

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.) Docket No. ER07-99-000

**MOTION FOR LEAVE TO ANSWER, AND ANSWER, OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213 (2006), the New York Independent System Operator, Inc. (“NYISO”) respectfully moves for leave to answer, and answers, the protest filed by a limited number of New York Transmission Owners (“Protest”)¹ of the NYISO’s request for a one-time tariff waiver in the above-captioned proceeding.²

I. Motion for Leave to Answer

The NYISO recognizes that the Commission generally discourages answers to protests. However, the Commission has previously allowed answers when they correct inaccurate statements,³ help to clarify complex issues, provide additional information that will assist the Commission, or are otherwise helpful in the development of the record in a proceeding.⁴ Moreover, an answer is warranted when the protest requests affirmative relief.⁵

¹ The following New York Transmission Owners joined the protest: Long Island Power Authority, Consolidated Edison Company of New York, Inc., Orange & Rockland Utilities, Inc., and Central Hudson Gas & Electric Corporation (“Protesting TOs”).

² See *Request for Limited, Temporary Waiver of the New York Independent System Operator, Inc.*, Docket No. ER07-99-000 (Oct. 24, 2006) (“Waiver Request”).

³ *Southern Minnesota Municipal Power Agency*, 57 FERC ¶ 61,136 (1991).

⁴ See, e.g., *New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting NYISO answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was “helpful in the development of the record . . .”).

⁵ See 18 C.F.R. § 385.213(a)(3) (2006).

The NYISO submits that good cause exists to permit this answer. The answer clarifies certain mischaracterizations in the Protest. In addition, the answer provides the Commission with information that will be helpful in resolving the issues presented in this proceeding. Finally, the Protest seeks affirmative relief from the Commission in the form of a refund obligation. Because the Protest seeks affirmative relief, the NYISO should be permitted to answer as a matter of right.

II. Answer

The Protest claims that the Commission must reject the NYISO's request for a one-time waiver of Rate Schedule 5 of its Open Access Transmission Tariff ("OATT").⁶ The Protest claims that the Commission does not have authority to grant a tariff waiver under the circumstances present here. It also asserts that the filed rate doctrine mandates that the NYISO pay refunds for its non-compliance, and that any other outcome would be a violation of the rule against retroactive ratemaking.

These contentions are based on faulty reasoning and should be rejected by the Commission. Contrary to the Protest, the Commission not only has the authority to grant waivers of tariff provisions resulting from an inadvertent error, the Commission has in fact granted limited, one-time waivers of tariff provisions in the past. The NYISO is asking for no more than such a limited tariff waiver. Again contrary to the Protest, if the Commission were to decide not to grant the requested tariff waiver, it has the authority not to require refunds. Based on the balance of the equities present here, it would be entirely appropriate for the Commission to exercise this discretion not to require refunds.

⁶ The NYISO explained in the Waiver Request that it was seeking a one-time waiver of Rate Schedule 5 because an incorrect monthly cost allocation methodology for Operating Reserves was inadvertently included in Rate Schedule 5. The NYISO's OATT had always described and the NYISO had always used an hourly cost allocation methodology; the NYISO's market settlement software has always and continues to employ that same hourly cost allocation method. However, a *daily* cost allocation methodology was inadvertently included among the tariff amendments during the NYISO's extensive revisions to the OATT as part of the implementation of the NYISO's Real-Time Scheduling software.

A. The Commission Has Permitted Waiver Of Tariff Provisions Resulting From Inadvertent Errors

The Protest argues that the Commission may not exercise its authority to grant a request for tariff waiver if the reason for the request stemmed from an error that was not caused by external circumstances. The Protest is simply incorrect. Indeed, the Commission has in the past granted waivers of tariff provisions where the waivers were necessitated by actions made in error.⁷

In this regard, the NYISO takes issue with the Protest's assertion that the cases the NYISO cited in Waiver Request are inapposite. The waivers sought by the regulated entities in the proceedings cited by the NYISO were necessary to correct errors that would impact customers.⁸ The NYISO's waiver request in this proceeding is intended to do the same, namely, to obtain a one-time, limited tariff waiver to ensure that an error is corrected and to avoid revising past bills to implement a result that was not intended in the first place.

Thus, contrary to the assertions in the Protest, the NYISO has satisfied the elements that the Commission reviews in determining whether a waiver is appropriate. The NYISO made a good faith error, the effects of which need to be remedied, even as the harm resulting from the waiver is, in comparison to the overall market administered by the NYISO, relatively small. The NYISO's waiver request is also of a limited duration.

B. Refunds Are Not Appropriate In This Case

⁷ In one recent proceeding, ISO New England, Inc. ("ISO-NE") requested a limited and temporary tariff change. The Commission evaluated ISO-NE's request under the same general principles that it reviews for tariff waiver requests. The Commission concluded that ISO-NE's filing "is similar to the filings in past cases where the Commission has granted one-time waivers of tariffs to alleviate the effects of errors by ISOs or other entities." *ISO New England, Inc.*, 117 FERC ¶ 61,171 at P 22 (2006). The NYISO observes that the Commission in that order cites to several of the same orders that the NYISO referenced in the Waiver Request. *See id.* at n.15.

⁸ For example, the Protest (at n.11) cites *New York Independent System Operator, Inc.*, 112 FERC ¶ 61,347 at P 7 (2005), stating that "[a] NYISO error in calculating persistent undergeneration charges" necessitated the waiver request (emphasis added). The Protest also cites *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 at P 5 (2003), which involved a tariff waiver to "exclude the use of an unamortized balance in the calculation of a variance adjustment required under the tariff where *its inclusion would result in double-counting.*" (emphasis added).

If the Commission were to decide not to grant the requested tariff waiver, it has the authority not to require refunds. The NYISO recognizes the importance of the filed rate doctrine. However, judicial and Commission precedent confirm that the Commission need not impose refunds whenever there is a filed rate violation. As the D.C. Circuit has repeatedly held, whether to order refunds is within the Commission's discretion, and nothing in the Federal Power Act mandates refunds.⁹ Indeed, the Commission has often exercised its discretion not to order refunds after a reasoned evaluation of the relevant facts in a particular proceeding.¹⁰

The Commission may evaluate the equities of a particular case in deciding whether refunds are appropriate.¹¹ The equities present in this proceeding warrant exercise of the Commission's discretion not to order refunds.

The NYISO first notes that the stated intent of the original tariff filing submitted in Docket No. ER04-230 was to make the tariff conform to the NYISO's existing billing procedure -- not to make a change in the allocation of Operating Reserves charges. All of the NYISO's Market Participants throughout the transparent stakeholder process supported the filing as a whole, and no Market Participant, including the Protesting TOs, realized the error. Thus, there is no equitable reason for a refund to be imposed.

Moreover, the NYISO was not, and could not be, unjustly enriched as a result of the error. The NYISO is an independent, not-for-profit entity. It cannot therefore reap any sort of unjust windfall as a result of the error. In addition, the error was made in good faith. The NYISO was not engaging in behavior designed to unjustly benefit some class of market

⁹ See, e.g., *Towns of Concord, et al. v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) ("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 if permitted to retain it.") (internal citations omitted).

¹⁰ See, e.g., *Mirant Americas Energy Marketing, L.P.*, 112 FERC ¶ 61,056 at P 24 (2005) (explaining that equities of the case did not warrant refunds).

¹¹ See, e.g., *Louisiana Public Service Commission v. FERC*, 174 F.3d 218, 223 (D.C. Cir. 1999).

participants at the expense of others. Although the Protest complains about the monies at issue, the amount is relatively small compared to the total Operating Reserves cost over the period at issue. The total cost of Operating Reserves over the nine-month period at issue is \$66.2 million. As such, the \$1.1 million difference resulting from which allocation method is used represents only 1.7% of the total Operating Reserves cost for that period. Moreover, the \$1.1 million is spread among 236 affected Load Serving Entities.

In addition, and as the NYISO pointed out in the Waiver Request,¹² the methodology the software employed actually results in a more equitable cost allocation than the methodology inadvertently included in Rate Schedule 5.

Finally, contrary to the Protest, failing to require refunds would not result in a violation of the rule against retroactive ratemaking. The Protest has not pointed to any reason why the Commission's exercise of discretion not to order refunds in other cases violated the rule against retroactive ratemaking, nor could it. As explained above, judicial and Commission orders have long held that the Commission enjoys significant discretion in deciding whether to order refunds if it finds the filed rate was not in fact followed. That exercising such discretion violates the rule against retroactive ratemaking, as the Protest suggests, flies in the face of well-established precedent.

¹² See Waiver Request at 5-6 (explaining that the cost allocation methodology inadvertently included in the OATT is less equitable than the methodology that had previously been part of the OATT and is currently used by its software settlement system).

III. Conclusion

WHEREFORE, for the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission accept this answer and reject the Protest.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the foregoing document on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of 18 C.F.R. § 385.2010 (2006).

Dated at Rensselaer, New York this 29th day of November 2006.

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