UNITED STATE 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**
Long Island Lighting Company	**)**		**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**
Rochester Gas and Electric Corporation and	**)**		**ER97-4234-015**
	)		
New York Power Pool	**)**	**Docket Nos.**	**ER97-1523-019**
	)		**OA97-470-018**
	)		**ER97-4234-016**
	)		**(not consolidated)**

JOINT APPLICATION FOR REHEARING AND REQUEST FOR DEFERRAL OF THE MEMBER SYSTEMS AND THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

The Members of the Transmission Owners Committee of the Energy Association of New York State, formerly known as the Member Systems of the New York Power Pool ("Member Systems"),[1] and the New York Independent System Operator, Inc. ("NYISO") submit this Joint Application for Rehearing and Request for Deferral on limited issues of the Commission's Opinion No. 457 issued on July 2, 2002, "Opinion and Order Affirming Initial Decision[2]"

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[1] The Member Systems include: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, Orange and Rockland Utilities, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, the Power Authority of the State of New York and Rochester Gas and Electric Corporation. Each of the Member Systems reserves the right to participate collectively or individually.

[2] Central Hudson Gas & Electric Corporation, et al., 95 FERC ¶ 63,013 (2001) ("Initial Decision").

("Opinion No. 457"),[3] pursuant to Rule 713 the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2001) and Section 313(a) of the Federal Power Act ("FPA"), 16 U.S.C. § 825l(a).

INTRODUCTION AND SUMMARY

The Commission has a duty to engage in reasoned decision-making and to justify its decision based on the facts and the law. The Commission's summary affirmation of the Initial Decision with respect to two transmission service agreements is directly at odds with the Commission's duty to engage in reasoned decision-making and to explain its decision based on the applicable facts and law.[4] The failure of the Presiding Judge and the Commission' to address these issues, each of which were addressed in the Joint Brief on Exceptions of the Member Systems and the NYISO violates these basic duties.

At issue in this proceeding is one element of the Member Systems' proposal to restructure the New York Power Pool and to establish the NYISO in accordance with the Commission's Order No. 888[5] policies. Specifically, the Member Systems sought to harmonize

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[3] Central Hudson Gas & Electric Corp., et al.,100 FERC ¶ 61,023 (2002) ("Opinion No. 457").

[4] These include: (1) the transmission service agreement under Niagara Mohawk FERC Rate Schedule No. 178 between Niagara Mohawk and Sithe/Independence Power Partners, L.P. ("Sithe") ("Sithe TSA"); and (2) the transmission service agreement between the Consolidated Edison Company of New York, Inc. ("Con Edison") and the New York City Public Utility Service ("NYCPUS") under Con Edison's FERC Rate Schedule No. 97 ("NYCPUS TSA").

[5] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd New York v. FERC, 122 S.Ct 1012 (March 4, 2002).

the NYISO tariffs with 41 pre-existing TSAs under the new NYISO regime. The Member Systems filed amendments to reflect, among other things, the uniform application of ancillary services, marginal losses, scheduling provisions, the right to convert to transmission congestion contracts, and the NYPA transmission adjustment charge. The proposed amendments were designed to apply limited aspects of the NYISO tariff that would allow for an efficient transition to competitive electricity markets and implementation of the new NYISO structure.

In its Opinion No. 457, the Commission issued an Opinion and Order affirming an Initial Decision of Administrative Law Judge William J. Cowan on all issues in the above-captioned proceeding. The Commission thereby properly approved the application of the amendments to all but two of the TSAs that had not been already resolved by settlements.[6] However, in contravention of Commission precedent, express contractual rights and overall restructuring objectives, the Commission affirmed, without discussion or reference to the record established in this proceeding, the Presiding Judge's decisions that: (1) the NYISO's marginal loss methodology should not apply to the Sithe TSA for the Locked-In Period; and (2) the amendments to the NYCPUS TSA must first be filed with the NYSPSC before they could become effective.

Ironically, the Commission in its Opinion No. 457 asserted that "[t]his decision benefits consumers as it supports the restructuring of electricity markets in New York as well as the functioning of the New York [Independent] System Operator. . . . " Opinion No. 457 at P 1. With respect to the Sithe TSA and the NYCPUS TSA, nothing could be further from the truth.

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[6] Application of the amendments to these TSAs was consistent with how the Member System treated themselves. Central Hudson Gas & Electric Corp., Letter Order issued in Docket Nos. ER97-1523-008, et al. (Aug. 19, 1999).

As a result of the Order, Sithe will be the only transmission customer exempt from the application of the NYISO's marginal loss methodology. Sithe will receive a refund[7] at the expense of all other transmission customers -- notwithstanding the Presiding Judge's finding that the Sithe TSA specifically authorizes Niagara Mohawk to amend all rate provisions of that TSA, including transmission loss rates. This result is particularly unreasonable in light of Niagara Mohawk's express reservation of Section 205 rate change rights and the fact that, even with the amendments, the Sithe's total costs would be substantially lower than the rates paid by identically situated transmission customers under the Commission-approved NYISO OATT. Clearly, with regard to the Sithe TSA, this decision cannot be read to benefit consumers, support restructuring of electricity markets in New York or to facilitate the functioning of the NYISO.[8]

With respect to the NYCPUS TSA, no purpose is served by requiring the filing of the amendments with the NYSPSC, particularly in light of the fact that the Commission, in any event, will be the final arbiter of the amendments at issue, consistent with the terms of the NYCPUS TSA and FERC precedent.[9] Moreover, the Commission affirmed the findings of the Presiding Judge that the amendments are appropriate and that NYCPUS should not be able to avoid the NYISO's charges that are the subject of the Amendments. However, without waiving any rights, the amendments to the NYCPUS TSA will be filed at the New York Public Service

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[7] The refund is defined in the Initial Decision as "the difference between what Sithe paid the NYISO during the locked-in period and the losses computed under the pre-existing TSA methodology, using a loss factor based upon recent historical data." 95 FERC at 61,164.

[8] Moreover, as a result of the restructuring effectuated by the Member Systems and the NYISO, Sithe successfully renegotiated its agreement under which Sithe sells the electricity transmitted under the Sithe TSA to Con Edison and was fully reimbursed by Con Edison for this change in loss methodology as a result of renegotiation of the power purchase agreement.

[9] FERC reviews the NYSPSC decision de novo.

Commission ("NYSPSC") to expedite resolution of this issue. The Member Systems and the NYISO request that the Commission hold in abeyance its ruling with respect to the NYCPUS TSA pending a decision by the NYSPSC. The NYSPSC decision will then be forwarded to the Commission for ultimate decision as a part of the record developed in this proceeding over the last three years.

Unless reversed, the Commission's decision on these issues will obstruct restructuring initiatives in New York and will result in millions of dollars of cost shifting associated with the Sithe TSA. In addition, no valid purpose will be served by obtaining a ruling at the NYSPSC that will have no force or effect for the NYCPUS TSA. Indeed, it will impede the implementation of all regional transmission organizations ("RTOs") and Standard Market Design ("SMD").

The Commission's failure to recognize the express reservation of Section 205 rights and its refusal to evaluate the amendments in light of the reasonableness of the NYISO restructuring will impede the Commission's goals to establish a standard market design and to encourage the formation of RTOs. The Commission should encourage the Standard Market Design proposed in Docket No. RM01-12-000 to be implemented as broadly as possible. Although the number of grandfathered agreements in New York is limited in scope, the number is likely to be far greater in other regions of the country. Certainly, where those agreements contain a clear reservation of Section 205 rights to change the rates for service, as is the case here, the Commission should interpret that reservation of rights to permit the implementation of the Standard Market Design, which would include the locational-based marginal pricing methodology at issue here. As demonstrated below, the Commission has previously concluded that transmission losses are a component of transmission rates. An unreasonably narrow reading of the reserved Section 205

rights, as the Presiding Administrative Law Judge and the Commission have done here, will substantially delay the implementation of the very RTO/SMD changes the Commission has determined are necessary nationwide. Moreover, the Commission has announced that it endorses the marginal loss methodology, previously approved in New York, as part of the industry-wide restructuring plan. The summary affirmation of the Initial Decision is directly at odds with this recent overarching determination. However, in an unexplained departure from this clear policy preference and the underlying facts of the case, the Commission has decided to make an exception for Sithe and, thereby, to allow Sithe to pay lower rates than every other transmission customer, both in New York and potentially the nation.

SPECIFICATION OF ERRORS

The Commission erred in the following respects:

(1) The Commission erred in summarily accepting the Presiding Judge's determination -- which improperly ignored evidence as to the parties' express contractual rights and Commission precedent-- that certain of the provisions of the Sithe TSA precluded application of the NYISO marginal loss methodology to the Sithe TSA for the Locked-in Period;

(2) The Commission erred in summarily accepting the Presiding Judge's determination -- which improperly ignored evidence that the proposal was just and reasonable and contradicted Commission precedent -- that the marginal loss methodology is not just and reasonable as to the Sithe TSA; and

(3) The Commission erred in summarily accepting the Presiding Judge's decision -- which improperly ignored Commission precedent, ignored evidence as to the parties' express contractual rights and failed to recognize that no valid purpose was served by the ruling--

that the otherwise appropriate amendments to the NYCPUS TSA must be filed with the New York State Public Service Commission ("the NYSPSC") before they can take effect.

ARGUMENT

I. THE COMMISSION ERRED IN CONCLUDING -- IN LIGHT OF EVIDENCE AS TO THE PARTIES' EXPRESS CONTRACTUAL RIGHTS AND APPLICABLE COMMISSION PRECEDENT--, THAT AS A MATTER OF LAW, NIAGARA MOHAWK WAS CONTRACTUALLY PRECLUDED FROM AMENDING THE SITHE TSA TO INCORPORATE THE MARGINAL LOSS PROVISIONS OF THE NYISO OATT FOR THE LOCKED-IN PERIOD.

In their Joint Brief on Exceptions with respect to the Initial Decision, the Member Systems and the NYISO demonstrated that: (1) Section 8.1 of Sithe TSA expressly authorized Niagara Mohawk to file unilateral rate changes, (2) pursuant to that authority, Niagara Mohawk filed to amend the Sithe TSA to apply the Commission-approved NYISO marginal loss methodology thereto; (3) even with the application of the marginal loss charges, Sithe's total charges were less than the just and reasonable rate approved for NYISO OATT customers; and (4) in addition, Sithe had reaped significant benefits as a result of the restructuring of the New York markets.

However, the Presiding Judge ignored record evidence and Commission precedent to reach its decision that the NYISO marginal loss methodology should not apply to the Sithe TSA. Moreover, in Opinion No. 457, the Commission summarily affirmed the Initial Decision -- without any discussion of the applicable law and facts -- despite the fact that the Initial Decision ignored express contractual rights embodied in the Sithe TSA and Commission precedent directly on point. The Commission had a duty to engage in reasoned decision-making and to

justify its decision based on the facts and the law.[10] The Commission's failure to address these issues, each of which were addressed in the Joint Brief on Exceptions of the Member Systems and the NYISO constitutes plain error.[11] Accordingly, the Commission's affirmation of the Presiding Judge's Initial Decision with respect to the application of the marginal loss methodology for the Locked-In period with respect to the Sithe TSA is arbitrary, capricious, an abuse of discretion and contrary to law.

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[10] FPC v. United Gas Pipe Line Co., 393 U.S. 71, 72-73 (1968) (case remanded when there was "no articulation of 'any rational connection between the facts found and the choice made.'"); Association of Oil Pipe Lines v. FERC, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (FERC's orders must articulate "a rational connection between the facts found and the choice made.") The Commission must provide an adequate and adequately supported explanation for its findings, conclusions or actions; otherwise, they should be set aside. See 5 U.S.C. § 706(2)(A) (under the Administrative Procedure Act, an agency's actions, findings and conclusions which are arbitrary, capricious, an abuse of discretion or otherwise contrary to law should be set aside).

[11] Carolina Power & Light Co. v. FERC, 716 F.2d 52, 53-56 (D.C. Cir. 1983) (remanded when FERC failed to respond to arguments raised); see Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration, 2002 U.S. App. LEXIS 15081, at *41-42 (D.C. Cir. July 26, 2002) (remanding when agency failed to address a significant challenge to the rationality of its decision); Iowa v. FCC, 218 F.3d 756, 759 (D.C. Cir. 2000) (remanding when agency failed to address substantial argument raised before it); Frizelle v. Slater, 111 F.3d 172, 177 (D.C. Cir. 1997) (concluding that an agency decision was arbitrary because it did not respond to non-frivolous arguments that could affect the agency's ultimate decision).

A. The Commission erred in failing to address Niagara Mohawk's express contractual right to amend the Sithe TSA to apply the NYISO marginal loss methodology and uncontroverted testimony regarding the same.

The Member Systems and the NYISO clearly established Niagara Mohawk's express contractual right to amend the Sithe TSA to apply the NYISO marginal loss methodology thereto. Section 8.1 of the Sithe TSA expressly provides that:

> Nothing contained herein shall be construed as affecting in any way . . . Niagara Mohawk's right under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission . . . for a change in rates under Section 205 of the Federal Power Act . . . .

Ex. MS-3, Schedule E at 21 (p. 18 of the TSA) (emphasis supplied). Section 8.1, therefore, empowers Niagara Mohawk with the right to file unilaterally with the Commission any "change in rates" *notwithstanding any other provision to the contrary in the Sithe TSA*. Both the Initial Decision and, therefore, Opinion No. 457's summary affirmation thereof, expressly recognize that Section 8.1 of the Sithe TSA "clearly and unambiguously gives Niagara Mohawk the right to unilaterally make an application to the Commission for a change in rates under Section 205." See Initial Decision at 65,159. The Member Systems and the NYISO also offered uncontroverted testimony of Niagara Mohawk witness Clement E. Nadeau, the executive at Niagara Mohawk responsible for negotiating the Sithe TSA that, during the negotiation of the Sithe TSA, all parties agreed that there were no limitations on Niagara Mohawk's unilateral rate change rights, including with respect to loss rates. Ex. No. MS-9 at 6, lines 6-11.

As demonstrated by the Member Systems and the NYISO, Niagara Mohawk's rate change rights are further confirmed by a plain reading of Section 9.1. Section 9.1 of the Sithe TSA provides that:

> PRODUCER shall compensate NIAGARA MOHAWK for losses incurred by NIAGARA MOHAWK in its control area and

> NIAGARA MOHAWK shall compensate PRODUCER for losses avoided by NIAGARA MOHAWK in its control area as a result of NIAGARA MOHAWK's provision of transmission services hereunder. **The determination of such losses and the procedure for compensation thereof shall be determined by NIAGARA MOHAWK's Power Control Department in accordance with NIAGARA MOHAWK's practices relating to other similar transactions and in accordance with GOOD UTILITY PRACTICE.**

Ex. MS-3, Schedule E at 22 (p. 19 of the TSA) (emphasis added).

Notwithstanding this unequivocal language and the uncontroverted testimony related thereto, however, the Presiding Judge held that non-rate terms embodied in Section 9.1 of the TSA precluded Niagara Mohawk from amending the Sithe TSA to apply the NYISO marginal loss methodology for the Locked-in Period. According to the Presiding Judge, Section 9.1 of the Sithe TSA "clearly and unambiguously envisions a particular means of determining compensation for losses" pursuant to which "losses incurred or avoided will be determined with reference to Niagara Mohawk and its control area." Initial Decision at 65,159. Because Section 14.1 of the Sithe TSA precludes any changes to that agreement (other than to Sections 4, 7 and 8) except with the mutual consent of the parties, the Presiding Judge concluded that "[t]here is no avenue within the four corners of the contract that would permit the unilateral filing of changes to non-rate terms and conditions of service. . . ." Id. Yet, nothing in these provisions refutes or supersedes Niagara Mohawk's unilateral rate change rights in Section 8.1.

Indeed, the Presiding Judge's interpretation of those provisions is directly at odds with, and is countered by: (1) the express terms of Section 8.1; (2) the express terms of Section 9.1; (3) uncontroverted testimony as to the parties' intent; (4) New York law as to the effectiveness of

sequential, contradictory clauses;[12] and (5) consideration of the overall context of the restructuring at issue in the proceeding. Accordingly, the Commission erred in summarily affirming the Presiding Judge's failure to carefully consider the express terms of the Sithe TSA and compelling evidence as to the parties' intent.

B. The Commission also erred in failing to explain its decision in light of Commission precedent.

In addition, the Commission erred in failing to give effect to applicable Commission precedent, which the Presiding Judge failed to even address. First, the Commission has previously held, as the Member Systems and the NYISO pointed out in their Joint Brief on Exceptions that ". . .transmission losses are a component of overall transmission rates. . . . " PacifiCorp, 84 FERC ¶ 61,303 at 62,393 (1998). When coupled with the express provisions of Section 8.1 -- which, on its face, trumps any other provision in the Sithe TSA, including Section 9.1 and 14.1 -- Niagara Mohawk has the unilateral right to make rate changes applicable to losses under Section 205.

Second, as the Member Systems and the NYISO also pointed out in their Joint Brief on Exceptions, the Commission has expressly rejected a claim by another Niagara Mohawk TSA customer, with similar contractual terms in a different context, that Niagara Mohawk's rate change right was limited by the non-rate provisions of its TSA. The Initial Decision and Opinion No. 457 were devoid of any substantive discussion as to the applicability of this important precedent.

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[12] Moreover, the clause first appearing in the contract must be given effect at the expense of the second clause. See, e.g., Honigsbaum's Inc. v. Stuyvesant Plaza, Inc., 178 A.D.2d 702, 704 (3d Dept. 1991) ("[I]n the case of total repugnancy between two contract clauses, the first of such clauses shall be received and the subsequent one rejected.").

In Niagara Mohawk Power Corporation, 75 FERC ¶ 61,087 (1996) ("Watertown"), the City of Watertown, New York ("Watertown") claimed that, in its TSA with Niagara Mohawk ("the Watertown TSA"), "the parties expressly agreed to [kilo]watt hour metering and billing."[13] In rejecting Watertown's claim that the method of metering and billing were "non-rate provisions" beyond the scope of Niagara Mohawk's rate change rights, the Commission first quoted the express provisions of Section 2.1 of the Watertown TSA, which were similar to the provisions of the Sithe TSA at issue in the instant proceeding:

> Section 2.1 of the agreement between Niagara Mohawk and Watertown provides in relevant part that:
>
> Beginning on January 1, 1996, and on each January 1 of every fifth year thereafter, NIAGARA shall update the rate contained in Attachment II to reflect the then current cost of service. Except as provided in the immediately preceding sentence, nothing contained herein shall be construed as affecting in any way the right of NIAGARA to unilaterally make application to . . . FERC for a change in the transmission service rates under [S]ection 205 of the Federal Power Act.

75 FERC ¶ 61,087, at 61,262 (emphasis in original).

The Commission held that the meaning of this provision was clear:

> As quoted above, [the Watertown TSA] states 'except as provided in the immediately preceding sentence,' - - the update - - Niagara Mohawk may file for a rate change under [S]ection 205 of the FPA. Niagara Mohawk legitimately exercised its contractual right to seek the new billing method.

Id. (footnote omitted). The Commission also expressly rejected Watertown's claim that Niagara Mohawk's unilateral rate change right was limited by non-rate provisions of the Watertown TSA:

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[13] Motion to Intervene, Protest, Motion to Reject and Answer to Request for Blanket Waiver and Alternate Motions for Five Month Suspension, Summary Disposition and Hearing of the City of Watertown, New York, Niagara Mohawk Power Corporation, Docket No. ER96-224-000, at 22 (filed Dec. 1, 1995).

> For this reason, Watertown's remaining references (Protest at 21-22) to other provisions of its power purchase agreement and transmission service agreement with Niagara Mohawk do not undermine Niagara Mohawk's 'unilateral' ability under [S]ection 2.1 to apply for a 'change in the transmission service rates,' as long as such a proposed change is not inconsistent with its obligation to 'update' its cost of service every five years.

Id. at 61,262 n.3.

While the Presiding Judge referenced the Watertown case when summarizing the parties' positions, there was no reference in the Initial Decision as to the effect of this order with respect to the instant proceeding. The Commission erred in failing to provide an adequate explanation as to its summary endorsement of the Presiding Judge's failure to address this precedent in the context of the instant proceeding.

The failure of the Presiding Judge and, therefore, the Commission to consider any extrinsic evidence in determining the meaning of the provisions of the Sithe TSA also is inconsistent with prior rulings in this proceeding and constitutes plain error. See Central Hudson Gas & Electric Co., 90 FERC ¶ 61,042 (2000); Order on Legal Issues (issued by Presiding Judge William J. Cowan) (dated April 25, 2000).

II. THE COMMISSION ERRED IN SUMMARILY CONCLUDING -- IN LIGHT OF EVIDENCE THAT THE PROPOSAL WAS IN FACT JUST AND REASONABLE AND APPLICABLE COMMISSION PRECEDENT -- THAT THE MEMBER SYSTEMS AND THE NYISO FAILED TO SHOW THAT THE APPLICATION OF THE NYISO MARGINAL LOSS METHODOLOGY TO THE SITHE TSA WAS JUST AND REASONABLE

The Commission improperly summarily accepted the determination of the Presiding Judge that the Member Systems and the NYISO failed to demonstrate that the NYISO marginal loss charge as applied to the Sithe TSA was just and reasonable in accordance with Section 205

of the FPA.[14] In reaching this result, the Presiding Judge committed three errors, as pointed out by the Member Systems and the NYISO in their Joint Brief on Exceptions. He erroneously concluded that the Member Systems' and NYISO relied on a theory that the burden of proof was shifted to parties seeking to justify departures from the Commission-approved marginal cost methodology. Initial Decision, at 65,162. He further erroneously concluded that, under the Commission-approved marginal loss methodology, the NYISO would likely overcollect marginal losses and Sithe, who was not subject to Schedule 1 charges, would not be able to share in the distribution of the overcollection. The Presiding Judge also improperly determined that benefits to Sithe as a result of the restructuring process were irrelevant as to the issue of whether the Member Systems' proposal is just and reasonable. Id. at 65,163-64.

However, in their Joint Brief on Exceptions, the Member Systems and the NYISO demonstrated that, in fact, Sithe's total payments under the Sithe TSA were significantly lower than the rates Sithe would have paid for similar service under the NYISO OATT. Niagara Mohawk witness Nadeau stated in his Direct Testimony that the revenues that Niagara Mohawk received under the Sithe TSA and fourteen other TSAs "are substantially below the revenues that Niagara Mohawk would receive for similar service furnished under the rates accepted by the Commission for service under the NYISO OATT." Ex. MS-3 at 9, lines 20-24. In rebuttal testimony, Mr. Nadeau calculated savings to Sithe, as a result of the grandfathering of its TSA, of approximately $15,000,000 on an annual basis over the transmission service charge component of the NYISO OATT rates which the Commission has found to be just and reasonable. MS-9 at 13, lines 25-27.

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[14] Initial Decision, at 65,169-71.

The Presiding Judge completely ignored the fact that, by exempting Sithe from the payment for NYISO marginal losses costs would be shifted from Sithe to the NYISO's OATT customers. Notably, the NYISO's OATT customers already pay higher Commission-approved rates than Sithe. This result is unreasonable due to: (1) the Commission's previous determination that marginal losses accurately reflect the losses that would actually be avoided if Sithe's transmission service was curtailed,[15] (See also, Ex. MS-9 at 20, lines 2-8); and (2) Mr. Nadeau's uncontroverted testimony that the transmission service provided under the Sithe TSA imposed actual losses on the NYISO that were substantially above system average losses, due to both the extreme length of the transmission path and the fact that this service crosses New York's frequently congested Total East Interface. Ex. MS-12 at 7, lines 1-15.

Moreover, the Member Systems and the NYISO established in this proceeding that their proposal to amend the Sithe TSA was appropriate in light of the overall restructuring of the New York markets. First, they demonstrated that Sithe had an incentive to -- and did -- successfully restructure its power purchase agreement under which Sithe sold the electricity transported under the TSA to Con Edison. Ex. MS-7 at 15, lines 22-24; 16, lines 1-8. Dr. Scott Harvey, a witness for the Member Systems and the NYISO, also established that Sithe was fully reimbursed by Con Edison for the increase in costs resulting from the imposition of marginal losses on service under the TSA, on a dollar for dollar basis. Ex. MSI-6 at 3, lines 8-12 ("My point has been only that the marginal losses charge that Sithe pays for transmission service is determined using the same LBMP price that was used to determine payments to Sithe under the Con Edison PPA. As

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[15] January 27 Order, at 61,214 ("[W]hen choosing between two purchase options that have the same input cost except for losses, the buyer will select the one with the lowest marginal losses. When a purchaser makes this choice, the cost of system losses is, in fact, reduced by the marginal losses as computed by [the] Member Systems."). Id.

a result, increases in the charge for losses between Independence and Pleasant Valley also increased the LBMP price that was used to determine payments to Sithe under the Con Edison PPA."); See also, Ex. MSI-5 at 10, lines 2-11; 11, lines 1-21; 13, line 14-21.

Nonetheless, the Presiding Judge failed to consider these significant benefits to Sithe. Based on the extensive evidence submitted by the Member Systems and the NYISO, the Commission erred by summarily affirming the Presiding Judge's determination that the application of marginal losses methodology to Sithe was unjust and unreasonable.

III. THE COMMISSION ERRED WHEN IT SUMMARILY AFFIRMED THE PRESIDING JUDGE'S RULING --WHICH IMPROPERLY IGNORED COMMISSION PRECEDENT, IGNORED EVIDENCE AS TO THE PARTIES' EXPRESS CONTRACTUAL RIGHTS AND FAILED TO RECOGNIZE THAT NO VALID PURPOSE WAS SERVED BY THE RULING--, AS A MATTER OF LAW, THAT THE NYCPUS TSA PRECLUDES THE OTHERWISE PROPER AND APPROPRIATE AMENDMENTS FROM BECOMING EFFECTIVE UNTIL THEY ARE FIRST FILED WITH THE NEW YORK PUBLIC SERVICE COMMISSION

The Member Systems and the NYISO urge the Commission to defer its ruling with respect to the NYCPUS TSA as set forth herein and in the alternative, rehearing of the Commission's summary affirmation of the Initial Decision -- which improperly ignored Commission precedent, ignored evidence as to the parties' express contractual rights and failed to recognize that no valid purpose was served by the ruling --that, as a matter of law, the NYCPUS TSA precludes the otherwise proper Amendments to that FERC-jurisdictional TSA from becoming effective until they are first filed with the NYSPSC for acceptance or approval. The Commission had a duty to engage in reasoned decision-making and to justify its decision based on the facts and the law. [16] The Commission's failure to address these issues, each of which were

[16] FPC v. United Gas Pipe Line Co., 393 U.S. 71, 72-73 (1968) (case remanded when there was "no articulation of 'any rational connection between the facts found and the choice made.'");

addressed in the Joint Brief on Exceptions of the Member Systems and the NYISO constitutes plain error.[17]

Without waiving any rights, the amendments to the NYCPUS TSA will be filed at the NYSPSC to expedite resolution of this issue. The Member Systems and the NYISO request that the Commission hold its ruling with respect to the NYCPUS TSA in abeyance pending a decision by the NYSPSC. Once issued, the NYSPSC decision will be forwarded to the Commission for ultimate disposition based on the record developed in this proceeding over the last three years.

In their Joint Brief on Exceptions with respect to the Initial Decision, the Member Systems and the NYISO effectively demonstrated that the Presiding Judge improperly ignored record evidence and Commission precedent to reach his decision that the FERC-jurisdictional Amendments to the NYCPUS TSA must be first filed with the NYSPSC before they could become effective. The Presiding Judge reached this decision notwithstanding evidence that: (1)

(..continued)
Association of Oil Pipe Lines v. FERC, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (FERC's orders must articulate "a rational connection between the facts found and the choice made.")
The Commission must provide an adequate and adequately supported explanation for its findings, conclusions or actions; otherwise, they should be set aside. See 5 U.S.C. § 706(2)(A) (under the Administrative Procedure Act, an agency's actions, findings and conclusions which are arbitrary, capricious, an abuse of discretion or otherwise contrary to law should be set aside).

[17] Carolina Power & Light Co. v. FERC, 716 F.2d 52, 53-56 (D.C. Cir. 1983) (remanded when FERC failed to respond to arguments raised); see Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration, 2002 U.S. App. LEXIS 15081, at *41-42 (D.C. Cir. July 26, 2002) (remanding when agency failed to address a significant challenge to the rationality of its decision); Iowa v. FCC, 218 F.3d 756, 759 (D.C. Cir. 2000) (remanding when agency failed to address substantial argument raised before it); Frizelle v. Slater, 111 F.3d 172, 177 (D.C. Cir. 1997) (concluding that an agency decision was arbitrary because it did not respond to non-frivolous arguments that could affect the agency's ultimate decision).

Con Edison had express rate change rights, (2) uncontroverted testimony established that the parties to the NYCPUS TSA only contemplated that filings would first be filed at the NYSPSC if they fell within the ambit of the NYSPSC's jurisdiction, which they did not; (3) Con Edison filed the FERC-jurisdictional amendments with the Commission; and (4) the Presiding Judge, and the Commission by affirmation, agreed that the amendments were appropriate with respect to the NYCPUS TSA. Nonetheless, in Opinion No. 457, the Commission summarily affirmed the Initial Decision, once again devoid of any discussion as to the legal or factual basis for requiring the parties to first file the NYCPUS amendments with the NYSPSC, particularly in the absence of any readily apparent valid purpose. Accordingly, the Commission's affirmation of the Presiding Judge's Initial Decision with respect to the NYCPUS TSA is arbitrary and contrary to law.

Importantly, the Presiding Judge properly concluded that, with respect to the NYCPUS TSA: the Amendments do not relate to NYSPSC retail rates;[18] the Amendments do not relate to services provided by, or charges paid to Con Edison;[19] and NYCPUS should reimburse the NYISO for the costs it incurs in providing services to NYCPUS.[20] Notwithstanding these

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[18] Initial Decision, at 65,184 ("Con Edison is not changing its rates to NYCPUS. . . The new services provided by the NYISO to effectuate the competitive electric markets in New York must be paid for by the entities that they are intended to benefit. NYCPUS is one such entity.") Id.

[19] Initial Decision, at 65,181. ("I find that Con Edison was under no obligation to provide ancillary and LSE services to NYCPUS.") Id.

[20] Initial Decision, at 65,184. ("[NYCPUS] should not be allowed to evade responsibility to the new statewide regime by a strained interpretation of a settlement that deals with retail rates and has really nothing to do with the provision of ancillary services in the context of an ISO.") Id.

conclusions, however, the Presiding Judge held that the Amendments to the NYCPUS TSA must be filed first with the NYSPSC before it could become effective.

A. The Commission is the ultimate arbiter with respect to the Amendments at issue and the requirement to file first with the NYSPSC elevates form over substance.

The NYCPUS TSA, which also includes retail rates that are not at issue in this proceeding, expressly provides that Con Edison has the unilateral right to file Amendments to the TSA with the NYSPSC "subject to FERC review." Both the contract and Pre- and Post-Order No. 888 cases support the position of the Member Systems and the NYISO that the Commission has exclusive jurisdiction over the rates at issue in this proceeding. See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd New York v. FERC, 122 S.Ct 1012 (March 4, 2002); Consolidated Edison Co. of New York, Inc., 15 FERC ¶ 61,174 (1981); Consolidated Edison Co. of New York, Inc., 39 FERC ¶ 61,003 at 61,006 (1987); Order No. 888 at 31,784-85; New York State Elec. & Gas Corp., 77 FERC ¶ 61,044 at 61,154 (1996) ("NYSEG"), reh'g denied, 83 FERC ¶ 61,203 (1998).

The Commission also has held that the substance of the transaction, notwithstanding the contract language, must also be considered:

> While we agree that the contract language is the appropriate starting point for analysis, and that the language indicates that NYPA is selling EDP to NYSEG, the Commission is bound to look not just at the contract language, but also at the

> substance of the transaction. . . based on a review of all the evidence and the details before us, we concluded that the contract language was not determinative.
>
> * * *
>
> To rely solely, or even principally, on the parties' contractual recitations, as the New York Commission urges, is to elevate form over substance. . . .

83 FERC at 61,903-904; See also, Joint Reply Brief of Member Systems and NYISO at 85-86. In this case, the Presiding Judge properly found that the Amendments at issue were FERC-jurisdictional. The Commission, therefore, erred in summarily affirming the Presiding Judge's determination that the FERC-jursidictional Amendments must be first filed at the NYSPSC.

B. The Presiding Judge Improperly Failed To Consider The Evidence Of The Parties' Intent With Respect To The Contract Language At Issue

The Presiding Judge improperly failed to consider evidence of the parties' intent with respect to the contract language at issue, and the Commission erred in summarily affirming this ruling. Con Edison witness, Mr. Raymond Turkin, testified that the contract language at issue only related to retail rates and not to the situation where, as here, FERC is implementing state-wide transmission policies related to services not previously provided under the TSA. As Raymond Turkin testified:

> . . . The NYCPUS Agreement requires Con Edison, in certain circumstances, to first negotiate with NYCPUS any changes in the rates, terms, and conditions of the service provided by Con Edison and then to seek approval from the NYSPSC for any such changes prior to seeking FERC approval. However, since Con Edison was not seeking to change the base rates, terms, or conditions of the service that Con Edison is providing to NYCPUS, it was not necessary for Con Edison to either negotiate with NYCPUS or to file with the NYSPSC prior to making the necessary filing with the FERC. Because the rate change contemplated by the Amendment calls for NYCPUS to pay certain additional NYISO charges, no changes were required to any Con Edison rate schedule on file with or approved by the NYSPSC. What Con Edison filed at FERC was an amendment to the NYCPUS Agreement itself, not an amendment to the rate schedule (NYSPSC Rate Schedule No. 9) which is a separate filing with the NYSPSC and is not part of the NYCPUS Agreement. The amendment simply seeks to require NYCPUS to pay the NYISO for new services that NYCPUS will now receive as a result of the FERC approval of the NYISO and, therefore, Con Edison was not required to first negotiate with NYCPUS or to make a filing with the NYSPSC before seeking FERC approval.

Ex. MS-1 at 11, lines 6-22 (emphasis added). In rebuttal testimony, Mr. Turkin testified that:

> Con Edison's actions were consistent with the explicit terms of the NYCPUS Agreement and the 1997 Settlement Agreement. Both agreements set forth provisions to be followed in the event that Con Edison was to seek a change in its rates. As stated in my direct testimony (p. 11), since Con Edison was not seeking to change the base rates, terms, or conditions of the service that Con Edison is providing to NYCPUS it was not necessary for Con Edison to follow the rate change procedures of the 1987 NYCPUS Agreement or the 1997 Settlement Agreement. Con Edison is only seeking to require NYCPUS to pay the NYISO for the new services that NYCPUS now receives from the NYISO as a result of the FERC's approval of the NYISO. Con Edison did, however, serve a copy of the filing with FERC to amend the NYCPUS Agreement on the NYSPSC.

Ex. MS-7 at 9, lines 11-24; 10, lines 1-2.

It was plain error for the Commission to ignore this evidence as to the parties' intent. This testimony clearly provides that such Amendments were not of the nature that were required to be filed for an initial review by the NYSPSC.

CONCLUSION

WHEREFORE, for the above stated reasons, the Member Systems and the NYISO respectfully request: that the Commission reverse those portions of its Opinion No. 457 that:

(1) reject the application of the marginal loss provisions of the NYISO OATT to the Sithe TSA; and

(2) require the prior approval of the NYSPSC before making a filing with the Commission to modify the NYCPUS TSA as proposed in this case; and

that the Opinion No. 457 be accepted and affirmed in all other respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day, the 1st day of August, 2002, served the foregoing document upon each person designated on the official and restricted service lists for Docket No. ER97-1523-011, et al., compiled in this proceeding, pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.2010(a)(1)(i), by United States first class mail.

_____

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