

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. Statement of the Case	2
II. Argument.....	3
A. <u>The Commission Possesses Ample Legal Authority to Order Refunds and Should Exercise Its Discretion to Direct the NYISO to Correct Charges as Appropriate Under the NYISO Tariffs.</u>	3
B. <u>The Commission Must Direct the Parties to Use the Stipulated Methodology, as Amended by NYAPP, to Correct the Errors that Led to the Misallocation of Unaccounted for Energy</u>	6
III. Proposed Findings and Conclusions	7

TABLE OF AUTHORITIES

Federal Cases	Page(s)
<i>IDACORP Energy LP v. FERC</i> , 433 F.3d 879, 883 (D.C. Cir. 2006).....	5
<i>Las Cruces TV Cable v. FCC</i> , 645 F.2d 1041, 1047 (1981).....	4
<i>Louisiana Pub. Serv. Comm’n v. FERC</i> , 174 F.3d 218, 223 (D.C. Cir. 1999).....	4
<i>Niagara Mohawk Power Corp. v. FPC</i> , 379 F.2d 153 (D.C. Cir. 1967).....	1
<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000)	1
<i>Towns of Concord v. FERC</i> , 955 F.2d 67, 76 (1992)	4
 Administrative Proceedings	
 Orders	
<i>Holland v. Midwest Independent System Operator, Inc.</i> , 112 FERC ¶ 61,105	6
<i>Exelon Corp. v. PPL Electric Utilities</i> , 114 FERC ¶ 61,298 at P 14 (2006)	5
<i>Entergy Services, Inc.</i> , 80 FERC ¶ 61,197 (1997).....	1
<i>Midwest Independent System Operator, Inc.</i> , 117 FERC ¶ 61,113 (2006)	1
<i>Niagara Mohawk Power Corp. v. FPC</i> , 379 F.2d 153, 159 (D.C. Cir. 1967).....	5
<i>Pepco Energy Services, Inc. v. PJM Interconnection, LLC</i> , 128 FERC ¶ 61,051 at P 28 (2009).....	6
 Regulations and Tariff Provisions	
New York Independent System Operator OATT Section 7.2A	3
Comm’n Rules of Practice & Procedure, 18 C.F.R. § 385.706	1
NYISO’s Accounting and Billing Manual Section 3.2.2.1.....	7

I. STATEMENT OF THE CASE

Over the course of the six months since this proceeding was sent to settlement, the Settling Parties have negotiated a settlement agreement (“Settlement Agreement”), which includes a Joint Stipulation of Facts Not in Dispute (the “Joint Stipulation”) and a Stipulated Methodology for Calculation and Issuance of Corrected Invoices (the “Stipulated Methodology”). NYAPP filed Comments partially contesting the Settlement Agreement. *See* Amended Initial Comments of the New York Association of Public Power (Nov. 16, 2009).

The Settling Parties were unable to reach an agreement with respect to whether the Commission should direct the NYISO to correct the invoices to market participants in certain NYSEG and National Grid subzones that were affected by the metering errors identified in the Joint Stipulation, and asked that the Commission resolve this issue (the “Reserved Issue”). The Reserved Issue is “whether, based on the agreed-upon facts in the Joint Stipulation and any other facts or considerations deemed relevant by the Commission, the Commission should direct the NYISO to correct the NYISO’s invoices to market participants in certain NYSEG and National Grid subzones that were affected by the metering errors identified in the Joint Stipulation.” Explanatory Statement in Support of Settlement Agreement, Attachment A at 4 (Sept. 21, 2009). With regard to the Reserved Issue, the Commission must use its refund authority and direct the NYISO to correct the misallocation of UFE caused by metering errors, as appropriate.

II. ARGUMENT

A. The Commission Possesses Ample Legal Authority to Order Refunds and Should Exercise Its Discretion to Direct the NYISO to Amend the Invoices

Courts have recognized that “the breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies, and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives.” *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). In addition, the Commission has broad remedial discretion to address violations of the filed rate requirements of the Federal Power Act Section 205. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015 (9th Cir. 2004) (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000)). The Commission “unquestionably has the power” to exercise its remedial discretion by requiring refunds. *Id.* The Commission has the authority—indeed, a responsibility—to ensure the accuracy of rates. Because the errors in the allocation of UFE substantially affected charges to LSEs, this case provides a fruitful opportunity for the Commission to redress a long series of inaccuracies.²

In addition to federal case law, the NYISO Tariff also allows refunds in connection with “finalized” invoices in certain instances. Section 7.2A of the NYISO Open Access Transmission Tariff states: “For purposes of this Section 7.2A, ‘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

² See Petition for Declaratory Order of the New York State Electric & Gas Corporation at 20 (Dec. 23, 2008) (“NYSEG Petition”).

from the Commission in accordance with the Federal Power Act.” Services Tariff § 7.4 (emphasis added). This provision makes clear that both the NYISO and the Commission recognize that certain circumstances necessitate the reopening of finalized invoices. Although the time passed in the case exceeds the 24 month period for the NYISO to issue final bills, special circumstances exist in this case. In approving the NYISO Tariff, the Commission contemplated that there would be times when concerns of accuracy outweigh concerns of finality. In this case, it was stated that there was a pattern of errors that were “extraordinary in their scale and frequency.” NYSEG Petition at 3. In addition, the nature of the errors made them very difficult to detect—in part because the allocation of UFE is difficult to validate independently. *Id.* at 6. The Commission and the NYISO purposefully included an exception in the tariff for unusual circumstances such as these, and Commission action is needed in order to prevent an unjust result.

When determining whether or not to issue refunds, the agency must show that it considered relevant factors and struck a reasonable balance among them. *Towns of Concord v. FERC*, 955 F.2d 67, 76 (1992) (citing *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (1981)). In *Towns of Concord*, the court stated that “customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will given offense to equity and good conscience if permitted to retain it.” *Towns of Concord*, 955 F.2d at 75. In *Louisiana Pub. Serv. Comm’n v. FERC*, the court found that a refund is not appropriate if the end result of a tariff violation is not “unjust, unreasonable, or unduly discriminatory.” 174 F.3d 218, 223 (D.C. Cir. 1999).

The Commission has amended invoices several times in the past, recognizing a need to provide equitable relief. For instance, in *Exelon Corp. v. PPL Electric Utilities*, the Commission explained that correcting improperly billed invoices did not violate the ban on retroactive ratemaking. 114 FERC ¶ 61,298 at P 14 (2006). As FERC explained, “[t]he ban on retroactive ratemaking, however imposes no obstacle on amending invoices; in fact, the prohibition on retroactive ratemaking may well require an amended invoice if the original invoice deviated from the tariff.” *Id.* (citing *IDACORP Energy LP v. FERC*, 433 F.3d 879, 883 (D.C. Cir. 2006)). Accordingly, the Commission found that the billing errors should be corrected, despite the fact that PJM’s billing system was more complex than the simple application of a tariff rate to a transaction. *Exelon Corp. v. PPL Electric Utilities*, 114 FERC ¶ 61,298 at P 13 (2006).

Additionally, the Commission has recently found that the need for accuracy outweighs concerns of financial certainty in certain situations. For instance, in *Niagara Mohawk Power Corp.*, the Commission ordered the NYISO to adjust certain invoices issued between January and August 2007, for energy purchases which took place between March and August 2005. *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314 at P 24 (2008). The Commission, in granting National Grid’s request, explained that “[t]o refrain from doing so would yield an unjust and unreasonable result, requiring some customers to pay too much for energy purchases over the relevant periods, while others would pay too little due to erroneous billing data.” *Id.* Both of these orders present similar inequities to the case at hand. It would yield an unjust and unreasonable result for the Commission to deny NYSEG’s request to correct the misallocation of UFE costs in this case.

The Commission has properly exercised its refund authority into other organized markets as well. *See Pepco Energy Services, Inc. v. PJM Interconnection, LLC*, 128 FERC ¶ 61,051 at P 28 (2009) (noting that the market rules governing the peak-hour-period availability charge for infrequently-run generators were unjust and unreasonable under section 206 of the Federal Power Act and ordering PJM to pay refunds for the 2008-2009 delivery year); *see also Holland v. Midwest Independent System Operator, Inc.*, 112 FERC ¶ 61,105 at P 21 (explaining that FERC was not persuaded that Midwest ISO cannot provide the refunds required by the April 18 Order and continue to provide efficient settlement services to its Market Participants). Certain circumstances—such as those present in this case—require FERC action to prevent an injustice. Consequently, FERC should amend the NYISO invoices in accordance with the controlling precedent.

B. The Commission Must Direct the Parties to Use the Stipulated Methodology, as Amended by NYAPP, to Calculate Refunds

The administrative difficulties associated with issuing refunds are not implicated in this case. In the event that the Commission orders refunds, the parties have already agreed to the “Stipulated Methodology” that should be used to calculate the amounts owed. The Commission has properly found that the administrative burden to the ISO does not take precedence over achieving a just result. *See Holland v. Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,105 at P 11 (2005) (stating that “any administrative difficulties Midwest ISO may face are outweighed by the need to ensure that public utilities charge their customers the filed rate”). As discussed below, the Stipulated Methodology, as amended by NYAPP, is an equitable way to address the errors in the calculation of UFE.

NYAPP contests the Settlement Agreement to the extent that the Settling Parties intend to allocate the costs of additional UFE to NYAPP Members located on the Niagara Mohawk system, including the City of Sherrill and Oneida-Madison Electric Cooperative, in violation of the NYISO's Accounting and Billing Manual. *See* Amended Initial Comments of the New York Association of Public Power (Nov. 16, 2009). Section 3.2.2.1 of the NYISO's Accounting and Billing Manual provides that:

LSEs that are designated as providing actual hourly metering data are excluded from the sub-zonal load allocation process described above, and their metered consumptions are excluded from the denominator of the allocation ratio for the service month's initial invoicing.³

Therefore, the proper treatment of LSEs equipped with hourly interval recording metering systems, e.g., wholesale LSEs, including NYAPP's Members, is that they are excluded from the sub-zonal load allocation process for distributing UFE.

Therefore, NYAPP recommends that the Stipulated Methodology be amended to make certain that no additional UFE be charged to NYAPP Members and other wholesale LSEs, located on the National Grid system. With that amendment, and as a general matter, NYAPP supports use of the Stipulated Methodology as a means of correcting the misallocation of UFE.

³ *New York Independent System Operator Manual 14: Accounting and Billing Manual at § 3.2.2.1, Sub-Zonal Load Allocation to LSEs for Initial Settlement (September 2009),* <http://www.nyiso.com/public/webdocs/documents/manuals/administrative/acctbillmnl.pdf>.

III. PROPOSED FINDINGS AND CONCLUSION

For the reasons explained herein, the Commission should direct the NYISO to provide refunds and should use the Stipulated Methodology, as amended by NYAPP, to address the errors in the allocations of Unaccounted for Energy.

Respectfully submitted,

Thomas L. Rudebusch

/s/ _____

Jeffrey C. Genzer

Thomas L. Rudebusch

Natalie Karas

DUNCAN, WEINBERG, GENZER

& PEMBROKE, P.C.

1615 M Street, N.W., Suite 800

Washington, D.C. 20036

(202)-467-6370

Attorneys for

New York Association of Public Power

Dated: November 30, 2009

CERTIFICATE OF SERVICE

I certify that I have this day served the forgoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by U.S. Mail. Dated at Washington, D.C. this 30th of November 2009.

Natalie M. Karas
Natalie M. Karas
DUNCAN, WEINBERG, GENZER
& PEMBROKE, P.C.
1615 M St., N.W.
Suite 800
Washington, D.C. 20036
(202) 467-6370

Document Content(s)

EL09-26 NYAPP Brief.PDF.....1-12