

169 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Light Power & Gas of NY LLC

v.

Docket No. EL19-39-001

New York Independent System Operator, Inc.

ORDER ON REHEARING

(Issued December 19, 2019)

1. In a June 20, 2019 order, the Commission denied a complaint by Light Power & Gas of NY LLC (LPGNY) against New York Independent System Operator, Inc. (NYISO), which alleged that NYISO violated its Open Access Transmission Tariff (OATT) by attributing to LPGNY the outstanding debts of North Energy Power LLC (North Energy).¹ LPGNY sought rehearing. For the reasons discussed below, we deny rehearing.

I. Background

2. North Energy is an energy service company providing electric supply service to New York retail customers. On September 17, 2018, North Energy filed for Chapter 11 bankruptcy. NYISO asserted claims against North Energy for various unpaid amounts related to its purchases in NYISO's markets.

3. LPGNY was formed on or about February 28, 2014.² According to LPGNY, its business was never advanced in New York, although the intent was for it to operate as a retail electricity seller in New York since it was created back in 2014.³ In the fall of 2018, the New York State Department of Public Service authorized LPGNY to operate as a retail energy seller or energy service company.⁴

¹ *Light Power & Gas of NY LLC v. New York Independent System Operator, Inc.*, 167 FERC ¶ 61,232 (2019) (Complaint Order).

² Complaint at 4.

³ *Id.*

4. To participate in NYISO's wholesale electricity markets, LPGNY must also complete an application for registration with NYISO. After receiving LPGNY's application, NYISO issued a letter on December 21, 2018, notifying LPGNY that it would hold LPGNY's application in abeyance pending payment by another market participant — North Energy — of North Energy's outstanding and unpaid obligations to NYISO under Section 27.4 of NYISO's OATT.⁵ The letter stated that NYISO determined that LPGNY is a continuation of North Energy, with successor liability for North Energy's debts to NYISO and that, pursuant to Section 27.4 of NYISO's OATT, a Transmission Customer that defaults on a payment obligation to NYISO must cure the default and make payment in full prior to being re-admitted to participate in NYISO's markets.⁶ NYISO's letter to LPGNY further stated that NYISO will resume its evaluation of LPGNY's application once North Energy has paid all outstanding amounts owed to NYISO.⁷

5. Under Section 27.4 of NYISO's OATT, a Transmission Customer whose previous default resulted in a Schedule 1 bad debt loss charge to other Transmission Customers may not reenter the NYISO wholesale energy market until it has cured such default by payment to NYISO of all outstanding obligations, and has met other NYISO minimum participation requirements.⁸ NYISO determined that under the specific circumstances of the case, LPGNY and North Energy should be treated as the same "Transmission Customer" under Section 27.4 of the NYISO OATT.⁹

6. LPGNY initiated a complaint with the Commission challenging NYISO's decision to hold LPGNY's registration application in abeyance.¹⁰ LPGNY argued, among other things, that NYISO incorrectly applied successor liability to LPGNY and used an improper common law standard to do so.

7. In the Complaint Order, the Commission denied LPGNY's complaint, finding that NYISO did not violate its OATT by attributing to LPGNY the outstanding debts of North Energy for purposes of considering LPGNY's application for registration in NYISO's

⁴ *Id.* at 4-5.

⁵ Complaint, Ex. H.

⁶ *Id.*

⁷ *Id.*

⁸ NYISO, OATT, Attachment U, § 27.4 (0.0.0).

⁹ NYISO February 19, 2019 Answer at 6-8, 10.

¹⁰ Complaint at 1.

markets.¹¹ The Commission determined that Section 27.4 of NYISO's OATT is silent with respect to the question of whether two different Limited Liability Companies (LLCs) with close ties can be treated as the same Transmission Customer.¹² The Commission looked to relevant Commission precedent to determine the conditions under which the Commission may regard two entities as a single entity.¹³ The Commission found that the close overlap of LPGNY and North Energy presented circumstances in which NYISO's treatment of LPGNY and North Energy as one Transmission Customer, was reasonable.¹⁴ LPGNY sought rehearing.

II. Discussion

A. Tariff Interpretation

8. LPGNY argues that the starting point for tariff interpretation is determining whether the relevant tariff language is ambiguous, and that the Commission never made a finding of ambiguity.¹⁵ LPGNY contends that under *Southwest Power Pool*¹⁶ and *N.Y. Indep. Sys. Operator, Inc.*,¹⁷ the Commission must declare tariff language ambiguous prior to relying on extrinsic evidence.¹⁸ LPGNY contends that reviewing courts must also consider whether a tariff is ambiguous prior to deferring to the Commission's construction.¹⁹

9. As stated in the Complaint Order, the Commission "looks first to the language of the tariff or contract itself and, only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence of intent."²⁰ Here, the Commission found that the NYISO OATT is "silent with respect to

¹¹ Complaint Order, 167 FERC ¶ 61,232 at P 37.

¹² *Id.* P 38.

¹³ *Id.* P 40.

¹⁴ *Id.* P 41.

¹⁵ Rehearing Request at 7.

¹⁶ 160 FERC ¶ 61,115, at PP 44-45 (2017).

¹⁷ 131 FERC ¶ 61,032, at P 30 (2010).

¹⁸ Rehearing Request at 7-8.

¹⁹ *Id.* at 7.

²⁰ *Vt. Elec. Power Co., Inc.*, 132 FERC ¶ 61,068, at P 15 (2010). *See also*

the question of whether two different LLCs with close ties can be treated as the same Transmission Customer.”²¹ LPGNY does not dispute the Commission’s determination that the tariff is silent with respect to this issue. That finding is adequate to permit the Commission to rely, as it did in the Complaint Order, on Commission precedent and extrinsic evidence, in discerning the meaning of Section 27.4 of the OATT.²²

Accordingly, the Commission relied on: (1) Commission precedent addressing conditions under which the Commission may regard two entities as a single entity; and (2) the proffered evidence which includes affidavits submitted by NYISO describing the close overlap between LPGNY and North Energy.²³ The Commission concluded that it was reasonable to treat LPGNY as the same entity as North Energy under the single entity theory,²⁴ and therefore NYISO’s decision – to disregard North Energy’s and LPGNY’s separate corporate forms to ensure that Section 27.4 of the NYISO OATT is not evaded in a manner that would permit an entity to simply shift its business activities into a different corporate entity to avoid paying debts it incurred – was reasonable.

B. Single Entity Theory

10. LPGNY argues that the NYISO process for determining corporate form is unjust, unreasonable, and unduly discriminatory. LPGNY argues that an unwritten standard cannot be implemented with consistency and fairness and replaced with *post-hoc* rationalizations.²⁵ LPGNY states that, pursuant to Order No. 890,²⁶ a transmission

PacifiCorp v. Reliant Energy Services, Inc., 103 FERC ¶ 61,355 (2003)); *see also Ohio Power Co. v. FERC*, 744 F.2d 162, 168 (D.C. Cir. 1984) (“Extrinsic evidence regarding the interpretation of a contract is considered when the meaning of the contract cannot be determined from its text and structure or from the application of canons of contract interpretation.”).

²¹ Complaint Order, 167 FERC ¶ 61,232 at P 38.

²² *See, e.g., Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993); *City of Seattle v. FERC*, 923 F.2d 713, 716 (9th Cir. 1991); *Vermont Elec. Power Co. Inc.*, 132 FERC ¶ 61,068, at P 15 (2010) (“When presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the language of the tariff or contract itself and, only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence of intent”).

²³ Complaint Order, 167 FERC ¶ 61,232 at P 38-41.

²⁴ *See infra* note 30.

²⁵ Rehearing Request at 16.

²⁶ *Preventing Undue Discrimination and Preference in Transmission Service*,

provider is required to make available the standards, rules or business practices to administer its OATT. LPGNY argues that NYISO never articulated to LPGNY or the Commission any written policy, process, factor, tariff, rule, law, or standard it applied to determine that LPGNY should be treated as a successor to another corporate entity. For this reason, LPGNY asserts that the Commission should have found NYISO's conduct to be unjust, unreasonable or unduly discriminatory.²⁷ Moreover, LPGNY argues that the Complaint Order does not address LPGNY's objection that NYISO improperly imported and applied successor liability into its OATT.²⁸ LPGNY also contends that the Complaint Order, which encourages NYISO to add language to its OATT to address comparable situations, demonstrates the unreasonable and unduly discriminatory impact of NYISO's actions and the Commission's Complaint Order.²⁹

11. As described above, the Commission construed NYISO's OATT in light of Commission precedent and, specifically, the single entity theory³⁰ to determine that NYISO did not violate its OATT by treating LPGNY as the same entity as North Energy for the purpose of administering NYISO's OATT. The issue of whether NYISO applied successor liability as the rationale for its actions is irrelevant to the Commission's analysis. The Commission's analysis relies on the language of the tariff and Commission precedent; the Commission need not rely on the same rationale as NYISO in order to

Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

²⁷ Rehearing Request at 16-17.

²⁸ *Id.* at 10.

²⁹ *Id.* at 18 (referencing Complaint Order, 167 FERC ¶ 61,232 at P 46).

³⁰ The Complaint Order discusses the single entity theory as when: "an agency may disregard the corporate form in the interest of public convenience, fairness, or equity. This principle of allowing agencies to disregard corporate forms is flexible and practical in nature. Corporations may be regarded as one entity for the purposes with which the agency is immediately concerned even though they are legitimately distinct for other purposes. Moreover, no bad intention on the part of the corporations is necessary; the inquiry is simply a question of whether the statutory purposes would be frustrated by the corporate form." Complaint Order, 167 FERC ¶ 61,232 at P 40 (citing *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149, at 61,356 (1986) (*Town of Highlands*)). (footnotes omitted); see also *Transcontinental Gas Pipe Line Corp.*, 58 FERC ¶ 61,023, at 61,045 (1992), *aff'd sub nom. Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320 (5th Cir. 1993) (*Transcontinental*)).

determine that NYISO acted properly in applying Section 27.4 of NYISO's OATT to LPGNY. We also note that the prohibition against *post hoc* rationalizations by administrative agencies does not apply to NYISO because the prohibition only applies to federal administrative agencies.³¹

12. Furthermore, the Commission's suggestion for NYISO to add language to its OATT to address future entities in a similar situation does not demonstrate that NYISO's actions or the Commission's Complaint Order are unreasonable or unduly discriminatory.³² Having found that NYISO did not violate its OATT, the Commission may recommend improvements to a jurisdictional tariff. Such guidance does not suggest that NYISO's OATT is inadequate as written, as there can be more than one just and reasonable rate.³³

C. Bad Debt Loss Procedures

13. LPGNY states that the Commission erred by rejecting its argument that NYISO must follow bad debt procedures pursuant to Section 27.1 of the OATT prior to denying LPGNY entry into the markets.³⁴ LPGNY contends that the Commission improperly exempts NYISO, because NYISO did not make the requisite threshold determination that deviating from the bad debt procedures would minimize the size of, or avoid, a bad debt loss.³⁵

14. We find that the Commission properly determined that NYISO was not required to first follow the bad debt procedures specified in Section 27.1 of its OATT prior to denying LPGNY entry into the NYISO markets. LPGNY cites no tariff or other requirement that requires NYISO to follow the bad debt procedures prior to acting on a new application for registration in NYISO markets. As explained in the Complaint Order, the NYISO OATT outlines procedures that NYISO may use to recover debt in the event of a default. If NYISO is unable to obtain the debt loss from North Energy, the

³¹ Complaint Order, 167 FERC ¶ 61,232 at P 45.

³² *See id.* P 46.

³³ *Cities of Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984) ("FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable-and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs"), *cert denied*, 469 U.S. 917 (1984); *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,109, at P 20 (2009) ("[i]t is well established that there can be more than one just and reasonable rate").

³⁴ Rehearing Request at 11.

³⁵ *Id.* at 11-12.

defaulting entity, the default is assumed by NYISO and other Transmission Customers pursuant to the formula in Section 27.3 of NYISO's OATT.³⁶ NYISO may deviate from the procedures under Section 27.2 of the NYISO OATT, "or pursue alternative cost-recovery measures, if it determines that doing so would be more likely to minimize the size of, or avoid, a bad debt loss."³⁷ We find that NYISO reasonably opted not to first use the bad debt loss procedures here, because doing so would avoid a circumstance where North Energy could essentially resume business as a new entity (LPGNY), and walk away from its debts while forcing other Transmission Customers in NYISO to pay for North Energy's default.

D. Record Evidence

15. LPGNY states that, contrary to what the Commission found in the Complaint Order, it did, in fact, dispute certain evidence that the Commission relied on, such as that LPGNY and North Energy have the same contacts and administrators and that LPGNY intends to serve the same customers in the same market as North Energy.³⁸ LPGNY argues that it disputed that evidence when it stated that: (1) "[i]t is improper for the NYISO to rely on speculation and hearsay statements of NYISO employee Sheri Prevratil;"³⁹ (2) "NYISO's fact affidavits do not establish any facts, but merely speculate and rely on rank hearsay as to connections between North Energy and LPGNY;"⁴⁰ and (3) "in order to deny the Complaint and find that NYISO's determination is proper, the Commission would be required to resolve disputed questions of fact in favor of NYISO's raw speculation."⁴¹

16. Moreover, LPGNY asserts that it was denied due process because the Commission did not provide LPGNY with a procedure to challenge NYISO's factual assumptions, and, for this reason, the Commission's decision was contrary to Commission precedent.⁴² In particular, LPGNY states the Commission should have afforded it the same process as

³⁶ NYISO, OATT, Attachment U, § 27.3 (0.0.0) (providing that the amount of bad debt loss shall be allocated *pro rata* to all Transmission Customers).

³⁷ Complaint Order, 167 FERC ¶ 61,232 at P 44 (citing NYISO, OATT, Attachment U, § 27.2).

³⁸ Rehearing Request at 11.

³⁹ *Id.* (citing LPGNY Answer at 22 n.57).

⁴⁰ *Id.* (citing LPGNY Answer at 33).

⁴¹ *Id.*

⁴² *Id.* at 12.

in *Transcontinental*⁴³ and *Town of Highlands*,⁴⁴ where the Commission set the matter for hearing before an administrative law judge, prior to making a determination on whether to disregard the corporate form and impose liability.⁴⁵

17. We disagree that LPGNY's statements raised material issues of disputed fact. NYISO submitted two affidavits with factual evidence that LPGNY and North Energy have the same contacts and administrators, similar addresses, are engaged in the same business in the same territory, and seek to serve the same customers.⁴⁶ In particular, the affidavit submitted by Ms. Sheri Prevratil, the Manager, Corporate Credit in the Finance Department of NYISO, states that Mr. Abe Leiber, who had been one of the contacts for North Energy, expressed a desire to get his customers back during discussions related to LPGNY's registration application.⁴⁷ LPGNY's statements did not dispute this specific factual evidence nor has LPGNY offered countervailing evidence to dispute the connections between LPGNY and North Energy. Rather, LPGNY's blanket statements merely challenge the Commission's use of NYISO's evidence as speculative and/or hearsay statements. These generalized arguments do not rebut NYISO's specific factual evidence. In addition, hearsay is admissible in administrative proceedings,⁴⁸ and thus the Commission did not err in relying on these statements.

18. We further disagree that LPGNY has been denied due process. Due process generally requires a "meaningful opportunity" to be heard before one is deprived of life, liberty, or property.⁴⁹ But, LPGNY was heard on this matter – both in its complaint and

⁴³ *Transcontinental*, 998 F.2d at 1321.

⁴⁴ *Town of Highlands*, 37 FERC ¶ 61,149 at 61,356.

⁴⁵ Rehearing Request at 13-14.

⁴⁶ Complaint Order, 167 FERC ¶ 61,232 at P 41 & n.93 (citing NYISO Answer at 7, Attachment III Davies Aff. ¶¶ 8-13, Attachment II Prevratil Aff. ¶¶ 9-11).

⁴⁷ *Id.* at P 41 n.95 (citing NYISO Answer, Attachment II Prevratil Aff. ¶¶ 8, 10-11).

⁴⁸ See *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *School Board of Broward Cty., Fla. v. Dep't Health, Education, and Welfare*, 525 F.2d 900, 905 (5th Cir. 1976); see also *Old Dominion Elec. Coop.*, 119 FERC ¶ 61,253, at P 10 (2007) ("hearsay is admissible in administrative proceedings"); *Entergy Services, Inc.*, 153 FERC ¶ 61,184, at P 61 (2015) ("...in an administrative proceeding, the issue is not whether evidence is hearsay, but whether it is probative evidence should not be excluded from administrative proceedings based solely on its characterization as hearsay").

⁴⁹ *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir.

its April 24, 2019 answer – which the Commission carefully considered. As explained above, LPGNY failed to dispute factual underpinnings in this proceeding, and only offered general critiques of the evidence relied on by the Commission. In addition, in *Transcontinental* and *Town of Highlands*, which LPGNY cites in support of its request for further fact-finding procedures, the Commission found that the parties in those cases raised material issues of disputed fact, which warranted further fact-finding proceedings before an administrative law judge, whereas here, LPGNY has not.⁵⁰

E. Venue and Application of Law

19. LPGNY argues that fact-intensive successor liability cases should be resolved by a court applying New York successor liability law.⁵¹ LPGNY contends that the Complaint Order preempts New York state law and ignores well-settled case law.⁵² For example, LPGNY states that the Complaint Order would expand NYISO’s authority to override and contradict a potential order from a bankruptcy court, should there be a shortfall in the debtor’s estate with insufficient funds to cover NYISO’s administrative claims.⁵³ LPGNY argues that it is improper for NYISO and the Commission to impose the substance of the successor liability doctrine under the “guise of artful language and policy.”⁵⁴ In addition, LPGNY contends that the Complaint Order did not address LPGNY’s argument that it was denied its Seventh Amendment right to a jury trial.⁵⁵ LPGNY states that NYISO’s determination of successor liability circumvents the Seventh Amendment right to a jury trial by allowing NYISO to serve as a judge, jury, and sentencing authority in finding that Section 27.4 of the NYISO OATT requires LPGNY pay North Energy’s past-due financial obligations.⁵⁶

20. LPGNY’s arguments suffer from several infirmities. By mischaracterizing the Commission’s action as a determination on successor liability, LPGNY improperly raises

2006) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

⁵⁰ Rehearing Request at 13 (citing *Transcontinental*, 998 F.2d at 1321; *Town of Highlands*, 37 FERC ¶ 61,149 at 61,356).

⁵¹ Rehearing Request at 15.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 10, 14.

⁵⁶ *Id.* at 14.

concerns regarding the Commission's process and its jurisdiction to act. The Complaint Order explicitly stated that the Commission's determination was not predicated on successor liability.⁵⁷ Rather, the Commission interpreted NYISO's jurisdictional OATT. We consequently find LPGNY's arguments challenging the Commission's alleged application of successor liability meritless, and we thus reject them.

21. Further, contrary to LPGNY's assertions, the Complaint Order does not infringe on the authority of a bankruptcy court. The Complaint Order pertains to and is limited to regulation of NYISO's wholesale market and the rules for voluntary participation in that market, which rests exclusively within the Commission's jurisdiction.

22. LPGNY's claim to a jury trial under the Seventh Amendment is also misplaced. As the Supreme Court stated, "[w]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"⁵⁸ Here, Congress enacted the FPA which gave the Commission the authority to regulate the rates, terms and conditions for interstate transmission and wholesale sales of electric energy under FPA sections 205 and 206, which includes NYISO's OATT.⁵⁹ Accordingly, because Congress "assign[ed] the adjudication of [this] statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder."⁶⁰

F. Rejected Pleadings

23. In the Complaint Order, the Commission rejected NYISO's second answer, dated May 20, 2019, and LPGNY's second answer, dated June 4, 2019.⁶¹ On rehearing, LPGNY argues that the Commission impermissibly characterized its June 4, 2019 pleading as an answer to an answer and should not have rejected the pleading.⁶²

⁵⁷ Complaint Order, 167 FERC ¶ 61,232 at P 40.

⁵⁸ *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 455 (1977) (*Atlas Roofing*).

⁵⁹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (*Granfinanciera, S.A.*) (citing *Atlas Roofing*, 430 U.S. at 453–455; *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974); *Block v. Hirsh*, 256 U.S. 135, 158 (1921)).

⁶⁰ *Id.* at 53-54.

⁶¹ Complaint Order, 167 FERC ¶ 61,232 at P 36.

⁶² Rehearing Request at 9.

24. We disagree. Although LPGNY styled its June 4, 2019 pleading as an “Answer to the Motion to Reject by [NYISO] and Cross-Motion of [LPGNY] to Reject Answer and Motion of [NYISO] and Impose Consequences,” LPGNY’s pleading was, in substance, an answer to NYISO’s May 20, 2019 answer. We evaluate a pleading based on its substance, rather than its style or form.⁶³ Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to an answer unless otherwise ordered by the decisional authority. Because the Commission was not persuaded to accept NYISO’s May 20, 2019 answer, or LPGNY’s June 4, 2019 answer to NYISO’s May 20, 2019 answer, LPGNY’s June 4, 2019 pleading was appropriately rejected.

⁶³ See, e.g., *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984) (“Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it.”).

The Commission orders:

LPGNY's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.