148 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

New York Association of Public Power Docket No. EL12-101-000

v.

Niagara Mohawk Power Corporation d/b/a
National Grid and
The New York Independent System Operator, Inc.

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued September 8, 2014)

1. On September 11, 2012, as amended on September 26, 2012 and October 2, 2012, pursuant to section 206 of the Federal Power Act (FPA),[1] the New York Association of Public Power (NYAPP) filed a complaint against Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) and the New York Independent System Operator, Inc. (NYISO) alleging that the current 11.5 percent return on equity (ROE) used in calculating rates for transmission service under the NYISO Open Access Transmission Tariff (Tariff) is unjust and unreasonable, and should be replaced with a 9.49 percent ROE (Complaint). In this order, we establish hearing and settlement judge procedures. Further, we set a refund effective date of November 2, 2012.

I. Background

2. Niagara Mohawk recovers its transmission revenue requirements through the Niagara Mohawk Wholesale Transmission Service Charge (TSC) included in the NYISO Tariff. The TSC is calculated using a formula rate contained in the NYISO Tariff. By June 14 of each year, Niagara Mohawk recalculates its annual transmission revenue requirement by populating the data inputs in the formula rate. Niagara Mohawk's current

[1] 16 U.S.C. § 824e (2012).

ROE is 11.5 percent, inclusive of a 50 basis point adder for Niagara Mohawk's participation in the NYISO, and was established by settlement in Docket No. ER08-552 and accepted by the Commission on June 22, 2009.[2]

3. As discussed below, on September 11, 2012,[3] NYAPP filed a complaint alleging that Niagara Mohawk's current 11.5 percent ROE is unjust and unreasonable and should be replaced with a just and reasonable ROE of 9.49 percent. While the instant complaint was pending before the Commission, two additional complaints were challenging Niagara Mohawk's current 11.5 percent ROE as unjust and unreasonable. In the first subsequent complaint, on November 2, 2012, in Docket No. EL13-16-000, the Municipal Electric Utility Association of New York (MEUA) filed a complaint alleging that Niagara Mohawk's 11.5 percent ROE should be replaced with a just and reasonable ROE of 9.25 percent. In the second subsequent complaint, on February 6, 2014, in Docket No. EL14-29-000, NYAPP filed another complaint alleging that Niagara Mohawk's 11.5 percent should be replaced with a just and reasonable ROE of 9.36 percent. The Commission is issuing orders setting the complaints in Docket Nos. EL13-16-000 and EL14-29-000 for hearing and settlement judge procedures concurrently with the instant order.[4]

II. Complaint

4. NYAPP asserts that, due to significantly changed economic circumstances since the ROE was established in the Formula Rate Order, the current 11.5 percent ROE has become unjust and unreasonable. NYAPP asserts that its expert witness, Dr. Jonathan A. Lesser, performed a discounted cash flow (DCF) analysis that shows that the zone of reasonableness ranges from 6.38 percent and 10.75 percent with a median of 8.99 percent. NYAPP contends that the just and reasonable ROE is 9.49 percent, inclusive of the 50 basis point adder for membership in an ISO or RTO and based on the 8.99 percent median calculation.

5. NYAPP asserts that Dr. Lesser's DCF analysis conforms to Commission policy and precedent and results in a national proxy group of 16 companies.[5] NYAPP states that

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[2] *Niagara Mohawk Power Corp.*, *Inc.*, *et al.*, 127 FERC ¶ 61,289 (2009) (Formula Rate Order).

[3] NYAPP amended its complaint on September 26, 2012 and again on October 2, 2012.

[4] *Municipal Elec. Utils. Ass'n of N.Y. v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Op., Inc*., 148 FERC ¶ 61,175 (2014); *N.Y. Ass'n of Pub. Power v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Op., Inc*., 148 FERC ¶ 61,176 (2014).

the analysis excludes six companies due to their ongoing or recently completed merger or acquisition activity, two companies that lacked sufficient dividend history, three companies with 2010 annual revenues of less than $1 billion, and a number of companies with corporate ratings more than one notch above or below Niagara Mohawk.

6. NYAPP states that the resulting overall weighted average cost of capital (WACC), using its recommended 9.49 percent ROE and the formula rate capitalization percentages and rates, is 6.73 percent. NYAPP explains that, in making this calculation, its witness reduced the weighted common equity ratio in the capital structure from 61.33 percent to 50 percent, because the formula for capital structure limits the percentage of common equity to no more than 50 percent of total capital structure, and Niagara Mohawk's actual weighted common equity ratio is 61.33 percent. NYAPP states that the impact of this new WACC on the before-tax investment return is a reduction of $19,080,537.

7. NYAPP requests that the Commission: (1) institute a paper hearing proceeding to investigate Niagara Mohawk's ROE and establish a just and reasonable ROE; (2) establish the earliest possible refund date; (3) direct Niagara Mohawk to make refunds; and (4) direct the NYISO to make a tariff filing to change the stated ROE to a just and reasonable ROE as determined in this proceeding. NYAPP argues that a paper hearing, rather than a trial-type hearing, would be sufficient in this case and would facilitate an earlier Commission decision. In the alternative, if the Commission is not inclined to institute a paper hearing, then NYAPP requests an evidentiary hearing.

8. On September 26, 2012, NYAPP filed an amendment to the Complaint to add Schedule 5 of Exhibit No. NYP-6, which was inadvertently deleted from the Complaint. On October 2, 2012, NYAPP filed a second amendment to the Complaint to add the work papers of its witness, Dr. Lesser.

III. Notice and Responsive Pleadings

9. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 57,565 (2012), with answers, protests, and interventions due on or before October 1, 2012.[6] Motions to intervene were filed by Municipal Electric Utilities Association of

[5] NYAPP selected the proxy group using the following screening criteria: (1) electric utilities covered by the Value Line Investment Survey (Value Line); (2) neither announced a merger or acquisition nor were involved in an ongoing merger or acquisition during the six-month analysis period; (3) have paid constant or increasing dividends for at least the past two years; (4) are covered by at least two generally recognized utility industry analysts and which have long-term (5-year) earnings growth forecasts reported by Institutional Brokers; (5) have annual revenues of at least $1 billion; and (6) have an investment grade corporate credit rating within one "notch" of Niagara Mohawk, which is currently rated at A- by Standard and Poor's (i.e., utilities having credit ratings between BBB+ and A).

New York and Public Service Electric and Gas Company. Allegheny Electric Cooperative, Inc. (Allegheny) filed a motion to intervene and comments.[7] On October 1, 2012, Niagara Mohawk filed an answer to the Complaint. On October 16, 2012, NYAPP filed an answer to Niagara Mohawk's answer.

10. Notice of the amendment was published in the *Federal Register*, 77 Fed. Reg. 60,970 (2012), with protests and interventions due on or before October 9, 2012. None were filed.

11. Notice of the second amendment was published in the *Federal Register*, 77 Fed. Reg. 61,593 (2012), with protests and interventions due on or before October 15, 2012. None were filed.

12. On December 7, 2012, NYISO filed a motion for dismissal as a party to the proceeding, arguing that NYISO is not the beneficiary of, nor is it responsible for establishing the level of, Niagara Mohawk's transmission service rates. NYISO states that it simply administers the Tariff in which the Niagara Mohawk transmission service rates are described, and that it will submit through eTariff any revisions to its Tariff that the Commission orders Niagara Mohawk to make in this proceeding. NYISO states that the Commission has recently granted a motion to dismiss under similar circumstances.[8]

13. On December 14, 2012, NYAPP filed a request for a September 11, 2012 refund effective date.

A. Niagara Mohawk's Answer

14. In its answer to the Complaint, Niagara Mohawk argues that the Commission should summarily dismiss the Complaint because it suffers from procedural flaws. Specifically, Niagara Mohawk contends that NYAPP has not complied with the requirements of Rule 206(b)(8)[9] because it has not provided the work papers supporting

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[6] On September 18, 2012, an errata notice was issued to correctly list both Niagara Mohawk and NYISO as Respondents.

[7] In its comments, Allegheny states that it supports the Complaint and that the Complaint is grounded in Commission precedent.

[8] NYISO Motion for Dismissal at 3 (citing *Martha Coakely, Mass. Attorney General, et al. v. Bangor Hydro-Electric Co., et al.*, 139 FERC ¶ 61,090, at P 23 (2012)).

[9] 18 C.F.R. § 385.206(b)(8) (2014) ("A complaint must...[i]nclude all documents that support the facts in the complaint in possession of, or otherwise obtainable by, the

Dr. Lesser's analyses, including his DCF analysis. Niagara Mohawk also contends that the Complaint disregards Rule 206(b)(9)[10] by failing to explain why NYAPP did not attempt to negotiate a resolution with Niagara Mohawk prior to filing the Complaint. Niagara Mohawk states that, even if the Commission does not dismiss the Complaint on these grounds, it should set a refund effective date for a date after NYAPP has supplied its work papers and undertaken a good-faith negotiation to settle the controversy.

15. Niagara Mohawk also contends that the Complaint fails to meet the threshold burden under FPA section 206 of demonstrating that Niagara Mohawk's approved base ROE is unjust and unreasonable and that NYAPP's alternative base ROE is just and reasonable. Niagara Mohawk argues that NYAPP's DCF analysis is seriously flawed, and its proposed base ROE would be one of the lowest in the country and substantially lower than those the Commission recently approved for similar transmission-owning utility companies. Specifically, Niagara Mohawk asserts that NYAPP (1) misapplies the merger criterion in selection of the proxy group by improperly excluding companies whose mergers were already completed when the Complaint was filed; (2) misapplies a revenue cutoff criterion that excludes from the proxy group utilities with less than $1 billion in annual revenues; (3) relies on annual dividend data that differs from that published in industry sources; (4) uses an incorrect method of identifying low-end outliers in the proxy group; and (5) relies on the median of the DCF results to set the ROE, which is incorrect in this case. Niagara Mohawk also argues that five alternative ROE models and benchmarks do not corroborate NYAPP's DCF analysis, but rather call it into question.

16. Niagara Mohawk also argues that serious factual inaccuracies plague the Complaint, which demonstrate the need for trial-type hearing procedures. First, Niagara Mohawk states that the Complaint grossly exaggerates the impact of lowering its base ROE by applying this effect to overall transmission revenues, when only a small percentage of Niagara Mohawk's revenues derive from wholesale transmission service. Niagara Mohawk explains that the corrected impact of changing its base ROE from 11 percent to 8.99 percent is approximately $1.6 million, instead of $19 million. Second, Niagara Mohawk claims that the Complaint overestimates the impact of changes to its base ROE by claiming that any "excess" revenues generated by Niagara Mohawk's transmission service charge ROE "go straight to NMPC's bottom line at the expense of customers," when these revenues are actually returned to Niagara Mohawk's retail customers as billing credits.

complainant, including, but not limited to, contracts and affidavits…").

[10] 18 C.F.R. § 385.206(b)(9) (2014) ("A complaint must…[s]tate (i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used…").

17. Finally, Niagara Mohawk contends that there are numerous issues of material fact that cannot be adequately addressed through a paper hearing. Accordingly, if the Commission declines to summarily dismiss the Complaint, Niagara Mohawk requests that the Commission set it for trial-type hearing procedures and assign a settlement judge.

B. NYAPP's Answer

18. NYAPP argues that Niagara Mohawk's answer challenges not only Dr. Lesser's analysis, but the Commission's DCF analysis itself, and fails to provide an independent DCF analysis using the Commission's DCF methodology to correct the alleged flaws. In response to Niagara Mohawk's argument that NYAPP's proposed ROE would chill support for transmission infrastructure, NYAPP argues that its proposed ROE is the result of an accurate application of the Commission's DCF analysis and is consistent with the Commission's policies encouraging transmission expansion.

19. NYAPP contends that its application of the Commission's merger criterion is proper because the Commission's criterion focuses on merger activity during the analysis period, not on whether a merger has been finalized by the end of the analysis period. NYAPP disagrees with Niagara Mohawk that including merging firms in the proxy group is acceptable as long as stock prices are not affected because it is unclear how one would determine whether stock prices were impacted by merger activity, and even if a merger does not affect a firm's stock price, it can significantly affect other variables in the DCF analysis. NYAPP reiterates that excluding firms with revenues less than $1 billion from the proxy group is consistent with Commission precedent[11] and argues that Niagara Mohawk's witness, Dr. William E. Avera, fails to identify the proper annual threshold revenue screen. NYAPP contends that Dr. Avera's dividend payment values are incorrect and inconsistent with Commission policy because Dr. Avera uses forecast annualized dividend payments instead of actual dividends received, which results in effectively double-counting dividend growth and imputing an upward bias to the DCF estimates. NYAPP also contends that Dr. Avera inappropriately departs from the Commission-approved 100 basis point standard for excluding low-end outliers in the proxy group by creating his own artificial standard. NYAPP asserts that use of the median ROE value of the proxy group is proper because there is no evidence that Niagara Mohawk's business and financial risk profiles differ significantly from the average risk of the firms in the proxy group. With respect to Dr. Avera's comparison of four remaining alternative ROE models, NYAPP argues that each of these models contains methodological flaws.

20. NYAPP disputes that the Complaint contains factual errors. In response to Niagara Mohawk's claim that NYAPP overestimates the alleged $19 million impact of

[11] NYAPP Answer at 7-8 (citing *Southern Calif. Edison Co.*, 131 FERC ¶ 61,020, at P 51 (2010)).

changing Niagara Mohawk's base ROE, NYAPP argues that the calculation is correct because Niagara Mohawk's transmission load pays rates based on a much higher ROE than the majority of Niagara Mohawk's customers. In response to Niagara Mohawk's argument that excess revenues are returned to customers in the form of billing credits, NYAPP argues that this means that wholesale customers are subsidizing Niagara Mohawk's retail customers, which must be undone by establishing a just and reasonable ROE.

21. Finally, NYAPP disputes that the Complaint contains procedural errors. NYAPP explains that it complies with Rule 206(b)(8)[12] because NYAPP submitted Dr. Lesser's work papers on October 2, 2012 and most of them had even been previously submitted as exhibits to the Complaint. NYAPP submits that no party was prejudiced by the error but that any prejudice can be cured by adjusting the refund effective date to reflect the October 2, 2012 submittal. NYAPP also explains that the Complaint complies with Rule 206(b)(9)[13] because it clearly states that NYAPP did not believe that negotiations would be productive until after a complaint had been filed and a refund effective date had been established.

IV. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[14] the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

23. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[15] prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept NYAPP's answer because it has aided us in our decision-making.

24. We will grant NYISO's motion for dismissal as a party to this proceeding. We agree with NYISO that it simply administers the Tariff in which the Niagara Mohawk transmission service rates are described and is not the beneficiary of Niagara Mohawk's transmission service rates. Niagara Mohawk is the true party in interest for purposes of this proceeding.[16] In addition, NYISO's motion was not protested.

[12] 18 C.F.R. § 385.206(b)(8) (2014).

[13] *Id*. § 385.206(b)(9).

[14] *Id*. § 385.214.

[15] *Id*. § 385.213(a)(2).

B. Substantive Matters

25. We find that the Complaint raises issues of material fact that cannot be resolved based upon the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the Complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA. We find that a paper hearing would be insufficient in this case given the numerous complex issues of material fact to be resolved.

26. The Commission recently issued Opinion No. 531,[17] in which the Commission changed its practice for determining the ROE for public utilities. Accordingly, we expect the participants' evidence and DCF analyses to be guided by the Commission's decision in Opinion No. 531.

27. Concurrently with the instant order, the Commission is consolidating the proceedings in Docket Nos. EL13-16-000 and EL14-29-000 with the instant proceeding.[18] In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month period following the refund effective date. Because the instant complaint and the complaint in Docket No. EL13-16-000 were filed within two months of each other and challenge the same rate, we find that establishing the same refund effective date in both dockets would best synchronize the two proceedings. We, therefore, exercise our discretion to set the refund effective date in this proceeding coincident with the refund effective date in Docket No. EL13-16-000, i.e., November 2, 2012.[19] Accordingly, we deny NYAPP's request for a September 11, 2012 refund effective date. In the third

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[16] We note that NYAPP states that it has named NYISO as a respondent only because Niagara Mohawk's ROE is a stated value in the NYISO Tariff, and any change in the stated ROE would require a tariff revision filing by NYISO. Complaint at 4.

[17] *See Martha Coakley, Mass. Attorney Gen., et al v. Bangor Hydro-Elec. Co., et al.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014).

[18] *Municipal Elec. Utils. Ass'n of N.Y. v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Op., Inc*., 148 FERC ¶ 61,175 (2014); *N.Y. Ass'n of Pub. Power v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Op., Inc*., 148 FERC ¶ 61,176 (2014).

[19] *See, e.g., Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co., et al.*, 50 FERC ¶ 61,193, at 61,629 (1990).

consolidated proceeding, Docket No. EL14-29-000, we are establishing a refund effective date of February 6, 2014.

28. Due to the establishment of two refund periods in this consolidated proceeding, it is appropriate for the parties to litigate a separate ROE for each refund period. Therefore, for the refund period covered by Docket Nos. EL12-101-000 and EL13-16-000 (i.e., November 2, 2012 through February 2, 2014), consistent with the approach taken in Opinion No. 531 which stressed use of recent financial data to determine the ROE, the ROE for that particular 15-month refund period should be based on the most recent financial data available during that period, i.e., the last six months of that period. For the refund period in Docket No. EL14-29-000 (February 6, 2014 through May 6, 2015) and for the prospective period, the ROE should be based on the most recent financial data in the record, consistent with the Commission's holding in Opinion No. 531 that a single ROE should be established for the most recent refund period addressed at the hearing and for the prospective period based on the most recent financial data in the record.[20]

29. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[21] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[22] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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.

30. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on

[20] *See Martha Coakley, Mass. Attorney Gen., et al v. Bangor Hydro-Elec. Co., et al.*, Opinion No. 531, 147 FERC ¶ 61,234 at PP 65-67, 160.

[21] 18 C.F.R. § 385.603 (2014).

[22] 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 this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within twelve months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by September 30, 2015. Thus, we estimate that, if the case were to go to hearing immediately, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by July 31, 2016.

31. We dismiss Niagara Mohawk's arguments regarding procedural defects. NYAPP amended the Complaint to provide the work papers to Dr. Lesser's testimony. Furthermore, the Commission's regulations do not require a complainant to use informal dispute resolution procedures prior to filing a complaint. The regulations merely require the complainant to state whether any informal dispute resolution procedures were used or why such procedures were not used. NYAPP explained in the Complaint that it viewed alternative dispute resolution procedures as being unlikely to be successful. [23]

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding 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. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge 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 discussions, 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 sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

[23] *See Indicated Shippers v. Trunkline Gas Company, LLC*, 106 FERC ¶ 61,232, at P 32 (2004).

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a 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.

(E) The refund effective date in Docket No. EL12-101-000, established pursuant to section 206(b) of the FPA, is November 2, 2012.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.