

Municipal and Rural Electric Cooperative Systems
Service Tariff Amendments – Notice of Adoption

October 26, 2010

EXHIBIT “E”

Law Offices
Duncan, Weinberg, Genzer & Pembroke, P.C.

WALLACE L. DUNCAN (1937-2008)
EDWARD WEINBERG (1918-1995)
ROBERT WEINBERG
JEFFREY C. GENZER
THOMAS L. RUDEBUSCH
MICHAEL R. POSTAR
TANJA M. SHONKWILER
ELI D. EILBOTT*
LISA S. GAST
PETER J. SCANLON
KATHLEEN L. MAZURE
DEREK A. DYSON
BHAVEETA K. MODY
KRISTEN CONNOLLY McCULLOUGH
SETH T. LUCIA
JOSHUA E. ADRIAN
MATTHEW R. RUDOLPHI
JASON T. GRAY

RICHMOND F. ALLAN*
TERRY E. SINGER*
FREDERICK H. HOOVER, JR.*
JAMES D. PEMBROKE*

SUITE 800
1615 M STREET, N.W.
WASHINGTON, D.C. 20036

(202) 467-6370
FAX (202) 467-6379
www.dwgp.com

April 13, 2009

California Offices
SUITE 1410, 915 L STREET
SACRAMENTO, CA 95814
(916) 498-0121
SEAN M. NEAL

SUITE 501
100 W. SAN FERNANDO STREET
SAN JOSE, CALIFORNIA 95113
(408) 288-2080
BARRY F. McCARTHY*
C. SUSIE BERLIN*

Northeast Regional Office
2700 BELLEVUE AVENUE
SYRACUSE, NEW YORK 13219
(315) 471-1318
THOMAS J. LYNCH*

* REGISTERED TO PRACTICE BEFORE U.S.
PATENT AND TRADEMARK OFFICE

*OF COUNSEL

By E-mail and Overnight Express

Anne B. Cahill
Corporate Secretary
New York Power Authority
123 Main Street, 15M
White Plains, New York 10601

Dear Ms. Cahill:

Enclosed please find the Comments of the New York Association of Public Power ("NYAPP"). These materials are provided in accordance with the Notice of Proposed Rulemaking to amend the Authority's current production service tariffs applicable to its Municipal and Rural Electric Cooperative System Customers, issued by the Power Authority of the State of New York.

As a preliminary matter, NYAPP requests that the proposed amendments be suspended until Staff addresses NYAPP's Comments and amends the proposal to change the service tariffs. Please contact the undersigned with any questions.

Very truly yours,



Thomas L. Rudebusch

Enclosure

**COMMENTS OF THE
NEW YORK ASSOCIATION OF PUBLIC POWER
ON THE
POWER AUTHORITY OF THE STATE OF NEW YORK'S
NOTICE OF PROPOSED RULEMAKING
TO AMEND PRODUCTION SERVICE TARIFFS
APPLICABLE TO
MUNICIPAL AND RURAL ELECTRIC COOPERATIVE CUSTOMERS**

The New York Association of Public Power ("NYAPP") submits these Comments on the Power Authority of the State of New York ("Authority" or "NYPA") Notice of Proposed Rulemaking on amending the Authority's production service tariffs for the Municipal and Rural Electric Cooperative customers. These materials are provided in accordance with the Public Notice issued by the Power Authority of the State of New York, accepting written comments through April 13, 2009.

NYAPP was formed in early 2005 to better represent the interests of its members on policy and regulatory issues. NYAPP is an unincorporated association of nine municipal electric utilities and four rural electric cooperatives located throughout New York State. NYAPP's municipal utility members are Village of Freeport Electric Department, Green Island Power Authority, Village of Greenport Municipal Utilities, City of Jamestown Board of Public Utilities, Town of Massena Electric Department, Village of Rockville Centre, City of Salamanca Board of Public Utilities, Village of Sherburne and City of Sherrill Power & Light. NYAPP's rural electric cooperative members are Delaware County Electric Cooperative, Inc., Oneida-Madison Electric Cooperative, Inc., Otsego Electric Cooperative, Inc. and Steuben Rural Electric Cooperative, Inc.

The Notice of Proposed Rulemaking states that the Authority proposes to reformat Service Tariff Nos. 38A, 38B and 39A for easier reading and improved organization. However, as NYAPP comments herein, these goals cannot be achieved while omitting provisions of the Contracts, as amended and as altered in settlements, that are crucial elements of the understanding of the parties, NYAPP requests that the Authority hold in abeyance the proposed amendments to the service tariffs until the Staff addresses NYAPP's Comments and alters the proposed amendments accordingly.

1. *IT IS NOT SUFFICIENT TO STATE THAT CONFLICTS BETWEEN THE SERVICE TARIFFS AND THE CONTRACT ARE RESOLVED IN FAVOR OF THE CONTRACT*

The Authority proposes to "reformat" Service Tariff Nos. 38A, 38B and 39A into one set of documents provisions that were adopted at different times, including certain standard terms. While easier reading and improved organization are important goals,

they cannot be achieved if crucial elements of the understanding of the parties, as expressed in the Contract, are omitted and not included. It is not sufficient to state in the Service Tariff that "any conflicts between this Service Tariff and the Contract (including any amendments or settlements between Customer and Authority) with respect to any components of the NYISO charges listed above shall be resolved in favor of the Contract." (Original Leaf No. 7 of each service tariff.).

To begin with, *any* conflict between the Contract and the service tariff should be resolved in favor of the Contract, not just conflicts over NYISO charges. The Contract expresses the understanding of the parties, not the Service Tariff.

What is the Contract? Service Tariff Nos. 38A and 39A define the Contract "an executed contract for the Sale of Firm Hydroelectric Wholesale Power and Energy between Customer and Authority." Service Tariff No. 38B does not contain a definition of Contract, but defines "Agreement" instead.

The term "Contract" should be understood to be each Customer's 1986 power supply contract, as amended by the 1991 amendment [Rider A] and the 1998 amendment [Rider B], and as further modified, *inter alia*, by the "global settlement" executed with each system in 2002. The Authority proposes to amend the service tariffs to incorporate provisions from Riders A and B, as well as with other provisions, while omitting crucial elements of the global settlement. This selective clarification does not achieve easier reading and improved organization.

For example, Service Tariff Nos. 38A and 38B, applicable to the full requirements customers, are proposed to be amended to state that the "Customers shall compensate the Authority for the following NYISO charges," including Ancillary Services 1 through 6. (Original Leaf No. 6.) This flies in the face of what the global settlement provides – that the Customer will receive from the Authority amounts owed the NYISO for Schedules 2, 3, 5 and 6 for the Customer's Niagara purchases.¹

Similarly, Service Tariff No. 39A, applicable to the partial requirements customers, are proposed to be amended to state that "if assessed on Authority on behalf of Customer, the Customer shall compensate the Authority for the following NYISO charges," including Ancillary Services 1 through 6. (Original Leaf No. 6.) Under the global settlement, the partial requirements customers are entitled to the same treatment as the full requirements customers, even if they are direct customers of the NYISO and do not use the Authority as an agent.

Another example is that the global settlement provides that the Customers will receive a "cost-based credit for surplus hydroelectric energy sales." While this is a crucial element of the parties' understanding, as expressed in the global settlement, it is not a feature incorporated anywhere in the proposed amended Service Tariffs.

¹ This is one option. Another is that the Customer receives a share of revenues from the Authority's sale of generation-related ancillary services to the NYISO.

Selectively incorporating some elements of Riders A and B, while omitting provisions from the global settlement, does not achieve the goals of easier reading or improved organization. It is not sufficient protection for Customers that a statement is proposed that the Contract prevails in case of conflicts with the service tariff.

2. OTHER PROPOSED AMENDMENTS ARE NOT FROM RIDERS A OR B AND MAY OR MAY NOT REFLECT THE SERVICES THE AUTHORITY IS UNDER CONTRACT TO SUPPLY TO THE CUSTOMERS

While the Notice of Proposed Rulemaking states that the Authority proposes to “reformat” Service Tariff Nos. 38A, 38B and 39A, not all of the provisions are found in Riders A or Rider B. Some of the additional provisions are not consistent with the service the Authority is under contract to provide to the Customers.

For example, Service Tariff No. 39A, applicable to the partial requirements customers, is proposed to read so that the Customer shall compensate the Authority for “any and all charges ... associated with the Authority’s responsibilities as a Load Serving Entity for the Customers...” (Original Leaf No. 7.) This is inaccurate, since, by being under a partial requirements contract, the Customers their own Load Serving Entity (or the use the New York Municipal Power Agency as their LSE agent).

Another example, contained in all three proposed service tariffs, is that it is proposed that “any charges assessed on the Authority ... incurred in connection with the NYISO’s Comprehensive System Planning Process” shall be paid by the Customer. (Original Leaf No. 7.) The Authority does not explain where this provision is contained in the Contract or how it is a “reformatting” of the existing obligations.

In conclusion, there is much work that needs to be done before the service tariffs are amended. NYAPP requests that the Authority hold in abeyance the proposed amendments to the service tariffs until the Staff addresses NYAPP’s Comments and alters the proposed amendments accordingly.

Dated: November 12, 2008

Respectfully submitted,

/s/ Thomas L. Rudebusch

Jeffrey C. Genzer
Thomas L. Rudebusch
DUNCAN, WEINBERG, GENZER
& PEMBROKE, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036
(202) 467-6370
tlr@wgp.com

For the New York Association of Public Power