UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

INITIAL BRIEF OF
RETAIL ENERGY SUPPLY ASSOCIATION

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Pursuant to the Notice issued on October 13, 2009 by the Federal Energy Regulatory Commission ("Commission"), the Retail Energy Supply Association ("RESA") hereby files this Brief on the "Reserved Issue" in the above-referenced proceeding concerning efforts of New York State Electric & Gas Corporation ("NYSEG") to re-bill certain customers back to 1999 for purchases of energy supposedly incorrectly invoiced due to errors in metering data at certain meters owned and operated by NYSEG and Niagara Mohawk Power Corporation d/b/a National Grid USA ("National Grid"). RESA members, many of whom are Energy Service Companies ("ESCO's") in New York oppose any result in this proceeding that would result in re-billing its members.

First, the New York Independent System Operator, Inc. ("NYISO") Tariff prohibits such re-billing and establishes a firm 24 month period in which to reconcile invoices. Second, re-billing ESCOs for activities in which they engaged ten years ago would cause significant harm. Many of those customers are no longer served by the same ESCO and ESCOs would have no means to recover those costs from current customers. Third, it is important to note that ESCOs are innocent parties in this proceeding. ESCOs do not control the meters that resulted in these errors – they rely entirely on the utility to provide accurate data that they use to bill their customers and price their services. Finally, common equitable principles and prior Commission precedent support rejection of efforts to rebill/invoice ESCOs for these meter errors. Business

decisions have been made in reliance on the data provided at the time. ESCO contracts with their customers have expired. The markets have continued to develop over the last ten years. Burdening ESCOs with significant sums in prior period re-bills would be inequitable. RESA respectfully requests that the Commission find that NYSEG should not be entitled to re-bill for the past period reflecting meter errors uncovered well after the fact. In support of this brief, RESA submits as follows:

I.
FACTS

A. Factual Background

This proceeding commenced on December 23, 2008 with the filing by NYSEG of a Petition for Declaratory Order seeking from the Commission an order requiring NYISO to rebill charges to correct for invoices that were sent based on incorrect metering information. The amount at issue that would be re-billed would total approximately $20 million and those amounts date back to errors that allegedly occurred starting in 1999 and ending March 2008. Of the $20 million in alleged errors: (1) $7 million is associated with errors caused by inaccuracies in the Snyder Lake-Hoag Meter owned and operated by National Grid; (2) $13.5 million is associated with the Cold Springs Tie Meter, owned and operated by NYSEG; and (3) $350,000 is associated with other National Grid-owned meters.

Despite NYSEG's admission that some of these meter errors had existed at NYISO startup in 1999, NYSEG noted that it did not discover these substantial metering errors until "recently."[1] NYSEG asked the Commission to order NYISO to rebill National Grid, alleging that without rebilling, National Grid will have received a windfall. NYSEG asserted that

[1] NYSEG Petition at p.1.

"extraordinary circumstances" exist, therefore NYISO Tariff obligations that would otherwise limit recovery of billing errors should be disregarded.

According to the Settlement Agreement (discussed below), the metering errors "directly affected the measurement of subzone load in certain National Grid and NYSEG subzones, causing an overstatement in NYSEG's subzone Unaccounted for Energy ("UFE") and an understatement in National Grid's subzone UFE."[2]

On January 22, 2009, a number of parties intervened and protested, including National Grid and NYISO. In its Protest, National Grid opposed rebilling for these amounts and noted that approximately 85% of the alleged errors and nearly 70% of the overbilling was the direct result of NYSEG's own metering errors. National Grid asserted that the NYISO Tariff prohibited such rebillings without a showing of "extraordinary circumstances" which had not been shown. National Grid noted that these metering errors were rather small and reached the magnitude as identified in the Petition only because of the delay in NYSEG discovering them.

NYISO argued that the Petition should be denied because any rebilling would upset the "settled expectations" regarding finalized invoices. NYISO noted that the NYISO's Tariff-related settlement provisions "establish specific time periods for the NYISO and its customers to review, challenge, correct, and finalize settlement information."[3] NYISO explained the rationale for establishing fixed deadlines after which bills are presumed final. NYISO noted that it is incumbent on all customers to review settlement information and find any errors. In this case, NYSEG and National Grid "were responsible for reviewing their tie-line metering data and challenging any errors within tariff prescribed time frames."[4]

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2 Settlement Agreement at P.14.
3 NYISO Comments at p.4.
4 NYISO Comments at p.5.

NYISO pointed out that National Grid was not the only customer that would be affected by any rebilling. NYISO correctly noted that ESCOs in National Grid's service territory would also be affected via National Grid's retail access program. NYISO stated that these ESCOs were innocent victims – "not responsible in any way for the metering error at issue, have received finalized invoices for all of the service months at issue, and have no reason to expect that invoices that were finalized in accordance with the NYISO tariffs as far back as 1999 may now be subject to adjustments."[5]

On March 30, 2009, the Commission issued an order setting the matter for settlement judge procedures.[6] On September 21, 2009, as the result of these settlement judge discussions, NYSEG on behalf of it and the other settling parties (National Grid and New York Municipal Power Agency ("NYMPA")) filed a partial settlement agreement ("Settlement Agreement").

In the Settlement Agreement, the parties agreed to a stipulation of facts. NYSEG agreed not to contest certain identified metering errors. The parties also agreed on a procedure to deal with the issue to which they could not agree, referred to as the Reserved Issue. The Reserved Issue is expressed by the parties as follows:

> "whether, based on the agreed-upon facts in the Joint Stipulation and any other fact or consideration 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 metering errors identified in the Joint Stipulation. If the Commission orders the NYISO to correct such invoices, the NYISO will rebill using the Stipulated Methodology."[7]

The Stipulated Methodology is a way by which UFE allocations allegedly inaccurately allocated to the metering errors could be reallocated to the "correct" market participants. As

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5 NYISO Comments at p.7.

6 *New York State Electric & Gas Corporation*, 126 FERC ¶ 61,292 (2009).

7 Settlement Agreement at P.5.

reflected in the Settlement Agreement, the Stipulated Methodology would multiply the inaccurately-billed energy recorded through meter error by the NYISO's LBMP to calculate the value of the energy which could be distributed among LSEs participating in the National Grid and NYSEG subzones during the metering error period. The Stipulated Methodology would replace the need for NYISO to revise all market participant invoices on an hourly basis for the time period at issue.

The Settlement Agreement includes a number of Appendices, including Appendices 5 and 6 which list the ESCOs and their MW and percentage responsibility for the UFE associated with the metering errors. By reviewing an ESCO's percentage responsibility and multiplying that times $20 million, an ESCO can figure its cost responsibility if the Commission orders NYISO to correct the invoices as requested by NYSEG.

B. RESA

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity.[8] RESA and its members are actively involved in retail electricity markets throughout New York, as well as in regulatory proceedings impacting the development of NYISO and other RTO markets. RESA members are ESCOs that serve retail customers in New York, including in the service areas of NYSEG and National Grid.[9]

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[8] RESA's members include ConEdison Solutions, Inc.; Direct Energy Services, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; RRI Energy; Sempra Energy Solution, LLC.

[9] On October 13, 2009, RESA filed a motion to intervene out of time in this proceeding and, on October 29, 2009, Chief Administrative Law Judge Wagner granted RESA' intervention. RESA is, therefore, a party to this proceeding and has been given the right to participate in the briefing on the Reserved Issue.

RESA members are listed on Appendices 5 and 6 and would shoulder significant portions of any monies returned to NYSEG. RESA is opposed to any rebilling and submits that rebilling these amounts will cause substantial harm to its members listed on Appendices 5 and 6.[10]

II.
SUMMARY OF ARGUMENT

RESA submits that the NYISO should not be ordered to re-bill customers for amounts associated with purchases of energy allegedly incorrectly invoiced due to errors in metering data at certain meters owned and operated by NYSEG and National Grid. RESA opposes this re-billing for three primary reasons. First, the NYISO Tariff expressly prohibits this sort of re-billing. Errors must be discovered in a reasonably timely basis; seeking to assess customers for ten years' worth of meter errors is inconsistent with the Tariff.

Second, NYSEG has not shown that extraordinary circumstances are present, a showing necessary to disregard the NYISO Tariff and commence re-billing. Metering is an exclusive obligation of the utility – NYSEG must be responsible to accurately meter for its services and discover any errors in a timely fashion. The MWh level of the metering errors are so large because the errors went undetected for so long. NYSEG must not be rewarded for failing to uncover these errors in a timely fashion.

Finally, retroactive re-billing is not supported by equitable principles and prior Commission precedent. The Commission generally declines to order refunds when refunds would undermine confidence in the markets and when entities cannot revisit their economic decisions. These factors are present here. RESA's members relied on the meter data provided by the utilities. RESA's members, as ESCOs serving retail markets in New York, cannot revisit

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[10] Certain RESA members have acquired one or more ESCOs that also appear on Appendices 5 and 6.

their purchasing decisions, cannot revisit or bill under contracts that may have expired many years ago, and will have a difficult time recovering these costs.

III.
ARGUMENT

RESA opposes rebilling for the 1999 – 2008 time period and in the amounts reflected on Appendices 5 and 6 of the Settlement Agreement. First, the NYISO Tariff precludes rebilling so far in the past unless NYSEG can make a showing that such rebilling is supported by extraordinary circumstances. Second, there are no extraordinary circumstances present here. In fact, these metering errors occurred on meters owned and operated by NYSEG and it should have uncovered these errors long ago. Third, rebilling these amounts will cause RESA members significant harm. RESA members are ESCOs located within the National Grid service area. The success of a competitive retail business depends on the efficiency of acquiring retail load, on securing the corresponding power resources, and on careful management of physical and financial risk at execution of the sales agreement with the end use customer. There are no deferral mechanisms to manage charges and assessments -- imposed well after the fact -- that could not have been foreseen. In short, RESA members as ESCOs may have no ability to recover these costs from customers.

A. The NYISO Tariff Prohibits Rebilling

Both the NYISO's Services Tariff and Open Access Transmission Tariff ("OATT") (jointly "Tariffs") prohibit NYISO from adjusting invoices that have become final under the tariff processes, absent a Commission or court order.[11] The NYISO Tariffs, which govern the operation of the NYISO and upon which all market participants rely, contain extensive details on

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[11] *See* NYISO Services Tariff, Section 7.4, Sheet No. 190; NYISO OATT, Section 7.2A, Sheet No. 82.01.

invoicing, correcting errors and revising data. There were numerous opportunities for NYSEG and for National Grid to find and correct these metering errors. They alone controlled the meters; they alone compiled and submitted the data to the NYISO. However, once the express time periods have expired, it is appropriate that the invoices become final and not subject to adjustment.

As noted by the NYISO in its Comments submitted in response to the Petition (at 4), the Tariff provisions governing the finality of invoices were an intentional balancing of customers needs for accurate settlement statements and their interests in financial certainty of a final invoice not subject to revision. The Tariff provisions were designed to prevent just what NYSEG seeks in this case.

In order to have a successful and well functioning market, participants in that market must be able to rely on the Tariffs and must have the confidence that transactions will not be upset after the fact. Certainty of invoicing, billing and assessment of charges is especially critical to retail marketer/ESCOs offering services in retail markets.

ESCOs seek to enroll customers in individual utility service areas. The type of customer and the term of any arrangement varies by customer and service provided, but terms of one to five years are common. ESCOs can only collect costs from customers while they are customers. Thus, customers today were either not customers in 1999 or would be subject to a different contractual relationship now that would preclude re-billing for the prior contractual periods. In addition, ESCOs must rely upon the utility for many things, including meter data like the type at issue here as well as the corresponding levels of UFE charged to LSEs in each zone or sub-zone. ESCOs collect appropriate comments from their customers and remit appropriate amounts to their wholesale suppliers and/or the NYISO based on metering data supplied by, in this case

National Grid. ESCOs do not have access to tie-line meter data and must rely exclusively on the utility for such information.

ESCOs do not have the mechanisms that utilities possess for managing cash flow. ESCOs do not have the ability to create a regulatory account or deferral to collect costs from customers over time or at a later time. As a result, ESCOs must be able to rely on the Tariffs and NYISO's enforcement of the Tariffs in order to conduct their business in an orderly fashion so that all customers can obtain the benefits that retail marketers like RESA's member, provide. NYISO's Tariffs are on file, effective and must be enforced to prohibit re-billing of these alleged metering errors. Otherwise, a market participant will never be able to assume that a transaction is no longer subject to adjustment.

B. NYSEG Has Not Shown That Extraordinary Circumstances Exist to Disregard the Express Tariff Provisions Prohibiting Retroactive Re-billing

In its Petition, NYSEG argued that "extraordinary circumstances" existed such that departure from the NYISO Tariffs would be warranted. NYSEG relied upon a prior-filed National Grid case in which National Grid was permitted to rebill outside of the Tariff process due to the unique circumstances presented in that proceeding.[12] The *National Grid* case is distinguishable and does not support retroactive rebilling in this case. There are simply no extraordinary circumstances that would justify the remedy sought here.

The basic facts of the *National Grid* case are as follows. In February of 2008, National Grid filed a petition for declaratory order requesting the Commission to order NYISO to adjust invoices issued between January and August 2007 involving energy transactions from 2005. According to National Grid, due to a computer programming error, "consumption data reported

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12 *See Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314 (2008) ("*National Grid*").

by [National Grid] to the NYISO for service received by these customers from March through November 2005 'overstated the consumption for the load served by some LSEs (primarily ESCOs) and understated the consumption for the load served by other LSES (including National Grid and NYPA).'"[13] The computer error was made at the final stage of the invoicing process, when customers had limited time to review and discover any errors. In addition, the error, submission to NYISO of duplicative usage data, was only submitted to the NYISO – the correct data was submitted to the ESCO, making discovery of the error even more difficult.

In its order permitting the re-invoicing, the Commission noted that the NYISO Tariff generally prohibits the NYISO from adjusting final invoices. However, under the "specific circumstances at hand" [14] the Commission found that extraordinary circumstances existed that warranted Commission action to require NYISO to make the requested changes. The case at hand presents no similar justification.

First, the errors at issue in this proceeding – tie line meter errors – were present in the initial bills over a period of years, undiscovered by the utilities and are just the type of errors that the Tariff language was designed to address. If NYSEG is allowed to collect these amounts now, it would create an incentive for utilities to find these sorts of errors at any time or at their whim and seek to collect tidy sums from customers, creating an endless cycle of re-billing that will eliminate any hope of finality in the NYISO billing process.

Second, the meter errors and the resulting costs at issue are only so large and identified by NYSEG now as "extraordinary" because a series of small errors accumulated over time and went undetected for many years. The meters and the data were under the control of NYSEG. It is NYSEG's general utility obligation to ensure that the information compiled by those meters is

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13 *National Grid* at P.8.
14 *National Grid* at P.24.

accurate. ESCOs rely entirely on the accuracy of this information in providing its services to its customers. NYSEG must not be rewarded (or at a minimum remove any incentive to ensure that its meters are recording accurately) by being able to claim extraordinary circumstances and collect from market participants up to ten years after the transactions took place for meter errors that they should have discovered sooner.

Finally, what would be extraordinary in this case would be the harm to ESCOs caused by any decision to permit re-billing. Based on the information in Appendix 5, ESCOs would be responsible for approximately 16% of the amounts owed. Yet, ESCO did nothing wrong. ESCOs could not have discovered these errors – they did not have access to this metering information. In addition, ESCOs cannot, like a utility, just include these new charges in customer bills. Customers served by ESCOs in 1999 are not likely served by the same ESCO in 2010 when any payment would be required. ESCOs do not possess the means to collect from customers with whom they no longer have a contract. Furthermore, ESCOs relied on historic levels of UFE when pricing existing contracts. Had NYSEG detected and corrected the metering errors in a timely fashion, ESCOs would have incorporated the appropriate UFE values into current contracts. Finally, ESCOs that have would have a liability for these retroactive charges may find themselves at a competitive disadvantage today. If ESCOs with a retroactive liability try to recover these costs from existing customers they will be at a competitive disadvantage vis a vis ESCOs who were not serving customers at the time of these meter errors with no retroactive liability. Long serving ESCOs will be punished due to no fault of their own for participating early in newly opening retail markets. Clearly, NYSEG should not be entitled and the Commission should not order NYISO to re-invoice or rebill customers for the accumulated meter errors.

C. Retroactive Rebilling Is Not Supported by Equitable Principles and Prior Commission Precedent

As noted in parts A and B above, the invoices rendered by the NYISO are final and not subject to adjust/rebill. NYSEG should have discovered these errors in a more timely manner and pursuant to the timelines established in the Tariffs made whatever adjustments necessary in the time periods prescribed. No extraordinary circumstances have been presented that would excuse the failure to discover these errors or justify the harm to ESCOs caused by imposition of millions of dollars in charges for services provided up to ten years ago. However, in addition to these valid reasons to uphold the provisions of the NYISO Tariffs and not order the NYISO to rebill these amounts, equitable principles and prior Commission precedent require that the invoices remain final and not subject to adjustment.

In this case, NYSEG and National Grid have resolved the metering errors that have plagued upstate New York for the last ten years. Today, customers should be receiving accurate information and paying for services received. Thus, all that remains to be reconciled are the past periods. As noted above, the NYISO Tariffs contemplated that errors would be discovered after the fact and the Tariffs contain provisions that, after established periods of time, invoices become final and not subject to change. RESA submits that there have been no Tariff violations and no other justification under Federal Power Act Section 205[15] to find that the filed rate doctrine requires implementation of a retroactive refund remedy. To the extent that the Commission finds that justification exists, the Commission should exercise its discretion to *not* order refunds.

The Commission's discretion is at its zenith when fashioning a remedy.[16] The Commission has broad remedial discretion "even in the face of an undoubted statutory violation,

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15 16 U.S.C. § 824d.

16 *Niagara Mohawk Power Corporation v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

unless the statute itself mandates a particular remedy."[17] In *Towns of Concord*, the court found 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 give offense to equity and good conscience of permitted to retain it."[18] The Court noted that the Commission must analyze the "facts of this case" and consider whether refunds are "equitable in the circumstances of the litigation."[19] In ascertaining whether the Commission had properly exercised its discretion to require refunds, courts have required the Commission to look at whether any violation was made in bad faith[20] and whether a refund is a proportionate remedy for the violation that occurred.[21]

In the RTO/ISO framework, the Commission has declined to issue refunds when refunds "would create substantial uncertainty in the … markets and would undermine confidence in them," and when "customers cannot effectively revisit their economic decisions."[22] In addition, in *Bangor Hydro-Electric Co. v. ISO New England, Inc.*, 97 FERC ¶ 61,339 (2001) (*Bangor Hydro*") the Commission declined to order refunds despite an admission by ISO New England that a computer error identified in a Complaint filed by Bangor Hydro caused ISO New England to violate a Tariff market rule. The Commission stated:

> [T]hese prices have been relied upon by market participants ever since that time. Thus, to go back at this point and change those prices, when no notice was given by ISO-NE that such a disruption might occur, would do far more harm to wholesale electricity wholesale markets than is justifiable or appropriate in light

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17 *Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000).

18 *Towns of Concord, Norwood and Wellesley, Mass. v. FERC*, 955 FERC F.2d 67, 75 (D.C. Cir. 1992) (*Concord*).

19 *Town of Concord*, 955 F.2d at 75-76.

20 *See Concord*, 955 F.2d at 76 (Boston Edison (the utility) did not realize that it had committed a tariff violation).

21 *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099 (D.C. Cir. 1993).

22 *New York Independent Transmission System Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000).

> of the circumstances raised by Bangor Hydro and would be fundamentally unfair to market participants.[23]

Consistent with Commission and Court precedent, the Commission must not order NYISO to rebill for these meter errors. First, these errors arose well in the past. Market participants relied on the information presented to them at the time, sent their own invoices to customers, and paid those entities who were owed payment, all in reliance on the meter data that was under the sole control of NYSEG or National Grid. The invoices became final without the entity with the access to the information – NYSEG – discovering the errors.

Second, market participants cannot revisit their economic decisions. This is especially true with respect to ESCOs. These transactions took place years ago. As noted above, ESCOs such as RESA members, are not likely to have the same customers today as they did when the errors were made. If they no longer have contractual privity with a customer, they cannot go back and collect any underpayment from that customer for any prior period. ESCOs cannot easily collect these costs from current customers. These customers were not responsible for any underpayment that arose in a prior year or years. ESCOs do not have deferral accounts or other mechanisms that regulated utilities possess to handle over and underpayments from a cash flow perspective. Thus, ESCOs are likely to have to bear these costs with no means of recovery, when, at the time the invoice was tendered and the error was undiscovered, the customer would have been rightfully responsible for the charge.

Third, the remedy would be disproportionate to any "violation." As admitted by NYSEG, these meter errors were relatively small but became significant due to the passage of time. At the time of each monthly invoice, any error was small. Thus, there was little, if any,

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23 *Bangor Hydro*, at 62,590.

harm at the time due to the error.[24] However, on an accumulated 100 month basis, application of a remedy and collection of ten years worth of money from ESCOs identified on Appendix 5 to the Settlement Agreement payable currently creates substantial harm to ESCOs for the reasons identified in the paragraph above.

Finally, imposition of these back charges would create substantial uncertainty in the market. ESCOs require market certainty and the adherence to Tariffs and stated rules in order to succeed. Their customers rely on the ESCO to meet the price and other contractual obligations. In order to have a vibrant retail and wholesale marketplace, market participants, and ESCOs in particular, must be able to rely on Tariff procedures and the finality of invoices. In this case, if NYSEG is able to succeed in collecting for its past meter errors, any other utility can do the same thing today, tomorrow, next year or whenever it wants and seek to collect any alleged under-recoveries that it uncovers. ESCOs will operate never knowing when another utility will seek to collect for some past error long after the final invoice has been paid, citing the same "extraordinary circumstances" plea that NYSEG has used here. This possibility creates an untenable situation for competitive markets. There is ample time in the Tariff to discover billing errors. If an invoice is final, it is final. In short, based on the facts present here, refunds should not be ordered.

IV.
CONCLUSION

RESA respectfully requests that the Commission deny the request of NYSEG to order the NYISO to re-bill customers for its metering errors. The NYISO Tariff carefully balances the need for finality in billing and the need to ensure that billing data is accurate. NYSEG has

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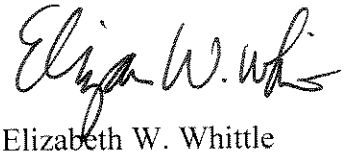
[24] That being said, NYSEG and other utilities should ensure that their meter data is accurate because ESCOs and other market participants that must rely on this data must be sure that the information they are provided is accurate and the resulting rate just and reasonable.

simply not shown that extraordinary circumstances exist that would change that balance in favor of re-billing for ten years' worth of meter errors. Not only is what NYSEG seeks inconsistent with the Tariff, it is inconsistent with Commission precedent and prior practice.

WHEREFORE, RESA respectfully requests that the Commission should not direct 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.

Respectfully submitted,



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Dated: November 25, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Initial Brief of Retail Energy Supply Association via electronic mail on all parties listed on the service list compiled by the Secretary in this proceeding.

Dated in Washington, DC this 25th day of November, 2009.

Elizabeth W. Whittle