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 ON LEGAL ISSUES
(Issued April 25, 2000)

On August 3, 1999, the Member Systems of the New York Power Pool ("Member Systems") [1] collectively made a unilateral filing to amend 37 existing bilateral transmission services agreements ("TSAs") between several entities, including Sithe /Independence Power Partners L.P. ("Sithe"), Indeck-Corinth Limited Partnership ("Indeck"), Selkirk Cogen Partners, L.P. ("Selkirk"), Lockport Energy Associates, L.P. ("Lockport"), New York City Public Utility Service ("NYCPUS"), and NYPA, and transmission providers, Niagara Mohawk, NYSEG, or Con Edison. The Member Systems contended that the amendments ("the August 3 amendments"), which, inter alia, reflect the uniform application of ancillary services, marginal losses, scheduling provisions, conversion to Transmission Congestion Contracts, and conforming changes to

[1]These entities are now identified as "Member of the Transmission Owners Committee of the Energy Association of New York State." They consist of: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc. ("Con Edison"); LIPA, New York State Electric & Gas Corporation ("NYSEG"); Niagara Mohawk Mohawk Power Corporation ("Niagara Mohawk"); Orange & Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation ("RG&E"). The Power Authority of the State of New York ("NYPA") is also a Member System, but did not join in the August 3 filing. For the sake of brevity, I will refer to these entities (excluding NYPA) as "the Member Systems."

the NYPA Transmission Adjustment Charge ("NTAC"), were needed to accommodate the restructuring of the New York electricity markets and the establishment of an independent transmission system operator ("the NYISO"). These amendments were filed in response to the Commission's determination in Central Hudson Gas & Electric Corp., 86 FERC ¶ 61,062, 61,217-18, order on reh'g, 88 FERC ¶ 61,138 (1999), that the Member Systems could not amend the TSAs generically. The Commission then set the August 3 amendments for hearing in this proceeding.

On November 17, 1999, RGE and Niagara Mohawk submitted four additional unexecuted service agreements with NYPA on behalf of third party customers (Docket Nos. ER97-1523-018 and ER97-1523-019). By order issued January 12, 2000, the Commission accepted and suspended the proposals, subject to refund, to be effective as of the NYISO start-up on November 18, 1999, and consolidated the filing with the instant proceeding.

A procedural schedule was established dividing the proceeding into three phases: a settlement judge process to try to consensually resolve as many issues as possible, followed by a second phase for consideration of legal issues that were not dependent upon disputed facts for resolution. The third phase is an evidentiary hearing process to try remaining issues. This order considers only legal issues. I have framed this as an order, as opposed to an Initial Decision, because, as will be apparent, I have deferred resolution of most of the issues until the evidentiary hearing phase is completed. Accordingly, it seems inappropriate to trigger an exceptions review process at the Commission at this stage of the case for the limited rulings made here.

Briefs on legal issues were filed by Sithe, Lockport, Indeck, NYCPUS, the Municipal Electric Utilities Association of New York State ("MEUA"), Selkirk, and the Commission Staff ("Staff"). The NYISO filed a letter in lieu of an initial brief. Reply briefs were received from the Member Systems, Sithe, Lockport, Indeck, MEUA, Selkirk, and the NYISO. On March 7, 2000, Indeck filed a supplemental letter noting its opposition to the imposition of regulation penalties, in response to an interpretation of the NYISO that Indeck learned about after the filing of its brief.

After briefs on legal issues were filed, several settlements were reached between the Member Systems and parties filing such briefs that have the effect of mooting some of these legal issues. Among the settlements received is one between the Member Systems, the NYISO and Selkirk that resolves all issues in this proceeding with respect to amendments to Selkirk's TSA except whether Selkirk, under its grandfathered TSA, is or should be subject to real-time congestion charges under the provisions of the NYISO

OATT. That issue is considered, but not finally determined, below. Other settlements have been filed between: AES, Niagara Mohawk and NYSEG; Member Systems, the NYISO and PG&E Energy Trading-Power; and NYSEG, Niagara Mohawk and Lockport. In addition, Indeck's March 7, 2000 letter advises that it had reached a settlement in principle with the Member Systems covering all issues with the exception of the legality of imposition of penalty congestion charges and regulation penalties. However, no filing has been made.

The format of this order does not follow the Revised Consolidated Statement of Issues, filed on February 14, 2000, because that list is simply a compilation of each parties' phrasing of the issues, many of which are repetitive or duplicative of issues listed by others. This type of issue list will not be acceptable for the evidentiary phase of this proceeding. Parties are reminded of the following procedural rule:

> **JOINT STATEMENT OF CONTESTED ISSUES**. Parties should develop a Joint Statement of Contested Issues which shall contain, in a tabular format, a concise, neutral statement of each issue, the position of each party on each issue, the names of the witnesses, citations to testimony and exhibits in support of each party's position on each issue, and dollar amounts for each issue, where appropriate.

Parties are further reminded that I waived the filing of pre-trial briefs on the condition that I receive a good, well-referenced Joint Statement of Contested Issues. (See transcript of October 14 prehearing conference at 24.) I expect that such a statement will, for example, have one issue dealing with congestion pricing, with as many subparts as required to develop specific points, but not four issues that differ only because each was written by different counsel. [2]

One further observation seems important at this point. It is clear that the parties that briefed legal issues were of the opinion that they could be resolved without the

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[2] Parties are also reminded that a table of contents is required for briefs, and that table of contents must direct the reader to the correct page where the argument is discussed. The table of contents in several of the briefs filed to date in this proceeding failed to state the correct page for a listed argument.

benefit of an evidentiary record. That is to say, that these issues could be determined definitively from an analysis of the various agreements and applicable statutes, regulations and precedent. In general, I have not found that to be the case. I have found that the Commission did not intend for most of these issues to be decided summarily without the benefit of a record. In my judgment, the Commission's decision proved wise in that these issues, while "legal" in the broad sense, are so imbued with factual disputes and so dependent upon factual context that they should not be considered in a vacuum occupied only by briefs and argument. This will no doubt disappoint the parties seeking summary determinations, but it would be unwise to rush to a judgment on these issues when they can be better developed and explained in an evidentiary hearing where intent, implications, benefits and detriments can be examined carefully.

GENERAL ISSUES

ISSUE I: Generally, whether the TSAs may be modified to incorporate the provisions of the NYISO OATT in light of PURPA, the "Mobile-Sierra" doctrine, Order No. 888, the Commission's orders approving the ISO, and other Commission precedent?

Several entities filing briefs on legal issues contend that the modifications proposed in the August 3 amendments cannot be implemented without the consent of the affected parties in light of the provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA")[3], the so-called "Mobile-Sierra" doctrine [4], Order No. 888 [5], and other Commission precedents. It is appropriate here to review the context of the filings in light of the provisions of these statutes, orders and precedent.

PURPA

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[3] 16 U.S.C. § 824a-1 et.seq. (2000).

[4] See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); and FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

[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 on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 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).

Sithe and Lockport point to the intent of Congress in enacting PURPA to encourage the development of cogeneration facilities as alternatives to utility generation. See 16 U.S.C. § 824a-3(a) (directing FERC to prescribe rules as necessary to encourage cogeneration). They assert that the Commission, when enacting regulations implementing PURPA, expressed its intent to ensure that Qualifying Facilities ("QFs") which had obtained the certainty of an arrangement would not be deprived of the benefits of their commitments as a result of changed circumstances. Order No. 69, FERC Stats. & Regs., Regulations Preambles, ¶ 30,128, at p. 30,880 (1980).

Sithe also cites New York State Electric & Gas Corp., 71 FERC ¶ 61,027, at p. 61,118 (1995), as emphasizing and reaffirming the Commission's policy that QFs are differently situated from utilities and must rely upon power purchase agreements ("PPA") to develop and finance their projects. Unilateral changes to its TSA here, Sithe contends, would effect modifications to its long-term contractual rights under its PURPA PPA, contrary to the protections afforded it under that PPA. Sithe argues that these TSA changes would result in an unlawful modification of the carefully structured economic terms of the PPA and the TSA. Specifically, Sithe suggests that the day-ahead scheduling requirement of TSA Amendment (2) and the Energy Imbalance Charge imposed by Amendment (3) would restrict Sithe's rights in its long-term PURPA PPA with Con Edison and are therefore contrary to precedents under PURPA which hold that QFs should not be deprived of the benefits associated with the certainty of their long-term contracts. Sithe concludes that the Member Systems are in effect seeking to change its PPA indirectly through the proposed TSA amendments, when it is unlawful for them to make such changes directly.

Lockport makes similar arguments about the impact on its PPA of imposing scheduling and congestion charges on it through amendments to its TSA. It argues that its settled rights under its PPA would be unlawfully modified and that these new provisions would fundamentally change the economic terms that the parties had negotiated in the PPA. Lockport makes an additional, even more fundamental argument. It contends that, in order to encourage QF development, QFs have been exempted from virtually all of the provisions of the Federal Power Act ("FPA")[6], including ratemaking, financial, and organizational regulation. Since QFs are not public utilities under the Federal Power Act, the Commission is without jurisdiction, Lockport argues, over a QF's PPA with a utility, or the rates and terms within that contract, (citing New York State at p. 61,115). Accordingly, Lockport concludes that the Commission has no authority to

[6] 16 U.S.C. § 791a et. seq. (2000).

approve the Member Systems modifications to the TSA that would contravene the terms of the PPA.

Staff disagrees with Lockport and Sithe. Staff posits that the exemption from regulation for QFs contained in 18 C.F.R. § 292.601-602 is limited to those QFs with a capacity of less than 30 MW or those producing electricity from geothermal or biomass resources. Moreover, New York State, Staff argues, dealt with the certainty of contract rates in light of changed utility avoided costs, and not with transmission rates at issue here. Staff concludes that the proposed TSA modifications should be examined "under the normally applicable criteria." [7] The NYISO is in accord. [8]

Lockport, however, suggests that Staff has misread Section 292.601, which exempts all qualifying facilities from the FPA, other than *a qualifying small power production facility* with power production capacity which exceeds 30 MW, if such facility uses any primary energy source other than geothermal resources. Lockport states that it is a qualifying *cogeneration* facility, not a qualifying small power production facility, and is therefore exempt from the requirements of the FPA.[9]

The Member Systems agree with Staff that PURPA presents no obstacles to the August 3 amendments, but for a different reason. They say that the proposed TSA amendments do not purport to amend the PPAs, but only the FERC-jurisdictional TSAs. Nothing in PURPA, the Member Systems contend, eliminates any party's ability to exercise transmission service rights under the Federal Power Act. They suggest it is well-settled that PURPA is displaced whenever a transaction involves transmission subject to the Commission's jurisdiction, citing Western Massachusetts Electric Co., 61 FERC ¶ 61,182 (1992), where the Commission held:

> When a utility transmits QF power in interstate commerce ... a Commission jurisdictional transaction takes place; jurisdiction over the transmission of electric energy in interstate commerce and over agreements affecting or relating to such service (and the rates for such service) are subject to the Commission's exclusive jurisdiction. 61 FERC at p. 61,662 (footnote omitted).

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[7] Staff Initial Brief, at 33.

[8] NYISO Reply brief, at 8.

[9] In a letter filed on April 3, 2000, Staff acknowledges that its earlier interpretation was incorrect. Staff adheres to its position, however, that PURPA is not a bar to the proposed contract amendments.

Member Systems conclude that they are only attempting to amend an agreement governing a jurisdictional activity, subject to the Commission's approval. [10]

Mobile-Sierra

Staff points out that, under the Federal Power Act, there are two methods whereby wholesale electric rates and related terms and conditions may be changed: a utility may initiate a change by making a Section 205 filing with the Commission, or, under Section 206, any party (or the Commission) may request a prospective change in an existing rate upon a finding that the existing rate is unjust, unreasonable, unduly discriminatory or preferential. Utilities and their customers may also set rates by contract.

Staff continues by noting that the interplay between the parties' right to set rates by contract and the Commission's ratemaking responsibilities was examined by the Supreme Court in the Mobile and Sierra cases (hereinafter "Mobile-Sierra," when referring to the doctrine of these cases). In Mobile, the Court held that a regulated natural gas company furnishing gas to a distributing company under a long-term fixed rate contract could not, without the consent of the distributing company, change the rate specified in the contract by making a filing under Section 4 of the Natural Gas Act. In Sierra, the Court extended this rationale to proceedings under the Federal power Act, holding that fixed price contracts between parties could not be modified unilaterally. This holding notwithstanding, the Court went on to add that the Commission was empowered under the Federal Power Act to modify a contract rate despite provisions in the contract prohibiting changes, if it found it necessary to do so in the public interest. 350 U.S. at 355. Satisfaction of the public interest standard in this context would require more than a showing of non-compensatory rates. It would be necessary to show that the existing rate was so low as to adversely affect the public interest, such as where the utility's ability to continue service would be threatened, or where failure to modify the rate would excessively burden other customers, or where the rate is shown to be unduly discriminatory. Id.

Staff further notes that parties may enter into contracts that provide for unilateral changes in rates, or they may contractually eliminate the utility's right to make rate changes during the life of the contract. Where there is no provision in the contract for unilateral changes, the Mobile-Sierra doctrine requires that any proposed changes meet

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[10] But see the discussion of the arguments advanced by Lockport, under Issue V below, and Indeck, under Issue IV below, that the proposed changes in the TSA would result in de facto modification of the PPAs.

the Section 206 public interest standard. The parties cannot contract away the Commission's over-arching responsibility to modify rates prospectively under Section 206 to ensure that the public interest concerns are satisfied. Sierra, 350 U.S. at 353, 355, see also Papago Tribal Util. Authority v. FERC, 723 F.2d 950 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984).

Staff further points out that Papago also is instructive on the issue of the burden of proof necessary to show harm to the public interest that would justify changes to contract rates. There, the court held that a detriment to purchasers who were not parties to the contract must be established, in other words, some independent harm to the public interest must be shown. Id. at 953, n.4. The court described this burden as "practically insurmountable" and more difficult to meet than a just and reasonable standard. However, in Northeast Utilities Service Co. v. FERC, another court disagreed with the practically insurmountable description of the burden, while finding that the public interest standard had been met in light of demonstrated harm to third parties. See 55 F.3d 686, 691-93 (1st Cir. 1995).

Sithe argues here that the Commission has no discretion to accept a Section 205 filing that contravenes a private contract, seeing the Mobile-Sierra doctrine as a fundamental limitation on the Commission's Section 205 jurisdiction. Sithe contends that the doctrine applies not only to rates, but to non-rate terms and conditions of the private contracts, citing among other cases, Boston Edison Co. v. FERC, 856 F.2d 361 (1st Cir. 1988) and Alabama Power Co., 56 FPC 493 (1976). Sithe also refers to Viking Gas Transmission Co., 58 FERC ¶ 61,252 (1992), where a gas pipeline sought to impose on a customer unilateral contract changes in terms and conditions of service as part of an open access transportation policy. Sithe points out that the Commission rejected the proposed changes in light of a provision in the customer's contract with Viking that no modifications could be made except by written agreement of the parties, even though the contract contained a so-called "Memphis" [11] clause permitting the filing of unilateral changes in rates and charges. Id. at p. 61,826.

MEUA avers that the Mobile-Sierra doctrine is little more than an affirmation that traditional contract law applies under the Federal Power Act to a wholesale electric customer's contract with a regulated public utility supplier. MEUA cites Cities of Bethany, Bushnell, Cairo, et al. v. FERC, 727 F.2d 1131, 1143 (D.C. Cir 1984), cert. denied, 469 U.S. 917 (1984), where the court said: "the Mobile-Sierra doctrine is

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[11] Referring to United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103, 113 (1958).

refreshingly simple: ... Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." [12] MEUA also calls attention, among other cases, to Vermont Dept. of Pub. Serv. v. FERC, 817 F.2d 127, 134 (D.C. Cir. 1987), where the court found that a utility could only make such unilateral filings as are consistent with the terms of the contract governing relationships between the parties.

This general principle is echoed in the briefs of Selkirk and Lockport. In addition to cases discussed above, Selkirk cites Cities of Campbell v. FERC, 770 F.2d 1180 (D.C. Cir. 1985), in support of its position that a party's right to initiate a rate or non-rate change to a contract under Section 205 of the Federal Power Act depends upon whether the contract permits such unilateral rate or non-rate changes. The court there describes "an arena of freedom of contract within the regulated environment of utility-consumer relations." Id. at 1185-86. Lockport relies in part on Richmond Power & Light v FPC, 481 F2d 490 (D.C. Cir 1973), cert. denied, 414 U.S. 1068 (1973), where the court stated: "if a public utility. . . unilaterally files . . . a new tariff inconsistent with its contractual obligations, the newly filed tariff is a nullity and does not abrogate or supersede the contract." (citations omitted)

Indeck suggests that the requirements of Sections 205 and 206 appear to have been disregarded so far in this proceeding. It calls attention to the fact that the August 3 filing was styled by the Member Systems as falling under Section 205 and 206. Moreover, the Commission permitted implementation of rate changes here, subject to refund, without a hearing, as if proceeding under Section 205. The Commission should, it is argued by Indeck, hold the Member Systems to the standards of Section 205, including the sanctity of contractual commitments not to seek unilateral rate changes, instead of giving the Member Systems the benefit of switching back to Section 206 arguments when those under Section 205 are inconvenient.

The Member Systems contend that the Commission has already passed on the question whether the August 3 amendments can be summarily rejected on Mobile-Sierra grounds, when it denied rehearing in the instant proceeding, and ordered a hearing to decide whether the Mobile-Sierra doctrine applies to the individual contracts sought to be amended here. January 14 Order, 90 FERC ¶ 61,042 at p. 61,196. They assert that, at a minimum, the August 3 amendments raise contested issues of material fact that can only be resolved at an evidentiary hearing. The Member Systems further contend that unilateral filings to amend jurisdictional agreements are permitted to the extent that the

[12] Citations omitted.

contract language allows for such filings, and where they don't, the Commission may modify them under Section 206 of the FPA under a public interest finding. In either case, the Member Systems contend that an evidentiary hearing is required to sort out the facts and apply the law.

The Member Systems maintain that there are two categories of permissible changes under Section 205 that raise no Mobile-Sierra issues. First are those changes to contracts where the parties consent to the changes, and second are those remaining contracts which contain rate change rights. As to the former, the Member Systems have filed a motion for summary judgment, which is being handled separately from this order, and, as to the latter, the Member Systems argue that an evidentiary hearing is required to determine whether the amendments involve rate changes.

The NYISO emphasizes the importance of applying uniform provisions to all transmission customers, urging that the NYISO OATT be so applied to the maximum extent possible. Accordingly, it argues that any individual contract should be interpreted, where susceptible to such interpretation, to permit it to be brought into conformity with the new electric market in New York, i.e., to be modified pursuant to Section 205 of the FPA to conform with the NYISO OATT. If such contracts do not permit such an interpretation, NYISO contends that findings should be made under Section 206 to the FPA to permit the NYISO to operate under its OATT without having to recognize multiple exceptions and non-conforming rights. The NYISO believes that the public interest requires such a result and is prepared to so demonstrate in the evidentiary stage of this case.

The NYISO further explains its view that this is not the classic Mobile-Sierra situation, where a company is seeking to amend jurisdictional agreements for that company's financial gain. Here, it contends, new services are being provided through a new state-wide transmission arrangement, whereby the NYISO, not the incumbent utilities, administers the services and receives related payments on a non-profit basis. Contractual terms set in the old model would be unduly discriminatory in the new regime, the NYISO asserts. The public interest includes, at a minimum, the NYISO contends, the ability to direct transmission operations, coordinate maintenance scheduling, assume responsibility for control area operations and provide safe, reliable and efficient operation of the state power system, while promoting a competitive wholesale market in New York. The existing contracts need to be modified to carry out these functions successfully, the NYISO maintains.

ORDER NO. 888 and other related precedent

It is also important to examine the implications on the August 3 amendments of the Commission's orders guiding the restructuring of the electric industry. Staff points out that Order Nos. 888 and 888-A laid out the following principles:

- Generic modification of requirements contracts entered into before July 11, 1994 was inappropriate. Order No. 888, ¶ 31,036, at pp. 31,663-64 and 31,813-14.
- *Customers* were provided the right to seek modification of any provision of their contracts, on a case-by-case basis, under the just and reasonable standard, despite the existence of a Mobile-Sierra clause in the contract. Id. at p. 31,664; and pp. 31,813-14; Order No. 888-A ¶ 31,048 at pp. 31,191-92.
- Notwithstanding the presence of a Mobile-Sierra clause, it is in the public interest to permit utilities to seek amendments to stranded cost provisions, if the utility otherwise met the requirements of Order No. 888. Order No. 888 at p. 31,664; and pp. 31,810-12; Order No. 888-A at pp. 31,192-93.
- With respect to provisions other than stranded costs, a utility with a contract that has a Mobile-Sierra clause has the burden of showing that provisions it wishes to change are contrary to the public interest. Order No. 888-A at pp. 30,192-93.

While placing a higher burden on utilities seeking to change non-stranded cost provisions of contracts than customers seeking to change such provisions in their contracts seems inequitable, the Commission rationalized the disparate burden assignment by reference to the monopoly control exerted by utilities over access to their transmission facilities, and the unequal bargaining power they have over captive customers. Id. at pp. 30,193 n.35; and Order No. 888-B at pp. 62,090-91.

Lockport asserts that the Commission has sustained its policy of respecting transmission customers' contractual rights and obligations throughout the restructuring and changing rules of competitive electricity markets. Order No. 888, it says, recognizes that, while new transmission customers are entitled to take service under an open access tariff, existing transmission customers' requirements contracts would continue in force.

MEUA argues that the proposed amendments to the TSA between NYPA and Niagara Mohawk and NYSEG, through which its members receive power from NYPA**,** interfere with negotiated rights under existing TSAs. For many of the reasons discussed above in the threshold discussion of the Mobile-Sierra doctrine and Order No. 888, MEUA contends that the August 3 amendments are a "nullity." Wellesley, Concord, and

Norwood, Mass. v. FERC, 829 F.2d 275, 278 (1st Cir. 1987). It requests summary judgment in its favor and the dismissal of the proposed TSA amendments.

MEUA adds that the Commission affirmed its decision not to abrogate existing transmission contracts in its recent Order No. 2000, on Regional Transmission Organizations, where it stated:

> At this time, we continue to believe that it is not appropriate to order generic abrogation of existing transmission contracts. We recognize that existing contracts represent negotiated rights and obligations achieved through mutual negotiation. Order No. 2000, 89 FERC ¶ 61,285 (Slip op. at p. 602).

Staff also calls attention to the Commission's examination of the Mobile-Sierra doctrine in the context of Independent System Operator ("ISO") filings. In Pacific Gas & Electric Company, et al., Staff maintains that the Commission permitted any entity that wished to do so to continue exercising its contract rights for the term of the agreement, finding without merit the contention that such treatment would be discriminatory and unfair. See 81 FERC ¶ 61,122 at pp. 61,470-71 (1997). Staff also points to New England Power Pool, 83 FERC ¶ 61,045 (1998), where the Commission declined to require the conversion of 300 agreements to the ISO's OATT, citing Order No. 888. However, in Pennsylvania-New Jersey-Maryland Interconnection, et al., 81 FERC ¶ 61,257 (1998), staff notes that the Commission did require modification of bilateral agreements to the extent necessary to eliminate pancaked rates to non-transmission owners, where the transmission owners had designed a non-pancaked regime for their own transactions. Staff points out that the Commission's language there could be taken to support modifications of bilateral agreements to the extent required for facilitation of the formation of ISOs. However, Staff suggests that the Commission's action to override contracts there, and in Midwest Independent Transmission Operator, Inc., 85 FERC ¶ 61,372 (1998), were taken only to ensure that no customer pays pancaked rates that would exceed charges under an ISO's OATT. Staff concludes that these decisions should not be read so broadly as to permit non-consensual contractual changes in an ISO formation context without meeting Mobile-Sierra criteria.

The Member Systems argue that the policy of Order No. 888 that limits the modification of contracts is not applicable here. Their efforts to restructure the New York State electricity markets through the formation of the NYISO and the implementation of a system-wide tariff raise very different policy issues than the individual OATTs at issue in Order No. 888, the Member Systems suggest. For this reason, they reject Staff's attempt to limit the holdings in PJM and Midwest System Operator and see those decisions as fully supportive of their efforts here and signaling a Commission policy shift from the

individual company voluntary unbundling advanced in Order No. 888 to its current policy of favoring regional transmission service. Moreover, the Member Systems assert, Order No. 2000 expressly recognizes that existing transmission agreements may require modification to better facilitate the development of regional transmission arrangements. Regional Transmission Organizations, Order No. 2000, III FERC Stats. & Regs. [Proposed Regulations] ¶ 31,089 at p. 31, 205 (1999), order on reh'g, Order No. 2000-A, 90 FERC ¶ 61,201 (2000).

The Member Systems see their filing here as an attempt to establish comparable and non-discriminatory terms and conditions for the NYISO services, which requires amendment of existing TSAs, which they believe is necessary to establish the regional transmission structure that the Commission's policy is encouraging. [13] They further cast the opponents as unfairly seeking to retain preferential arrangements that will impose additional costs on others in the region.

NYISO sees PJM and Mid-West as laying the foundation for contract modifications here that are necessary to bring all stand-alone transmission services under the control and administration of the ISO. It argues that PJM stands for the proposition that any rights that the transmission owners have retained to modify their existing contracts should be read broadly, so that, if a contract permits modifications to rates, components of the cost of transmission, such as congestion and losses, should be seen as forms of rates. Only if contracts cannot be so interpreted, should such modifications be found impermissible under Section 205, NYISO maintains. If required to reach the public interest test under Section 206, NYISO asserts that the public interest favors the establishment of efficiently run ISOs, like its own. NYISO finds additional support for its views in Order No. 2000, where the Commission, albeit in the context of elimination of pancaked rates, concluded that it would need to balance, on a case-by-case basis, the desire to honor existing contractual arrangements with the need for a uniform a approach to transmission pricing. Order No. 2000, at p. 31,205.

Discussion and conclusion for Issue I:

The PURPA issue

Sithe, Selkirk and Lockport in particular argue that the August 3 TSA amendments, which introduce scheduling requirements and exposure to congestion

[13] In Order 2000, the Commission concluded that the NYISO did not meet the RTO criteria.

charges, have the effect of fundamentally changing the benefit of their underlying PPAs. These entities have made a persuasive argument that the new state-wide transmission regime effectuated under the NYISO's OATT and related agreements will alter the arrangements they contracted for with the purchasing utilities in their PPAs.

The Member Systems response, that they are seeking here only to change the transmission service agreements, and not the PPAs, will provide little comfort to plant owners who may have to significantly change their operations from those expected under their existing contracts, with possible adverse economic impacts, as a result of these new transmission arrangements. The sanctity of PURPA PPAs has been protected from direct non-consensual change, [14] and those contracts are entitled also to protection from material indirect modifications, unless the changes can be justified for some higher public purpose.

The Member Systems also contended at oral argument that many of the QF TSAs had provisions that contemplated changes, so the parties should not now be heard to complain when changes are being sought. They cite to Union Pacific Fuels, Inc., et al. v. FERC, 129 F.3d 157 (D.C. Cir. 1997), where the Court upheld the Commission's implementation of a new rate design resulting from a policy change, under a contract that allowed for rate changes, even though the modification had the effect of reallocating risk between the contracting parties. The Member Systems see a parallel here, in that TSA changes necessary to implement a new policy will have the effect of unanticipated changes in allocation of risks between the contracting parties. However, this situation is different from the one in Union Pacific in at least one obvious respect, that is, that the TSA modifications will have the effect of changing expectations not only under the TSA, but under downstream protected PURPA PPAs. In addition, it seems unlikely that parties agreeing to future TSA rate changes could have anticipated the kind of trickle down economic impacts to their PPA operations alleged here. Certainly, it can be concluded that the parties contracting for the TSAs could not have expected that those TSAs would be so altered by government intervention, taken under color of an authorized transmission rate change provision, that the economics of their underlying PURPA PPAs could possibly be materially changed.

The Member Systems further contend that PURPA is displaced whenever a transaction involves transmission subject to the Commission's jurisdiction. The Commission plainly has exclusive jurisdiction over the transmission arrangements at issue

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[14] Order No. 69, FERC Stats. & Regs., Regulations Preambles, ¶ 30,128, at p. 30,880; New York State Electric & Gas Corporation, 71 FERC ¶ 61,118 (1995).

here. This is not a case like Western Massachusetts, supra, cited by the Member Systems to support its position that PURPA is displaced if there is a conflict with the Commission's transmission jurisdiction. The issue presented there was a jurisdictional question between state and federal authority and that case is not particularly helpful in resolving the issue here.

But none of this analysis is conclusive, because the Commission, in addition to supporting the sanctity of PURPA PPAs, has also fostered the development of effective competitive wholesale electric markets by encouraging formation of independent transmission system operators. Here, ironically, the creation of the NYISO, an institution designed to foster development of wholesale competition in New York, has had the unfortunate effect of introducing changes in transmission arrangements that may have the indirect effect of modifying the transactions that the parties bargained for in their PPA contracts.

We are therefore confronted with two concepts designed to foster competition that are not working in harmony. Reconciliation of these two concepts here will be difficult. However, I am unable even to attempt such a reconciliation from the legal issue briefs received to date. I cannot conclude, as a matter of law, that the TSA amendments will cause such material harm to the underlying PPAs that their owners should be exempted from the new transmission regime. A record must be developed to look more closely at the alleged harm. Further, there may be offsetting advantages gained by these entities from participation in the new marketplace that have not been considered. And, of course, the need for uniformity in transmission terms and conditions by the NYISO must be established. Further, the public interest benefits of the NYISO and the new market structure must be more carefully and completely described. These are all questions of fact that must be developed during the upcoming hearing in order to reconcile the competing legal and policy initiatives and determine a result that will be consistent with the public interest. Accordingly, evidence should be developed in the hearing stage as to the impact on PPAs of the transmission changes in the context of the operation of the NYISO markets, under the public interest standard of Section 206 of the Federal Power Act. [15]

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[15] I reject Indeck's argument that the Commission has no authority to approve the Member Systems' TSA modifications because the Commission has no jurisdiction over a QF's PPA with a utility, or the rates and terms within that contract. The Commission has clear authority over the transmission agreements at issue here under the Federal Power Act, and it is that authority that is being exercised here.

Mobile-Sierra Issues

The Commission has clearly preserved any ruling on Mobile-Sierra issues, having stated in its September 30, 1999 order establishing this proceeding that it was "not deciding any issue concerning whether, and to what extent, the Mobile-Sierra doctrine may apply to any of the transmission agreement revisions proposed by the Member Systems." 88 FERC ¶ 61,306 at p. 61,942. Further, it asked that the presiding judge address such issues in the first instance. Member Systems has interpreted this action as surviving summary rejection, since the amendments were accepted for filing. Other parties, however, continue to urge summary rejection of modifications to existing rate schedules under Section 205 unless the parties have preserved the contractual right to make such changes.

Summary rejection at this juncture of the August 3 amendments as improper modifications to existing contracts under Section 205 is foreclosed both by the Commission's September 30, 1999 order establishing this hearing and by the Commission's January 14, 2000 order on rehearing. In the former, the Commission precluded my ability to reach a summary disposition when it failed to authorize me to act on motions to dismiss. Rejection of filings on Mobile-Sierra grounds, where the Commission itself declined to take such action and ordered a hearing, is not within my authority at this stage of the case. The rehearing order made this even clearer. The Commission stated that a hearing would provide the forum for "[t]he intricate legal and factual examinations that need to be done to decide whether the Mobile-Sierra doctrine, in fact applies." The Commission went on to express clearly its expectation that each of the pertinent contracts would be "individually and carefully examined" to determine whether they allow or prevent modifications such as those proposed here. January 14 Order, 90 FERC at p. 61,196. As helpful as they were, the briefs submitted on legal issues do not provide a basis for the careful examination of the Mobile-Sierra issues expected by the Commission. I believe that the Commission expected that the "hearing" it ordered would be an evidentiary, not a paper, hearing. In the face of the Commission's instructions and expressed expectations, I have no basis for reaching a summary conclusion of law that the Mobile-Sierra doctrine applies or does not apply to any of the modifications at issue in this proceeding.

Moreover, the briefs and the oral argument have emphasized the ambiguities involved in the existing contracts and have focused on genuine disputes as to the meaning of particular terms, such as whether a proposed modification, like new scheduling requirements, is or is not a permissible rate change. While some of the disputed provisions are clearer than others and, absent the Commission's instructions, might have been capable of resolution on the briefs alone, no purpose would be served by rushing to

judgment in defiance of the Commission's directions. The parties should prepare evidentiary presentations advancing their claims that the Mobile-Sierra doctrine either applies or does not apply in individual instances, contract by contract, modification by modification.

The Member Systems and the NYISO are correct also that an evidentiary hearing is required to examine whether modifications that may be barred by the application of the Mobile-Sierra doctrine should nevertheless be approved under Section 206 as necessary in the public interest to accommodate the new state-wide transmission structure of the NYISO. The way this case has been structured by the Commission, the evidentiary proceeding should determine whether each proposed disputed modification is a permissible unilateral filing under Section 205, and to the extent that it may not be, whether such a change is justified under Section 206, applying the legal standards under which such filings are tested.

Order No. 888 and other related precedent

The import of Commission actions in Order Nos. 888 and 2000 on the proposed modifications to existing contracts similarly cannot be determined in a legal vacuum. It seems clear from these Commission orders that there is a preference for respecting the negotiated rights and obligations achieved in existing contracts. Order No. 2000, at p. 31,205; Order No. 888, at pp. 31,663-64 and pp. 31,813-14. It is also clear that the Commission is willing, for the right reasons, to permit modifications of existing contracts. See PJM, and Mid-West, supra. The issues here are: (1) whether, as NYISO and the Member Systems see it, the latter cases established a policy that would permit contract modifications for the purpose of establishing a uniform approach to transmission services in New York's new state-wide system, and (2) whether the facts here require application of such a policy. These are issues that cannot be decided from an analysis of legal briefs, without more evidence on, inter alia, the functions of the NYISO, the need for uniformity and difficulties of operations without uniform approaches, the rights of contracting parties in individual cases, the implications on existing contracts of the proposed modifications, including an analysis of any benefits the parties derive from the new structure, and the effect of exemptions on other parties and the public interest. Accordingly, I conclude that summary legal conclusions cannot be made in the absence of such evidence.

ISSUE II: Whether under the grandfathered transmission service agreements the transmission customers should be subject to real time congestion costs under the provisions of the NYISO OATT (including, but not limited to Section 3.1 and the other provisions of Attachment K to the NYISO OATT)?

Selkirk argues that the Member Systems' imposition of congestion charges violates the terms of its TSA, the NYISO OATT, and the NYISO Services Tariff in light of the Commission's acceptance of amendments thereto.

In its original December 1990 TSA with Niagara Mohawk, Section 8.1 stipulated that Niagara Mohawk may unilaterally file a Section 205 application for a rate change and that Selkirk may challenge the same.[16] However, the TSA was amended by letter agreement in April, 1997. This amendment specifies that a Section 205 proceeding may only be commenced if loss determination methodology is changed in another proceeding and applicable on a system-wide basis.[17]

Selkirk also points to Sections 7B.1 and 2.2 of the NYISO OATT to bolster its position. Section 7B.1 states that grandfathered customers will pay their contracted rates.[18] However, in a preface to Section 7B.1, Section 7B.0 specifies that charges applicable to Grandfathered Agreements are described in Attachment K.[19] Attachment K, Section 2.2 states that existing transmission agreements will remain in effect according to contractual terms and conditions.[20] It goes on to state that "customers electing grandfathered rights will be exempt from having to pay the Congestion Component of the TUC."[21]

Finally, Selkirk argues that the Transmission Services Tariff does not accommodate the imposition of congestion charges. In January 2000, the Commission approved a revision to the NYISO Services Tariff that included the retroactive adjustment of QF scheduling.[22] In oral argument on April 5, 2000, Selkirk argued that the

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[16] Transmission Services Agreement between Niagara Mohawk and Selkirk, executed December 13, 1990, Section 8.1.

[17] Amendment to Transmission Service Agreement, by letter agreement dated April 18, 1997.

[18] NYISO Open Access Transmission Tariff, § 7B.1.

[19] Id. at § 7B.0.

[20] OATT, Attachment K, § 2.2.

[21] Id.

[22] New York Independent System Operator, Inc., 90 F.E.R.C. ¶ 61,015 (2000).

Commission's acceptance of retroactive adjustments renders Section 3.1 obsolete.[23] Such adjustments, Selkirk argued, effectively eliminate any distinction between Day Ahead and Intra Day scheduling.[24]

Sithe also argues that grandfathered transmission customers are exempt from paying for congestion charges under Attachment K to the OATT, § 2.2 (Original Sheet No. 258). It objects to any attempt of the ISO to construe any provision of Attachment K to permit the NYISO to impose congestion charges on grandfathered customers. It seeks a summary finding that the NYISO is precluded from imposing congestion charges on grandfathered customers.

Lockport links the day-ahead scheduling requirement in the proposed TSA amendments with congestion charges and argues that these provisions fundamentally change the bargain that Lockport and NYSEG struck in their original TSA. Requiring Lockport to schedule its electricity and pay congestion charges would unlawfully modify the economic terms of the existing contract and is contrary to the rights and obligations the parties negotiated, Lockport argues. Moreover, scheduling is impractical, says Lockport, given that it has no ability to schedule its output across Niagara Mohawk's transmission system. Because it is unable to schedule its output into the day-ahead market**,** Lockport contends that it will likely be subject to real-time congestion costs under the proposed TSA amendments and may be required to pay regulation penalties to the NYISO. According to Lockport, the proposed modifications would do nothing less than abolish its right under the existing TSA to deliver power whenever necessary up to 100 MW and impose in its place new charges on Lockport if it delivers electricity in excess of its day-ahead schedule. Lockport urges rejection of what it considers improper modifications to its PPA.

Indeck claims that the assessment of penalty congestion charges would increase its transmission rate, degrading its existing service without a compensating reduction in the firm transmission rate. Such a unilateral change is also prohibited under the terms of

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[23] Tr. at p. 214.

[24] Id.

its existing TSA, Indeck contends, and is contrary to judicial and Commission precedent and policy protecting settled contract rights. [25]

Indeck points out that its existing TSA specifies the rate for transmission service, and a July 1,1997 amendment further states that such rate will remain as stated for the term of the agreement or until changed pursuant to a Section 205 filing made no earlier than the date of an event that has not yet occurred. [26] Moreover, Indeck asserts that Section 14.1 of its existing TSA provides that "no change or variation in this agreement may be made except in express terms and by an instrument in writing signed by the parties hereto." Indeck interprets this provision as being applicable to non-rate terms of the TSA, since the rate term was specified separately. For these reasons, Indeck argues that the TSA can be modified by the Commission only upon satisfaction of the more difficult Section 206 public interest standard.

Staff weighs in on this issue, seeing the matter in a somewhat different light. Staff points out that Niagara Mohawk provides transmission to Selkirk, Sithe, Lockport and Indeck QFs under substantially the same transmission agreements. These agreements contain a provision, staff asserts, which unambiguously allows Niagara Mohawk to file for changes in its rates under Section 205 of the Federal Power Act. Hence, Staff believes that the Mobile-Sierra doctrine is not a bar to the Member Systems' filing concerning congestion costs.

Indeck responds to Staff's point that its TSA was amended in 1997, as discussed above, to specify a rate for transmission service, including scheduling and dispatch and reactive support service, which is to remain in place for the term of the agreement or until it is changed pursuant to a Section 205 or 206 filing made no earlier than the date of an event which has not yet occurred. Indeck believes that Staff was unaware of this

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[25] Like Lockport, Indeck opposes imposition of regulation penalties for similar reasons. The Member Systems argue persuasively that such charges are not imposed under the TSAs, but the Services Tariff, which is not the subject of this case. However, the extent to which scheduling constraints imposed by the August 3 amendments expose these entities to unexpected regulation charges is a germane point to raise in this case.

[26] This date being the date Sithe prevails in its challenge to the loss determination methodology applicable in its transmission service agreement with Niagara Mohawk, and such methodology is changed to an average system-wide basis. Indeck states that Sithe has not prevailed in its challenge to the loss determination methodology as of the date of its brief.

amendment, wherein Niagara Mohawk voluntarily waived its right to file changes to the TSA, when it made its argument above. [27]

The Member Systems agree with Staff and go on to contend that Section 3.1 of Attachment K to the Commission-approved NYISO OATT clearly grandfathers existing TSAs with respect to congestion costs, but only to the extent that transactions are scheduled day ahead and are on schedule. Section 3.1 of Attachment K states:

> Each ETA Customer that maintains Grandfathered Rights under an option listed . . . above, retains the right to inject power at one specified bus and take power at another specified bus . . . without having to pay the Congestion Component of the TUC, but only to the extent it schedules the injection and withdrawal Day-Ahead and is on schedule. . . . If the customer . . . transmits Energy without scheduling it Day-Ahead . . . the customer will pay the real-time TUC for all Energy transmitted . . . . This TUC will include real-time Congestion Rents.[28]

The Member Systems maintain that, under the NYISO OATT, grandfathered agreements must be scheduled in the day-ahead market in order to preserve the grandfathered status. They assert that departure from this approved protocol would subsidize the non-conforming entities and require substantial revisions to the NYISO design and implementation software. Further, the arguments by Indeck and Selkirk that Niagara Mohawk is precluded from seeking to apply Section 3.1 of Attachment K to the NYISO OATT because of the separate July 1, 1997 agreement are in error, the Member Systems allege, because that agreement was intended only to govern attempts by Niagara Mohawk to increase certain revenues and do not govern congestion costs.

To the extent that the congestion charges are found not to be permissibly filed rate changes under Section 205, the Member Systems contend that the Commission is authorized to find them appropriate under Section 206.

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[27] In a letter filed April 3, 2000, Staff acknowledges that it was unaware of the 1997 amendments to the contracts of Indeck and Selkirk. Staff now sees these amendments as imposing a condition precedent for a Section 205 filing that has not been met. Hence, Staff now argues that the Section 206 standard would be appropriate for proposed changes to the contracts of these entities. This confusion confirms the wisdom of deferring resolution of such matters pending further development of the issues in the context of an evidentiary hearing record.

[28] OATT, Attachment K, § 3.1.

Sithe rejects the interpretation of the Member Systems that the filing of congestion cost proposals is permitted here, contending that the TSA's prohibition against assignments and the TSA clause prohibiting changes to non-rate terms and conditions operate against forcing Sithe into a contractual arrangement with NYISO for transmission service and from levying congestion costs against Sithe. It goes on to argue that neither the proposed TSA amendments, nor Attachment K of the OATT, permit the NYISO to impose "intra-day" congestion charges against Sithe.

Discussion and Conclusion for Issue II:

Clearly, there are disputed issues surrounding the intent of Section 3.1 of Attachment K to the NYISO OATT and its relationship to Section 2.2 that preclude a summary disposition of this matter on the basis of the briefs received and the oral argument. Member Systems attached to its brief an affidavit of Mr. John Buechler, a consultant who planned and designed the model and systems of the NYISO, to bolster its claim that the grandfathered rights did not extend further than the day-ahead market of the NYISO. Indeck, Sithe, and Lockport contend otherwise. There is an ambiguity here that will benefit from testimony as to intent, and an explanation of the ramifications of one interpretation versus another. The Buechler affidavit is designed to provide some of these answers. However, that affidavit has not been accepted as authoritative by the parties disputing the Member Systems interpretation. In these circumstances, I conclude that the record will be better informed on this issue if a decision is deferred to the evidentiary stage of this hearing, where parties will have the opportunity to offer testimony and to conduct cross-examination that might clarify the issue.

Similarly, the question whether the July 1, 1997 amendment specifies a rate for transmission that cannot be changed unilaterally, as Indeck and Selkirk maintain, or whether that amendment was intended solely to increase Niagara Mohawk's revenues without inoculating the customers from congestion cost responsibility, as argued by Member Systems, is incapable of reasoned determination on the legal arguments advanced on brief.

Finally, the question whether Member Systems has met its burden of proof is premature. They are entitled to argue that the changes are authorized under Section 205, and, if not, to pursue justification under Section 206's more difficult standard. Whether they meet the applicable burdens will be established only after receiving the evidence intended to prove these points in the evidentiary hearing.

ISSUE III: Whether cost support under Section 35.13 of the Commission's regulations must be provided by Member Systems either for the changes proposed

in its filing or with respect to the agreements sought to be modified by the Member Systems' filing?

Sithe argues that Niagara Mohawk has the burden to justify any amendments that change Sithe's costs based upon a change in Niagara Mohawk's cost of service and that Niagara Mohawk has not yet filed any utility-specific cost support to justify the August 3 amendments. Sithe argues that no attempt has been made here to quantify the financial impact or burden on Sithe by filing cost data analogous to the Commission's Part 35 requirements. 18 C.F.R. § 35.13(a)(2), 35.13(c), (e) (1999). This requires, Sithe contends, a summary determination before the evidentiary hearing that Niagara Mohawk's amendment filing be rejected. Such cost support is required to support a Section 206 filing, Sithe contends. Since the Member Systems' August 3 amendments are not authorized under Section 205, according to Sithe, utility-specific cost data must be furnished. Sithe maintains that no change can be made in its costs under the TSA unless triggered by a change in Niagara Mohawk's costs. No showing of such cost changes has been made here, Sithe says.

Indeck makes a similar argument, contending that there has been no attempt to meet the requirements of Part 35.

The Member Systems contend that the Commission has already accepted the cost support for the August 3 amendments, citing to the Commission's January 14, 2000 order in this proceeding. There, the Commission stated:

> The service agreement amendments proposed here are intended to reflect service previously approved in the Docket No. ER97-1523 proceeding based on cost information previously supplied by the Applicants. The hearing established in this case allows the parties to address whether both the rate and the non-rate provisions of the proposed amendments are consistent with the services previously approved and whether they are just and reasonable in the context of the start-up of the NYISO. Parties .... err in arguing that the proposed amendments are so lacking in the basic supporting information required by Section 35.13 that summary rejection of those amendments is required. 90 FERC ¶ 61,042 at p. 61,197.

At oral argument, the Member Systems contended that the Commission did not envision a rate case review of each transmission provider's revenue requirement when it set up this proceeding. Instead, they argue, the Commission accepted the last approved revenue requirement for each company, and approved as reasonable a generic cost demonstration for the new ISO services. This proceeding, Member Systems continue, is for the purpose of ensuring that the market participants pay for these incremental ISO

services. An analysis of each transmission provider's underlying revenue requirement is not required to accomplish this, the Member Systems maintain.

Discussion and conclusion for Issue III:

The Commission has decided that there was sufficient cost support to preclude summary rejection of the August 3 amendments. The Member Systems are correct in their assertion that the issue about the sufficiency of the supporting cost information is not open for review. However, that is not the same issue as whether the submitted cost information will be enough to satisfy the applicable legal standard for final approval of the August 3 amendments. To prevail against opposing views, Member Systems must file a case-in-chief that meets their burden of proof that the proposed revisions are just and reasonable or necessary in the public interest. What they choose to file is up to them. It may be that the approach taken by the Member Systems will be sufficient to satisfy the legal standards without further cost support, given the Commission's previous determinations. But parties will not be precluded from continuing to advance their claim that what has been filed to date falls short of satisfying the burden of proof under applicable statutory standards. In the final analysis, the sufficiency of cost support cannot be determined in advance of evidentiary submissions that may or may not supplement the current record.

ISSUE IV: **Whether the effective date of the August 3 amendments should be reestablished by the Commission consistent with any finding that the TSA amendments may not be accepted pursuant to Section 205? If a refund is required in this proceeding who is responsible for the refund?**

Sithe maintains that the effective date of the Sithe TSA agreements should be reestablished by the Commission consistent with a finding that the TSA amendments may not be accepted pursuant to Section 205, and refunds should be ordered for payments made by Sithe as a result of the amendments since November 18, 1999.

Sithe's point on this issue is that, since the amendments may not be authorized under Section 205, the Commission must establish an effective date for the amendments pursuant to Section 206. If the Member Systems are allowed to proceed under Section 206, the changes can be prospective only. Hence, under Sithe's reasoning, an effective date must be established for proceeding under Section 206 and refunds should be ordered for payments made from the Section 205 effective date (November 18, 1999) until the newly established effective date. In response to the letter in lieu of brief filed by the NYISO, Sithe asks for a determination here and now that any change in Sithe's TSA be prospective only from the date of a final FERC order in this proceeding, if consideration

of any of the proposed TSA amendments is permitted under the public interest standard of Section 206.

Indeck has also stated its view that, so far in this proceeding, the requirements of Section 205 and 206 of the FPA appear to have been disregarded:

> Since Section 206 does not permit the implementation of a rate change, even one subject to refund, prior to a hearing, but the Member Systems have sought and obtained such action, the Commission should be holding the Member Systems to the standards associated with Section 205 rate changes, including the sanctity of contractual commitments not to seek unilateral rate changes. The Commission should not allow the Member Systems to abrogate their contractual commitments by switching back to Section 206 arguments after having reaped the benefits of obtaining a pre-hearing rate change. The Member Systems must not be allowed to mix and match their favorite aspects of various FPA sections; rather, they should be required to take each Section of the FPA as it was enacted. Indeck Initial Brief, fn 10.

The Member Systems state that they are of the view that the proposed TSA amendments are permissible under Section 205, but the ultimate resolution of that question will not be possible until the evidentiary hearing has been completed. They contend that the Commission, in its January 14, 2000 order, stated that it had preserved the right to order refunds when it accepted and suspended the August 3 amendments and said that "whether refunds are ordered, and who should pay them [should be] decided later, at the conclusion of the proceeding." The same logic, Member Systems contend, applies to the effective date.

Discussion and conclusion for Issue IV:

The Member Systems proposed TSA amendments under "either" Section 205 or 206 of the Federal Power Act. This, and the Commission's order setting this case for hearing, have resulted in some understandable confusion, in that the Member Systems have obtained the benefit of placing all of the changes into effect, subject to refund, without the hearing that would have been required for those changes proceeding under Section 206, even though they filed under both Sections of the Federal Power Act.

The effective date has been set by the Commission as if this were only a Section 205 case. The September 30 order granted an effective date pursuant to Section 205, since the Commission granted waiver of its prior notice requirements to the extent necessary to allow the Member Systems' proposal to become effective concurrently with

the effective date of the NYISO OATT. Central Hudson Gas & Elec. Corp., et al., 88 FERC ¶ 61,306 at p. 61,942. As argued by Sithe, this is inconsistent with the establishment of effective dates under Section 206, which does not permit early effective dates and affords customers with protection against unjust and unreasonable cost increases during the pendency of a proceeding.

While some leeway and creative approaches may have been justified to get the NYISO up and running, these ultimately must be reconciled with the requirements of the Federal Power Act. Accordingly, to the extent that Member Systems are permitted to proceed under Section 206 for particular TSA amendments, a new effective date must be established by the Commission consistent with the requirements of Section 206. The parties have agreed to request certification to the Commission of the question of an appropriate effective date. Accordingly, there is no issue that requires resolution while the matter is pending before the Commission.

Finally on this subject, the NYISO has filed a letter in lieu of a brief simply preserving the question of how any refunds that might be ordered in this proceeding should be funded. That issue is not ripe for determination at this stage of the proceeding.

CONTRACT-SPECIFIC ISSUES [29]

ISSUE V: Is it just and reasonable to require Lockport under its grandfathered transmission service agreement to schedule delivery of electricity under that agreement to the transmission system directly with the ISO or would any such requirement be prohibited by PURPA, the Mobile-Sierra doctrine, Order No. 888, the Commission's Orders approving the NYISO, or other Commission precedent? [30]

Lockport claims that, by seeking to impose scheduling and real-time congestion charges on it through amendments to its TSA, Lockport's settled rights under its PURPA PPA would be unlawfully modified. Lockport maintains that the day-ahead scheduling

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[29] The way these issues were organized and argued has left a great deal to be desired, as noted above. Some of the points in the discussion of Contract Specific Issues also have been analyzed under the General Issues category, and some of the arguments here apply to other contracts, as well. The duplication is regretted, but was unavoidable.

[30] Points made by Lockport dealing with issues other than the effect of the scheduling requirement on its PPA are considered elsewhere in this order. Also, the scheduling arguments advanced here by Lockport apply generally to the contracts of Selkirk, Sithe and Indeck, as well. (Tr. at 222-30)

provision sought to be added to the TSA would fundamentally modify the economic terms of the PPA that were negotiated by the parties. Under the PPA and pre-existing TSA, Lockport's delivery of electricity to NYSEG is treated as a spot market sale that requires no advance scheduling, Lockport advises. It has no ability to schedule its output across Niagara Mohawk's transmission system and has no ability to determine how much transmission capacity it uses until after the transaction has occurred, Lockport claims, because Niagara Mohawk's transmission serves Lockport's residual output after delivering to a General Motors plant and serving NYSEG's load in the Lockport, New York area. Lockport argues that, because of its inability to schedule its output into the NYISO's day-ahead market, it will likely be subject to real-time congestion costs and regulation penalties under the Member Systems' proposed TSA amendments

This scheduling requirement and consequent exposure to congestion charges alters the nature of energy deliveries intended by the parties in the PPA, Lockport maintains. The proposed TSA amendments would, Lockport contends, abolish its right to deliver power whenever necessary up to 100 MW and in its place would impose new charges if Lockport delivers in excess of its day-ahead schedules. This, Lockport claims this is an unlawful de facto modification of the PPA.

The Member Systems contend that scheduling is a rate term of the TSA because, at root, it is an issue with financial implications, even though its basic purpose is to facilitate the NYISO's control of the grid. Hence, the change need only be found to be just and reasonable, according to the Member Systems.

Even if found to be a non-rate term or condition, the Member Systems believe the proposal meets the public interest standard and overcomes the Mobile-Sierra bar and the just and reasonable standard of Section 205. The Member Systems see Lockport as raising a "technical contract argument" [31] that should not be found to interfere with the need to establish a uniform, comparable method of scheduling transactions in the new, state-wide bulk power system. Unless all market participants taking transmission service comply with the NYISO OATT scheduling requirements, the system will not be able to function reliably, the Member Systems argue. Even worse, exempting Lockport from the new scheduling protocol will give that generator preferential treatment, and shift costs to other market participants, as well as provide gaming opportunities to select market participants with respect to congestion contracts, Member Systems argue. They point to the Commission's action in PJM that required modification of all bilateral contracts to

[31] Member Systems Reply Brief at p. 22.

assure that the ISO could properly administer transmission services, including arranging scheduling. PJM, 81 FERC at p. 62,281.

Discussion and Conclusion for Issue V:

The question whether the proposed TSA amendments constitute an unlawful infringement of rights under Lockport's PPA or those of similarly situated entitites cannot be decided without evidence on the impact of the changes on the PPAs, in the context of the NYISO's new market structure, as discussed above in the discussion of Issue I. That issue, along with the issue whether or not scheduling constitutes a permissible rate change, or must be justified against a higher standard, need to be developed further in the context of a hearing, as envisioned by the Commission. These matters cannot be summarily resolved here on arguments of law alone.

One further point arises in the context of this issue that has more generic applicability. In general, many of the customers objecting to the TSA amendments are raising what the Member Systems describe as "technical issues" about the details of specific contracts, but fail to appreciate the larger context of the proposed changes. This is, I suppose, the fundamental issue of this proceeding, i.e., whether the customers can continue to rely on the technical specifics of their contracts, or whether they should be forced to accept revisions required to achieve a higher purpose, the establishment and operation of the NYISO. The parties have approached this as a "black and white" issue. But, as discussed below as to Sithe's assignment claims, the contracts need to be reconciled with the reality of the NYISO. The evidentiary hearing must explore mechanisms for making that kind of reconciliation, if at all possible.

ISSUE VI: Should certain amendments be eliminated entirely in the case of Sithe in light of whether the ISO service or charge would be applied to Sithe?

Sithe maintains that certain of the proposed TSA amendments would incorporate into Sithe's contract charges that simply do not apply to Sithe's bilateral, wholesale transmission arrangement with Niagara Mohawk. Among these are OATT Energy Imbalance Service Charges, Other OATT Ancillary Services Charges, and the NYPA Transmission Adjustment Charge ("NTAC"). Sithe further objects to provisions in the proposed TSA amendments that would define Conversion of Grandfathered Rights to Grandfathered TCC, Replacement of TSA Capacity Reservation Term, and Specification of Transmission Receipt and Delivery Points. Sithe argues for a summary finding that these provisions either have no application to Sithe or duplicate terms and conditions in Sithe's TSA.

The Member Systems see the charges complained about here by Sithe as falling with the category of rate changes, which Niagara Mohawk has a right to file under the TSA.

Discussion and Conclusion for Issue VI:

Sithe seems right that several of the NYISO services and charges will not apply to or will duplicate terms of its existing transmission arrangement with Niagara Mohawk. Nevertheless, some of the new services or charges may not duplicate others and may be authorized as permissible rate changes. At the oral argument, the Member Systems offered to meet with Sithe to attempt to settle these matters. As of the date of this order, no settlement has been forthcoming. In the absence of an agreement, I believe that the entire issue could benefit from a more comprehensive airing in the upcoming evidentiary hearing. Accordingly, I find it prefereable to defer consideration of Sithe's arguments here until completion of the hearing process, where it can be determined with greater precision which charges apply to its TSA with Niagara Mohawk, and whether or not they are permissible rate changes. Meanwhile the parties are urged to continue discussions to limit the issues in controversy to services that actually apply to Sithe.

ISSUE VII: Do assignment provisions in Sithe's TSA prohibit the Member Systems from unilaterally seeking to require Sithe to contract directly with the ISO?

Sithe contends that provisions in its TSA with Niagara Mohawk prevent an assignment of Niagara Mohawk's rights and obligations under the TSA to NYISO, which, according to Sithe, is the effect of the proposed TSA amendments. Sithe points to two provisions in its TSA with Niagara Mohawk, the first of which, Section 14.1, provides that the parties must mutually agree to any change or variation in the contract, with three exceptions. Two of the exceptions, regarding Sections 4 and 7, are not applicable here because they refer to rights that are no longer available. The third exception in Section 8 permits Niagara Mohawk to change Sithe's transmission rate by making an application under Section 205 of the Federal Power Act. Section 11 of the Sithe/Niagara Mohawk TSA prohibits outright an assignment without the other party's consent.

Sithe further argues that Section 5.1.1 of the TSA establishes Niagara Mohawk as the sole provider of transmission service to Sithe for delivery to Con Edison, and that rates for that service are based on Niagara Mohawk's costs. In light of these provisions and pertinent precedent, Sithe maintains that the unilateral changes offered in the August 3 amendments cannot lawfully be effected.

The Member Systems first argue that Niagara Mohawk has not assigned its TSA with Sithe. Instead, it was accorded grandfathered rights, keeping it "alive" in the new NYISO environment, they maintain. Even if it is concluded that Niagara Mohawk has assigned the TSA, the Member Systems contend that the right to make such an assignment to a responsible service provider is expressly authorized in the TSA:

> Except as otherwise provided in this Section 11, neither party shall assign, pledge or otherwise transfer this AGREEMENT or any right or obligation under this AGREEMENT, by operation of law or otherwise, without first obtaining the other party's consent, which consent shall not be unreasonably withheld.

Member Systems cite Stolzfus v. 315 Berry Street Corp., 504 N.Y.S. 2d 349, 132 Misc. 2d 520 (Sup. Ct. Kings County 1986), for the proposition that Sithe cannot under New York law unreasonably withhold consent to an assignment, where the contract explicitly so provides.

Member Systems contended at the oral argument that the only thing different about the arrangement between Sithe and Niagara Mohawk now is that there will be charges required for new ISO services approved by the Commission, but that the existing contract will be otherwise honored. The new charges are the result of the reality that, under the approved NYISO structure, the ISO will be the sole provider of certain services on a prospective basis. Sithe sees this arrangement as constituting a partial assignment by Niagara Mohawk of its responsibilities under its contract with Sithe. Otherwise, Sithe maintains, there is no privity of contract between it and the NYISO.

Discussion and Conclusion for Issue VII:

Sithe's assignment argument approaches this central issue from the wrong direction and is not sustainable on its merits alone. That is because, even if the change here is construed as an assignment or partial assignment, under the terms of the contract, consent cannot be unreasonably withheld. Even if Sithe is correct that the assignment entails extensive modifications that might allow it to withhold consent, [32] under New York law, restrictions on assignments in agreements amount to a personal covenant that does not void or terminate the contract, but creates a remedy in damages. Sullivan v. International Fidelity Insurance Co., 465 N.Y.S. 2d 235, 96 A.D. 2d 555 (1983); Belge v. Aetna Casualty & Surety Co., 334 N.Y. Supp. 2d 185, 39 A.D. 2d 295 (1972).

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[32] Gladliz, Inc. v. Castiron Court Corp. 677 N.Y.S. 2d 662, 177 Misc. 2d 392 (Sup. Ct. New York County 1998).

This issue, however, devolves into and is more properly viewed as the more general question whether the changes filed in the August 3 amendments are permissible under Section 205 or can be justified under Section 206. This is simply not a case where Niagara Mohawk is attempting to assign its contract with Sithe to another entity. Instead, the August 3 amendments propose a series of broad changes to establish the framework for operation of the NYISO and a new competitive wholesale electric marketplace within New York. The establishment of the NYISO has resulted in that entity becoming the exclusive provider of certain services, the costs for which must now be paid by users of those services. The inquiry as to the justness and reasonableness of those changes and/or whether they are required in the public interest will not be appreciably advanced by looking at the issue as if it were a simple contract assignment question. Such a technical analysis fails to give proper credence to the grandfathering of the contracts in other material respects, and fails as well to address the reality of the introduction of the NYISO. Indeed, Sithe's brief, which contains numerous arguments suggesting that it cannot be made to accept services from the NYISO, fails to come to grips with the reality that Niagara Mohawk can no longer provide the services Sithe wishes directly because the transmission system is now operated by the NYISO. The world is not the same as it was, and it cannot be restored to its previous condition by Sithe's shouting over and over that it prefers to do business the old way. While the Member Systems must justify the modifications at issue, the Commission has accepted the concept of the NYISO and is unlikely to require the kind of major surgery that would be necessary to restore Sithe to the position it was in before the NYISO was established, which its arguments suggest is the outcome it wants. It would be well advised to direct its efforts in the hearing toward showing how its views can be reconciled with the reality of the NYISO, or propose some alternative approach to meet its needs that would not require rejecting the underlying concept of the NYISO.

ISSUE VIII: Whether Section 5 and 11 of the Niagara Mohawk TSA permits Niagara Mohawk to propose amendments imposing additional ancillary service charges and the NTAC on MEUA members under Section 205 of the FPA (with the exception of a reactive power charge), and whether Niagara Mohawk has met its Section 206 burden of changing the Niagara Mohawk TSA? Whether Niagara Mohawk's proposal to impose marginal losses in addition to the average system losses violates Section 8.1 of the Niagara Mohawk TSA and the Control Area loss agreement attached to and made a part of the Niagara Mohawk TSA?

MEUA maintains that its members purchase firm power service from NYPA, as well as additional transmission service from NYPA at pancaked rates. It its view, these firm power contracts include all generation-related ancillary services necessary to provide

firm power and Niagara Mohawk's TSA with NYPA provides that each MEUA member, through NYPA, will pay for transmission service and transmission losses.

For a number of reasons, MEUA contends that it is improper for Niagara Mohawk, through a Section 205 filing, to impose charges for these services on MEUA members. First, MEUA claims that an April 26, 1994 agreement between Niagara Mohawk, NYSEG and MUEA attached to the Niagara Mohawk TSA imposes an obligation on the part of Niagara Mohawk and NYPA to provide 30 days notice of any changes in rates or terms and conditions and to negotiate in good faith with MEUA on any such changes prior to any filing by Niagara Mohawk at FERC. Because it claims that this notification and negotiation did not occur here, MEUA asks that the Member Systems' filing be dismissed.

MEUA further contends that Sections 5 and 11 of the Niagara Mohawk TSA do not permit the imposition of additional ancillary service charges and the NTAC on MEUA members under Section 205 and that the Systems have not met a Section 206 burden. MEUA claims that these proposals are not changes in rates that are allowed, but changes in terms and conditions of service, which Niagara Mohawk has no right to make, absent mutual agreement among the parties. Without such an agreement, MEUA says that a Section 206 justification is necessary, where the high public interest standard must be satisfied. Seeing no such demonstration here, MEUA asks that the proposed TSA amendments be summarily dismissed.

Neither has Niagara Mohawk met the conditions required in Section 3.3.1 of the TSA to propose recovery of ancillary service costs, MEUA argues. It points to language in Section 3.3.1 that lays out specific requirements that Niagara Mohawk must meet, including evidentiary materials to accompany a Commission filing, to seek recovery of such costs. MEUA maintains that this showing has not been made here.

MEUA next objects to the marginal loss proposal in the proposed TSA amendments. According to MEUA, the Member Systems are proposing that customers pay Niagara Mohawk and NYSEG average system losses and pay the ISO for marginal losses. It contends that MEUA members now pay for losses in kind, according to loss factors in the Control Area Loss Agreement, a practice that would not change. Added to that would be payments to the ISO for marginal losses based on substantially the same transaction. Because the parties have not consented to the additional charges, MEUA seeks summary dismissal of the proposal.

Finally, MEUA cites to a recent initial decision where the Presiding Judge found that NYSEG was precluded from imposing OATT ancillary service charges on that

company's TSA customers, essentially because the contracts control and no additional charges for ancillary services under the OATT could be assessed during their term. New York State Electric & Gas Corp., 85 FERC ¶ 63,002 (1998). MEUA argues that the same conclusion should apply to the proposed TSA amendments here.

The Member Systems have quite a different view, tied largely to their contention that the proposed TSA amendments at issue here are seeking to modify TSAs between NYPA and either Niagara Mohawk or NYSEG. NYPA, the Member Systems maintain, has consented to the changes, and, as the only transmission customer under those agreements, it is free to do so without abrogating the rights of any party to those contracts. Even without that consent, the Member Systems argue, they would be entitled to a hearing on the proposed TSA amendments under Section 206. The Member Systems also contend that the Initial Decision in NYSEG is inapposite because there, unlike here, the contract amendment was a unilateral filing by the transmission provider.

Turning to the MEUA assertion that adoption of the proposed NYISO ancillary service charges and NTAC will require its members to pay twice for the same service, the Member Systems argue that ancillary services required for transmission service after commencement of the NYISO's operations will be provided by the NYISO, and not by NYPA. The NYISO must have the ability to recover its costs of providing these services. Any double charge resulting from NYPA's continuing collection of charges related to the same service is a matter for MEUA's members to pursue with NYPA, the Member Systems contend, and is outside FERC's jurisdiction. [33]

As to MEUA's claim that the proposed TSA amendments would allow for double recovery of losses, the Member Systems contend that it is based upon a misunderstanding of the proposal. They say that Section 3.3 of Attachment K to the NYISO OATT provides that the transmission owner shall not charge for losses under the third party transmission wheeling agreement to the extent that the losses are provided under the OATT.

Responding to MEUA's claim that Niagara Mohawk failed to provide proper notice of the proposed TSA amendments, the Member Systems maintain that a Joint Stipulation and Agreement filed with the Commission on June 17, 1999, (which MEUA signed, along with Niagara Mohawk and other member Systems) superseded the April 26, 1994 agreement relied upon by MEUA for the notice and negotiation requirements. The new agreement, the Member Systems contend, explicitly supercedes all prior agreements

[33] See 16 U.S.C. § 824(f).

and provides that a Section 205 filing would be required to authorize the Member Systems to collect charges for ancillary services and marginal losses under the ISO tariff for any of the MEUA members taking service under preexisting non-OATT transmission agreements. The Member Systems further claim that the notice and negotiation provisions of the 1994 agreement were in fact met, citing to MEUA's protest in this proceeding, which the Member Systems claim provides evidence of prior knowledge and negotiation. The Member Systems also suggest that the Commission decline to exercise jurisdiction over the interpretation of the 1994 agreement because it is not a TSA, but a wholly separate agreement unrelated to the exercise of the Commission's responsibilities under the FPA and that the Commission decline to interfere with the effectiveness of the proposed TSA amendments between NYPA and the utilities because MEUA has not satisfied the standards for injunctive relief.

Staff, in its initial brief, argued that Section 11.2 of Niagara Mohawk's Rate Schedule 204 required a Section 206 filing that satisfies the public interest standard in order to implement proposed changes to everything other than base rates. In a letter filed on April 3, 2000, Staff advises that its analysis was incorrect, and that Section 11.1 of Rate Schedule 204 authorizes changes to terms and conditions under Section 205, and Section 11.2 covers both base rates and rates in addition to base rates.

Discussion and Conclusion for Issue VIII:

The Member Systems are correct that summary dismissal of the August 3 amendments, as they affect the NYPA agreements with Niagara Mohawk and NYSEG under which MEUA members receive service, would be inappropriate. First, the amendments have been consented to by NYPA, the contracting party. (Tr. at 255.) [34] Whatever rights MEUA members may have as ultimate customers under these arrangements, they do not include barring NYPA from reaching agreements with Niagara Mohawk and NYSEG. Moreover, as explained above in the discussion of Mobile-Sierra issues, I believe that the Commission intended that Mobile-Sierra claims be adjudicated in an evidentiary hearing, having themselves twice denied opportunities for summary disposition and plainly stated a preference for intricate analysis of the individual contracts

[34] A filing from NYPA consenting to the amendments and stating the effective date of that consent has not been received as of the date of this order. At the oral argument, Counsel for NYPA represented that NYPA consents to the amendments and would file such a statement. I am accepting that representation for purposes of this order.

in a hearing. Further, as the Member Systems argue, they have a right to attempt to meet in the hearing the more difficult Section 206 public interest standard for these amendments, in the event their Section 205 claims falter, because the Commission accepted their presentation of the amendments as either justified under Section 205 or 206 of the FPA. MEUA will be able to participate in that hearing and may challenge the justness and reasonableness of the proposed TSA amendments or to claim that the public interest does not require the proffered changes.

I also reject the MEUA claim that the Niagara Mohawk TSA amendments are barred because Niagara Mohawk failed to satisfy the notice and negotiation provisions of an April 26, 1994 agreement between NYPA, Niagara Mohawk, and MEUA that was attached to the Niagara Mohawk TSA. The Member Systems persuasively argue that this agreement was superseded by a subsequent settlement, filed with the Commission on June 17, 1999, under which MEUA agreed that Niagara Mohawk was required to file under Section 205 to impose the NYISO ancillary service charges and marginal losses. This agreement contained a clause which rather clearly indicates that it is intended to supersede all prior agreements among the parties as to the subject matter addressed. It is therefore unnecessary to delve into whether, as the Member Systems contend, Niagara Mohawk actually did satisfy the notice and negotiation requirements of the earlier agreement.

Next is MEUA's claim that adoption of the NYISO services and NTAC will result in a double charge because these services are included in charges that MEUA pays NYPA. Here, the Member Systems have a sufficient answer when they point out that that the ancillary services will now be provided by the NYISO, which must have a mechanism to recover its costs. If there is a double charge problem for ancillary service costs and the NTAC in NYPA's charges to MEUA, the cure seems to be in that agreement, which is not within the scope of the TSA amendments at issue here.

Finally, as to MEUA's argument that its members will be exposed twice to loss charges, the Member Systems have clarified that Section 3.3 of Attachment K to the NYISO OATT provides that the transmission provider will not charge for losses that are collected via the OATT. Any disagreement with that interpretation may be litigated during the upcoming hearing.

ISSUE IX: Whether the five-year rate freeze agreed to by NYCPUS and Con Edison in a 1997 Settlement Agreement, and approved by the New York Public Service Commission ("NYPSC") in its PSC Opinion No. 97-16, is a bar to the modification of the NYCPUS-Con Edison Transmission Agreement; whether Commission precedent supports Commission deferral to the New York

Commission's determination that the economic delivery rates under the NYCPUS-Con Edison Transmission Agreement be frozen until 2002; and whether the Transmission Agreement for NYCPUS customers may be modified given that NYCPUS buys and sells state economic development power only?

NYCPUS argues that Con Edison's proposed amendment to its TSA should be rejected because it conflicts with requirements in its 1987 Transmission Agreement with Con Edison that Con Edison attempt to negotiate an agreement with NYCPUS before requesting changes, first seek approval from the NYPSC and obtain the consent of NYCPUS for any assignment of its TSA to the NYISO. It further alleges that the rate changes that would flow from approval of the proposed TSA amendments would violate a five-year transmission rate freeze agreed to by Con Edison in a 1997 Settlement Agreement filed with and approved by the NYPSC. NYCPUS contends that there was no attempt to negotiate the proposed changes with it, no attempt to obtain NYPSC approval and no attempt to obtain the consent of NYCPUS for an assignment of the TSA rights and obligations. As to the freeze, NYCPUS points out that the Commission rejected a proposal by NYSEG to amend existing transmission agreements with its Economic Development Program customers to change line loss factors because the changes conflicted with a Settlement Agreement rate order adopted by the NYPSC. New York State Electric & Gas Corp., 84 FERC ¶ 61,185 (1998). NYCPUS further contends that the proposed TSA amendments violate principles of economic development and that public policy dictates that they should be rejected.

The Member Systems argue that Con Edison is specifically authorized to file for unilateral changes such as those in the proposed TSA amendments, referring to the 1997 Settlement Agreement provision which it claims freezes only base rates. As for the NYSEG case, the Member Systems claim to distinguish it on the basis that the rate in that case was found to have been fully bundled and included line losses, and, therefore, any change in line loss factors would violate the settlement agreement at issue there. Here, the Member Systems argue, the rate changes proposed are for new services that were not contemplated in the 1997 Settlement Agreement. That Settlement Agreement does not insulate NYCPUS from the costs imposed by the NYISO nor from costs imposed by others than Con Edison, the Member Systems argue. As to the economic development public policy argument, the Member Systems maintain that the relative difference between dollars paid by NYCPUS and non-economic development customers will remain the same and that NYCPUS would in fact be unjustly enriched if its TSA were exempted from the costs of the NYISO in that it would be receiving all of the benefits of the NYISO without sharing in the cost of the new institution. In the words of the Member Systems, someone has to pay for the scheduling service, the voltage control, the regulation, the operating reserves and the black start service that the NYISO will provide,

as well as the NTAC and marginal losses that are an essential part of the NYISO market structure. "Free riders" will simply require others to pay for these services, the Member Systems contend.

Staff, in its Initial Brief, contended that deference to the rate freeze approved by the NYPSC was in order here, a result it believed supported by New York State Electric & Gas, supra. In a letter filed on April 3, 2000, Staff backed away from this position, now contending that the rate freeze refers to rate increase filings of Con Edison due to increased costs or lowered sales. Since this modification is not for those purposes, Staff now sees the rate freeze as no bar to the instant filing. Staff, however, continues to argue that the Section 206 standard remains appropriate.

Discussion and conclusion for Issue IX:

I cannot conclude from the arguments advanced in the legal issues briefs and at oral argument that the filing here by the Member Systems is barred either by failure to meet the requirements of Section 9 of the 1987 NYCPUS Transmission Agreement or because it constitutes an impermissible rate change under the 1997 Settlement Agreement. Both of these arguments involve ambiguities or contract interpretation questions that will be clarified in the hearing stage of this proceeding. There is also no persuasive reason to bar the filing at this point on public policy grounds. That issue may also benefit from further development in the evidentiary hearing.

CONCLUSION

The requests for summary rejection of certain of the proposed TSA amendments are denied for the reasons discussed above. The questions of law that were raised in this phase of the case are generally not susceptible to judgment on the basis of legal arguments outside of the factual context of the amendments. The Member Systems should, in their case-in-chief, present evidence to support their view either that each revision is permissible under Section 205 of the Federal Power Act because the contract between the transmission provider and customer allows for such a change, that any preconditions for making a filing have been satisfied, and that such a change is just and reasonable; or that the modification is allowed under Section 206 of the Federal Power Act because it is permissible under that standard, and is just and reasonable, or that the public interest requires the change under that provision of the statute. All arguments that the Member Systems have failed to meet their burden of proof are, accordingly, premature.

This concludes the phase of these proceedings devoted to consideration of legal issues.

William J. Cowan
Presiding Administrative Law Judge