**1. NYSEG Arguments**

28. NYSEG states that, in the October 28, 2010 Order, the Commission found that the 2008 *Niagara Mohawk* Order was distinguishable from the present situation.<sup>27</sup> NYSEG argues that, although the circumstances in the 2008 *Niagara Mohawk* Order may vary in some manner from those in the instant proceeding, the 2008 *Niagara Mohawk* Order stands for a general policy that, in the presence of extraordinary circumstances, the Commission will order the correction of finalized invoices when it has determined that significant injustice would result absent Commission action.<sup>28</sup> NYSEG maintains that the facts of this case need not mirror those of the 2008 *Niagara Mohawk* Order for the circumstances to qualify as extraordinary or for significant injustice to occur. Consequently, NYSEG avers that the Commission has failed to convincingly explain: (1) how the circumstances that led to these metering errors were not “extraordinary;” or (2) why NYSEG has not suffered a “significant injustice” in being forced to shoulder these losses alone.

29. First, NYSEG alleges that the establishment of an ISO is an “extraordinary circumstance.” NYSEG argues that, of the six ISOs, NYISO is the only ISO to begin simultaneously day-ahead and real-time energy market operations, as well as ancillary services in capacity markets, rather than phasing in market functions over time. NYSEG states that this ambitious approach, supported by Commission policies, resulted in numerous early challenges with markets, data processing systems, and NYISO’s billing system.<sup>29</sup> Therefore, NYSEG contends that NYISO’s start-up constituted extraordinary circumstances that are very unlikely to reoccur. NYSEG argues that NYISO’s “growing pains” made the billing errors exceptionally hard to detect, as acknowledged in the October 28, 2010 Order,<sup>30</sup> and the Commission, therefore, erred in finding that the metering errors did not constitute extraordinary circumstances.

30. Second, NYSEG asserts that its approximately \$21 million in losses constitutes a “significant injustice to NYSEG.” NYISEG notes that the Commission held that these

---

<sup>27</sup> NYSEG Request for Rehearing at 13 (citing October 28, 2010 Order, 133 FERC ¶ 61,094 at P 64).

<sup>28</sup> *Id.* (citing October 28, 2010 Order, 133 FERC ¶ 61,094 at P 63).

<sup>29</sup> NYSEG Request for Rehearing at 14.

<sup>30</sup> *Id.* (citing October 28, 2010 Order, 133 FERC ¶ 61,094 at P 68).

losses were “so slight and caused so little harm to NYSEG as to go unnoticed for all those years.”<sup>31</sup> NYSEG argues that the Commission failed to engage in reasoned decision-making because the Commission also found that correcting the invoices would inflict “large additional bills” and “inequality and injustice” on ESCOs. NYSEG contends that this is not reasoned decision-making because none of the ESCOs will suffer more than slightly over three percent of the losses experienced by NYSEG and the majority of the affected ESCOs would be re-billed for less than 50 percent of the amounts due. NYSEG claims that it is arbitrary and capricious for the Commission to deem the more than \$21 million of NYSEG’s loss to be insignificant, but the losses of the ESCOs to be significant.

31. Finally, NYSEG argues that the Commission failed to weigh the equities between NYSEG and National Grid. NYSEG states that National Grid was the meter authority for six of the seven meters involved. NYSEG also alleges that National Grid was: (1) responsible for the majority of the incorrect data submissions to NYISO; (2) the meter authority for Snyder Lake-Hoag, which was the longest-lived of the errors; and (3) enjoyed 54 percent of the windfall that resulted from the errors. NYSEG asserts that National Grid is also a transmission owner of comparable size to NYSEG; therefore, it asserts, if the losses involved in this case are “slight” or “minor” as compared to NYSEG, then correcting the errors would not impose an onerous obligation on National Grid. Accordingly, NYSEG requests that, if it refuses to direct NYISO to correct the invoices using the Stipulated Methodology, the Commission should consider crafting a remedy that considers the extraordinary circumstances of the NYISO start-up and balances the equities between NYSEG and National Grid.

## **2. Commission Decision**

32. The Commission is not persuaded by NYSEG’s arguments. As an initial matter, NYSEG, as the complainant, has the burden of demonstrating that extraordinary circumstances exist.<sup>32</sup> To date, the Commission has found extraordinary circumstances warranting its ordering bill corrections after the tariff deadline in only one proceeding, the 2008 *Niagara Mohawk* Order. In the 2008 *Niagara Mohawk* Order, the Commission found that,

---

<sup>31</sup> *Id.* P 15 (citing October 28, 2010 Order, 133 FERC ¶ 61,094 at P 64).

<sup>32</sup> See *Minnesota Power & Light Co.*, 23 FERC ¶ 61,393, at 61,835 (1983) (Section 206 itself does not contain a reference to burden of proof, but rather is controlled by section 556(d) of the Administrative Procedure Act, which imposes the burden on “the proponent of a rule or order . . .”).

in the specific circumstances at hand, it is appropriate to order the NYISO to adjust the invoices for the period March through August 2005 to correct for the effects of the erroneous data on which they were computed. To refrain from doing so would yield an unjust and unreasonable result. . . . This is an unusual situation in which untimely action by the market participants was not due to failure on their part to act once the errors were discovered, but rather by the unusual nature and timing of the errors.<sup>33</sup>

However, as the Commission found in the October 28, 2010 Order,<sup>34</sup> this case is distinguishable on its facts from the 2008 *Niagara Mohawk* Order and, therefore, we affirm that the latter order does not support directing NYISO to open the long-settled invoices here. In the 2008 *Niagara Mohawk* Order, the Commission found that the errors arose at the very end of the market settlement and correction process, when incorrect data was introduced into allegedly “corrected” bills: a mishap that the utilities could not reasonably have anticipated and, therefore, they could not be faulted for not reviewing again, the purportedly final and corrected invoices for errors.<sup>35</sup> Further, in the 2008 *Niagara Mohawk* Order, the Commission observed that the utility had only a 25-day review period to detect the errors in the purportedly corrected bills.<sup>36</sup> In contrast, in this proceeding, NYSEG had the opportunity to review the 1999 through October 1, 2002 invoices during a customer review period of twelve months, four months to review invoices spanning October 1, 2002 to December 31, 2006, and seven months to review invoices issued in 2007 and 2008.

33. NYSEG’s claim that the establishment of an ISO is a circumstance not likely to reoccur, even if true, is not persuasive. That the billing errors began during NYISO’s start up does not mean that NYSEG could not have discovered the billing errors at some point, especially given that the billing errors continued well past NYISO’s start up. Moreover, the NYISO billing and settlement system was developed with the full participation of the NYISO stakeholders, including NYSEG, following NYISO’s shared governance process,<sup>37</sup> and evolved from NYISO’s inception to the current system in

---

<sup>33</sup> 2008 *Niagara Mohawk Order*, 123 FERC ¶ 61,314 at P 24.

<sup>34</sup> October 28, 2010 Order, 133 FERC ¶ 61,094 at P 64.

<sup>35</sup> See 2008 *Niagara Mohawk Order*, 123 FERC ¶ 61,314 at PP 6, 24; see also *New York Independent System Operator, Inc.*, 128 FERC ¶ 61,086, at P 21 (2009), *reh’g denied* 133 FERC ¶ 61,028 (2010).

<sup>36</sup> *Id.* P 24.

<sup>37</sup> Joint Stipulation at 10.

operation since 2007.<sup>38</sup> At NYISO's startup, the billing process defined in the Services Tariff contained a longer settlement period ostensibly to allow market participants more billing review time as the system was new and developing. Moreover, NYISO and its stakeholders refined the billing and settlement process over time, as reflected in the fact that the settlement period was gradually shortened as NYISO's billing system improved.

34. Further, we find that, through this nine-year period of minor billing errors, NYSEG was able, had it undertaken a close review of the data and invoices, to ascertain the existence of the subject billing errors. As NYSEG conceded, NYSEG has not shown that it was impossible to detect the instant billing errors, but only that detection may have been difficult because of their small size and because the billing data was presented in aggregate form.<sup>39</sup> NYSEG should have been aware of the limitations of the initial billing and settlement computer system and should have taken these limitations into consideration when reviewing invoices submitted during the settlement periods. Accordingly, the Commission does not find the creation of NYISO, in and of itself, to necessarily be an extraordinary circumstance to warrant ordering NYISO to re-bill market participants for settled invoices for approximately 99 months of service, especially when all other market participants were subject to the same billing and settlement system.

35. Next, NYSEG asserts that the size of its loss, approximately \$21 million, was significant to NYSEG and the Commission did not properly balance the equities fairly among NYSEG, the ESCOs, and National Grid. The Commission disagrees. The \$21 million dollar amount merely reflects the aggregate impact of a large number of individually small, recurring metering errors by NYSEG and National Grid over roughly a nine-year period (a figure which reflects a large amount of interest calculated at the Commission's specified rate). In the October 28, 2010 Order, the Commission balanced the *de minimis* dollar impact on NYSEG of each individual billing error at the time each such billing error occurred over the nine-year period against the substantial, immediate rate effect on current customers of a large, immediate billing refund amounting to \$21 million. The Commission reasonably found that the disproportionately large effect of a

---

<sup>38</sup> Joint Stipulation at 9.

<sup>39</sup> NYSEG, Reply Brief at 13-14. ("NYSEG has never claimed that it was physically impossible to find the errors if one knew where to look for them, only that the errors were extremely difficult to detect in the available data . . ."). We also note that the Commission did not, as NYSEG asserts at page 14 of its Request for Rehearing, agree that the billing errors were "exceptionally hard, even impossible, to detect." The Commission only stated, "[w]e agree that detection may have been difficult...." October 28, 2010 Order, 133 FERC ¶ 61,094 at P 68.

\$21 million refund on these current customers outweighs the past series of small effects on NYSEG. And, the Commission stated that \$11 million of this amount was a result of NYSEG's own metering errors.<sup>40</sup> Further, in its Reply Brief, NYISO observed that, if the Commission directed NYISO to adjust finalized customer invoices to account for NYSEG and National Grid's metering errors, National Grid would be responsible for funding approximately \$12.5 million of the adjustment, and LSEs and municipalities in National Grid's service territory would be responsible for approximately \$9 million of the adjustment.<sup>41</sup> The Commission took into account that LSEs and ESCOs cannot collect these debts after such a long period 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.<sup>42</sup> Therefore, based on these facts, the Commission properly balanced the equities between all parties involved and stated that "in addition to weighing the equities as to NYSEG, we have also considered the equities as to others in the market [ESCOs], and the potential inequity and injustice to them (in the form of large additional bills) that would result from ordering refunds."<sup>43</sup>

36. Finally, we reject NYSEG's request that we consider a remedy to reflect the relative equities between NYSEG and National Grid. NYSEG simply points out that incorrect billing necessarily results in some entities being charged too little, while others are charged too much. However, the effect of each individual billing error on National Grid as it occurred was *de minimis*, just like the *de minimis* effect of each of those errors on NYSEG as they occurred.

37. In any event, NYSEG's requested relief cannot be granted as it would require the application of the Stipulated Methodology of the Settlement, which was contested and which was rejected. And since the past billings are final and therefore continue to constitute the filed rate, we have no basis to craft any special remedy that results in different bills.

---

<sup>40</sup> See October 28, 2010 Order, 133 FERC ¶ 61,094 at n.7. In its Initial Brief, at 5-6, NYISO stated that approximately \$13.6 million of the approximately \$21 million amount at issue (which includes interest) was the result of NYSEG's metering errors and approximately \$ 7.9 million was the result of National Grid's metering errors.

<sup>41</sup> NYISO Initial Brief at 6.

<sup>42</sup> October 28, 2010 Order, 133 FERC ¶ 61,094 at P 66.

<sup>43</sup> *Id.* P 68.

**C. Rejection of the Settlement Agreement and Stipulated Allocation Methodology**

**1. NYSEG Arguments**

38. NYSEG asserts that the Commission erred in rejecting the Contested Settlement with its Stipulated Allocation methodology as moot because it decided not to order the affected invoices corrected.<sup>44</sup> In particular, NYSEG takes issue with the Commission's statement that it finds it "of importance that the parties could not agree on a methodology to allocate the undercharges."<sup>45</sup> NYSEG argues that the Commission has great latitude when crafting remedies and its discretion was not limited to use of the Stipulated Methodology of the Settlement Agreement.

39. NYSEG also avers that the Commission fails to recognize that the opposition to the Stipulated Methodology was limited. NYSEG states that, among the parties contesting the agreement, four protested only the possible use of NYISO's bad debt mechanism. NYSEG states that it already had indicated its willingness to surrender its claims to any bad debt, and no other party has legitimate grounds to protest NYSEG's decision not to seek recovery of bad debt. NYSEG continues by asserting that the other party to contest the Settlement, NYAPP, contested the Settlement only to the extent that entities that had not initially been allocated unaccounted-for-energy (UFE) would be required to make refunds. NYSEG alleges that the Stipulated Methodology would have only re-billed LSEs that had been historically allocated UFE and had thus benefitted from the windfall.

40. As for the allocation of any refund to LSEs in NYSEG's subzones, NYSEG states that it is solely responsible for UFE in its subzones and no LSEs suffered losses due to the billing errors and thus are not entitled to a refund.<sup>46</sup> Therefore, NYSEG asserts that the concerns of parties contesting the Settlement and Stipulated Methodology were either illusory or involved amounts that NYSEG was willing to forgo. Thus, it asserts, the Commission did not engage in reasoned decision-making in rejecting the Settlement and Stipulated Methodology as unworkable.

---

<sup>44</sup> NYSEG Request for Rehearing at 17.

<sup>45</sup> *Id.* (citing October 28, 2010 Order, 133 FERC ¶ 61,094 at P 65).

<sup>46</sup> *Id.* p. 18.

## 2. Commission Decision

41. The Commission rejected the Settlement as moot because, as a result of its decision to not exercise its discretion to reopen and correct the subject invoices, the Commission did not need to reach a decision on whether to approve the contested Stipulated Methodology.<sup>47</sup> NYSEG asserts that the Commission erred in not granting NYSEG relief and could have crafted a refund remedy of its own making. However, before making a determination on the Stipulated Methodology, the Commission was required to resolve the threshold Reserved Issue:

[W]hether, 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.<sup>48</sup>

Thus, the matter of what methodology to use to allocate refunds became moot once the Commission decided not to require NYISO to reopen settled invoices.

42. NYSEG's argument, although couched in terms of why NYSEG believes the Commission could have crafted a remedy, is actually a criticism of one of the Commission's stated reasons for not allowing the reopening of billing in the first place. In the October 28, 2010 Order, the Commission noted that "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."<sup>49</sup> Therefore, this was only one factor in that decision. However, it was a valid factor to be considered because, in light of the fact that the Settlement's Stipulated Methodology for allocating the refunds and undercharges was contested, the Commission would have been constrained to make a merits finding on whether the Stipulated Methodology, or any alternative methodology, was just and reasonable<sup>50</sup> – a finding only achievable by establishing a record through further

---

<sup>47</sup> October 2010 Order, 133 FERC ¶ 61,094 at P 73.

<sup>48</sup> Settlement, Attachment B at 3.

<sup>49</sup> October 28, 2010 Order, 133 FERC ¶ 61,094 at P 65.

<sup>50</sup> See 18 C.F.R. § 385.602(h)(1)(i) (2012) ("If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact."); *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974)

(continued...)

contentious, time consuming, and costly litigation. In any event, in this order, we have reaffirmed the various reasons for the Commission's underlying decision, of which this was only one factor, and NYSEG has not provided sufficient basis on rehearing to overturn that decision.

The Commission orders:

NYSEG's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner LaFleur is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

(where settlement is contested, the Commission must make an "independent finding supported by substantial evidence on the record as a whole, that the proposal will establish just and reasonable rates.").