STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on May 22, 2002

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 01-E-0680 - Nucor Steel Auburn, Inc. – Complaint Seeking Resolution of a Dispute with New York State Electric & Gas Corporation Regarding Application of Tariff Rates.

ORDER DENYING REHEARING AND STAY AND AUTHORIZING AN ENFORCEMENT PROCEEDING

(Issued and Effective May 23, 2002)

BY THE COMMISSION:

BACKGROUND

In an Order Directing Entry Into a Flex Rate Contract (Order Directing Entry) issued March 25, 2002, New York State Electric & Gas Corporation (NYSEG) was directed to execute a flexible rate contract (flex rate contract) with Nucor Steel Auburn, Inc. (Nucor).[1] Nucor owns and operates a steel production facility in Auburn, New York that is NYSEG's single largest customer, with a peak load of 44 MW.

NYSEG was to execute and implement the flex rate contract by April 1, 2002. After refusing to execute the contract, however, the utility filed a Petition for Rehearing

[1] The Order Directing Entry was confirmed in an Order issued April 17, 2002 in this proceeding.

and Request For a Stay on April 8, 2002. In a filing dated April 12, 2002, Nucor responded in opposition to NYSEG. In a timely response dated April 22, 2002, the International Brotherhood of Electrical Workers (IBEW) supported NYSEG.

NYSEG replied to Nucor in an unauthorized filing dated April 22, 2002. Nucor rejoined in a letter dated April 24, 2002.

POSITIONS OF THE PARTIES

NYSEG's Petition

NYSEG maintains that it cannot be ordered to enter into a flex rate contract with Nucor, and that even if it could be, it cannot be required to execute a contract that conflicts with its applicable tariff. NYSEG also objects to the waivers of tariff conditions directed in the Order. It complains further that the rate set in the contract for electric service to Nucor is unduly preferential, detrimental to the interests of other utility ratepayers, and undermines the assurance that the utility will recover the lost revenues it will experience as a result of the contract.

Presenting its version of the events that led up to the Order Directing Entry, NYSEG relates that the dispute began when it terminated an existing contract for electric service at the Auburn site following Nucor's purchase of the steel plant located there from a prior owner. In the Negotiation Order,[2] NYSEG continues, it was directed to first implement an interim agreement with Nucor for electric service and then negotiate a longer-term flex rate contract. The utility reports that it

[2] Case 01-E-0680, supra, Order Directing Flex Rate Contract Negotiations and Providing for Interim Relief (issued November 2, 2001).

executed the interim contract, but when the parties were unable to agree on terms for a longer-term contract, it commenced compliance with the dispute resolution process set forth in the Negotiation Order.

Nucor, NYSEG complains, went beyond that process, by making an unauthorized filing on March 19, 2002 that was shielded from disclosure as a confidential trade secret. That confidentiality, NYSEG asserts, "continues to shroud the Commission's deliberations in secrecy."[3] NYSEG also interprets the March 19 filing as withdrawing Nucor's earlier Petition for Rehearing of the Negotiation Order, where it requested that it be served under NYSEG's Economic Development Zone Incentive (EDZI) tariff.

NYSEG maintains that it cannot be ordered to enter into a flex rate contract with Nucor under the Public Service Law (PSL). It also argues that the Commission has never asserted authority to direct entry into a flex rate contract. The utility buttresses its argument with a contention that the authority for requiring a utility to execute a flex rate contract is not found in Opinion No. 94-15, where guidelines for flex rate contracts were adopted.[4] Interpreting the Columbia Order decision on a flex rate contract dispute, NYSEG discerns only a finding that a utility may be ordered to alter its negotiating stance, rather than a precedent on the Commission's authority to order entry into a contract.[5]

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[3] Petition, p. 8.

[4] Case 93-M-0229, Competitive Opportunities Available to Electric and Gas Customers, Opinion No. 94-15 (issued July 11, 1994).

[5] Case 97-E-0659, Columbia Corporation – Complaint, Order Dismissing Complaint (issued September 8, 1997).

Arguing that it is being ordered to enter into a flex rate contract under its S.C. 14 tariff, NYSEG maintains that it cannot be compelled to include in such a contract terms and conditions that contradict the provisions of the tariff. According to NYSEG, that tariff is available only to customers that demonstrate they will locate new business ventures within its service territory, or will expand existing ventures. NYSEG complains that the Order Directing Entry does not require Nucor to demonstrate that it has complied with those S.C. 14 predicates prior to obtaining its contract. Moreover, NYSEG argues, if the goal is to retain Nucor as a customer, then the appropriate flex rate tariff is S.C. 13, rather than S.C. 14. An interpretation that Nucor has complied with S.C. 14, NYSEG asserts, is not justifiable.

NYSEG also argues that the waivers of the tariff provided for in the Order Directing Entry are contrary to law. NYSEG asserts the tariff must be modified to provide for revised terms and conditions, before the utility may be ordered to enter into a contract with Nucor upon terms and conditions that differ from its existing tariff. Absent prior modification, NYSEG contends, the provisions of the tariff cannot be applied selectively to achieve the goal of awarding a contract to Nucor. In particular, NYSEG criticizes the waiver of the tariff requirement that Nucor make a 1¢ per kWh contribution towards system costs.

Criticizing the rate for electricity purchases set forth in the Nucor contract, NYSEG notes a lawful rate must exceed its marginal cost of providing electric service. It maintains that the finding in the Order Directing Entry on compliance with that marginal cost standard is erroneous and conflicts with relevant marginal cost data. The utility theorizes that appropriate components, such as marginal

transmission costs, may have been excluded from the marginal cost calculation.

Even if marginal costs were properly calculated, NYSEG complains, the calculation is based on a long-term forecast of marginal costs over a period of seven years. NYSEG characterizes such forecasts as notoriously unreliable. The utility would protect against the risk that marginal costs will rise above the forecast to a level that exceeds the contract price by including in the contract a floor price provision that would open the price to potential upward readjustments.

NYSEG also interprets PSL §66(12)(d) as requiring the utility to charge only rates specified in its tariffs, and prohibiting special contracts except those that are regularly and uniformly offered to all persons under like circumstances. NYSEG asserts that Nucor has been awarded a preferential contract rate instead of a rate available to others under like circumstances.

Expanding upon its claim that the contract afforded Nucor is discriminatory, NYSEG perceives an additional conflict with PSL §66(5), which explicitly prohibits preferential rates. According to NYSEG, Nucor has been singled out as the only beneficiary of this preferential rate, in a proceeding where NYSEG customers were not afforded the opportunity to oppose the subsidization of Nucor. NYSEG protests that these proceedings have been effectively closed to the public because of confidentiality restraints.

NYSEG believes the value of the contract rate discount to Nucor is $53.9 million over the seven year term. NYSEG bases its calculation upon a newspaper report stating that Nucor has been granted a rate of between 4.0 to 4.5¢ per kWh in the flex rate contract. The utility calculates that the lost revenues from such a contract rate would consume the entire Asset Sale

Gain Account (ASGA) identified in its recent Rate Plan.[6] The ASGA, NYSEG asserts, should be preserved for the benefit of all customers.

NYSEG also expresses concern that, once the ASGA is depleted, the burden of the contract costs will be shifted to its shareholders. It therefore maintains that the contract must include a regulatory out clause allowing it to escape the contract if shareholders rather than ratepayers are forced to shoulder its costs.

The Order Directing Entry, NYSEG contends, should be stayed. It maintains that if it is compelled to enter into this contract it and its ratepayers other than Nucor will suffer serious and perhaps irreparable harm.

NYSEG attaches to its petition a letter dated April 1, 2002, in which it claims its refusal to comply with the Order Directing Entry as of that date is justified. Also attached is a letter from Nucor dated April 3, 2002, in which the manufacturer maintains that since NYSEG has failed to execute the contract, the Commission should require the utility to serve Nucor under the EDZI tariff. NYSEG responds, in an attached letter dated April 5, 2002, that Nucor has waived its right to the EDZI tariff, because it withdrew its petition for rehearing on the EDZI issue in return for the Order Directing Entry requirement that NYSEG sign a flex rate contract.

Nucor's Response

Nucor maintains that the Order Directing Entry is well within the scope of the Commission's rate-setting powers under

[6] The Rate Plan provides that the ASGA shall serve as a source for the funding of economic development initiatives. Case 01-E-0359, New York State Electric & Gas Corporation – Electric Price Protection Plan, Order Adopting Provisions of Joint Proposal with Modifications (issued February 27, 2002).

the Public Service Law. According to Nucor, the same results could have been reached through any of several available rate-setting mechanisms, and the approach selected is clearly one lawful option. Moreover, Nucor believes the terms of the flex rate contract are reasonable. Nucor accuses NYSEG of elevating its authority over the Commission's, by insisting that only the utility can dictate the terms of a flex rate contract.

NYSEG's instant petition for rehearing, Nucor asserts, must be dismissed because it is an untimely collateral attack on the Negotiation Order. Nucor contends that, because NYSEG did not timely seek rehearing of the Negotiation Order, it has waived any jurisdictional claim in this proceeding.

Nucor disputes NYSEG's contention that the Commission lacks the authority to order entry into the flex rate contract. In setting rates, Nucor maintains, the Commission has broad powers under the Public Service Law, so long as the resulting rate is just and reasonable. Nucor also finds the requisite authority in the long-standing justification for the many flex rate contracts NYSEG has entered into since 1994.

Nucor also believes NYSEG has misinterpreted the Columbia Order. That Order, Nucor argues, addresses a flex rate contract that had already been executed. The flex rate customer, Nucor continues, could not argue that it had preserved objections to NYSEG's practices from the time prior to the execution of the contract.

Regarding NYSEG's tariff-related arguments, Nucor contends either of the utility's S.C. 13 or S.C. 14 tariffs afford a reasonable framework for a flex rate contract. Nucor points out that NYSEG itself suggested the provisions of S.C. 14 be used, and so the utility should not be permitted to rescind its reliance on that tariff. Nucor contends that NYSEG has repeatedly agreed that Nucor qualifies for the S.C. 14 tariff.

Looking to the record in this proceeding, Nucor finds more than ample support for its qualification as an S.C. 14 customer, and argues it is equally qualified for S.C. 13 treatment. Summarizing the factual determinations presented in this proceeding on its entitlement to a flex rate contract, Nucor points out that in the last two years, 30 U.S. steel companies have gone bankrupt or ceased operations. The defunct operations include a sister facility to Auburn located in Lemont, Illinois.

Nucor notes that it paid $115 million for the Auburn facility, making it one of the largest capital investments in upstate New York in recent years. Nucor also reports that its parent has recently invested $200 million in various locations around the United States, but none of that money could be allocated to the Auburn location until its electricity costs are known. The manufacturer identifies the benefits to the community and local economy that attend the operation of its steel plant in Auburn, which would be lost if the facility were to close or relocate.

Turning to the waivers of tariff conditions, Nucor contends they were appropriate. Nucor explains the Commission signaled in Opinion No. 94-15 that, in the proper circumstances, the 1¢ contribution towards system costs could be revisited. As a result, Nucor maintains that the Commission has merely implemented that prior Order here. Other tariff waivers, Nucor argues, were also justified.

Nucor maintains that the terms and conditions of the flex rate contract it was awarded are just and reasonable. Looking to the EDZI tariff, Nucor asserts it made concessions in comparison to the benefits available to it there. The comparison to EDZI, Nucor contends, is a reasonable benchmark. Nucor believes that it is entitled to take service under the

EDZI tariff because it was certified as an Empire Zone customer on March 16, 2001, thereby satisfying the prerequisite to EDZI service. Since the EDZI tariff is presumed lawful and just and reasonable, Nucor argues that anything which affords the utility benefits in comparison also must be lawful and just and reasonable.

Nucor also notes that it has submitted evidence in support of the finding that the contract rate is above marginal cost. NYSEG, Nucor asserts, presents no record evidence in support of its contention that the price is below marginal cost. Instead, Nucor asserts, NYSEG references only information it allegedly supplied to the Commission's Staff, but not to anyone else.

Responding to NYSEG's analysis of the ASGA, Nucor points out that NYSEG, in its current Rate Plan, protected its shareholders by assessing a number of potential claims against the ASGA fund. NYSEG, Nucor asserts, may make those assessments even if its earnings are excessive. Nucor also notes that ratepayers and their representatives had the opportunity to argue against the uses of the ASGA when the Rate Plan was adopted, but they acceded to the Commission's use of the ASGA as a source for funding flex rate contracts.

Nucor also argues that NYSEG's calculation of the costs associated with this contract are substantially overstated. Nucor asserts that its January 28 filing in this proceeding provides a detailed comparison of the respective costs and benefits to Nucor and NYSEG, on the trade secret basis that NYSEG insisted upon. Further contradicting NYSEG's cost analysis, Nucor calculates the cost of the flex rate contract to NYSEG at less than $15 million over five years. Nucor also claims the difference between the EDZI discounted rate it seeks and the amount it would pay under the otherwise applicable

tariff rate favors NYSEG, when curtailment benefits are taken into account.

Complaining that it, and not NYSEG, is irreparably harmed if the contract is not implemented, Nucor would deny the stay NYSEG requests. Nucor accuses the utility of imposing approximately $5 million in increased annual electricity costs on it, to the detriment of its business. Not only has NYSEG failed to show irreparable harm, Nucor continues, it has also failed to show that it has any likelihood of succeeding on the merits -- the other prerequisite to obtaining a stay. Nucor concludes the harm it faces from a stay far outweigh NYSEG's hypothetical and unfound claims.

IBEW's Response

In supporting NYSEG, IBEW objects that the lost revenues associated with the Nucor flex rate contract would deplete the ASGA, leaving insufficient funding for other economic development efforts. IBEW believes ASGA funding should be spread among a variety of projects, rather than just on Nucor. IBEW is concerned that Nucor may not even qualify for economic development benefits, and that the flex contract rate is unduly preferential.

IBEW also complains that the proceedings on the Nucor contract were conducted in secret. It argues secrecy protections effectively prevented it and other potentially-interested parties from commenting on the proposed contract.

NYSEG's Reply to Nucor

Disputing Nucor's contentions, NYSEG rejects the claim that the U.S. steel industry is in distress. The utility argues that new tariff quotas will enable the steel industry to rebound from past difficulties and that Nucor's stock is at a five-year

high. The utility contends that the magnitude of Nucor's $115 million investment in purchasing the Auburn facility demonstrates that it found acceptable the electric rates that existed at the time of the purchase.

NYSEG argues that it has not waived its right to question the Commission's jurisdiction over entry into flex rate contracts. The utility maintains it was entitled to wait until it was aggrieved by the actual exercise of authority in the Order Directing Entry, notwithstanding the description of that authority set forth in the Negotiation Order. NYSEG also reiterates its arguments on Public Service Law jurisdiction, contends that Nucor's comparisons to the EDZI rate are irrelevant, and claims that the marginal cost evidence Nucor relies upon is inadequate to justify the contract rate. Finally, the utility elaborates on its arguments for a stay and reiterates prior arguments.

Nucor's Rejoinder

Characterizing NYSEG's response as a "transparent attempt...to get in the last word and confuse the record in this process," Nucor urges the Commission to reject the filing.[7] Nucor maintains that NYSEG has not shown extraordinary circumstances justifying its unauthorized filing.

If the filing is not rejected, Nucor responds on three issues it believes were not adequately addressed in its earlier filings. First, it continues to claim that NYSEG is time-barred from pursuing its jurisdictional argument on Commission authority because the utility did not seek to overturn the jurisdictional decisions made in the Negotiation Order. Second, Nucor finds that NYSEG's arguments on tariff requirements are in

[7] Nucor Reply, p. 3.

error, because the Commission has the authority to make, through a flex rate contract, whatever modifications to the tariff are necessary for future application to a customer. Third, Nucor disputes NYSEG's claim that Nucor admitted the contract will cost ratepayers $7.5 million per year. Instead, Nucor notes that it only informed its employees that the difference between what NYSEG charges and a "decent electric rate" is about $7.5 million per year.

DISCUSSION AND CONCLUSION

The individual contract approach used to setting the just and reasonable rate for electric service to Nucor is within the ambit of the Public Service Law, and is not discriminatory because it is justified by the facts and circumstances here. NYSEG's claim that Nucor has been awarded a preferential rate is therefore without merit. Moreover, contrary to NYSEG's assertions, the overall impact of the Nucor flex rate contract on other ratepayers is beneficial.[8]

NYSEG's Legal Arguments

NYSEG maintains that the power to direct entry into a flex rate contract cannot be found in the Public Service Law, and that the treatment afforded Nucor illegally discriminates in its favor. The authority to direct entry into the flex rate contract, however, may be found in PSL §66(12-b)(a) and (a)(2), which authorize the designation of "appropriate" classes of business customers as eligible for "special rates or tariffs" in order to prevent the loss of customers or to attract new customers. The contract NYSEG was directed to enter into with

[8] To the extent responsive arguments are raised, the unauthorized NYSEG and Nucor filings are considered because they advance the record in this proceeding.

Nucor conforms to those statutory requirements. If the fact that the "appropriate" class at this time consists of one customer -- Nucor -- renders the "special rate" in the contract illegal, then the statute would become largely unworkable because contract applications generally begin with or affect a single customer.

NYSEG premises its claim that the contract approach is impermissible on an analysis on PSL §66(12)(d), which requires the utility to charge the rates specified in its tariff schedules. Under PSL §66(12)(e), however, we have the power "to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise." In directing the flex rate contract NYSEG must enter into for future deliveries to Nucor, we have merely prescribed a rate schedule applicable to Nucor.

NYSEG's argument also fails under PSL §66(12)(a) and (b), which afford us jurisdiction over "any form of contract or agreement" that establishes rates for utility customers. Consequently, the Nucor flex rate contract is a just and reasonable rate schedule fully in compliance with the Public Service Law.

NYSEG claims that the rate is discriminatory under PSL §65(5). Discrimination is found only if the facts and circumstances do not justify awarding a particular rate to a particular customer. Since NYSEG began negotiating flex rate contracts with individual customers in 1993, however, it has entered into more than seventy of those agreements. The prices in the agreements vary according to the particular facts and circumstances affecting the customer entering into the contract. So long as supported by the facts, these price variances do not render the flex rate contract approach, or any one of those contracts, discriminatory or illegal.

NYSEG also misinterprets the Columbia Order. That Order established that where parties willingly enter into a flex rate contract, that contract becomes binding on them without our approval. Where, as here, a party challenges the terms and conditions required in a contract, it would enter into a contract subject to resolution of its objections. If it timely preserves those objections, the contract, like any other rate, may be later modified or terminated. NYSEG's interpretation of the Columbia Order also disregards the conclusion reached there -- that a utility could be required to include in a flex rate contract terms and conditions that it opposed.

Therefore, under the Public Service Law, we may take into account all facts and circumstances in setting a new rate by special contract for prospective application.[9] As discussed below, the special rate created through the Nucor S.C. 14 flex rate contract is just and reasonable.

NYSEG's S.C. 14 Arguments

NYSEG's argument that the contract is illegal because it conflicts with the utility's S.C. 14 tariff cannot withstand analysis. Constructing Nucor's special rate contract by selecting among the requirements in the S.C. 14 tariff, applying some while rejecting others, is acceptable under the Public Service Law. Moreover, NYSEG has insisted upon referencing the Nucor contract to the S.C. 14 tariff since the dispute over contract terms and conditions began, and its claim that S.C. 14 is the wrong reference point is inconsistent with its earlier position.

The Nucor contract, cross referenced to the S.C. 14 tariff where appropriate, is an additional rate schedule whose

[9] As with any electric utility tariff or rate plan, the flex rate contract remains subject to our continuing jurisdiction.

terms and conditions, beyond the terms and conditions identified in the tariff, take effect on a prospective basis.[10] Indeed, the S.C. 14 tariff provides for the filing of an "addendum" to the tariff that expands upon the tariffed terms and conditions for each new flex rate contract.

Such a contract addendum modifies the tariff. Providing for the override or waiver of tariff conditions through a contract addendum merely clarifies that the addendum, and not the original tariff, controls on particular issues. As a result, the Nucor contract's terms and conditions need not comport to those of the existing S.C. 14 rate schedule because they are modifications to that schedule.[11]

NYSEG's assertion that Nucor fails to qualify for flex rate contract treatment under S.C. 14 also lacks merit. As Nucor contends, it submitted evidence in this proceeding sufficient to demonstrate that it is a qualifying business satisfying the prerequisites to obtaining a flex rate contract. We find that the troubles the steel industry faces generally, and the particularly acute financial disadvantages attending Nucor's operations in Auburn, pose a substantial risk to the potential for expansion and the continued viability of the Auburn business. Nucor could forgo expansion plans or leave the state entirely if appropriate electricity prices supporting its expansion and continued presence are not made available to it. The loss of this manufacturing plant would depress the local

[10] That some terms and conditions of the contract may be drawn from S.C. 13 instead of S.C. 14 is irrelevant, because the resulting contract is a modification of S.C. 14 notwithstanding the original source of the contract's various terms.

[11] NYSEG's citations to cases where customers were improperly classified under a tariff, or where disputes over tariff language were resolved, are therefore inapplicable.

economy in the Auburn region. Accordingly, Nucor has met the prerequisites for entitlement to a flex rate contract.

NYSEG also objects to a number of the specific terms and conditions contained in the contract as outside the scope of S.C. 14 or as otherwise unreasonable. NYSEG's objections, however, were addressed in the Order Directing Entry. It has failed to countermand any of the conclusions reached there on the justifications for those terms and conditions. Accordingly, NYSEG's interpretation of the S.C. 14 tariff requirements, and the relevance of those requirements to the Nucor contract, lack merit.

The Nucor Contract Rate

NYSEG complains that the rate for electric service under the Nucor contract is set at an unduly low price. The contract, however, is priced to recover costs while creating the rate incentives necessary for retaining Nucor's existing load, and encouraging it to add new load, at the Auburn site.[12]

Moreover, as Nucor points out, the contract rate compares favorably to the rate it would receive as a customer under the EDZI tariff. Providing for a higher rate under the contract as an alternative to the EDZI tariff, as a means for resolving the dispute over Nucor's entitlement to that tariff, is a reasonable approach.

NYSEG and IBEW protest that the contract was arrived at in secret, but the Order Directing Entry was issued only after proper notice was given under the State Administrative Procedure Act. NYSEG cannot complain of the trade secret

[12] As discussed in the Order Directing Entry at pp. 10-11, the contract sets a base price for electricity designated to serve Nucor's existing load and an incremental price that would adhere to new load Nucor would bring to the site upon an expansion of the plant.

designation afforded to the information underlying contract formation, because it petitioned repeatedly to keep that information secret. In conformance with NYSEG's petitions, materials related to the pricing of this contract have been treated as confidential trade secrets under our regulations, 16 NYCRR Part 6. Our review of that information -- which came from NYSEG or was provided to it by Nucor under obligation to protect its confidentiality -- satisfies us that NYSEG's contentions regarding the contract rate lack merit.[13]

NYSEG criticizes the contract rate as insufficient to cover the utility's marginal cost of furnishing service to Nucor. The Nucor contract rate for base load service, however, exceeds marginal cost. In the Order Directing Entry, it was decided that:

> Nucor's base rate price is reasonable. The price is greater than the marginal costs we forecast NYSEG will incur in supplying electricity to Nucor's existing demand over the next seven years, calculated as of the date of this Order. Since the price exceeds marginal cost, there is a contribution towards NYSEG's system common costs. The proposed base price therefore satisfies PSL §66(12-b)(a).

This finding is supported by trade secret evidence NYSEG submitted.

NYSEG also argues a floor price clause is needed to authorize upward adjustment of the base price if marginal costs rise above that price. The forecast of marginal cost made here, however, is binding over the seven-year term the base price is in effect. NYSEG has demonstrated it could obtain energy supply at a price that would enable it to meet Nucor's base demand at the contract price, eliminating energy costs as a variable that

[13] In contrast, NYSEG did not furnish confidential marginal cost information to Nucor, instead submitting it only to our Staff.

might drive marginal cost above the contract price. Forecasts of other rate components, such as marginal delivery costs, are reasonably reliable over a term as short as seven years. The forecast of the seven-year price as satisfying the marginal cost standard is therefore reasonable, and a floor price modifier to the base price is not needed.

Ratepayer Impacts

NYSEG argues the Nucor flex rate contract will have an adverse impact on ratepayers. Both NYSEG and its ratepayers, however, should benefit substantially from the economic stimulus and added electric revenues associated with the retention of Nucor as a customer and the expansion of its operations.

If Nucor were to leave the state, its contribution towards system common costs, through the portion of the contract rate that exceeds marginal cost, would be lost. Other customers, or NYSEG shareholders, would also be forced to assume responsibility for the embedded costs that Nucor's payments otherwise would have supported, because the embedded cost of the delivery facilities Nucor used must be paid for whether or not Nucor remains in New York. Moreover, the "multiplier effect" attending the high-paying manufacturing jobs at Nucor promotes economic activity in the Auburn region, thereby enhancing NYSEG's revenues and further benefiting other ratepayers.

Contrary to NYSEG's assertion, providing for the offset of lost revenues from the Nucor contract against the ASGA is not at issue in this proceeding. Instead, that approach was taken when NYSEG's existing Rate Plan was adopted -- an outcome NYSEG advocated.

Moreover, it appears that that NYSEG may have overstated the magnitude of the lost revenues it is entitled to recover from the ASGA. The calculation of lost revenues depends

on a comparison of the contract rate to the appropriate tariff rate. NYSEG's tariffed rates are due to change on January 1, 2003, and may change again in the future. While the forecast of those changes is an uncertain variable, the disparity between the contract rate and tariff rate may not result in the overall revenue loss NYSEG assumes.

For all the above reasons, NYSEG's Petition for Rehearing is denied.

Stay and Enforcement of the Prior Orders

NYSEG's request for a stay is denied. The utility has failed to show, as discussed above, that it would succeed on the merits in challenging the reasonableness of the Nucor flex rate contract. Moreover, it has not shown that it will be harmed, much less irreparably harmed, if it is required to enter into the contract. Indeed, it may sign the contract under protest subject to review by the courts.[14]

NYSEG's argument that Nucor has withdrawn its petition for rehearing is rejected. The Order Directing Entry specifies that Nucor's withdrawal of the petition was contingent upon "final resolution of flex rate contract issues."[15] Since NYSEG has refused to resolve those issues on a final basis, the condition precedent to withdrawal has not been met and Nucor's petition for rehearing remains pending.

[14] Case 91-E-0188, Mayflower Energy Partners, L.P. – Applicability of Long-Term Avoided Cost Estimates, Order Granting Rehearing in Part and Directing Entry Into a Contract (issued September 30, 1991). That Order was overturned in Long Island Lighting Company v. Public Service Commission, 199 A.D.2d 831 (3rd Dept., 1993), lv. den. 83 N.Y. 755, and the contract was terminated.

[15] Order Directing Entry, p. 10.

Pursuant to PSL §26, we direct Counsel to commence an enforcement action against NYSEG. Whether a penalty action should be commenced against NYSEG under PSL §25 is at the discretion of our Chairman.

The Commission orders:

1. The Petition for Rehearing and Request for a Stay of New York State Electric & Gas Corporation is denied.

2. Counsel is directed to commence an enforcement action against New York State Electric & Gas Corporation, consistent with the discussion in the body of this Order.

3. This proceeding is continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary