

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

Central Hudson Gas & Electric Corporation)	Docket No. ER97-1523-074
Consolidated Edison Company of New York, Inc.)	
Long Island Lighting Company)	
New York State Electric & Gas Corporation)	
Niagara Mohawk Power Corporation)	
Orange and Rockland Utilities, Inc.)	
Rochester Gas and Electric Corporation)	
Power Authority of the State of New York)	
New York Power Pool)	

**PROTEST OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.
AND THE NEW YORK TRANSMISSION OWNERS**

Pursuant to the Notice of Filing issued March 4, 2003 in Docket No. ER97-1523-074, the New York Independent System Operator, Inc. (“NYISO”) and the New York Transmission Owners¹ submit their Protest of the Sithe/Independence Power Partners, L.P. (“Sithe”) response (“Sithe Response”) to the Staff information requests issued in Docket No. ER97-1523-068.²

¹ The New York Transmission Owners are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York State Electric & Gas Corporation, New York Power Authority, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation and Niagara Mohawk Power Corporation, a National Grid Company. They are the eight electric systems in the State of New York that transferred operational control over significant portions of their transmission facilities to the New York Independent System Operator, Inc., which commenced operation on November 18, 1999, and are the largest Load Serving Entities (“LSEs”) in the NYISO.

² The NYISO responded on February 26, 2003 to the same Staff information request (“NYISO Response”). The NYISO response was noticed as Docket No. ER97-1523-073.

The Commission has before it two separate proceedings involving the NYISO's use of marginal losses. This remand proceeding involves the justness and reasonableness of the marginal loss provisions of the NYISO's Open Access Transmission Tariff ("OATT"). That tariff applies to all transmission service commencing on and after NYISO start-up, including service provided after the expiration of existing grandfathered agreements.

The other proceeding, Docket No. ER97-1523-011, involves the filing by the New York Transmission Owners (then referred to as the "Member Systems of the New York Power Pool" or the "Member Systems") of amendments to their grandfathered Transmission Service Agreements ("TSAs"). One of those was Sithe's grandfathered Rate Schedule No. 178 with Niagara Mohawk Power Corporation ("the Sithe TSA"). In that proceeding, one of the issues before the Commission was whether the Sithe TSA should be amended to require Sithe to pay marginal losses for service under that grandfathered agreement. Judge Cowan issued an Initial Decision in that other proceeding on May 11, 2001.³ The Commission summarily affirmed the Initial Decision.⁴ The matter is now pending on rehearing.

Sithe has actively participated in both these proceedings and has opposed the use of marginal losses under both the NYISO OATT and under the grandfathered provisions of the Sithe TSA. Despite Sithe's failure in its Response to acknowledge the difference between these two proceedings, they involve distinctly different issues. This distinction is critical if the

³ *Central Hudson Gas & Electric Corp., et. al.*, 95 FERC ¶ 63,013 (2001).

⁴ 100 FERC ¶ 61,023 (2002).

Commission is to keep the records straight and address here only the issues properly before the Commission in this docket.

**This Proceeding Does Not Involve
The Sithe Grandfathered Agreement**

The separate proceeding to amend the New York Transmission Owners' grandfathered TSAs, which is still pending rehearing before the Commission, arose because the Commission had expressly refused in the predecessor to the current sub-docket, to apply the marginal loss provisions in the NYISO Open Access Transmission Tariff ("OATT") to pre-existing transmission agreements in the absence of filed amendments to those agreements.⁵ Those are the same orders remanded by the U.S. Court of Appeals for the District of Columbia Circuit.

Because the remand orders at issue here, in sections of those orders *not* the subject of appellate review, explicitly required a separate proceeding to address grandfathered agreements, any service that Sithe has taken under the Sithe TSA is beyond the scope of this remand proceeding. The Commission should reject any request by Sithe that the Commission consider in this proceeding whether the marginal loss provisions of the NYISO OATT should be applied to the Sithe TSA or whether application of those provisions under the grandfathered Sithe TSA would be just and reasonable.⁶

⁵ See *Central Hudson Gas & Electric Corp., et al.*, 86 FERC ¶ 61,062 at 61,217-18 (1999), *reh'g granted in part and denied in part*, 88 FERC 61,138 at 61,388 (1999). See also, fn 15 *infra*.

⁶ See, also, *Motion of the New York Independent System Operator, Inc. and the New York Transmission Owners for Leave to Supplement the Record* filed on March 3, 2003 in Docket No. ER97-1523-068, *et al.* ("Motion to Supplement") and the NYISO's February 26, 2003 responses to Commission Staff's January 28, 2003 request for additional information.

Sithe fails to acknowledge the substantial distinction between the two proceedings. Sithe states, “for Sithe, the material issue raised relates to the lawfulness of Sithe’s responsibility for paying excessive marginal losses charges from November 18, 1999 through September 1, 2000. . . . Accordingly, the following response focuses on grandfathered contracts, other relevant bilateral agreements and tariffs as they were in effect from November 18, 1999 through September 1, 2002.”⁷ Yet that is the very period of time during which Sithe took grandfathered service under the Sithe TSA at issue in ER97-1523-011. Indeed, Sithe admits in its Response that it is not presently challenging the applicability of marginal losses to service under the NYISO OATT or under any other grandfathered agreement.⁸

Sithe then acknowledges that despite these facts, its previous pleadings had “challenged the lawfulness of the NYISO’s generic proposal to impose loss charges on Sithe and other transmission customers calculated pursuant to a marginal losses methodology.”⁹ That is the only issue properly before the Commission here. The NYISO and the New York Transmission Owners have demonstrated the reasonableness of the generic marginal loss proposal in their Motion to Supplement and especially in the Affidavit of Dr. Scott M. Harvey submitted with the Motion to Supplement. The NYISO and New York Transmission Owners will not repeat those arguments here, but request that the Commission accept the Motion to Supplement as incorporated by reference as part of this Protest.

⁷ Sithe Response at 2. The reference to other relevant bilateral agreements and tariffs is apparently to the various agreements described in the Sithe Response at 1-2.

⁸ *Id.*

⁹ *Id.*

**Even If This Proceeding Involves Grandfathered Contracts,
The NYISO Marginal Loss Approach Is Just And Reasonable**

Sithe ultimately acknowledges that its Response focuses on grandfathered contracts.¹⁰

Without conceding that that is the proper focus here, the NYISO and the New York Transmission Owners will, nevertheless, demonstrate below that the marginal loss approach that was the subject of appellate review is just and reasonable even with respect to grandfathered contracts.

Sithe has not paid scheduling fees in the form of NYISO Schedule 1. Such fees were not proposed by the New York Transmission Owners to be imposed as a part of the amendments to the Sithe TSA. Indeed, the description of scheduling fees provided in the third paragraph of the Sithe Response at 3 is generally correct. It does not follow, however, that Sithe would be overcharged. Nor is Sithe correct in arguing that “overstated transmission losses charges [have been] imposed upon Sithe.”¹¹

As the Motion to Supplement clearly demonstrates, the NYISO OATT does not overcharge for transmission service as a result of marginal losses. The NYISO energy and transmission pricing system is the least cost method to meet load and provide transmission service. That was clearly demonstrated in Dr. Harvey’s Affidavit at 10. Cost causation is satisfied because Locational Based Marginal Pricing (“LBMP”) charges each customer the actual marginal cost of accommodating their transactions based on least cost dispatch. As

¹⁰ *Id.*

¹¹ *Id.* at 3.

described in greater detail in Dr. Harvey's affidavit, the NYISO's LBMP pricing system, including the marginal loss methodology, assists in maintaining reliability by ensuring consistency between the pricing system and the NYISO's dispatch instructions. It also ensures that the "signals" for generation operation and construction provided by energy and transmission prices are consistent with the least-cost operation of the transmission system, with respect to both the cost of losses and congestion.¹²

LBMP pricing charges each customer the actual marginal cost of accommodating their transactions based on least cost dispatch. It is fundamental to least-cost dispatch that every transaction be treated as marginal and this is the way the NYISO's transmission system is actually dispatched. All dispatch decisions are made based on the cost of meeting an incremental MW of load at each location.¹³

The marginal loss charge is clearly the correct charge for losses as discussed above. Total payments for the marginal cost of losses calculated based on the marginal losses component of LBMP prices will, nevertheless, exceed the implicit average cost of the payments to generators for losses. Under the NYISO rate design, any difference between the charges for losses based on marginal losses and the average variable cost of payments to generators is taken into account in calculating the charges in excess of the transmission usage charge that are collected for physical loads as a credit against the Schedule 1 charge paid by physical loads.

¹² See Harvey Affidavit at 10.

¹³ *Id.* at 9.

As Dr. Harvey has demonstrated, when an entity such as Sithe pays for marginal losses or even congestion, it is paying for only a small portion of the total costs of the transmission system.¹⁴ As a result, any customer avoiding the payment of Schedule 1 charges (and, thus, not receiving the benefit for any credit for marginal losses in excess of the payments to generators to purchase energy for such losses) is far ahead of the customer paying for Schedule 1 and receiving the credit. Indeed, from the commencement of NYISO operations through the end of 2002, the NYISO Schedule 1 charge, with no credit for the difference between the charges for marginal losses and the payments to generators to purchase energy to supply such losses, has totaled \$1,635 million. The credit for the difference with respect to marginal losses has been \$611 million. Thus an entity such as Sithe not paying for Schedule 1 and therefore not getting the credit would have paid far less than a similar entity paying Schedule 1 and getting the credit.¹⁵

¹⁴ *Id.* at 16.

¹⁵ *See* NYISO Response at 3. Moreover, in the separate proceeding involving the Sithe TSA, still pending before the Commission on rehearing, the NYISO and the New York Transmission Owners submitted un-controverted testimony that the total charges to Sithe under its grandfathered TSA (including marginal loss charges) would be far less than the total charges to other customers receiving identical service under the NYISO OATT. Although the Presiding Judge relied on the same information to find that other proposed amendments to grandfathered contracts are just and reasonable (since the higher charges under the OATT have been found just and reasonable), the Presiding Judge ignored this evidence with respect to the Sithe TSA. The Commission's Order summarily affirming the initial decision also failed to consider this evidence. This issue is pending rehearing in that docket (ER97-1523-011).

**The Commission Should
Promptly Resolve These Issues**

Finally, Sithe “reserves the right to protest transmission losses in the future.”¹⁶ The NYISO and the New York Transmission Owners have no objection to Sithe’s retention of its statutory protest rights under section 206 of the FPA, so long as the Commission affirms in this proceeding that the marginal loss provisions of the NYISO OATT are in all respects just and reasonable. The NYISO and its market participants need a full and final resolution of this issue at this time. Any future protest would then have to address the finality of the decision rendered here.

WHEREFORE, the Commissions should accept this Protest with respect to the Sithe Response.

Respectfully submitted,

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LIPA, NEW YORK STATE ELECTRIC & GAS CORPORATION, NEW YORK POWER AUTHORITY, ORANGE AND ROCKLAND UTILITIES, INC., ROCHESTER GAS AND ELECTRIC CORPORATION, NIAGARA MOHAWK POWER CORPORATION, A NATIONAL GRID COMPANY (“New York Transmission Owners”)

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¹⁶ Sithe Response at 2, n.2.

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March 20, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in the above-captioned proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.2010 (2002).

Dated at Washington, D.C. this 20th day of March 2003.

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