

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

Central Hudson Gas & Electric Corporation)	Docket Nos. ER97-1523-011
Consolidated Edison Company of New York, Inc.)	OA97-470-010 and
LIPA)	ER97-4234-008
New York State Electric & Gas Corporation)	
Niagara Mohawk Power Corporation)	Docket Nos. ER97-1523-018,
Orange and Rockland Utilities, Inc.)	OA97-470-017, and
Rochester Gas and Electric Corporation)	ER97-4234-015
)	
)	Docket Nos. ER97-1523-019,
New York Power Pool)	OA97-470-018, and
)	ER97-4234-016

JOINT REPLY COMMENTS

**TO: The Honorable William J. Cowan
Presiding Administrative Law Judge**

Pursuant to Rule 602 of the Commission's Rules and Regulations, 18 C.F.R. § 385.602 (2000), Central Hudson Gas & Electric Corporation ("CHG&E"), Consolidated Edison Company of New York, Inc. ("Con Edison"), New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("Niagara Mohawk"), Orange and Rockland Utilities, Inc. ("Orange and Rockland" or "O&R"), and Rochester Gas and Electric Corporation ("RGE") ("Member Systems" or "Companies"), New York Power Authority ("NYPA") and the New York Independent System Operator, Inc. ("NYISO") (collectively referred to herein as "Sponsoring Parties") hereby file reply comments in response to certain initial comments filed on April 5, 2001 in the above-captioned proceeding.

On March 16, 2001, the Member Systems, NYPA and NYISO filed a Settlement and a

supporting Explanatory Statement ("Settlement"). The Settlement resolves one of the issues raised by Commission Staff in the above-captioned proceeding with respect to updating the data used as the NYPA Transmission Adjustment Charge ("NTAC") billing units in order to reflect the current New York loads and Load associated with Through Wheels and Exports ("NTAC Billing Determinant Update Issue"). On April 5, 2001, Staff submitted initial comments supporting the Settlement, and Allegheny Electric Cooperative, Inc. ("AEC") filed initial comments contesting the Settlement. The reply comments are limited to responding to AEC's initial comments.¹

COMMENTS

Over the last nearly two years since the inception of the instant proceeding, the Sponsoring Parties have devoted significant time, resources and effort to resolving issues related to conformance of existing transmission service agreements with the new NYISO regime. Prior to the hearing held last September, fourteen partial or full settlements were filed. Since that time, an additional three partial or full settlements have been filed, totaling seventeen settlements to date. Fifteen of the settlements have received Commission approval and only two, including the instant Settlement, await certification by the Presiding Judge. Like the settlements before it, the instant Settlement further narrows the scope of the issues that must be addressed in the imminent Initial Decision of the Presiding Judge.

Only two parties have filed initial comments in response to the Settlement. Staff filed initial comments in support of the Settlement. AEC filed comments opposing the Settlement.² AEC's opposition fails to raise any genuine issue of material fact with respect to the offer of Settlement and fails

¹ On April 13, 2001, American Municipal Power-Ohio, Inc. and Massachusetts Municipal Wholesale Electric Company filed Reply Comments supporting the initial comments of AEC. Accordingly, the Reply Comments of the Sponsoring Parties also address their reply comments as well.

² AEC receives transmission service from Niagara Mohawk under the provisions of the Niagara Mohawk Open Access Transmission Tariff ("Niagara Mohawk OATT") and purchases electricity from NYPA which Niagara Mohawk delivers to the Pennsylvania-New Jersey-Maryland Interconnection pursuant to the Niagara Mohawk Rate Schedule No. 138 with NYPA. AEC reimburses NYPA for the cost of this transmission service pursuant to the provisions of its non-jurisdictional power sales agreement with NYPA.

to include the required affidavit relevant to support any such claim, as required by Rule 602(f). Rather, the issues raised by AEC pertain to issues of law, policy and discretion that may be resolved by the Commission on the record before it without the need for an evidentiary hearing. Accordingly, the Sponsoring Parties urge the Presiding Judge to certify the Settlement. In the alternative, the Presiding Judge could sever AEC from the benefits of the Settlement, including the reduction of the NTAC charge, and could then certify the Settlement to the Commission as uncontested.

In either case, the Sponsoring Parties urge both the Presiding Judge and the Commission to recognize that this Settlement is fair, reasonable and in the public interest, particularly as the benefits afforded by this Settlement extend beyond the parties thereto. Indeed, all transmission customers in the New York Control Area will enjoy retroactive reductions in the applicable NTAC charges, as well as prospective updates and reconciliations thereto, which would not be achievable in the absence of this Settlement.

AEC'S ARGUMENTS THAT THE NTAC BILLING DIVISOR IS NOT AT ISSUE IN THIS PROCEEDING ARE INAPPROPRIATE, PARTICULARLY IN LIGHT OF EVIDENCE OFFERED BY AEC TO THE CONTRARY.

In its comments, AEC expresses support for the goals of the Settlement: "A change in the NYISO OATT to use annually updated billing determinants is a good idea."³ AEC also does not appear to object to the refunds that arise from the Settlement.⁴ AEC's main objection, which resounds as a pervasive theme throughout the AEC initial comments, is that the Settlement results in the resolution of an issue not in this proceeding. In light of its support of the Settlement's goals and AEC's active participation in this proceeding, AEC fails to explain how it is aggrieved by this Settlement.

Remarkably, AEC acknowledges and even cites pertinent references in briefs and testimony in

³ AEC at 7.

⁴ AEC at 14.

which it opposed the design of the NTAC,⁵ and, in particular, its arguments that the use of stale data in the divisor would produce an over-recovery, all within the context of the above-captioned proceeding.⁶

Indeed, in both written and oral testimony, AEC recommended specific modifications to the design of the NTAC that would impact NTAC charges applicable to all NYISO transmission customers, not merely those with grandfathered transmission service agreements.⁷ Such modifications were proposed, notwithstanding AEC's clear recognition that the Commission had approved the NTAC charge, without regard to application to grandfathered TSAs, when it approved the NYISO proposal.⁸ Additionally, AEC points to the testimony of Staff witness Stephen Pointer to demonstrate that Staff also objected to the use of stale divisor data, and AEC also concedes that Staff recognized the need for tariff amendments to update that data. AEC at 10 -11 (citing Staff Witness Pointer Ex. S-7 at 11-13; Staff Initial Brief at 61-62; AEC Initial Brief at 35-36).⁹

While expending significant effort demonstrating that both Staff and AEC have indeed raised concerns with respect to NTAC divisor issues, AEC claims that because the Member Systems previously contended that these claims had already been resolved by the Commission that the Commission may not now consider this Settlement. Thus, AEC appears to be contending that no party can offer a settlement to resolve issues it previously contended had already been resolved by the Commission in prior decisions, even where, as here, other parties had actively challenged such claims. This absurd position has never been embraced by the Commission in the past and should not be

⁵ AEC at 4, 12.

⁶ AEC at 4 (citing AEC Initial Brief at 35-36 and AEC Reply Brief at 45-46).

⁷ See, e.g., Direct Testimony of Bertram Solomon, Ex. No. AEC-1 at 12-15; Tr. at 1228, 1232-33, 1247. Significantly, AEC acknowledges in footnote 5 of its initial comments that it has opposed the design of the NYISO OATT NTAC, but argues that it never argued the NYISO OATT should be changed in this proceeding. AEC at 12. Yet, a plain reading of AEC's revisions to the NTAC, including excising grandfathered TSAs from the payment of the NTAC, would necessarily require a change to the NYISO OATT.

⁸ Tr. at 1232-33.

⁹ As explained in the Settlement, the issue as to the NTAC Billing Determinant, as raised by Commission Staff witness Stephen Pointer, is, in fact, the one and only issue resolved in the Settlement.

accepted by the Commission in this case.

In fact, it is not uncommon for parties to reach settlements in this manner or to otherwise go beyond the confines of a specific proceeding to negotiate a settlement. AEC certainly did so in the settlement filed on May 8, 2000 ("May 8th Settlement") in this proceeding, which was approved by letter order on September 18, 2000. In that settlement, Niagara Mohawk agreed to reduce the transmission rate of \$1.90 per kW month in its Rate Schedule No. 138 with NYPA to \$1.81 per kW month effective as of the date of the amendments and provided refunds to NYPA, which NYPA in turn provided to the parties, including AEC, in accordance with that May 8th Settlement. Nothing in the amendments proposed by the Member Systems in these proceedings purported to modify that transmission rate, yet AEC supported and directly benefitted from that settlement.

THE SETTLEMENT IS APPROPRIATE AND DOES NOT PRECLUDE AEC FROM PURSUING ITS CHALLENGES TO PAYMENT OF NTAC AS A GRANDFATHERED CUSTOMER.

The Settlement is clear. The only issue resolved by the Settlement is the NTAC Billing Determinant Update Issue as raised by Staff. The Settlement explicitly states that it does not address any other issues raised by Commission Staff concerning the NTAC issue in this proceeding (*e.g.*, imposition of the NTAC on certain grandfathered TSAs or removal of the load associated with certain grandfathered TSAs from the NTAC billing units).¹⁰ Moreover, the Settlement does not purport to address or resolve any other issues raised by any other party or non-party in this proceeding.

Despite the clarity of the Settlement, AEC also objects to the Settlement on the ground that it does not protect them from "unwanted over-charges."¹¹ Contrary to the assertions of AEC, the

¹⁰ These same issues were similarly advanced by other parties, including AEC.

¹¹ AEC, for the first time in this proceeding, raises an issue about the computation of NTAC relative to other income NYPA receives to meet its transmission revenue requirement. The mechanism for this is fully described in Attachment H of the NYISO OATT and AEC raises no material issue.

Settlement does not address issues related to application of the NTAC to AEC and does not foreclose AEC from continuing to litigate this issue in the instant proceeding. Rather, the Settlement results in a one-time retroactive reduction of the NTAC charge effective as of January 1, 2000 relating to calendar year 2000 and ongoing updates and reconciliation of the NTAC charge effective as of January 1, 2001 to ensure there is no overcollection.¹²

To the extent that AEC is complaining that the Settlement does not adequately guarantee that NYPA will flow the benefits of any reduction in the NTAC through to AEC under those parties' non-jurisdictional power sales agreement, that contention must be rejected for two reasons. First, the Commission has no authority to regulate the terms of that non-jurisdictional sale of electricity. Second, the evidence at the hearing demonstrated that NYPA has not billed AEC for NTAC with respect to any service provided under that agreement. Thus, no such pass-through is required at this time.

Were the Commission to find that AEC or NYPA was not subject to the NTAC charge on the basis of any claim advanced by AEC at the hearing in this proceeding, this Settlement would have no effect on AEC or NYPA as grandfathered transmission customers. If this Settlement is certified and approved and the Commission were to determine that AEC or NYPA, as grandfathered customers, were subject to NTAC, the resultant NTAC would be lower by virtue of the Settlement for the past periods and would be continually reviewed and updated on a prospective basis ensuring that appropriate data is being utilized in the calculation of the NTAC. Because the Settlement reflects a delicate balance of compromise, any material changes would unravel the Settlement and the benefits to be shared by all NYISO transmission customers.¹³ Because AEC has failed to produce any evidence

¹² See Settlement at Section III.

¹³ The Settlement specifically provides that all provisions of this Settlement are material and that it is conditioned upon acceptance by the Commission of the entire Settlement without material change or

of how it would be adversely affected by the terms of the Settlement under any conceivable scenario and has failed to raise any genuine issue of material fact, the Commission should reject AEC's self-serving attempt to obtain a greater benefit in this Settlement than any other affected party, and the Settlement should be certified and accepted and/or approved as fair, reasonable and in the public interest. To the extent that the Commission finds any merit whatsoever in AEC's claims, the Sponsoring Parties will agree to sever AEC from the Settlement, including all benefits of the Settlement retroactively and prospectively if it is determined that AEC must pay the NTAC.

PROCEDURAL DEFECTS REGARDING THE REVISED TARIFF SHEETS ADVANCED BY AEC ARE WITHOUT MERIT.

AEC objects to the filing of the revised tariff sheets in concert with the Settlement. The Algonquin¹⁴ case that AEC cites for the proposition that changes in this docket to the tariff constitute an improper procedure is inapposite. The Algonquin case arises in the context of a filing that is unrelated to any settlement. In that case, the Commission had rejected the filing of certain tariff sheets and on rehearing the parties filed revised tariff sheets addressing concerns enunciated by the Commission. The Algonquin case has no bearing on the instant proceeding.

In this case, the Settlement requires the filing of revised tariff sheets to effectuate the changes to resolve the NTAC Billing Determinant Update Issue. The revised tariff sheets are properly appended to the Settlement and comply with Commission requirements, including the application of Order No. 614.¹⁵ As evidenced in Staff's Initial Comments, the Sponsoring Parties have already agreed to file a compliance filing, upon Commission approval or acceptance of the Settlement, to revise references in

¹³(...continued)
condition.

¹⁴ Algonquin Gas Transmission Co., 57 FERC ¶ 61,081 (1991).

¹⁵ The lead dockets in which the initial NYISO tariffs were filed and approved were terminated by letter order issued on July 31, 2000.

the tariff to outdated NTAC billing units. At that time, the Sponsoring Parties also agree that the revised tariff sheets that are appended to the Settlement will be refiled as part of the afore-mentioned compliance filing.

THE SETTLEMENT NEGOTIATIONS WERE OPEN TO ALL INTERESTED PARTIES.

The instant Settlement is the product of negotiations spanning the last several months after the hearing. AEC argues that, while it participated in the early stages of the Settlement, it was excluded from final negotiations. All interested parties were welcome to participate in the product that ultimately was filed with the Commission. Indeed, informal settlement conferences and teleconferences were held and AEC participated therein. AEC's arguments are unfounded and without merit and must be rejected.

Respectfully submitted,

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cc: The Honorable William Cowan
Service List

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list in accordance with Rule 2010.

Dated at Washington, D.C. this 16th day of April 2001.

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