



As indicated below, the NYISO tariffs set forth explicit time periods for the NYISO and its customers to review, challenge, correct, and finalize customer invoices.<sup>4</sup> Once an invoice is finalized, the NYISO is not permitted to make any further adjustments to the invoice except as ordered by the Commission or a court of competent jurisdiction.<sup>5</sup> The Commission retains broad authority to fashion remedies in such instances,<sup>6</sup> but it has indicated that finalized customer invoices should only be adjusted in the event of extraordinary circumstances when significant injustice would result in the absence of Commission action.<sup>7</sup> The Commission has previously found extraordinary circumstances to exist only once, when a customer did not have a reasonable opportunity to review and challenge its settlement information within the time provided under the NYISO tariffs due to the unusual nature and timing of the error.<sup>8</sup>

The NYISO urges that, in determining whether extraordinary circumstances exist in this or in any similar proceeding, the Commission consider several relevant factors, including: (i) the size of the settlement error, (ii) the careful balance that the NYISO and its stakeholders have struck in developing settlement provisions that reflect the importance of both accuracy and financial certainty, (iii) Transmission Owners' responsibility to provide accurate metering data to the NYISO, (iv) the visibility of the settlement error to affected customers within the time period provided for customers to review and challenge their settlement data, and (v) the impact of untimely revisions on other customers within the relevant Transmission Owners' service territories (e.g., ESCOs and municipalities).

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<sup>4</sup> See NYISO Market Administration and Control Area Services Tariff ("Services Tariff") § 7.4; NYISO Open Access Transmission Tariff ("OATT") § 7.2A.

<sup>5</sup> See *id.*

<sup>6</sup> See *Town of Concord, et al. v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) ("Town of Concord Case").

<sup>7</sup> See 128 FERC ¶ 61,086 at PP. 19-21 (July 24, 2009) ("NYSEG Order"); Niagara Mohawk Power Corporation, Order Granting Petition for Declaratory Order, Docket No. EL08-40-000 at P. 25 (June 30, 2008) ("National Grid Order").

<sup>8</sup> See National Grid Order at PP. 24-25.

In addition, in the event that the Commission decides to order the NYISO to adjust the finalized customer invoices in this instance, the NYISO respectfully requests that the Commission order the NYISO to make such adjustments in accordance with, and without deviation from, the methodology set forth in Exhibit 2 of the Proposed Settlement (“Stipulated Methodology”).<sup>9</sup>

## **I. STATEMENT OF THE CASE**

On December 23, 2008, NYSEG filed a petition requesting that the Commission issue a declaratory order directing the NYISO to adjust certain finalized customer invoices dating from 1999 through 2008 that had been affected by erroneous metering data supplied by NYSEG and National Grid.<sup>10</sup> On March 30, 2009, the Commission ordered a settlement judge proceeding to resolve NYSEG’s petition.<sup>11</sup>

The Settling Parties engaged in settlement discussions for approximately six months. The NYISO actively participated in these discussions. At the conclusion of these discussions, the Settling Parties negotiated the Proposed Settlement, which they filed with the Commission on September 21, 2009.<sup>12</sup> The Proposed Settlement resolved all matters at issue, with the exception of the Reserved Issue, which is the subject of this proceeding. Specifically, the Settling Parties came to an agreement on certain stipulated facts relevant to the Reserved Issue,<sup>13</sup> and agreed upon the Stipulated Methodology to calculate and issue adjusted invoices if the Commission orders the NYISO to do so.<sup>14</sup> However, the Settling Parties could not reach an agreement as to whether it is appropriate in this instance for the Commission to order the NYISO to correct

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<sup>9</sup> See Proposed Settlement at Attachment B, Exhibit 2.

<sup>10</sup> See Petition for Declaratory Order of New York State Electric & Gas Corporation, Docket No. EL09-26-000 (December 23, 2009) (“NYSEG Petition”).

<sup>11</sup> See Order of Chief Judge Appointing Settlement Judge and Scheduling Settlement Conference, Docket No. EL09-26-000 (April 7, 2009); Order Establishing Settlement Judge Procedures, 126 FERC ¶ 61,292 (March 30, 2009).

<sup>12</sup> See Proposed Settlement at Attachment B.

<sup>13</sup> See *id.* at Attachment B, Exhibit 1.

<sup>14</sup> See *id.* at Attachment B, Exhibit 2.

finalized customer invoices that were affected by erroneous metering data supplied by NYSEG and National Grid. The Settling Parties, therefore, agreed to present this issue directly to the Commission for resolution. In its October 13, 2009, and October 21, 2009, notices in the above-referenced docket, the Commission adopted the Settling Parties' proposed schedule for the receipt of briefs on the Reserved Issue.<sup>15</sup>

## II. POINTS OF CONSIDERATION

### A. The Commission Should Carefully Consider Certain Factors in Determining Whether to Require the NYISO to Adjust Finalized Customer Invoices

The settlement provisions in the NYISO tariffs establish explicit time periods for the NYISO and its customers to review, challenge, correct, and finalize customer invoices.<sup>16</sup> Once a customer's invoice is finalized in accordance with these provisions, the NYISO is not permitted to make further adjustments to the invoice absent an order from the Commission or a court of competent jurisdiction.<sup>17</sup> The Settling Parties have requested that the Commission determine whether such an order is appropriate in this instance to correct errors in the metering data supplied by NYSEG and National Grid affecting customer invoices for service months dating from 1999 through 2008.<sup>18</sup>

The Commission has broad authority to fashion remedies.<sup>19</sup> In cases such as the one at hand, the Commission is responsible for determining whether to order refunds,<sup>20</sup> but is not

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<sup>15</sup> See Notice Clarifying Prior Notice, Docket Nos. EL09-26-000 and EL09-26-001 (October 21, 2009); Notice of Filing of Settlement Agreement and Establishment of Comment Dates, Docket Nos. EL09-26-000 and EL09-26-001 (October 13, 2009).

<sup>16</sup> See Services Tariff § 7.4; OATT § 7.2A.

<sup>17</sup> See *id.*

<sup>18</sup> See Proposed Settlement, Attachment B, at p. 3.

<sup>19</sup> See *Town of Concord Case* at 76 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“Agency discretion is often at its “zenith” when the challenged action relates to the fashioning of remedies.”)).

<sup>20</sup> See *id.* (“As to the necessity of refunds to deter violations of the statute, the [Federal Power] Act leaves this determination to the Commission’s expert judgment.”).

required to do so.<sup>21</sup> In determining whether to grant or deny refunds, the Commission is required to show that “it considered relevant factors and . . . struck a reasonable accommodation among them” and that “its order granting or denying refunds was equitable in the circumstances of this litigation.”<sup>22</sup> In making such determination within the context of the NYISO settlement process, 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 a significant injustice.<sup>23</sup> To date, 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 provided under the NYISO tariffs due to the unusual nature and timing of the error.<sup>24</sup> Importantly, the Commission has since found that extraordinary circumstances did not exist in a proceeding in which the errors were visible to the customer and the customer had the full time period provided by the NYISO tariffs to review and challenge such errors.<sup>25</sup>

The NYISO urges that in determining whether extraordinary circumstances exist in this or any similar proceeding, the Commission carefully consider the following factors:

i. Size of the Settlement Error. The amount that NYSEG seeks to recover in this proceeding is approximately \$21.5 million. This amount reflects the aggregate impact of a number of small, recurring metering errors by NYSEG and National Grid over an approximate nine-year period combined with interest calculated at the Commission’s specified rate.<sup>26</sup> This total averages to approximately \$2.4 million per year during the affected period. Approximately

<sup>21</sup> See *Midwest Independent Transmission System Operator*, Order on Rehearing, 118 FERC ¶ 61,212 at PP 87-95 (March 15, 2007); *Town of Concord Case* at 73-76.

<sup>22</sup> *Town of Concord Case* at 76 (quoting *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981) and *Wisconsin Elec. Power Co. v. FERC*, 602 F.2d 452, 457 (D.C. Cir. 1979)).

<sup>23</sup> See NYSEG Order at PP. 19-21; National Grid Order at PP. 24-25.

<sup>24</sup> See National Grid Order at PP. 24-25.

<sup>25</sup> See NYSEG Order at PP. 19-21.

<sup>26</sup> The figures in this brief are approximate and include estimated interest amounts.

\$13.6 million of this amount is a result of NYSEG's metering errors and approximately \$7.9 million is a result of National Grid's metering errors. If the Commission directs the 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.

ii. Balance Between Accuracy and Financial Certainty. The explicit time limits for invoice corrections established in the NYISO tariffs were the result of extensive discussions among the NYISO and its stakeholders and reflect their collective judgment on the appropriate balance between customers' interest in accurate settlements and their sometimes competing interest in the financial certainty afforded by finalized invoices that are no longer subject to continuing adjustments.<sup>27</sup> Settlement processes that promote both finality and financial certainty are vitally important for the NYISO-administered markets to function effectively as customers cannot make sound business decisions without the confidence that their financial obligations will not be upset years later.<sup>28</sup> The NYISO's settlement provisions provide substantial opportunity for review, challenge, and correction of customer settlement data. As the Commission has previously determined, these settlement provisions are part of the NYISO's filed rate, and the NYISO's filed rate is not violated when customer invoices are not revised after the specified

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<sup>27</sup> See NYISO Management Committee, Motion Regarding Proposal to Shorten the NYISO Settlement Cycle, September 29, 2006, available at: [http://www.nyiso.com/public/webdocs/committees/mc/meeting\\_materials/2006-09-29/agenda\\_06\\_Motion\\_re\\_settlements\\_cycle\\_proposal.pdf](http://www.nyiso.com/public/webdocs/committees/mc/meeting_materials/2006-09-29/agenda_06_Motion_re_settlements_cycle_proposal.pdf) ("Whereas, the NYISO and Market Participants seek to balance the benefits of financial certainty with adequate assurances regarding the accuracy of NYISO-issued customer invoices. . .").

<sup>28</sup> See New York Independent System Operator, Inc., New York Independent System Operator, Inc.'s Proposed Tariff Revisions Regarding the Review, Challenge, and Correction of Customer Settlement Information, Docket No. ER06-783-000 at p. 7 (March 27, 2006) ("Section 7.4.C of the Services Tariff has also been revised to more clearly establish the finality of a Close-Out Settlement by explicitly prohibiting the NYISO from making changes to an invoice after the issuance of a Close-Out Settlement for that month absent Commission or judicial intervention. This clarification will provide certainty regarding the finality of prior settlements that is vitally important to the effective functioning of the NYISO markets.").

time periods in the NYISO tariffs for the review, challenge, and correction of customer invoices have expired.<sup>29</sup> The settlement provisions clearly contemplate the possibility that from time to time a settlement error would not be discovered until the expiration of the time period within which the NYISO may make adjustments to customer settlements. This was deemed to be a reasonable trade-off in the interest of achieving the financial certainty afforded to all customers by finalizing invoices that are not subject to continuing revisions years after the charges were incurred. In the case at hand, the Commission should consider whether directing the NYISO to adjust numerous customers' invoices for approximately 100 service months dating back to 1999<sup>30</sup> would be consistent with the careful balance reflected in the NYISO tariffs between accuracy and financial certainty in customer invoices.

iii. Responsibility to Provide Accurate Metering Data. The NYISO does not have direct access to its customers' metering data. New York Transmission Owners, in their capacity as meter authorities, are responsible for providing accurate and timely metering data to the NYISO.<sup>31</sup> The NYISO and its customers rely on the provision of such data for the proper functioning of the NYISO settlement process. In the case at hand, both NYSEG and National Grid have stipulated that they supplied erroneous metering data to the NYISO.<sup>32</sup> Attempting to

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<sup>29</sup> See 128 FERC ¶ 61,086 at P. 22 (July 24, 2009) (“We also find, contrary to NYSEG’s assertions, that the filed rate doctrine is not violated here. 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 filed rate doctrine is rate predictability for customers. Section 7.2A gives NYISO transmission customers the assurance that, after the specified timeframe for review, challenge, and correction, their invoices are final unless the Commission or court orders a change. Providing this financial certainty to customers is fully consistent with the filed rate doctrine.”).

<sup>30</sup> See Proposed Settlement, Attachment B, Exhibit 1 at pp. 12-18.

<sup>31</sup> See Agreement Between New York Independent System Operator and Transmission Owners § 2.05 (“Each Transmission Owner shall have the responsibility for providing metering data in its Transmission District to the ISO, unless other parties are authorized by the appropriate regulatory authority to provide metering data. Each Transmission Owner shall be responsible for collecting and making available to the ISO billing quality metering data and any other information for the Transmission District required by the ISO for billing purposes.”).

<sup>32</sup> See Proposed Settlement, Attachment B, Exhibit 1 at pp. 12-18.

address the failure of metering authorities to provide accurate metering information through untimely adjustments to customer settlements would fail to address the underlying problem and would diminish the incentive for Transmission Owners to carefully review the accuracy of their settlement data in a timely manner.

iv. Visibility of the Settlement Error. An essential component of the NYISO settlement process is each customer's responsibility to review its own settlement information for errors. NYISO customers have significant visibility into the settlement information upon which their invoices are based and understand their responsibility to thoroughly review this data and identify any errors within clearly-established time periods. Indeed, the NYISO provides notices to customers within the settlement time periods reminding them of this responsibility and of upcoming deadlines. As indicated above, the Commission has previously determined that extraordinary circumstances did or did not exist based on whether the customer requesting the adjustments to finalized customer invoices had the benefit of the time provided under the tariffs to review and challenge its settlement information and the errors at issue were visible during that time.<sup>33</sup> In the case at hand, the settlement errors were visible to both NYSEG and National Grid. Neither party identified or challenged such errors within tariff-prescribed time periods.

v. Effect on Others within NYSEG and National Grid's Service Territories. NYISO customers rely on the financial certainty provided by finalized invoices. In the case at hand, NYSEG and National Grid were the parties responsible for the metering errors at issue in this proceeding. However, under the Stipulated Methodology, NYSEG and National Grid would not be the only parties affected by adjustments to the finalized invoices in question. Specifically, certain LSEs and municipalities in National Grid's service territory would be subject to unanticipated charges totaling approximately \$9 million. Those customers were not responsible

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<sup>33</sup> See NYSEG Order at PP. 19-21; National Grid Order at PP. 24-25.

for — and were not capable of — validating the accuracy of the metering data supplied by NYSEG and National Grid. The Commission should consider the impact that untimely invoice adjustments would have on those customers' settled financial expectations, as they have received finalized invoices for all of the service months at issue and likely have reasonably relied upon the finality of such invoices. Those customers have no reason to expect that invoices dating back as far as 1999, which have long been finalized in accordance with the NYISO tariffs, would now be subject to adjustments. On the other hand, the Commission should also consider investigating (i) NYSEG's assertion that these adjustments would inure to the benefit of its retail customers and (ii) the commensurate impact of making any further adjustments on National Grid's retail customers.<sup>34</sup>

**B. If the Commission Directs the NYISO to Adjust Finalized Customer Invoices, the Commission Should Direct the NYISO to Make Such Adjustments Consistent with the Stipulated Methodology**

If the Commission directs the NYISO to adjust the finalized customer invoices at issue in this proceeding, the NYISO respectfully requests that the Commission direct the NYISO to make such adjustments in accordance with, and without deviation from, the Stipulated Methodology.<sup>35</sup> The Stipulated Methodology does not provide for a full resettlement of the NYISO-administered markets over the relevant time period. The relevant time period in this proceeding spans nearly a decade, from late 1999 to 2008, which includes invoices for approximately 100 service months that would need to be adjusted if the Commission orders adjustments. As the NYISO has previously indicated to the Commission, a full resettlement would be impossible for a majority

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<sup>34</sup> See NYSEG Petition at 3.

<sup>35</sup> See Proposed Settlement at Attachment B, Exhibit 2.

of this time period, and would be impracticable for the remainder of the time period.<sup>36</sup> In particular, a full resettlement of the NYISO-administered markets would be impossible for the period of November 1999 through January 2005 because the software platform upon which the markets were settled during this time period no longer exists. For subsequent years, the amount of effort required to fully resettle the markets would require such a monumental effort so as to be impracticable. For this reason, the Stipulated Methodology was developed by the Settling Parties with input by the NYISO to provide a reasonable mechanism that the NYISO could implement to make invoice adjustments should the Commission order such adjustments without creating an unduly burdensome commitment of resources and personnel by the NYISO.

### III. CONCLUSION

WHEREFORE, the New York Independent System Operator, Inc. respectfully submits this initial brief and respectfully requests that the Commission consider the concerns addressed herein and, in the event that the Commission determines that invoice adjustments are warranted in this proceeding, that the Commission not deviate from the Stipulated Methodology in ordering the NYISO to make such adjustments.

Respectfully submitted,

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<sup>36</sup> See Initial Comments of New York Independent System Operator, Inc. in Support of the Settlement Agreement and Offer of Partial Settlement, Docket Nos. EL09-26-000 and EL09-26-001, at p. 2 (November 12, 2009); see also Motion to Intervene and Comments of the New York Independent System Operator, Inc., Docket No. EL09-26-000 at p. 11 (January 22, 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 this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2009).

Dated at Washington, DC this 30<sup>th</sup> day of November, 2009.

By: /s/ Catherine A. Karimi  
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