

UNITED STATES OF AMERICA 110 FERC ¶61,359
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

New York Independent System Operator, Inc.

Docket Nos. ER04-958-001
EL05-78-000

ORDER DENYING REHEARING, INSTITUTING INVESTIGATION, AND
ESTABLISHING REFUND EFFECTIVE DATE AND
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 25, 2005)

1. In this order, the Commission denies rehearing of a letter order issued on August 2, 2004,¹ in which the Director, Division of Tariffs & Market Development – East, acting pursuant to delegated authority, accepted for filing revisions to the open access transmission tariff (OATT) of the New York Independent System Operator, Inc. (NYISO) regarding Long Island Power Authority’s (LIPA) wholesale transmission service charge. However, we will institute, under section 206 of the Federal Power Act (FPA),² an investigation into the continued justness and reasonableness of this accepted rate filing, and will establish a refund effective date. We will also establish hearing and settlement judge procedures.

Background

2. On June 25, 2004, NYISO, on behalf of LIPA, submitted revisions to its OATT to revise LIPA’s wholesale transmission service charge. The filing was not protested and was accepted pursuant to delegated authority on August 2, 2004.

¹ *New York Independent System Operator, Inc.* (Docket No. ER04-958-001 Aug. 2, 2004) (unpublished letter order) (August 2 Order).

² 16 U.S.C. § 824e (2000).

3. On September 1, 2004, the Municipal Electric Utilities Association of New York State (MEUA), which had intervened but had not protested NYISO's filing, submitted a request for rehearing of the August 2 Order.

4. On September 17, 2004, LIPA filed an answer to MEUA's rehearing request. On September 30, 2004, MEUA filed an answer to LIPA's answer.

Rehearing Request

5. MEUA seeks rehearing of the August 2 Order on two grounds. First, MEUA contends that revisions to LIPA's wholesale transmission service charge enable LIPA to collect state taxes from municipal entities, in violation of New York State tax law. MEUA states that, under New York State tax law, utilities are not required to report or pay taxes on "gross income" (as relevant here, transmission revenues) received from municipal utilities. Therefore, according to MEUA, LIPA is not required to pay taxes to New York State on the revenues received from municipal utilities and so need not collect those taxes from municipal utilities. Second, according to MEUA, under the transmission service charge rate formula adopted in the filing, transmission losses are collected twice, once by the NYISO and once by LIPA. MEUA argues that, because the NYISO already collects these losses, they should not be deducted from the billing units.

6. In its answer to MEUA's rehearing request, LIPA argues that MEUA had notice and a full opportunity to timely raise any issues it may have had with the proposed revision to LIPA's wholesale transmission service charge components. Having failed to timely raise these matters, LIPA contends that MEUA should not be able to disrupt and undermine the administrative process by now raising these matters. In addition, LIPA argues that MEUA's request for rehearing falls squarely within the Commission's rule prohibiting parties from raising new issues on rehearing.

7. In its answer to LIPA's answer, MEUA asserts the LIPA has mischaracterized the Commission's standards for considering arguments first raised on rehearing, noting that the Commission has reserved its authority to do so whenever appropriate. MEUA asserts that there is good cause to consider the arguments it raises in its rehearing request. Specifically, the issues raised on rehearing were not apparent on the face of the filing but required investigation into both New York State law and the NYISO OATT, and it therefore took more than the eleven business days between notice and intervention for MEUA to identify and present these issues. MEUA also notes that the Commission acted so promptly on the LIPA rates that MEUA was unable to supplement its filing prior to the Commission's issuance of a decision.

Discussion

8. We will deny MEUA's rehearing request. It is undisputed that MEUA did not protest NYISO's filing, but only first raised its concerns on rehearing. The Commission normally does not allow parties to raise new issues on rehearing, and we will not allow MEUA to do so here.³ We find that MEUA has not demonstrated that there was good cause for its failure to timely raise these issues. NYISO's filing was made on June 25, 2004, while the date for protests was July 16, 2004; we see no reason why MEUA could not have identified these issues by July 16, 2004.

9. The Commission's regulations specify that protesters normally will be allowed 21 days to file protests of rate filings like the NYISO filing at issue here.⁴ MEUA suggests that it had only eleven days. Putting aside whether an eleven-day comment period would have been adequate, an issue we need not address here, the fact is that MEUA was not limited to eleven days. The *Federal Register* notice, consistent with our regulations, provided 21 days from the date of filing to the date for protests. While the *Federal Register* notice was published on July 9, 2004, NYISO filed its submission with the Commission on June 25, 2004, and the Commission made that filing publicly available on its website that same day. Thus, MEUA was on notice of the filing on June 25, 2004, twenty-one days before the deadline specified in the *Federal Register* notice for filing protests. Accordingly, we will deny rehearing.

10. However, in light of the concerns raised by MEUA regarding LIPA's collection of state taxes from municipal entities and its double collection for transmission losses, and upon further consideration, we will institute an investigation, under section 206 of the FPA, into the continued justness and reasonableness of NYISO's previously-accepted rate filing, and will establish a refund effective date. In addition, because this investigation will involve issues of material fact, we will set the matter for a trial-type evidentiary hearing.

11. Although we are instituting an investigation and establishing hearing procedures, we believe that it would be in the best interest of the parties to resolve this dispute expeditiously and consensually rather than through litigation. Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004). If the parties desire, they may, by mutual agreement, request a specific judge as the settlement

³ See, e.g., *Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 (2000).

⁴ 18 C.F.R. § 35.8(a) (2004).

judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁵ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

12. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to consumers, and consistent with our precedent,⁶ we will establish the refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of our initiation of the proceeding in Docket No. EL05-78-000 is published in the *Federal Register*.

13. Section 206 also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it failed to do so and shall state its best estimate of when it reasonably expects to make such a decision. To implement that requirement, we will direct the settlement judge or presiding judge, as appropriate, to provide a report to the Commission no later than 15 days in advance of the refund effective date in the event the settlement judge or presiding judge, as appropriate, has not, by that date: (1) certified to the Commission a statement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or issuance of an initial decision.

⁵ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁶ See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Electric Light Co.*, 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Electric Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

The Commission orders:

(A) MEUA's request for rehearing is hereby denied.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), an investigation is hereby instituted, in Docket No. EL05-78-000, concerning the continued justness and reasonableness of NYISO's previously-accepted rate filing with respect to LIPA's collection of state taxes from municipal entities and its double collection for transmission losses, as discussed in the body of this order.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding ordered in Ordering Paragraph (B) above, under section 206 of the Federal Power Act, in Docket No. EL05-78-000.

(D) The refund effective date in Docket No. EL05-78-000, established pursuant to section 206(b) of the Federal Power Act, shall be sixty (60) days following publication in the *Federal Register* of the notice ordered in Ordering Paragraph (C) above.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in the proceeding ordered in Ordering Paragraph (B) above within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(F) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussion, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every thirty (30) days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(G) If the settlement judge procedures fail, and a formal hearing is to be held, a presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory

Docket Nos. ER04-958-001 and EL05-78-000

- 6 -

Commission, 888 First Street, N.E., Washington, D.C. 20427. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.