

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

New York Independent System
Operator, Inc.

Docket No. ER07-99-000

ORDER GRANTING REQUESTED RELIEF AND DIRECTING REFUNDS

(Issued December 21, 2006)

1. On October 24, 2006, the New York Independent System Operator, Inc. (NYISO) notified the Commission of a discrepancy between its settlement software and its Open Access Transmission Tariff (OATT or tariff)¹ concerning the allocation of Operating Reserves costs. NYISO requests that it be allowed to allocate Operating Reserves using the settlement software methodology until the discrepancy is resolved. In this order, we grant NYISO's request to use its settlement software methodology effective October 25, 2006, direct NYISO to make refunds for past periods, and to file a refund report and an informational status report as discussed below.

I. Background

2. NYISO states that, under Rate Schedule 5 of its original OATT, costs incurred in each hour were allocated to loads and exports based on each customer's share of the total load and exports in that hour. This recovery method remained in effect until NYISO revised its tariff to implement its real-time scheduling system, effective February 1, 2005.²

¹ New York Independent System Operator, Inc. FERC Electric Tariff, Original Volume No. 1.

² See *New York Indep. Sys. Operator, Inc.*, 106 FERC ¶ 61,111 (2004) (accepting NYISO's real-time scheduling filing in Docket Nos. ER04-230-000).

3. According to NYISO, when it submitted its filing to implement the real-time scheduling system it inadvertently changed the Operating Reserves cost recovery mechanism in the OATT from an hourly allocation to a daily allocation. The OATT thus now provides that an entire day's Operating Reserves costs are allocated among loads and exports based on each customer's share of load and exports for the entire day. NYISO also states that the transmittal letter accompanying that real-time scheduling system filing indicated that the change from the hourly to the daily method was being made to bring NYISO's OATT into alignment with actual settlement practices.³ However, the settlement practice actually being used was an hourly, rather than daily allocation methodology. NYISO states that, during the course of a major review of its billing and accounting system software, it discovered the discrepancy between how its settlement software and its OATT treat Operating Reserves cost recovery.⁴

II. NYISO Request

4. NYISO seeks to be allowed to continue to allocate Operating Reserves costs using the hourly methodology until its stakeholder process determines whether to file a tariff amendment to conform the tariff to the method used by the settlement software or take such other action as may be necessary to conform the settlement software to the tariff.

5. NYISO states that the revision to Rate Schedule 5 of the OATT was mistakenly filed and unnecessary. NYISO states that a review of the materials presented to stakeholders in connection with the real-time scheduling system filing reveals no evidence that any change in the Operating Reserves cost allocation was intended.

6. In addition, NYISO claims that the daily allocation methodology would produce a less equitable allocation than an hourly method because instead of matching hourly costs to the loads in the energy market during the hour the costs were actually incurred, costs

³ The transmittal letter filed in Docket No. ER04-230-000 provides (in pertinent part):

Section 2.0 of Rate Schedule 5 would be revised to reflect that customers will pay hourly charges aggregated over a Dispatch Day, not a monthly charge for Operating Reserves. This is not an RTS-related change but is being offered at this time so that the NYISO's tariff provisions match its actual billing practices.

⁴ NYISO states that the discrepancy has no effect on clearing prices for Operating Reserves.

would be socialized over the day. NYISO states that it does not socialize the cost of energy across an entire operating day nor should it socialize the cost of Operating Reserves across an entire operating day.

7. NYISO also states that Commission authorization will allow it to continue finalizing customer settlement invoices and that, without Commission authorization, it will be required to reprogram its billing and accounting system to incorporate the daily allocation methodology and to reissue invoices.

8. Also, according to NYISO, the financial impacts are relatively small. For the period from March 2005 through September 2006 the total Operating Reserves costs were approximately \$66.2 million. NYISO estimates that reallocating the costs using the daily allocation methodology would redistribute about \$1.1 million, which represents 1.7% of the total Operating Reserves costs, among 236 affected customers, over that period.

9. NYISO states that it is working through its stakeholder process to develop a proposal to amend Rate Schedule 5 to conform to the current hourly allocation actually used in its billing and accounting system. NYISO intends to complete the stakeholder process by the end of 2006 and file a tariff amendment in early 2007.

10. NYISO argues that the Commission has evaluated a number of issues in determining whether or not to authorize such actions including: the underlying error was made in good faith; any such authorization is of a limited scope; a concrete problem needs to be remedied; and any such authorization will not have undesirable consequences, such as harming third parties. NYISO states that the underlying error was made in good faith and that, despite a transparent stakeholder process, the error went unnoticed as part of a voluminous tariff filing. NYISO also states that the scope of the request is limited to a relatively short time period and would have a relatively small financial impact. Next, NYISO asserts that the error needs to be remedied. It argues that the hourly allocation methodology has been used since NYISO began market operations in 1999 and that it is more equitable and consistent with cost causation principles. Finally, NYISO argues that the authorization will not have undesirable consequences but without such authorization NYISO will be unreasonably required to implement a manual process or invest in a substantial and costly recoding effort.

III. Notice and Responsive Pleadings

6. Notice of NYISO's filing was published in the *Federal Register*, 71 Fed. Reg. 65,486 (2006), with interventions and protests due on or before November 14, 2006. The

NRG Companies,⁵ D.C. Energy, LLC and Epic Merchant Energy LP filed timely motions to intervene. The New York Power Authority (NYPA) filed a timely motion to intervene and comments. The Long Island Lighting Company d/ba/ LIPA, Consolidated Edison Company of New York, Orange & Rockland Utilities, Inc. and Central Hudson Gas & Electric Corporation (collectively, Protesting Parties) filed a timely joint motion to intervene and protest. NYISO filed an answer to the protest and New York State Electric and Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, and Rochester Gas & Electric Corporation (Intervening Parties) filed a motion to intervene out of time.

11. NYPA supports NYISO's filing and agrees with NYISO that the change to the allocation method in the tariff was an unintentional error.

12. The Protesting Parties request that the Commission reject the request and require NYISO to issue refunds. Protesting Parties do not oppose a prospective modification of the Operating Reserves allocation methodology; however, they argue that NYISO is attempting to seek a waiver for its noncompliance with its tariff. They assert that, under section 205 of the Federal Power Act (FPA)⁶ and the filed rate doctrine, NYISO may not provide jurisdictional service inconsistent with its filed rates.

13. Protesting Parties argue that NYISO has not justified its request. First, they assert that NYISO's modification of Schedule 5 is not an error justifying a tariff waiver and that Schedule 5 was circulated to NYISO stakeholders, approved by the necessary stakeholder committees and approved by the Commission. They state that market participants were on notice of the tariff change and had reason to expect that the invoices issued by NYISO, starting with the effective date of the tariff modifications, would allocate Operating Reserves costs using the daily allocation methodology.

14. Second, Protesting Parties argue that grant of the requested relief is not limited in scope because it includes all invoices from March 1, 2005 forward with an undefined end date. They also argue that, the period in question has already spanned over 20 months and that there is over \$1 million (plus interest) in incorrect charges.

⁵ The NRG Companies are NRG Power Marketing Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

⁶ 16 U.S.C. § 824d (2000).

15. Next, Protesting Parties contend that NYISO has failed to demonstrate that Commission action will address a concrete problem that needs to be remedied. They state that, if the Commission accepts NYISO's violation of Schedule 5 then the filed rate doctrine would be eviscerated. Finally, Protesting Parties argue that Commission action would have real and undesirable consequences including over \$1 million in incorrect charges that would ultimately be passed on to wholesale and retail customers.

16. NYISO responds that it is seeking limited, one-time relief and that the Commission has granted such relief in the past. NYISO states that if the Commission were to decide not to grant relief, it has authority to not require refunds and that it would be appropriate for the Commission to exercise its discretion to not require refunds. According to NYISO, the intent of the tariff filing submitted in the real-time scheduling proceeding was to make the tariff conform to NYISO's existing billing procedures, not to make a change in the allocation of Operating Reserves charges. It also states that, as an independent, not-for-profit entity, it cannot reap any sort of unjust windfall as a result of the error and that it was not engaging in any behavior designed to unjustly benefit some class of market participants at the expense of others. NYISO also reiterates that the amount of money at issue is relatively small and that the hourly allocation methodology used results in a more equitable cost allocation. Finally, NYISO argues that the protest provides no reason why the Commission's exercise of discretion to not order refunds in other cases violates the rule against retroactive ratemaking.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.214(d) (2006), the Commission will grant Intervening Parties' late-filed motion to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NYISO's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

18. The Commission finds that NYISO has presented sufficient justification to allow it, on a prospective basis, to use an hourly allocation methodology – as an hourly allocation methodology better matches costs and loads and thus better tracks cost causation -- until such time as its stakeholder process determines to amend the tariff or to make changes to the billing and accounting systems. While we find that NYISO has made a sufficient and persuasive showing that prospectively an hourly allocation should be used, from March 2005 forward NYISO has failed to comply with its tariff. Whether or not NYISO and its stakeholders had any intent to change the methodology from an hourly process to a daily process, the fact still remains that the tariff, the filed rate, reflects the daily methodology. Accordingly, we will grant authorization, on a prospective basis beginning the day after NYISO notified the Commission of this problem (i.e., October 25, 2006).⁷ However, we direct NYISO to make refunds for the period from March 2005 to October 24, 2006, within 30 days of the date of this order. We also direct NYISO to file a refund report with the Commission showing the refunds, including interest, within 30 days after making the refunds. Further, we require NYISO to file an informational status report on the progress of its stakeholder process and its efforts to either file a tariff amendment or reform its practices to conform to the tariff.

19. Finally, it should be noted that NYISO uncovered this discrepancy through a major corporate initiative to improve the quality and accuracy of its processes. Upon discovering the error, NYISO took the issue to its stakeholders for resolution and notified the Commission. The Commission commends NYISO, and other jurisdictional entities, who initiate procedures to improve their operations to better serve their customers, and the Commission encourages them to continue to do so.

The Commission orders:

(A) NYISO's request for relief is hereby granted, on a prospective basis, as discussed in the body of this order.

(B) NYISO is hereby directed to make refunds, within thirty (30) days of the date of this order, as discussed in the body of this order, and NYISO is hereby directed to file a refund report, within thirty (30) days after making refunds, as discussed in the body of this order.

⁷ We will grant waiver of the 60-day prior notice requirement to make the authorization effective the day after the date of filing.

(C) NYISO is hereby directed to file an informational status report within thirty (30) days of the date of issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.