20091124-5126 FERC PDF (Unofficial) 11/24/2009 4:50:00 PM

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York State Electric and Gas Company) **Docket No. EL09-26-000**

INITIAL BRIEF OF CONSOLIDATED EDISON SOLUTIONS, INC.

Pursuant to the Notice issued by the Federal Energy Regulatory Commission on October 13, 2009 for Briefs on the above-referenced proceeding, Consolidated Edison Solutions, Inc. ("CES") submits the following Brief for the Commission's consideration. In this Brief, CES will explain its position as an Energy Service Company ("ESCO") on the "Reserved Issue" and why no re-billings are appropriate. The Commission has the discretion on whether to invoice Load Serving Entities ("LSEs") for over $20 million dollars of unaccounted for energy ("UFE") that according to the NYSEG settlement was caused by several metering errors that existed and went undetected since 1999. Like many ESCOs, CES is named in the NYSEG settlement, as a load server in the Snyder Lake Hoag, Cold Springs and East Springfield area, with potential financial liability for the historical UFEs.

The New York Independent System Operator ("NYISO") tariff allows market participants, including metering authorities, up to 24 months to find errors and request the NYISO to make corrections. The time passed in this case far exceeds the 24 month period for the NYISO to issue final bills. Even if the Commission were to consider re-billings in this case, such re-billings should not apply to ESCOs like CES that no longer have the means to recover additional charges from their end-use customers. As an entity without responsibility of the management of tie-line

meters, end-use consumption of the energy or the ability to pass the UFEs to the end-users, the Commission should exempt all ESCOs from such charges.

ESCOs rely on the metering authorities like NYSEG and NIMO to accurately perform their metering services on a timely and accurate basis. Based on the utility metering data, CES purchases the necessary electric products for its end-use customers for the period covered by the terms of their retail contracts. Once the NYISO invoices are finalized, ESCOs like CES do not have the ability to re-bill its end-use customers. Invoicing ESCOs for the UFEs over the last 10 years would inappropriately place financial responsible for UFE errors on LSEs who had no knowledge of or control over the errors.

I. BACKGROUND

On September 21, 2009, the settling parties, New York State Electric & Gas ("NYSEG"), National Grid ("NG") and the New York Municipal Power Agency submitted a Settlement Agreement to resolve errors in the allocation of unaccounted for energy ("UFE") in certain NYSEG and NG subzones of the NYISO. UFEs are attributed to power flow modeling errors, energy theft, statistical load profile errors, distribution loss deviations, and meter measurement errors. Although UFEs are charged to LSEs by grossing up the retail meter readings to match the wholesale energy usage, they are not caused or controlled by loads or LSEs. Only the metering authority has the ability to monitor, measure, and manage UFEs costs.

The Settlement Agreement was developed in response to sustained metering errors and the use of inaccurate meter data since 1999 by the responsible meter authorities, NYSEG and NG. When the errors were discovered in 2007-2008 period and reported to the NYISO, bill corrections were

20091124-5126 FERC PDF (Unofficial) 11/24/2009 4:50:00 PM

made to the full extent of the NYISO tariffs to resettle invoices. For the periods beyond the NYISO tariff authority, a confidential Settlement process was ordered by FERC and completed in 2009, resulting in the September 21st Settlement Agreement. While the settling parties did not reach agreement on whether additional resettlement of invoices is appropriate, Exhibit 2 of the Settlement Agreement describes a methodology that could be used to correct invoices if so directed by the Commission.

II. SUMMARY OF ARGUMENT AND ARGUMENT

Extraordinary circumstances do not exist for the Commission to over-ride the existing tariffs and order the NYISO to re-bill for UFE's based on the NYSEG settlement. LSEs, and ESCOs in particular, would be financially harmed in the process and the certainty of final bills would be jeopardized.

CES is an active participant in the NYISO market, providing retail electricity to end-use customers. As a party named in the NYSEG settlement, CES will be financially impacted by a Commission order for NYISO re-settlement. CES opposes any rebilling to LSEs, as that would over-ride the current tariffs, which provide cost certainty for LSEs to conduct business. The current tariffs provide LSEs with a final bill; once settled, LSEs have no further liabilities for electric supply costs. The certainty of the final bill is an important necessity for retail markets to function. In addition to the harm to retail markets, there are several reasons why any refund is unjustified, as discussed in further detail sections.

A. UFEs ARE DESIGNED TO RECOVER FOR METER MEASUREMENT ERRORS AND SHOULD NOT BE ADJUSTED BEYOND THE FINAL BILLS

The UFE is not a charge for direct energy consumption, but a charge by the transmission owner to recover unaccounted for energy usage, not directly captured by the retail meter infrastructure owned by the metering authority. UFE charges are not exact charges but a collection of unaccounted for energy within and between load zones that are totaled and socialized to all loads within a given zone or sub-zone. CES' retail customers were charged for the appropriate volume energy consumption based on the available metering data and there is no basis for recalculating and reallocating UFE related charges since 1999.

B. REBILLING TO PERIODS EXCEEDING THE NYISO FINAL BILLING PERIOD IS INAPPROPRIATE AND HARMFUL TO RETAIL MARKETS

The NYISO Tariff provides sufficient time for market participants to challenge bills and for the NYISO to make corrections. The objective for establishing a final bill was financial assurance to the various competitive market participants for billing certainty, recognizing the necessity of price and cost certainty for any market. It would be inappropriate for the Commission to re-open NYISO bills that are up to ten years old to correct for a persistent meter error to benefit one market participant, NYSEG. Many of the companies that would be charged for this error are not the ones responsible for the metering errors nor could have detected the errors in a timely fashion. Retail LSEs such as CES would be financially harmed, as ESCOs have no contractual mechanism to collect such costs from current or past customers.

20091124-5126 FERC PDF (Unofficial) 11/24/2009 4:50:00 PM

Generally, retail ESCOs provide customers with fixed or indexed priced electricity for specific contract terms and have no ability to recover additional UFE charges years after the contract has ended. With a fixed price contract, retail LSEs sell energy to consumers at a pre-established price per kilowatt-hour for the term of the contract. Under an indexed contract, the price of energy delivered to the consumer is tied to either the local utility's energy price or to an external index such as the posted NYISO market prices during the term of the contract. If the metering errors had been discovered in a timely fashion and the UFEs correctly allocated, retail LSEs would have been able to collect the appropriate UFE costs from customers. Unlike traditional utilities, a retail LSE's customer base is not fixed; customers can, and do, switch from one supplier to another or back to the utility. Nor are the contracts that were in effect five or ten years ago still in effect today. Thus, requiring the NYISO to recalculate and then re-bill UFE charges ten years after the fact will cause significant financial harm to CES and the other retail LSEs that are unable to recover the costs of this rebilling from its customers and have a deleterious effect on the competitive retail electricity market by throwing in an element of major uncertainty and arbitrariness that does not exist today.

Retail LSEs are a necessary participant in the competitive markets that the Commission has been working to implement. Retail LSEs, however, cannot compete and remain financially viable if they have to absorb the costs of retroactive re-billings such as the one of this settlement before the Commission in this case. Unlike traditional utilities, retail LSEs cannot defer or otherwise pass these additional costs to customers because their sales contracts do not allow for retail re-billings years after the fact. Retail LSEs have a right to rely on market mechanisms, which timely settle transactions, especially those that have occurred as much as ten years ago.

The Commission has repeatedly held that it would be inappropriate to upset market participants' settled expectations by re-opening prior market results. In *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 104 FERC ¶ 61,262, at P11 (2003), the Commission rejected a retroactive installed capacity adjustment stating:

> We are unpersuaded by the arguments that a large percentage of NEPOOL voting shares support retroactive ICAP adjustment and that the financial impact on each participant may be small. Even when customer support is unanimous, the Commission retains the responsibility of making an independent judgment. [FN8] That the financial impact of a retroactive ICAP adjustment may be small is not relevant. [FN9] As we stated previously, ***the Commission will not upset the ICAP market participants' reliance on the finality of the months that have already settled*** under MRP 18. (footnotes omitted, emphasis added).

In *NSTAR Services Co. v. New England Power Pool, et al.*, 92 FERC ¶ 61,065, at 61,200 (2000), the Commission stated that "[w]e do not believe that retroactive price adjustments promote confidence in the ISO's markets." Indeed, these prior decisions recognize the need for certainty and finality in market transactions. If the NYISO is required to undertake the adjustment of these long past transactions, it will shatter these principles which are key to the continued viability of the New York electric markets.

Furthermore, in *Northern Natural Gas Co.*, 82 FERC ¶ 61,195 (1998), which presented a similar situation, the Commission noted that, if appropriate, it would follow the "procedure in such situations of authorizing each entity in the chain through which the refunds have flowed to recover the amounts they paid from the next person in the chain." Additionally, in *Wylee Petroleum Corp.*, 33 FERC ¶ 61,014 at 61,034 (1985) the Commission considered the amount uncollectible, when one party is unable to obtain reimbursement from another responsible party: "the Commission holds that in cases where the well operator and royalty interest owners do not

have an ongoing contractual relationship which would permit the operator to collect . . . refunds through billing adjustments, refunds owed by a royalty interest owner will be deemed uncollectible" under circumstances including the bankruptcy of the royalty interest owner, and "the Commission will consider the refund uncollectible and will waive the obligation".

CES purchased energy, paid for UFE and settled its accounts for consumers in the effected zones over the last ten years. In doing so, it relied on the historic UFE levels of the market. In analyzing whether the filed rate doctrine requires the Commission to automatically provide for refunds, the U.S. Court of Appeals for the D.C. Circuit stated that its “guiding concern is ‘[p]roviding the necessary predictability,’ allowing ‘purchasers of gas to know in advance the consequences of the purchasing decisions they make’’(citations omitted). *Towns of Concord, Norwood and Wellesley, Massachusetts v. FERC,* 955 F.2d 67, 75 (D.C. Cir. 1992). *See also Texas Eastern Transmission Corp. v. FERC, 102 F.3d 174, 288-89* (5th Cir. 1996), where the Court stated that the filed rate doctrine “seeks to prevent customers from relying on certain rates, only to find later that their purchasing decisions have been upset and their costs increased.” To require CES to pay a higher re-settled amount ten years after the fact would send a message to CES and other retail LSEs that they can *never* count on a NYISO bill being final, which would have a disastrous impact on the competitive electric market.

C. UNCOLLECTABLE CHARGES FOR UFEs SHOULD NOT BE ASSESSED AND CHARGED TO RATE SCHEDULE 1

Because some market participants named in this case no longer exist, and the NYISO may no longer be able collect all charges if the Commission orders a rebilling. To the extent the

20091124-5126 FERC PDF (Unofficial) 11/24/2009 4:50:00 PM

Commission orders re-billings, any amounts that the NYISO is unable to collect should not be treated as bad debt and should not be collected automatically from all participants.

III. CONCLUSION

The final bill issued by the NYISO should provide certainty to LSEs that charges will not be accessed 10 years after the service year. The metering authority should also have responsibility to detect and correct metering errors in a timely manner. A Commission order for re-billing of UFEs would encourage the metering authorities to be lax on their metering functions, as a precedent would be set to allow for corrections after final bills were issued. The Commission should also recognize that ESCOs are innocent by-standers of the metering errors and, without any ability to collect for additional costs from its present or past customers, would be financially harmed by a re-bill. Therefore, CES believes there is no basis for approval of the NYSEG settlement for re-bills.

Respectfully submitted,

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Document Content(s)

EL09-26-brief.DOC...1-8