

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York State Electric & Gas Corporation)	Docket No.	EL09-26-000
)		EL09-26-001

**COMMENTS IN LIMITED OPPOSITION TO OFFER OF PARTIAL
SETTLEMENT ON BEHALF OF THE LONG ISLAND POWER AUTHORITY
AND LIPA, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND
CENTRAL HUDSON GAS & ELECTRIC CORPORATION**

Pursuant to Rules 602 of the Federal Energy Regulatory Commission's (FERC or the Commission) Rules of Practice and Procedure, 18 C.F.R. § 385.602, the Long Island Power Authority and its subsidiary, the Long Island Lighting Company d/b/a LIPA, (collectively, LIPA), Consolidated Edison Company of New York, Inc. (Con Edison), and Central Hudson Gas & Electric Corporation (Central Hudson) (collectively, the Contesting Parties) respectfully submit comments in opposition to the Partial Offer of Settlement (Partial Settlement) filed on September 21, 2009, on behalf of the Settling Parties in the above-captioned proceeding.¹ The Partial Settlement purports to resolve all issues in this proceeding, except for an issue identified in paragraph 5 of the Partial Settlement (Reserved Issue) concerning whether the Commission should direct the New York Independent System Operator, Inc. (NYISO) to correct incorrect invoices that were issued between 1999 and 2008 due to metering errors.

As discussed below, the Partial Settlement includes a stipulated proposed methodology for calculation and issuance of corrected invoices.² The Contesting Parties' objections are limited to paragraph 7 of that methodology which states that "the NYISO

¹ The settling parties are New York State Electric & Gas Corporation (NYSEG), Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) and New York Municipal Power Agency (NYMPA).

² Partial Settlement, Exhibit 2 to Attachment B.

will utilize all tariff provisions to collect the corrected energy charges.” Specifically, the Contesting Parties dispute any application of this language that would permit the NYISO to socialize uncollectable amounts arising from the Partial Settlement’s rebilling through the bad debt provisions contained in Attachment U of its open access transmission tariff (OATT). As explained below, the bad debt provisions of NYISO OATT are not applicable on the facts presented here, and would result in an unfair shifting of costs.

Moreover, there is no need for any socialization of costs to resolve this matter as NYSEG has stated in its comments filed in this proceeding on November 11, 2009, that it voluntarily agrees to surrender any claims to the amounts that would be charged as a result of the use of the bad debt mechanism.³ The Contesting Parties recommend that the Commission issue an order stating that it will approve the Partial Offer of Settlement if, within 15 days of the order, the Settling Parties modify the Partial Settlement such that NYSEG takes responsibility for any uncollectable amounts arising from rebilling under the Partial Settlement. Otherwise, the Commission would be approving a Partial Settlement that is not otherwise just and reasonable and in the public interest.⁴

I. Background

For the period from 1999 to 2008, NYSEG and National Grid, the metering authorities in their respective districts, provided inaccurate tie-line metering data to the NYISO for one hundred service months. These metering errors caused an overstatement in NYSEG’s subzone Unaccounted for Energy (UFE) and an understatement in National

³ *New York State Electric & Gas Corp.*, Initial Comments NYSEG, Docket No. Docket Nos. EL09-26, *et al.* at 8 (Nov. 11, 2009) (NYSEG Comments).

⁴ Commission Rule 602(f)(4) provides that a party contesting an offer of settlement based on an unresolved issue of material fact must include an affidavit supporting its claim. 18 CFR § 385.602(f)(4). Such an affidavit is not required in this instance because the Contesting Parties opposition to paragraph 7 of the stipulated methodology raises purely legal and policy issues.

Grid's subzone UFE. The NYISO, in turn, issued invoices based on that erroneous information. As a result, Load Serving Entities (LSEs) in the NYSEG subzones were incorrectly billed for an overstated amount of UFE, while LSEs in the National Grid subzones were incorrectly billed for understated amounts of UFE. The NYISO's OATT does provide for billing challenge and correction periods,⁵ however NYSEG discovered these metering errors only after the invoices at issue had been finalized. Once invoices are finalized the NYISO does not have authority to adjust them absent an order from the Commission or a court of competent jurisdiction.

On December 23, 2008, NYSEG filed a petition for a declaratory order from the Commission to require the NYISO to rebill certain charges in order to remedy incorrect invoices totaling approximately \$20 million.⁶ By an order dated March 30, 2009,⁷ the Commission established settlement judge procedures in this proceeding after finding that the NYSEG and National Grid should be able to settle this matter between themselves with assistance from the NYISO. After a number of settlement meetings in which the Contesting Parties participated, the Settling Parties filed a Partial Settlement on September 21, 2009, that included a both a stipulation of facts and a stipulated proposed methodology. Additionally, because the Settling Parties were unable to reach an agreement regarding the Reserved Issue—whether the Commission should direct the NYISO to correct the NYISO's invoices at issue—the Settling Parties submitted to the Commission a joint motion contemporaneously with the Partial Settlement. The Settling

⁵ Section 7.4 of NYISO's Market Administration and Control Area Services Tariff and Section 7.2 of NYISO's Open Access Transmission Tariff.

⁶ *New York State Electric & Gas Corp.*, Petition for Declaratory Order of New York State Electric & Gas Corp., Docket No. EL09-26-000 (Dec. 23, 2008).

⁷ *New York State Electric & Gas Corp.*, 126 FERC ¶ 61,292 (2009) ("March 30 Order").

Parties requested the Commission to issue a supplemental notice in this proceeding to give interested third parties an opportunity to intervene, to permit late interventions, and to allow all parties, including late interveners, to brief the Commission directly on the Reserved Issue.

The Partial Settlement lists the names of specific LSEs that will be financially affected should the Commission decide to order adjustments.⁸ According to the Partial Settlement, the value of the UFE attributable to LSEs that are no longer doing business in the NYISO-administered markets is estimated to be approximately 10,000 MWh.⁹ The Partial Settlement contemplates that the NYISO would recover that amount from the remaining LSEs pursuant to its tariff provisions that socialize market participant defaults under its bad debt provisions, *i.e.*, Attachment U of the OATT. Yet, Attachment U is not intended to remedy billing errors dating back ten years after participants have left the market and been returned their collateral.

II. Comments in Opposition

A. The Stipulated Proposed Methodology Is Not Just and Reasonable.

The stipulated proposed methodology is a not a reasonable means to effectuate a Commission order directing the NYISO to correct the metering errors. In its initial comments in this proceeding, the NYISO stated that “the Commission should consider ordering that National Grid and NYSEG *resolve this matter between themselves*.”¹⁰ Agreeing with the NYISO, the Commission stated that these two parties “could and should settle this matter between themselves” and directed settlement judge proceedings

⁸ Partial Settlement, Appendices 1-6.

⁹ *Id.* at Exhibit 1, P19.

¹⁰ *New York State Electric & Gas Corp.*, Motion to Intervene and Comments of the NYISO, at 8, Docket Nos. EL09-26-000 *et seq.*, (Jan. 22, 2009) (emphasis added).

in this case.¹¹ Yet, rather than limit the financial implications of this bilateral billing dispute to those two parties, the Partial Settlement would inappropriately expand the scope of the liability through an improper application of the NYISO's bad debt tariff provisions. The stipulated proposed methodology would unfairly harm market participants by imposing substantial, unanticipated costs that are not rightly recoverable through Attachment U of the NYISO OATT.

i. Attachment U is Not Intended to Remedy Billing Errors Dating Back Ten Years after Participants Have Left the Market and Been Returned Their Collateral.

Attachment U of the NYISO OATT sets forth the procedures for declaring and recovering bad debt losses.¹² This bad debt policy is part of the NYISO's overall comprehensive financial assurance credit policy. The purpose of the tariff provisions implementing this credit policy is to protect active customers from losses resulting from the financial failure of individual market participants by requiring them to meet certain creditworthiness requirements. The bad debt loss provisions of the credit policy permit the NYISO to recover payments in full it does not reasonably expect to recover from defaulting Transmission Customers.¹³ These provisions were not intended to provide a remedy for billing disputes affecting customers that are no longer participating in the NYISO-administered markets and have been returned their collateral.¹⁴

Pursuant to its current credit policies, the NYISO analyzes a customer's projected financial obligation to the market. If a customer does not have unsecured credit, or to the

¹¹ See *New York State Electric & Gas Corp.*, 126 FERC ¶ 61,292, P18 (2009).

¹² The Commission approved Attachment U of the NYISO OATT in *New York Independent System Operator, Inc.*, 102 FERC ¶ 61,021 (2003), as revised by *New York Independent System Operator, Inc.* 104 FERC ¶ 61,311 (2003).

¹³ NYISO OATT, Attachment U, Fourth Revised Sheet No. 705.

¹⁴ See *New York Independent System Operator, Inc.*, 104 FERC ¶ 61,311 at P2 (2003).

extent that a customer's financial obligation exceeds its unsecured credit, it must provide collateral to the NYISO. The NYISO may declare a customer in default if it does not make a timely payment or fails to comply with the creditworthiness requirements. If the default is not cured within the prescribed period, the NYISO can immediately terminate service to the customer upon notice to the Commission.

Attachment U sets out the steps that the NYISO would ordinarily follow to recover debts in the event that a market participant is called upon in due course and cannot cover its bills in the energy market, thereby defaulting. First and foremost, the NYISO would draw upon the collateral provided by the defaulting market participant. Next, the NYISO would seek to recover any remaining losses through the participant's contribution to the Working Capital Fund. If that did not cover the debt, the NYISO would make a claim against any available loss protection insurance according to its terms. Only after all of these actions were exhausted would any remaining debt be allocated to all customers. Importantly, the NYISO may deviate from the above-mentioned sequence if it determines that an alternative cost-recovery measure would be more likely to minimize, or avoid, the bad debt loss.¹⁵

In acknowledgement of the fact that invoices are subject to true-ups and a period of billing challenges after they are issued, the NYISO is permitted to retain a customer's collateral customer in an amount and for a length of time to secure that customer's obligations to the NYISO after its withdrawal.¹⁶ However, the NYISO is not permitted

¹⁵NYISO OATT, Attachment U, Fourth Revised Sheet No. 707. Therefore, even in the event that the Commission determines that Attachment U controls the collection of UFE attributable to LSEs that have left the NYISO-administered markets, which, as explained above, the Commission should not, under its OATT the NYISO can permit NYSEG to take responsibility for those amounts.

¹⁶ *Id.* at 11-12

to retain this collateral *indefinitely*. This is because the bad debt mechanism is designed to function as a backstop protection for times when parties who have posted collateral default, not for allocating costs after parties have left the market and been returned their collateral.

The OATT bad debt provisions, which apply to defaulting Transmission Customers, are clearly inapplicable here, where a number of LSEs that have withdrawn from the market years ago and have been returned their collateral. It is not appropriate to utilize a provision that principally relies on satisfying debt with the collateral provided by the defaulting market participant when that collateral no longer exists. Using the bad debt mechanism as contemplated by the stipulated proposed methodology would require stakeholders to consider holding some level of collateral in perpetuity, something that was clearly not envisioned at the time these provisions were developed.

Moreover, the Commission has held that it is reasonable for the NYISO to ensure adequate collateral to cover only the limited period from default to termination of service.¹⁷ This limited level of collateral does not adequately take into account the newly expanded risk that would result if the bad debt mechanism is used as intended by the stipulated proposed methodology. Given the purpose of Attachment U, NYISO customers could not have reasonably understood their financial obligations to extend for a period of more than ten years, after market participants have withdrawn from the market and been returned their collateral.

¹⁷ *Id.* at P50.

ii. Attachment U Should Not be Used to Unfairly Shift Costs

Use of Attachment U to socialize unassignable costs as proposed by the Partial Settlement will result in the unfair cost shifting. Typically, LSEs either recover any NYISO costs assessed to them, if at all, from their customers or absorb the costs. If an LSE leaves the market, its customers are picked up by a new LSE. Here, where the LSEs who were in the market at the time these costs were incurred are gone and have been returned their collateral, it is fair that the costs should follow the load and be picked up by the new LSE now serving the old LSE's customers. What is not fair is to have the costs that should properly be borne ultimately by the old LSE's load be shifted to other customers by applying the bad debt fiction to socialize recovery as provided in the Partial Settlement.

iii. The Commission Does Not Need To Approve the Stipulated Methodology in Order to Resolve this Dispute.

In this instance, there is no need for any socialization of debt due to UFE attributable to LSEs that are no longer doing business in the NYISO-administered markets. In its comments filed on November 11, 2009, NYSEG acknowledged that market participants like the Contesting Parties may be concerned about the use of the bad debt mechanism contained in the Stipulated Methodology.¹⁸ To alleviate these concerns, NYSEG stated that it voluntarily agrees to surrender any claims to the amounts charged as a result of the use of that mechanism.¹⁹ Commission approval of NYSEG's proposed alternative approach would properly reduce the scope of the financial liability to what

¹⁸ NYSEG Comments at 8.

¹⁹ *Id.*

was originally intended when this matter was set for settlement procedures. This is a just and fair resolution of this dispute that originated between NYSEG and National Grid.

iv. Commission Approval of the Stipulated Methodology Would Have Precedential Value.

Lastly, notwithstanding claims to the contrary, it is clear that the Partial Offer of Settlement would establish Commission precedent and would accomplish this without a factual record for doing so. The Commission must be mindful, that although it may not be setting “binding” precedent, any order it issues approving a stipulated methodology will undoubtedly be used in the future as a sort of road map for an acceptable resolution. Therefore, the Commission should not approve the Partial Settlement as submitted because it would be in turn approving an improper application of Attachment U of the NYISO OATT.

III. Conclusion

Wherefore, the Contesting Parties respectfully request that the Commission issue an order stating that it will approve the Partial Offer of Settlement if, within 15 days, the Settling Parties modify the Partial Settlement such that NYSEG takes responsibility for any uncollectable amounts identified by the Partial Settlement.

Respectfully submitted,

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November 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Washington, D.C., this 12th day of November, 2009.

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Document Content(s)

11.12Comments.PDF.....1-11