UNITED STATES OF AMERICA
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 and 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

ORDER DENYING MOTION FOR SUMMARY DISPOSITION ON LIMITED ISSUES

(Issued April 19, 2000)

The Members of the Transmission Owners Committee of the Energy Association of New York State [1] ("Member Systems") have filed a motion for summary judgment on limited issues under Rule 217 of the Commission's Rules of Practice and Procedure. The Member Systems request that an initial decision be issued summarily finding that: (1) with respect to five of the transmission service agreements ("TSAs") at issue in these

[1] Although Member Systems' motion states that it is filed by the "Members of the Transmission Owners Committee of the State of New York", the filers have clarified that it is in fact a filing by the "Members of the Transmission Owners Committee of the Energy Association of New York State", which had been previously referred to as "Member Systems of the New York Power Pool." The Member Systems are: Central Hudson Gas & Electric Corporation ("Central Hudson"), Consolidated Edison Company of New York, Inc. ("Con Edison"), LIPA, New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("Niagara Mohawk"), Orange & Rockland Utilities, Inc., and Rochester Gas & Electric Corporation. The Power Authority of the State of New York ("NYPA") is also a Member System, but did not join in the August 3, 1999 filing which is the subject of these proceedings and is not included in term "Member Systems" as used herein.

proceedings, there can be no contested issues of material fact relating to the right of the Member Systems to unilaterally modify any of the TSA provisions; (2) with respect to a number of the TSAs in this case, the Member Systems have obtained the consent of the transmission customer to modify their TSAs, thus giving them a clear legal right to implement these amendments; (3) the status of certain intervenors as non-parties to certain of the amended TSAs does not confer any rights to raise Mobile-Sierra claims; (4) any objection to the proposed amendments that are based upon the potential for allegedly inappropriate cost flow-through under downstream contracts is beyond the scope of this proceeding; and (5) the necessary cost support for the New York Independent System Operator's ("NYISO") tariff provisions (including, but not limited to, the marginal losses methodology) has already been provided.

I. PROCEDURAL HISTORY

On August 3, 1999, the Member Systems made a filing to amend specific transmission agreements in effect between and among the individual Member Systems and/or various third party transmission customers. By order issued September 30, 1999, the Commission accepted for filing the revised TSAs and suspended them to take effect upon the effective date of the NYISO open access transmission tariff ("OATT").

In an order issued on October 5, 1999, the Chief Judge designated the undersigned as Presiding Judge for these proceedings. A prehearing conference was held on October 14, 1999. On October 15, 1999, I issued an order dividing the proceeding into three phases. These phases are: Phase one, to identify all issues germane to the proceeding, and to resolve disputed issues before the Settlement Judge, Administrative Law Judge H. Peter Young; Phase two, to consider any unresolved legal issues that are capable of being decided without resort to an evidentiary hearing; and Phase three, to conduct an evidentiary hearing for all the remaining issues.

During Phase two, Member Systems have negotiated a number of settlements, but certain issues remain unresolved. Member Systems are now seeking a summary disposition of a limited number of legal issues in this docket that they contend do not require an evidentiary hearing. In addition to considering the motion and answers filed in response, an oral argument was held on April 5, 2000, to discuss issues arising in this motion and in the legal issues phase of these proceedings.

II. DISCUSSION

A. Can summary judgment be rendered that proposed modifications to certain of the TSAs at issue in this proceeding are not barred by the Mobile-Sierra doctrine?

1. Member Systems

Member Systems contend that the Mobile-Sierra doctrine does not bar certain of the proposed contract amendments. In support of this contention, Member Systems first offer Niagara Mohawk's individual Open Access Transmission Tariff ("OATT") service agreement, which contains contractual language granting Niagara Mohawk the unilateral right to amend the contract.[2] The Member Systems argue that Niagara Mohawk's individual OATT service agreements with Allegheny Electric Cooperative, Inc. ("Allegheny"), American Municipal Power-Ohio, Inc. ("AMP-Ohio"), PG&E Energy Trading-Power, L.P. ("PGET"), and Niagara Mohawk Energy Marketing, Inc. ("NMEM") give Niagara Mohawk the unilateral right to amend the agreements. The Member Systems maintain that, since this is without factual dispute, it is appropriate to summarily find that there is no Mobile-Sierra bar to the proposed amendments to the TSAs of these entities.

Second, Member Systems claim that there is no Mobile-Sierra issue relating to any of the contracts between a Member System and NYPA, the transmission customer, because NYPA has agreed to the changes proposed in the August 3, 1999 filing. Member Systems contend that, where the transmission provider and the transmission customer have both consented to the proposed changes, the Mobile-Sierra doctrine will not bar the proposed amendments. Member Systems further argue that, since none of the intervenors [3] are parties to any of the Member System-NYPA contracts, they cannot raise

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[2] "Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the right of the Transmission Provider to unilaterally make application to the Commission for changes in rates, terms and conditions, charges, classification of service, Service Agreement, rule or regulation under Section 205 of the Federal Power Act and pursuant to the Commission's rules and regulations promulgated thereunder." See Niagara Mohawk Power Corporation OATT, Section 9, Sheet No. 35.

[3] Here, referring to Public Power Association of New Jersey ("PPANJ"), Allegheny, AMP-Ohio, Massachusetts Municipal Wholesale Electric Company and the

(continued...)

Mobile-Sierra concerns. Relying on Power Auth. Of the State of New York v. Long Island Lighting Co.[4] ("LILCO"), Member Systems maintain that, since neither MEUA nor the Out-of-State Munis were signatories to the original TSAs, they have no contractual right to challenge the proposed amendments on Mobile-Sierra grounds.

2. Commission Staff

Commission Staff ("Staff") first contends that the use of the LILCO precedent is inappropriate because the instant case is distinguishable from the facts presented in that case. In LILCO the main issue dealt with whether the consent of a party (certain Villages that were the ultimate customers of NYPA) to the 1981 settlement and a "concurring party" to a 1981 Agreement implementing the terms of the settlement, was required to make a filing proposing changes in the rate schedule underlying the 1981 Agreement. The Commission found that the Villages' status as a party to the settlement and a concurring party to the 1981 Agreement did not confer on them the status of contracting parties whose consent was necessary for changing the rate. Staff contends that the issue in this case is what statutory standards should be applied in determining whether the proposed changes are appropriate, and not whether the NYPA customers' permission was obtained or necessary to make the filing. Staff goes on to point out that neither the complainant nor the respondent in LILCO challenged the Villages' right to intervene in that proceeding or to contest the merits of the filing.

Staff further states that the contracts contain provisions that require filing with and approval by the Commission, notwithstanding the fact that NYPA has agreed to the proposed changes. Staff maintains that the Mobile-Sierra principles are applicable to the contract amendments, independent of the customers' right to assert them. Furthermore, the Commission's power to approve changes under the Section 206 public interest standard cannot be circumscribed or diminished by the parties' contracting decisions.[5]

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[3](...continued)
Pascoag, Rhode Island Fire District ("MMWEC-Pascoag") (collectively, "the Out-of-State Munis"), and the Municipal Electric Utilities Association of New York State ("MEUA").

[4] 60 FERC ¶ 61,069 at 61,235-36 (1992).

[5] Papago Tribal Authority v. FERC, 723 F.2d 950, 953 (D.C. Cir. 1983).

Finally, Staff argues that Mobile-Sierra applies to this case because harm to third parties must be considered with respect to the public interest standard under Section 206.[6] Additionally, specific provisions of several of the contracts impart procedural and substantive rights to the customers, Staff argues.[7]

3. MEUA

MEUA raises several contentions to refute Member Systems' arguments. First, MEUA contends that the Commission did not authorize the Presiding Judge to rule on a motion to dismiss. Second, according to MEUA, Member Systems have not demonstrated that NYPA concurs in the proposed amendments to the TSAs.[8] Third, MEUA claims that the terms and conditions of the NIMO & NYSEG TSAs may not be modified in a § 205 filing, especially here, where the Commission has called for each contract to be individually scrutinized. Fourth, MEUA states that its members have certain rights under the TSAs, including the right to protest rates, terms, and conditions of the contracts. Fifth, MEUA argues that its members are third party beneficiaries of the contract and are entitled to rights under federal contract law and New York state law.

MEUA further contends that the LILCO case does not support granting summary judgment based on the NIMO & NYSEG TSAs, because a review of the language in the contracts show that MEUA members are recognized and intended beneficiaries of the TSAs. Furthermore, the LILCO case is distinguishable, MEUA says, because it involved rates under a formula rate, not fundamental terms and conditions of service, which are at issue here.

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[6] See Northeast Utilities Service Company, 66 FERC ¶ 61,332 (1994), aff'd, Northeast Utilities Service Co. v. FERC, 55 F.3d 686 (1st Cir. 1995).

[7] See Section 1.(b) of NYSEG Rate Schedule No. 70; Section 11.1 of Niagara Mohawk Rate Schedule No. 204; Section VIII of Central Hudson's Rate Schedule No. 65.

[8] According to the letter attached to Member Systems' motion, NYPA stated that it did not object to the proposed amendments. The letter also states that NYPA would file a written pleading to express its support for the proposed amendments. NYPA has not filed a pleading, as of the date of this decision, although it committed to do so at the oral argument held on April 5, 2000. MEUA contends that NYPA has never expressed its support or approval of the proposed amendments since "not objecting" is not the same as "support."

4. Out-of-State Munis

The Out-of-State Munis contend first that they are not raising Mobile-Sierra issues in this proceeding. They claim to be raising only rate issues, not non-rate terms and conditions that are subject to Mobile-Sierra protection. Accordingly, the Out-of-State Munis see no need to address their rights to raise Mobile-Sierra claims.

Next, The Out-of-State Munis state that if the Motion is not simply ignored as moot and the merits are addressed, the motion should be denied because the Commission has permitted Out-of-State intervenors to raise Mobile-Sierra issues under the NYPA wheeling contracts. According to the Out-of-State Munis, neither NYSEG nor NYPA-NYSEG have objected previously to the Out-of-State Munis' standing to argue Mobile-Sierra issues. They contend that, in the past, the Commission has agreed that NYSEG was required to comply with Mobile-Sierra restrictions in its contract.[9] Additionally, the Out-of-State Munis argue that NIMO has never questioned their right to challenge increases. Member Systems have also not objected up to this point, so the Out-of-State Munis believe that Member Systems should not now be allowed to do so.

The Out-of-State Munis go on to state that the LILCO case does not apply because they are not arguing that they are parties to the NYPA-NIMO agreement. Also, the Out-of-State Munis contend that the language in the contract shows that the parties meant to confer more significant rights on them than the contract in the LILCO case.[10] Furthermore, the instant proceeding differs from LILCO, the Out-of State Munis argue, because the issue here is whether a statutory right (a Mobile-Sierra right) can be raised, and not whether the Out-of-State Munis' consent was necessary to make the initial filing of the proposed amendments.

Finally, the Out-of-State Munis contend that they have rights to raise all issues because they are third party beneficiaries under the NYPA-NIMO contract. They argue that the Commission and New York state law recognize the standing of indirect

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[9] New York State Electric & Gas Corp., 79 FERC ¶ 61,371 (1997) (ruling that the NYSEG-NYPA contract required NYSEG to provide 90-days notice prior to changing rates, and thereby enforcing this Mobile-Sierra protection).

[10] According to the Out-of-State Munis, the language in the NIMO-NYPA contract, with respect to rates, restricts NIMO's ability to raise rates, and does not limit those who can participate in or enforce this restriction, or the types of issues they can raise.

customers to raise statutory rights, even when the direct customer has waived their statutory rights.[11]

Conclusion for Issue A:

For several reasons, it is not necessary to analyze the merits of the issues with regard to the Member Systems request for summary judgment that proposed modifications to certain of the TSAs at issue in this proceeding are not barred by the Mobile-Sierra doctrine. I believe that the Commission has circumscribed my discretion to reach a summary disposition of this matter. First, the Commission's order plainly states that I am authorized to rule on all motions except motions to dismiss, which I conclude refers to motions for summary disposition under 18 C.F.R § 385.217. I further consider the Member Systems' "request" for summary judgment on certain discrete issues to fall within the bounds of the actions I am not authorized to take.

Second, the Commission also has required that I, in the first instance, determine the applicability of the Mobile-Sierra doctrine to the individual transmission agreement provisions proposed by the Member Systems in the context of a hearing. I have concluded that, even if the Commission had authorized me to rule on motions for summary disposition, I could not fulfill the Commission's expectation that each of the pertinent contracts be individually and carefully examined by conducting only a summary analysis of the motion and answers thereto. Moreover, the Commission clearly contemplated that my analysis be informed by the development of an evidentiary record, as stated in its January 14 order on rehearing in this proceeding, where it made clear its expectation that the contracts at issue be analyzed in the context of an evidentiary hearing.

In addition, there is something fundamentally unfair with the Member Systems' position. They seek summary judgment with respect to modification of certain TSAs, where they may have a stronger Mobile-Sierra position, yet urge denial of summary disposition for other modifications where they want the benefit of a hearing to sort out the Mobile-Sierra claims. (See Member Systems' Reply Brief) The better course to follow is to examine all of the modifications in the context of an evidentiary hearing.

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[11] See United Gas Pipe Line Company, 55 FERC ¶ 61,070 (1991). See also Otter Tail Power Co., 58 F.P.C. 2135 (1977), aff'd 583 F.2d 399 (8th Cir. 1978); Koch v. Consolidated Edison Co. of New York, Inc., 479 N.Y.S.2d, 62 N.Y.2d 548, 468 N.E.2d 1 (1984), reargument denied, 494 N.Y.S.2d 1032, 63 N.Y.2d 771, 484 N.E.2d 1054.

I am also persuaded that, with respect to the Out-of-State Munis, the motion is moot, because those entities have not raised Mobile-Sierra claims in this proceeding to date, but are challenging the justness and reasonableness of proffered rate changes. [12] And, with respect to NYPA customer TSAs, there is at the moment insufficient reason to expend effort at further analysis of the arguments offered in opposition to the motion by MEUA. [13] These matters will be resolved in the evidentiary hearing stage of this case.

For these reasons, the pending motion of the Member Systems for summary judgment that proposed modifications to certain of the TSAs at issue in this proceeding are not barred by the Mobile-Sierra doctrine is denied.

B. Is the Scope of this Proceeding Broad Enough to Cover Any Objection to the Proposed Amendments That Are Based upon the Potential for Allegedly Inappropriate Cost Flow-through under Downstream Contracts?

1. Member Systems

Member Systems claim that any objections to the possible flow through of costs related to non-jurisdictional agreements are not within the Commission's jurisdiction or at least are beyond the scope of the proceeding.

2. MEUA

MEUA observes that the Member Systems have offered no legal authority or precedent for their position. MEUA contends that its objections to proposed changes of transmission owners that get flowed through to its members historically have been received by the Commission and not precluded on the basis that NYPA could pass these charges along under separate agreements with MEUA members. MEUA states that the Commission has recognized the unique relationship NYPA has in providing power and transmission services to its full requirements customers under the Niagara Mohawk

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[12] The Out-of-State Munis reserved the right to raise Mobile-Sierra claims in the event that they are unable to reach an expected settlement of issues other than the justness and reasonableness of the imposition of the New York Power Authority Transmission Adjustment Charge ("NTAC") under Niagara Mohawk's Rate Schedule No. 138 and OATT, and operating reserve service charges.

[13] I note also that the promised filing from NYPA stating its consent and the effective date of its consent has not yet been received.

Redevelopment Act, and therefore has allowed MEUA to represent its Members in proceedings before the Commission for almost thirty years.

3. Out-of-State Munis

The Out-of-State Munis contend that they should be granted standing to pursue these issues because their objections are to the Member Systems' filing and not to Member Systems' contracts with NYPA. Furthermore, they contend that NIMO and NYSEG have never raised the standing issue before and the Commission has a long-standing tradition of granting standing to indirect customers on rate reasonableness issues (including NIMO and NYSEG rate cases).[14]

Conclusion for Issue B:

The Member Systems have not provided a basis in law or cited any precedent to support their request for a summary determination that objections to the August 3 amendments raised by Out-of-State Munis and MEUA as ultimate customers should be declared beyond the scope of this proceeding or beyond the Commission's jurisdiction. On the other hand, the Out-of-State Munis and MEUA have shown that there is ample precedent for the position that they have requisite standing to question the reasonableness of rate changes proposed under jurisdictional agreements that might be flowed through to them under non-jurisdictional intrastate contracts. Southern California Edison Co. v. FERC, 162 F.3d 116 (D.C. Cir. 1998); New York State Electric & Gas Corporation, 79 FERC ¶ 61,371 (1997); Niagara Mohawk Power Corporation, 41 FERC ¶ 61,131 (1987). Accordingly, the summary determination sought by Member Systems will not be rendered.

C. Has the Necessary Cost Support for the NYISO's Tariff Provisions (Including, but Not Limited To, the Marginal Losses Methodology) Already Been Provided?

1. Member Systems

Member Systems state that they have provided the cost support for the August 3 amendments required under Section 35.13 of the Commission's regulations. In support of

[14] See Southern California Edison Co. v. FERC, 162 F.3d 116 (D.C. Cir. 1998); New York State Electric & Gas Corp., 79 FERC ¶ 61,371 (1997); Niagara Mohawk Power Corporation, 41 FERC ¶ 61,131 (1987).

this contention, Member Systems claim that the Commission's January 14, 2000 order found that the cost information previously supplied was sufficient for the inclusion of the relevant NYISO OATT provisions into the grandfathered agreements. Therefore, the previous Commission order is binding on the parties, the Member Systems argue, and any further challenge to the sufficiency of the supporting cost information would constitute an impermissible collateral attack on the Commission's prior orders.

2. Commission Staff

Staff argues in response that the proposed modification of a number of the agreements requires a public interest showing under Section 206. Staff states that it is necessary to quantify the extent of any cost-shifting impact on third parties that would occur in the absence of adoption of the proposed amendments. Staff asserts that this burden cannot be met on the basis of the August 3, 1999 filing.

3. MEUA

MEUA contends that Member Systems have not provided the necessary cost support under the Commission regulations, and they must do so in their case-in-chief. MEUA further argues that the Commission's January 14 order does not go as far as Member Systems want it to. According to MEUA, Member Systems' position flies in the face of the hearing order. It argues that there would be no need for a case-in-chief if the Commission had already determined that all necessary cost support was provided.

4. Out-of-State Munis

The Out-of-State Munis maintain that Member Systems must present additional cost support in for their filing. They argue that the Commission's decision not to reject is vastly different from a finding that the rates are just and reasonable. They further contend that the Commission was only authorized to make a limited determination: whether the proposed tariff is sufficiently complete for the Commission to be able to decide whether or not to investigate and suspend the increased rate. Only rates that are patently defective are rejected at this stage, the Out-of-State Munis assert. Like MEUA, they observe that the Commission has already decided that Member Systems have an evidentiary burden to meet in this proceeding; therefore, they argue that the Member Systems must submit direct evidence of cost support for the amendments, including support for the revised rates.

Conclusion for Issue C:

The answering parties are correct that the Member Systems have an evidentiary burden to meet in this case and the Commission's conclusion that there was sufficient cost support for the amendments to survive summary rejection does not relieve them of that responsibility. The Member Systems are expected to file a case-in-chief to support the amendments. What they believe is necessary to prevail and what they decide to file is up to them, but I hereby deny their request for a summary ruling that they have provided the necessary cost support for the NYISO OATT provisions sought to be incorporated through the proposed amendments.

William J. Cowan
Presiding Administrative Law Judge