UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REPLY BRIEF

Elizabeth W. Whittle
Nixon Peabody LLP
401 9th Street, N.W., Suite 900
Washington, DC 20004

Attorney for Retail Energy Supply Association

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REPLY BRIEF OF RETAIL ENERGY SUPPLY ASSOCIATION

Pursuant to the October 13, 2009 Notice issued by the Federal Energy Regulatory Commission ("Commission"), the Retail Energy Supply Association ("RESA")[1] hereby files this Reply Brief to the Briefs filed by: (1) New York State Electric & Gas Corporation ("NYSEG"); and (2) Commission Staff. RESA submits that none of these filing entities have shown that extraordinary circumstances – or any circumstances for that matter – exist that would support ignoring the express terms of the New York Independent System Operator, Inc.'s ("NYISO") Tariff to allow re-billing as NYSEG seeks. In addition, equitable circumstances call for the Commission to retain the status quo for past periods, with knowledge that the meter errors have been caught and corrected for the future. In support of this Reply Brief, RESA submits as follows:

I. BACKGROUND

RESA hereby incorporates by reference the factual statement submitted in its Initial Brief and will not repeat a detailed factual statement here. In brief, on December 23, 2008, NYSEG filed with the Commission a petition seeking an order requiring NYISO to modify finalized invoices for the time period 1999 -2008 due to recently discovered errors in meter data submitted

[1] RESA members include Con Ed Solutions, 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 Solutions LLC. The Comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

by NYSEG and National Grid. The meter errors affected the amount of Unaccounted for Energy ("UFE") assessed and collected in portions of upstate New York. According to NYSEG, because of the meter errors, NYSEG was allegedly overcharged for UFE. Despite NYSEG's admission that some of NYSEG's own meter errors had existed at NYISO startup in 1999, NYSEG noted that it did not discover these metering errors until "recently."[2] 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 "extraordinary circumstances" existed, therefore NYISO Tariff obligations that would otherwise limit recovery of billing errors should be disregarded.

RESA and a number of parties filed initial briefs, taking issue with NYSEG's position. RESA opposed this re-billing for three primary reasons. First, the NYISO Tariff expressly prohibits this type 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 under the NYISO Tariff and Commission precedent to 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 and the financial implication 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

[2] NYSEG Petition at p.1.

decisions. 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 their purchasing decisions, cannot revisit or bill under contracts that may have expired many years ago, and therefore would be unable to recover these costs from their customers.

National Grid, Independent Power Producers of New York, Inc. ("IPPNY"), the NRG Companies also filed briefs opposed to re-billing. Commission Staff and NYSEG filed briefs supporting re-billing. The New York Association of Public Power ("NYAPP") filed a brief supporting re-billing, but not for NYAPP's two members included in the proposed Stipulated Methodology. Thus, the effect of NYAPP's brief would be to increase even more the retroactive assessment against Energy Service Companies ("ESCOs") like the RESA members.

NYSEG in its brief attempts to cast itself as harmed significantly by NYSEG's own meter errors. NYSEG casts itself as an innocent – its meter errors went undetected because of "data visibility" issues that supposedly occurred at NYISO startup. According to NYSEG, these visibility issues apparently render NYSEG's discovery of these errors well after the fact reasonable. Despite the fact that it wasn't until only recently that the NYISO's correction period for metering errors was shortened to 55 days (prior to 2002, NYSEG had 24 months to review settlement information, followed by a 12 month customer review period), NYSEG infers that this short time period made it difficult to catch the errors.

Commission Staff take the position that the invoices were incorrect and therefore violative of the filed rate doctrine. According to the Commission Staff, the invoices, even though they were not the result of any error of the NYISO, violated the Tariff and, therefore, must be corrected. Staff ignores the plight, harm and negative effect of a re-billing on ESCOs such as the RESA members, mis-characterizing this dispute as one between two large investor-owned utilities. As

will be shown in more detail below, the cases and support cited for Staff's proposition are simply inapposite to the situation at hand. The economic effect of a re-bill on ESCOs will be significant and must not be ignored. In sum, the Commission must find that the NYISO Tariff controls the situation – the bills rendered from 1999 – 2008 are final. NYISO must not be ordered to re-bill under the Stipulated Methodology or otherwise for the effect of these past meter errors.

II.
SUMMARY OF THE ARGUMENT

There has been no violation of the filed rate doctrine that warrants re-billing back ten years. The Commission Staff cites a number of cases in support of its position, yet all of the cases are inapposite and all involve actions or inactions of the RTO/ISO that led to a call for refunds. Here, the NYISO did nothing other than take NYSEG-created data and reasonably rely upon it in generating invoices. Extraordinary circumstances must be shown before modifying invoices and retroactively re-billing customers and there are no extraordinary circumstances presented here. Moreover, permitting retroactive re-billing would create a perverse incentive to never finalize invoices, allowing re-billing with no end. NYSEG has had plenty of time to catch its errors over the years and to allow re-billing now would cause substantial harm to RESA and its members.

III.
ARGUMENT

A. There Has Been No Violation of the Filed Rate Doctrine That Warrants Re-Billing Back Ten Years

Commission Staff takes the position that the Commission should order NYISO to re-bill because the use by NYISO of the inaccurate meter data rendered NYISO's actions violative of the filed rate doctrine.[3] However, NYISO has done nothing wrong. The meter errors were the fault of the transmission owners, NYSEG and National Grid. NYISO inputted the information

[3] Staff Brief at 11.

received. Nothing more. In fact, NYISO has followed its Tariff in determining that the bills are final. It was up to the transmission owners – the only entities with the metering information in their possession -- to submit accurate information and, if the information was not accurate, render correct information within the time periods specified in the Tariff. To hold NYISO responsible for the errors of NYSEG – the party complaining – is highly improper. As noted in RESA's brief, no matter what the legal theory, the Commission's discretion to order refunds remains paramount.

1. The Cases Cited by Staff Do Not Support its Position

In support of its position, Staff cite to a number of cases, yet these cases are inapposite to the situation at hand. In each case cited, the Commission found fault with the RTO/ISO's action or inaction. In this case there is no comparable RTO/ISO wrongdoing. For example, in *Idacorp Energy LP v. FERC*, 433 F.3d 879 (D.C. Cir. 2006), the Court addressed issues dealing in the interpretation and application of the California ISO Tariff with respect to whether certain charges should be considered within or outside a designated cost cap. FERC interpreted the Tariff and allowed California ISO to adjust bills but did not order refunds because the relevant cap was not reached. The Court found that the factual circumstances did not render the case one of retroactive ratemaking, but that of billing dispute involving interpretation of an arguably ambiguous Tariff term. In contrast, in this case the NYISO Tariff is clear and was applied pursuant to its express terms. There is no issue with respect to any action or inaction of NYISO.

In *DTE Energy Trading v. Midwest Independent System Operator, Inc.*, 111 FERC ¶ 61,062 (2005), the Commission found that Midwest ISO violated its Tariff by improperly assessing rates for re-directed point-to-point transmission service. Midwest ISO was found to have deviated from its Tariff in mis-calculating a rate. Again, in this proceeding, the NYISO did nothing but use the information provided by the transmission owner possessing control over the

meter data, rendering invoices and relying upon the material provided by the *only* entity with the information to correct it.

Similarly, in *Wisconsin Electric Power Co. v. Midwest Independent Transmission System Operator, Inc.*, 114 FERC ¶ 61,005 (2006), the Commission found again that Midwest ISO had modified, without authority and in violation of its Tariff, the methodology it used to allocate FTRs to eight Wisconsin Electric Co. network resource generating facilities without giving proper notice to Market Participants. Next, in *Exelon Corp. v. PPL Utilities Corp.*, 111 FERC ¶ 61,065 (2005) *order denying reh'g*, 114 FERC ¶ 61,298 (2006), it was PJM that mis-coded a facility as belonging to PECO when, in fact, the facility belonged to PPL due to a PJM-developed software coding error. Finally, an RTO/ISO-caused error was also the genesis behind the Commission's order to NYISO to issue corrected bills resulting from NYISO-created errors in its billing and accounting system software. *See New York Independent System Operation, Inc*. 117 FERC ¶ 61,305 P.20(2006).

The factual situation here is quite different from all of the cases relied upon by Staff (and NYSEG). NYSEG was in sole possession of this meter information (other than with respect to the errors missed by National Grid). NYSEG provided that information to NYISO which relied upon it to create and send bills to customers for payment. NYSEG had ample time to find its errors and submit corrected data to NYISO which, if brought to the NYISO in a timely fashion, would have resulted in corrected invoices to applicable market participants.

Importantly, not only did NYISO rely on this information, but market participants, including ESCOs, relied upon this information. ESCOs also relied on the NYISO's invoicing process and the Tariff provisions expressly declared those invoices final. In short, Staff's legal

support for its proposition that re-billing constitutes a violation of the filed rate doctrine is deficient.

2. The Extraordinary Circumstances Standard Is Recognized by the Commission and Applied by NYISO in a Non-Discriminatory Fashion

Staff and NYSEG take issue with the Commission's and NYISO's requirement that in order to make a change to an invoice that has become final under the Tariff that the entity show "extraordinary circumstances." NYSEG refers to the Tariff provision allowing modification of invoices only under Court or Commission order as a "safety net." In addition, according to Staff, long-standing court precedent that holds "customer refunds are a form of equitable relief" should only be applied in "complex" situations. According to Staff, this situation is not a complex situation. In fact, Commission Staff appears to beg the Commission to abandon prior precedent entirely. The Staff's attempts to minimize the complexity of the situation and Staff and NYSEG's attempts to lessen the already acknowledged "extraordinary circumstances" standard must not be countenanced. Commission precedent and equitable principles call for no retroactive refunds.

First, RESA disagrees that there are no "complex equities" present in this case. The entire NYISO operation is a complex one. Each market participants' role in the NYISO from generator, to transmission owner, to ESCO to NYISO is complex. NYSEG itself has admitted that the "NYISO is a large, comlex system that relies upon advanced technology."[4] Each of NYSEG and National Grid detailed the various Tariff changes that have arisen over the years to address the complex billing and invoicing systems and billing procedures.

Merely because the Settling Parties (of which RESA is not) agreed that there was a meter error is irrelevant to whether or not the level of complexity supported reliance upon long-

[4] NYSEG Brief at 7.

standing Court precedent standing for the proposition that refunds are a form of equitable relief. That the Settling Parties reconciled a means by which re-billing would be undertaken if the Commission found it necessary based on findings relating to the Reserved Issue is simply irrelevant to the equities in the proceeding. Refunds *are* a form of equitable relief and the Commission should weigh the equities and NOT order re-billing.

Second, while RESA may not disagree with Staff that NYISO has a duty to protect customers' interest in their money (Staff Brief at 19), RESA fundamentally disagrees with the proposition that the NYISO should be charged with ensuring that NYSEG is protected from *itself*. NYSEG was the entity with sole access to the metering data and failed utterly to find meter errors for up to ten years. In contrast, it is market participants' reliance interest that requires a NYISO fiduciary obligation. ESCOs relied on the data provided by NYSEG and on its accuracy. ESCOs relied upon the terms of the Tariff that finalized invoices after specified period of time. ESCOs acted in accordance with all rules and regulations and moved on with their business decisions in a reasonable and rational manner. It is ESCOs that deserve the protections of the Tariff and any fiduciary obligation of NYISO.

Third, RESA disagrees that there is "no presumption of finality in the NYISO's billing process."[5] The Tariff expressly renders bills final after the specified period of time. While today the period of time is more limited, as detailed by National Grid in its Brief (at 4) this was not always the case. For example, Section 7.4 contains explicit time periods for corrections of errors after which invoices are final, but recognizes a limited exception. This limited exception, which has been applied on a non-discriminatory basis to market participants (as NYISO is required to do) requires a showing of "extraordinary circumstances." The Commission has

[5] Staff Brief at 25.

recognized this standard.[6] Thus, there is a presumption of finality and an opportunity to, to create a limited exception to the general rule, upon a showing of extraordinary circumstances.

3. Re-Billing Would Create a Disincentive To Ensure that Data Provided to NYISO is Accurate

Finally, re-billing will not, as Staff suggests, create an incentive for the transmission owners to report metering errors. In fact, quite the contrary is true. What better incentive for NYSEG is there than to find promptly and report its meter errors than facing a risk that it will be unable to correct them? If a transmission owner is allowed to render invoices whenever it finds an error, there will never be finality in the market. In that case there would be no incentive – the transmission owner would know that all of its errors are correctable no matter when they are discovered. Denial of re-billing in this case creates the proper incentive for transmission owners to ensure that the information in its possession is as accurate as possible so that it may collect the revenues to which it is entitled.

B. NYSEG Has Not Shown that Extraordinary Circumstances are Present to Warrant Re-Billing

NYSEG fashions itself as the innocent victim in this proceeding. NYSEG attempts to discredit the NYISO's non-discriminatory and consistently-interpreted Tariff provisions governing the finality of bills as containing a "safety net" for correcting errors. NYSEG also refers to the 55 day billing review period contained in the NYISO's current Tariff and uses that time period to support the supposed reasonableness of its failure to catch the meter errors over a ten year period. NYSEG has simply not shown that the Tariff should be over-ruled and the final bills re-opened. Equitable principles do not support such a result.

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6 *See Niagara Mohawk Power Corporation*, 123 FERC ¶ 61,314 (2008).

1. NYSEG Had Plenty of Time to Catch its Meter Errors Over the Years

National Grid accurately depicts the various time periods in which NYSEG had to find its meter errors over the years.[7] As one might expect, the time periods to catch errors were considerably longer during the early years of NYISO development. According to National Grid:

- Prior to October 1, 2002, the NYISO tariff allowed twenty-four months for the NYISO to review settlement information and make corrections to the initial invoice followed by a 12-month Customer review period.
- From October 1, 2002 through December 31, 2006, the NYISO tariff allowed 12-months for the NYISO to review settlement information and make corrections to the initial invoice followed by a 4-month Customer review period.
- Beginning January 1, 2007, a single concurrent 7-month period was established for both NYISO and customer review of settlement information and a specific fifty-five day review period from the date of invoice for a supplier or meter authority to review and challenge generator, tie-line, and subzone load metering data.[8]

Clearly, NYSEG had sufficient time within the confines of the then-existing NYISO Tariff to find and correct any meter errors prior to the date in which the billing became final and not subject to adjustment. Thus, along with the development of the NYISO billing systems, the timing for reporting and correcting errors was logically shortened.

2. The Extraordinary Circumstances Standard Must Be Recognized

Section 7.4 states in relevant part, "finalized" data and invoices shall not be subject to further correction, including by the NYISO, except as ordered by the Commission or a court of competent jurisdiction." NYISO has applied its Tariff, on a non-discriminatory basis, to require a showing of extraordinary circumstances in order to support a requested adjustment. The Commission upheld this standard and has applied it.[9] References to this provision as a "safety

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7 National Grid Brief at 4.

8 *Id*. citations omitted.

9 *See Niagara Mohawk*, 123 FERC at P.23.

net" does not lower the standard. The extraordinary circumstances standard is an important one and cannot be modified in this proceeding.

As RESA showed in its Initial Brief (at 9-15), NYSEG has simply not shown that extraordinary circumstances support re-billing. These meter errors could have and should have been uncovered by NYSEG in the ordinary course and, had they been found in the ordinary course, could have been corrected within the confines of the Tariff. Had the meter errors been incorrect, the required corrections would have been small and easily made.

As RESA noted in its Brief (at 14-15), ESCOs, as retail suppliers in the NYISO market, compete with the incumbent utility for customers. Yet, ESCOs are very different. Unlike incumbent utilities, ESCOs have no deferral mechanisms. ESCOs serve customers for set terms and once the contract term is up, the customer may sign with the ESCO for another term, may sign up with another ESCO or may return to utility service. Some ESCOs were early entrants in New York retail markets and, if the Commission were to order retroactive re-billings, would have liability going back ten years. In competitive retail markets, it is unlikely that an ESCO would serve the same retail customers that it served ten years ago, let alone have contractual terms permitting the re-issuance of bills years after the fact. ESCOs, therefore, have no customers from whom to collect any re-billed amounts and would be directly harmed if the Commission were to order re-billing.

3. Equitable Considerations Support No Re-Billing

Like RESA, NYSEG cites *Town of Concord*, for the proposition that the Commission has "equitable discretion concerning whether to order refunds."[10] NYSEG cites *Estate of French*, a

[10] NYSEG Brief at 26.

Fifth Circuit decision that describes some factors to consider when determining whether to issue refunds. These factors are:

> [t]he passage of time, amounts owed, whether the sales are still jurisdictional, whether the refunds would pass to consumers who actually paid the money, the relative size of the producer, and whether on balance there is a benefit to the public interest.[11]

NYSEG also acknowledges that the Commission considers whether there was an improper windfall, whether the tariff violation was merely "technical" and whether there is a reasonable method to determine whether refunds are owed.[12] NYSEG tries to characterize its failure to catch what were at the time small metering errors that grew over time, as creating a windfall to National Grid. NYSEG also tries to use the existence of the Stipulated Methodology as evidence that calculating the remedy would be simple. The real equities in this case, however, favor no re-billing.

Even under the "criteria" espoused in *Estate of French*, NYSEG's arguments miss the mark. First, the passage of time weighs against re-billing. These UFEs occurred up to ten years in the past and well after the times for correcting errors specified in the NYISO Tariff. The amounts owed are relatively small to NYSEG but are not to small ESCOs operating in a competitive environment. While NYSEG asserts that refunds would pass to customers who paid the money, that is not clear. What is clear, however, is that the money collected from ESCOs will not come from the consumers who may have inadvertently underpaid for UFE. ESCOs are unable to collect from customers who are no longer customers.

With respect to consideration of the relative size of the producer, ESCOs, who would bear a significant portion of the retroactive rebilling obligation, are small in comparison to

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11 *Estate of French v. FERC*, 603 F.2d 1158, 1163 (5th Cir. 1978).

12 NYSEG Brief at 26.

National Grid and NYSEG. The effects of implementation for a retroactive payment obligation on ESCOs would be disproportionately adverse to ESCOs than any benefit arising to NYSEG. Moreover, the UFE is by nature not an exact calculation. The UFE is intended to "make up" for lost volumes of electricity resulting from a variety of sources including power flow modeling errors, energy theft, statistical load profile errors, distribution losses 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 UFE costs.

Finally, there is no benefit to the public interest. If NYSEG is successful in collecting for the old meter errors, NYSEG will be rewarded for failing to uncover errors that only it could have known about. There would be a significant incentive for all other transmission owners in the state to pour through their old records and seek to collect additional sums from market participants, despite an explicit Tariff provision that establishes the finality of invoices/bills. Thus, what NYSEG should have argued is not that its petition is the only claim pending, but that it is the *first* claim pending.[13]

4. Commission Precedent Does Not Support Re-billing

Like Commission Staff, NYSEG cites to the same cases which it alleges shows limited instances where the Commission has ordered refunds. However, and as noted in argument A.1 above, those cases all involved proceedings where the RTO/ISO committed the error. Here, the NYISO did nothing other than input data provided by and within the sole possession of NYSEG and National Grid. This is not the sort of error that cries for Commission correction. The invoices are final and there are no extraordinary circumstances that would support issuance of

[13] NYSEG Brief at 31.

new invoices, especially when issuance of new invoices would cause substantial harm to ESCOs like RESA members.

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 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 deny NYSEG's request to retroactively re-bill for amounts associated with NYSEG's meter errors.

Respectfully submitted,

Elizabeth W. Whittle
Counsel for Retail Energy Supply Association

Of Counsel:

Nixon Peabody, LLP
401 Ninth Street, N.W. Suite 900
Washington, DC 20004
202-585-8338
ewhittle@nixonpeabody.com (e-mail)

Dated: December 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Reply Brief via electronic mail on all parties listed on the service list compiled by the Secretary in this proceeding.

Dated in Washington, DC this 15th day of December, 2009.

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Elizabeth W. Whittle