

140 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

New York Independent System Operator, Inc.

Docket No. ER12-2317-000

ORDER ACCEPTING PROPOSED TRANSMISSION
REVENUE REQUIREMENT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued September 25, 2012)

1. On July 27, 2012, the New York Independent System Operator, Inc. (NYISO) submitted under section 205 of the Federal Power Act (FPA)¹ on behalf of the New York Power Authority (NYPA) an application by NYPA to increase the annual transmission revenue requirement (RR) used to develop the charges for transmission services provided by NYPA under NYISO's Open Access Transmission Tariff (OATT). NYPA requests that the Commission approve its revised RR, which is included in Attachment H of NYISO's OATT.² In addition, NYPA requests that the Commission approve certain ministerial revisions to the OATT, grant certain waivers, and exempt it from the Commission's filing fees.

2. NYPA requests waiver of the Commission's notice requirements to permit an effective date of August 1, 2012, for the proposed tariff revisions. Further, NYPA states that, although it is not subject to Commission orders directing the payment of refunds or suspending proposed rates, it will refund any payments it receives from NYISO based on the revised RR in excess of those ultimately approved by the Commission.³ As discussed below, we accept NYPA's revised RR for filing, effective August 1, 2012, as proposed, and set the matter for hearing and settlement judge procedures.

¹ 16 U.S.C. § 824d (2006).

² NYISO OATT, Attachment H, Section 14.2.2.

³ Transmittal Letter at 6.

I. Background

3. NYPA states that it is a corporate municipal instrumentality and a political subdivision of the State of New York and is a “state instrumentality” within the definition of § 201(f) of the FPA.⁴ NYPA states that, while it is outside of the Commission’s rate making jurisdiction, as a transmission owner of the NYISO, NYPA is subject to Commission review with respect to changes to its RR which is included in NYISO’s OATT. NYPA further states that it is engaged in the generation, sale and transmission of electric power and energy in New York. NYPA states that its facilities directly interconnect with the transmission systems of all of the investor-owned utilities in New York, as well as interconnecting with adjoining control areas through interconnections to utility systems in Vermont, Ontario, and Quebec. NYPA explains that it has no distribution facilities and that virtually all of NYPA’s customers are connected to the transmission and distribution systems of other public utilities. NYPA further explains that the Commission has recognized that unlike other public utilities, NYPA does not have a defined, integrated service area; instead, “its customers are located in the service areas of other transmission providers, and...pay for transmission service based on the costs of the transmission providers where the loads are located.”⁵

4. NYPA states that, when the NYISO was formed, NYPA, the NYISO, and the other New York Transmission Owners (NYTOs) agreed to establish in the NYISO OATT a NYPA-exclusive charge, the NYPA Transmission Adjustment Charge (NTAC). It states that the purpose of the NTAC is to recover any shortfall in NYPA’s RR that is not recovered under other agreements under which NYPA directly bills its own customers for transmission services.⁶ NYPA states that, on January 27, 1999, the Commission conditionally accepted the filing by NYPA and the other NYTOs to establish NYISO⁷ and, in conjunction with that filing, on November 17, 1999, the NYTOs filed a joint settlement agreement resolving all issues set for hearing in that docket. NYPA states that the settlement established the NTAC mechanism as a part of the NYISO OATT to ensure NYPA’s recovery of its RR, which is a component of the NTAC formula.⁸ NYPA

⁴ 16 U.S.C. § 824 (f) (2012). Transmittal Letter at 2. Accordingly, NYPA states that, as a subdivision of a state, NYPA is exempt from Part II of the FPA and, despite its filing here to comply with NYISO tariff requirements, NYPA does not waive its statutory exemption from FERC jurisdiction. Transmittal Letter at 1, n.1.

⁵ Transmittal Letter at 2 (citing *Central Hudson Gas & Elec. Corp.*, 103 FERC ¶ 61,143, at P 30 (2003)).

⁶ Transmittal Letter at 2-3 (citing *Central Hudson Gas & Elec. Corp., et al.*, 86 FERC ¶ 61,062 at 61,212, *order on reh’g*, 88 FERC ¶ 61,138, at 61,403-04 (1999)).

⁷ *Id.*

⁸ Transmittal Letter at 3 (citing NYISO OATT, Attachment H, Section 14.2.2.2.1.

explains that its current RR of \$165,449,297 was based on 1996 transmission costs and has remained unchanged since that time.⁹

II. Description of Filing

5. NYPA proposes a revised RR of \$183,096,025 based on projected calendar year 2012 costs, an increase of \$17,646,728 over its current RR, which amounts to a 10.7 percent increase.¹⁰ NYPA states the proposed RR increase is its first such request since the commencement of NYISO operations almost thirteen years ago. NYPA explains that it has agreed to “FERC review and approval [of its transmission RR] on the same basis and subject to the same standards as the Revenue Requirements of the Investor-Owned Transmission Owners” in New York.¹¹

6. While NYPA states that it accepts Commission review pursuant to the FPA Section 205 “just and reasonable” standard, NYPA requests exemption from the Commission’s regulatory filing requirements under 18 C.F.R. § 35.13 (2012).¹² NYPA bases this request on the manner that the just and reasonable standard of review is applied to numerous California municipal utilities, which, like NYPA, recover their transmission revenue requirement through Commission-jurisdictional rates.¹³ NYPA notes that such

NYPA states that it calculates the NTAC by deducting from its Commission-approved RR a number of directly-recovered revenue streams, such as revenues from transmission services, the sale of transmission congestion contracts, and congestion rents. That portion of its RR not recovered from those separate sources is recovered as a monthly surcharge assessed to all customers taking transmission service under the NYISO OATT. NYPA states that the NTAC thus ensures that NYPA is able to recover its Commission-approved RR by allocating the cost of any unrecovered revenue requirement to transmission customers throughout the state, who benefit from the inclusion of NYPA’s transmission facilities in the NYISO control area).

⁹ Transmittal Letter at 3 (citing *Central Hudson Gas & Elec. Corp., et al.*, 86 FERC at 61,212-213).

¹⁰ *Id.* at 3.

¹¹ *Id.* at 3-4.

¹² *Id.* at 4.

¹³ *Id.* at 4 (citing *City of Vernon, Calif.*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh’g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh’g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006), *remanded on other grounds sub nom. Transmission Agency of No. Calif. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007)(“*Vernon*”); *City of Azusa, Calif.*, 138 FERC ¶ 61,049 (2012) (“*Azusa*”); *City of Pasadena, Calif.*, 137 FERC ¶ 61,045 (2011) (“*Pasadena*”); *City of Riverside, Calif.*, 136 FERC ¶ 61,137

entities have met the FPA's just and reasonable standard without being required to submit detailed cost information in compliance with the requirements that apply to regulated utilities under section 35.13.¹⁴ NYPA states that, as a non-jurisdictional entity under the FPA, it has never been required to file an annual FERC Form 1 report, and thus has never been obligated to assemble its cost data in a manner that would lend itself to meeting the section 35.13 requirements. For these reasons, NYPA requests waiver of section 35.13.

7. NYPA proposes to recover the costs of operating, maintaining, and financing its current transmission system and states that its proposed RR reflects established cost-of-service principles and is consistent with Commission policy.¹⁵ NYPA has used 2012 projected test year data and 2011 historic year data to support its proposal. NYPA's application contains cost information describing the changes in its costs for operation & maintenance expenses, administrative & general expenses, and depreciation expense related to its transmission plant. NYPA states that it uses the Commission's accepted methods of calculating the cost of debt and equity to calculate return on rate base.

8. NYPA proposes a return on equity (ROE) of 9.75 percent, a cost of debt of 4.45 percent, and a debt-to-equity ratio of 29.3/70.7 percent, resulting in an overall rate of return (ROR) of 8.19 percent.¹⁶ NYPA asserts that its proposed ROE is consistent with maintaining NYPA's financial integrity and bond ratings,¹⁷ yet lower than returns generally allowed by other regulatory bodies and the Commission. NYPA's final ROE consists of a base ROE of 9.25 percent and a 50 basis point adder reflecting NYPA's ongoing participation in NYISO.¹⁸ To support its base ROE, NYPA performed a discounted cash flow analysis consistent with Commission precedent. NYPA states that its national proxy group analysis shows an ROE range between 7.16 and 10.37 percent, with an average of high and low medians of 9.24 percent.¹⁹

(2011) ("*Riverside*").

¹⁴ Transmittal Letter at 4 (citing *Vernon* P 44 & n.55).

¹⁵ Transmittal Letter at 4-5.

¹⁶ *Id.* at 5; NYPA Filing Exh. PA-8, Direct Testimony of Richard Ansaldo (Ansaldo Testimony) at 1-2.

¹⁷ NYPA is rated AA- by Standard & Poor's and Aa2 by Moody's Investor Service. Ansaldo Testimony at 2.

¹⁸ Transmittal Letter at 5; Ansaldo Testimony at 4.

¹⁹ Transmittal Letter at 5.

9. NYPA also proposes to revise Section 14.2 of Attachment H of the OATT to include a number of ministerial subsection renumbering changes that NYISO advised NYPA to make in this filing.²⁰

10. NYPA requests that the Commission waive its notice requirements²¹ to permit the proposal to be accepted for filing and become effective as of August 1, 2012, to allow NYPA to implement recovery of its increased costs as soon as possible.²² NYPA states that the Commission has consistently granted municipal utilities a waiver of its notice requirements to make effective requested revisions to tariff rates, subject to the Commission's decisional processes.²³

11. NYPA notes that, as a municipal utility, it is not subject to Commission orders directing the payment of refunds or suspending proposed rates.²⁴ NYPA submits that, nonetheless, it will make appropriate refunds to customers for any NTAC collections based on a RR that exceeds what the Commission accepts as just and reasonable. NYPA states that the Commission has previously approved NYPA's proposed refunds related to prior NTAC over collections.²⁵

12. NYPA also states that, as a municipality organized under the laws of New York, it is exempt from the fees otherwise imposed under Part 381 of the Commission's regulations.²⁶ NYPA notes that the Commission has consistently followed this practice for municipal utilities that have filed rate proposals²⁷ and applied this exemption to

²⁰ *Id.* at 5-6.

²¹ 18 C.F.R. § 35.3 (2012).

²² Transmittal Letter at 6.

²³ *Id.* at 6 (citing *e.g.*, *Azusa*, 138 FERC ¶ 61,049 (2012); *Pasadena*, 137 FERC ¶ 61,045 (2011); *Riverside*, 136 FERC ¶ 61,137 (2011)).

²⁴ *Id.* (citing *Transmission Agency of No. Calif. v. FERC*, 495 F.3d 663, 673-74 (D.C. Cir. 2007); *Azusa*, 138 FERC ¶ 61,049, at PP 18-20 (2012); *Pasadena*, 137 FERC ¶ 61,045, at PP 18-20 (2011)).

²⁵ *Id.* (citing *Central Hudson Gas & Electric Corp., et al.*, 101 FERC ¶ 61,136 (2002) (approving NYPA's proposed NTAC refunds arising from corrections to billing determinants)).

²⁶ 18 C.F.R. § 381.108(a) (2012).

²⁷ Transmittal Letter at 6 (citing *e.g.*, *Pasadena*, 137 FERC ¶ 61,045 (2011); *Riverside*, 136 FERC ¶ 61,137 (2011); *City of Vernon*, 124 FERC ¶ 61,005 (2008)).

NYPA in a prior transmission filing.²⁸ In keeping with this precedent, NYPA requests that the Commission waive any fee associated with this filing.

III. Notice of Filing and Responsive Pleadings

13. Notice of NYPA's Filing was published in the *Federal Register*, 77 Fed. Reg. 46,428 (2012), with interventions, comments, and protests due on or before August 17, 2012. Timely motions to intervene were filed by the City of New York; the Municipal Electric Utilities of New York State (MEUA);²⁹ New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation; and Niagara Mohawk Power Corporation d/b/a National Grid. Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., and Central Hudson Gas & Electric Corporation (collectively, Con Ed, *et al.*); Multiple Intervenors;³⁰ the New York Association of Public Power (NYAPP); and NYISO filed motions to intervene with comments or protests.

14. On September 4, 2012, NYPA filed an answer in response to protests.

A. Comments and Protests

15. NYAPP requests that the Commission set NYPA's application for hearing and settlement judge proceedings, as the Commission has done for similarly situated non-jurisdictional utilities, because it believes several items of the RR are overstated.³¹ Con Ed, *et al.* requests that the Commission suspend the rates for a nominal period, allow them to go into effect subject to refund, and order NYPA to demonstrate through a supplemental filing that NYPA complied with the NYISO OATT by first making a reasonable effort to allocate its proposed rate increase among its existing customers, before seeking recovery through NTAC.³² Con Ed, *et al.* argues that NYPA is obligated to allocate its proposed rate increase through non-NTAC sources of revenue, including "Monthly Net Revenues from Modified Wheeling Agreements, Facility Agreements and Third Party TWAs [i.e., third Party Wheeling Agreements], and Deliveries to directly connected Transmission Customers."³³ Con Ed, *et al.* assert that only after the amount of

²⁸ *Id.* (citing *New York Power Authority*, 82 FERC ¶ 61,078, *reh'g denied*, 83 FERC ¶ 61,137 (1998)).

²⁹ MEUA is an association of 40 municipal corporations which operate municipal electric utilities in New York. MEUA members are customers of NYPA.

³⁰ Multiple Intervenors is an unincorporated association of over 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

³¹ NYAPP Comments at 1-2.

³² Con Ed, *et al.*, Comments at 2-3.

the rate increase cannot be collected from its customers that NYPA should seek collection from NTAC. Multiple Intervenors request that the Commission establish a process that will allow parties the opportunity to probe the factors causing the requested NTAC increase.³⁴

16. NYAPP asserts that NYPA's proposed ROR is overstated and that the proposed capital structure of 29.32 percent debt and 70.68 percent equity should, instead, be replaced by an imputed capital structure of 50 percent equity and 50 percent debt.³⁵ NYAPP asserts NYPA is a "special purpose government entity" and draws a comparison to Michigan Electric Transmission Company, LLC, an independent transmission company for which the Commission approved the use of a 50/50 hypothetical capital structure.³⁶ NYAPP states that, in the *Vernon* case, the Commission approved a hypothetical capital structure based on the capital structure (and ROE) of the neighboring investor-owned utility, which was 48.4 percent debt and 51.6 percent equity.³⁷ Finally, NYAPP asserts that if the Commission were to impute a 50/50 capital structure, the ROR becomes 7.1 percent and the RR is reduced to \$175.5 million. Con Ed, *et al.* also question NYPA's calculation and justification for its proposed debt/equity ratio.³⁸

17. In addition, NYAPP states that NYPA has treated its Marcy-South lease as a capital lease, which would earn a return of 8.19 percent under NYPA's proposal.³⁹ NYAPP argues that NYPA bears the burden of demonstrating that the lease is, in fact, a capital lease, and not merely an operating lease which, in contrast, would not generate a return. NYAPP asserts that NYPA's application of an 8.19 percent ROR to its \$2,178,736 Marcy-South lease annual amortization expense contributes \$4,550,180 to its RR.

18. Further, NYAPP asserts that NYPA does not consistently use the allocation of headquarters amounts in deriving transmission administrative and general expenses and appears to use total amounts in some calculations.⁴⁰ NYAPP argues that the use of totals

³³ Con Ed, *et al.*, (citing NYISO's OATT, Attachment H, p. 66. Con Ed, *et al.* Comments at 3).

³⁴ Multiple Intervenors Comments at 4.

³⁵ NYAPP Comments at 3-5.

³⁶ *Id.* at 3-4 (citing *Michigan Electric Transmission Company, LLC*, 105 FERC ¶ 61,214, at P 21 (2003)).

³⁷ *Id.* at 4 (citing *City of Vernon*, 93 FERC ¶ 61,103, at 61,286 (2000)).

³⁸ Con Ed, *et al.* Comments at 4.

³⁹ NYAPP Comments at 5-7.

amounts may include costs that should not be directly allocated to transmission, such as non-transmission components of NYPA's various plant facilities and therefore, may also be overstated.

19. NYAPP and Multiple Intervenors note that NYPA has suggested that it will make a series of RR increases, in addition to the instant filing.⁴¹ Multiple Intervenors assert that the procedures established here to review the application are likely to govern future, similar filings related to increases in the NTAC. NYAPP argues that because NYPA does not currently follow specific guidelines for formula rate protocols, nor does it make an annual FERC Form 1 filing, that NYPA should look to the formula rate protocols of the Midwest ISO and the Midwest ISO transmission owners to establish its formula rate to make annual adjustments to the RR component of the NTAC.⁴²

20. NYISO takes no position on the merits of NYPA's revenue requirement filing. However, NYISO states that it appreciates NYPA's inclusion in its filing of several ministerial renumbering revisions to Attachment H, Section 14.2.2 of the NYISO OATT. NYISO explains that these ministerial section numbering revisions correct inadvertent errors introduced when NYISO transitioned to the eTariff system.⁴³

B. Answer

21. NYPA asserts that it has no duty to first maximize its revenue from its existing agreements with its contract customers or to make any supplemental filings before recovering its costs through NTAC.⁴⁴ NYPA asks the Commission to reject the claim that NYPA should allocate transmission costs to power customers served under grandfathered agreements before collecting costs through NTAC because there is no Commission precedent on this issue and, similarly, no support from the NYISO OATT. NYPA states that the NYISO OATT only defines the NTAC and does not instruct NYPA on how to perform its cost recovery function. NYPA states that the NTAC formula requires a direct allocation to a specific NYPA customer segment, which NYPA will carry out, but that the formula does not require direct allocation to any other customer segment.

⁴⁰ *Id.* at 7-10.

⁴¹ *Id.* at 10; Multiple Intervenors Comments at 4-5.

⁴² *Id.* (citing *Midwest Independent System Operator, Inc.* 131 FERC ¶ 61,127 (2010)).

⁴³ NYISO Comments at 2-3.

⁴⁴ NYPA Answer at 10-12.

22. NYPA contends that NYAPP provides no reasonable basis to support an imputed capital structure of 50 percent debt and 50 percent equity, rather than using NYPA's proposed 29.32 percent debt to 70.68 percent equity capital structure that is based on its actual system-wide capital structure.⁴⁵ NYPA asserts that NYAPP's contention is contrary to Commission policy, which has consistently held that a company's actual, system-wide capital structure is preferable to an imputed one unless there is an "overriding reason not to do so." Thus, NYPA argues that adopting a hypothetical structure would artificially raise debt and lower equity. NYPA explains that its AA-bond rating carries a low-cost debt rate of 4.45 percent, due to its actual, system-wide capital structure. Further, NYPA states that NYAPP mischaracterizes NYPA as an "independent transmission company." NYPA states that it is a state entity that owns and operates transmission and generation assets in the manner of a traditional utility and that it has actual figures to support its capital structure. NYPA states that NYAPP's arguments to apply a hypothetical capital structure should be rejected.

23. NYPA rejects NYAPP's contention that the Marcy-South leases are not capital leases.⁴⁶ NYPA attaches additional documentation, in the form of the relevant facilities agreements and an opinion of an independent utility consultant, that it believes demonstrates that the Marcy-South leases are appropriately classified as capital leases, justifying a return on capital and not merely recovery of the annual amortization expense.

24. NYPA argues that NYAPP's claims about alleged "inconsistencies" in its cost support are trivial and should be rejected.⁴⁷ NYPA states that the headquarters and total amounts for Account Nos. 922 (Administrative Expense Transferred) and 931 (Rents) are the same because there are no facility-specific allocations for these accounts. NYPA offers explanations for other discrepancies identified by NYAPP. NYPA asserts that any protested discrepancies do not undermine the soundness of its cost support and further adjustments will delay the Commission's approval of its application.

25. NYPA disagrees with Multiple Intervenors that additional hearing or settlement procedures are needed. NYPA states that Multiple Intervenors raised no particular criticisms of NYPA's cost data or the overall magnitude of the proposal.⁴⁸

⁴⁵ *Id.* at 3-4 (citing *Virginia Elec. and Power Co.*, 123 FERC ¶ 61,098, at P 73 (2008) ("The Commission has a strong preference for using the actual capital structure of the company in developing its rate of return, unless there is an overriding reason not to do so.")).

⁴⁶ *Id.* at 6-8.

⁴⁷ *Id.* at 8-10.

⁴⁸ *Id.* at 1, n.2.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴⁹ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁵⁰ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NYPA's answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review

28. The Commission has addressed the standard of review to be applied to petitions involving RRs filed by non-jurisdictional entities in the California Independent System Operator Corporation (CAISO) in an opinion reviewing the RR filed by the City of

Vernon, California (Vernon).⁵¹ In Opinion No. 479, the Commission recognized that, as a municipally-owned utility, Vernon was not subject to its section 205 jurisdiction. However, the Commission noted that because Vernon voluntarily submitted its RR as a component of CAISO's jurisdictional rate, Vernon's RR is "subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate."⁵² The Commission explained that, in *Pacific Gas & Elec. Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission has statutory authority to review Vernon's RR "to the extent necessary to ensure that the CAISO rates are just and reasonable."⁵³ Subsequently, the court upheld the Commission's decision that subjecting the RRs of non-jurisdictional utilities (like Vernon) to a full section 205 review is "the only way to ensure that CAISO's rate is just and reasonable."⁵⁴

⁴⁹ 18 C.F.R. § 385.214 (2012).

⁵⁰ 18 C.F.R. § 385.213(a)(2) (2012).

⁵¹ See *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

⁵² *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092 at P 44.

⁵³ *Id.* P 43 (quoting *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1117 (D.C. Cir. 2002)).

⁵⁴ *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 672 (D.C.

29. In *TANC*, the court ruled that the Commission had no authority to order Vernon to pay refunds under section 205 of the FPA. The court held that the structure of the FPA clearly reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority under section 205 of the FPA over wholesale electric energy sales.⁵⁵ The court reasoned that FPA section 201(f) exempts from Part II of the FPA "any political subdivision of a state."⁵⁶

30. These principles also apply to NYPA in this proceeding. Therefore, while NYPA is not within the Commission's jurisdiction under FPA section 205, we find that it is appropriate to apply the just and reasonable standard of section 205 to NYPA's proposed RR. To determine the justness and reasonableness of NYPA's proposed RR, we find that, as discussed below, hearing and settlement judge procedures are appropriate.

31. Con Ed, *et al.* requests that the Commission suspend NYPA's proposed rates for a nominal period and allow them to go into effect subject to refund. Consistent with the court's finding in *TANC*, NYPA is not subject to Commission-imposed rate suspension and refund obligations under section 205 of the FPA. However, we note that NYPA has agreed to refund any payment it receives from NYISO for NYPA's revised rates in excess of those ultimately approved by the Commission, consistent with its history of complying with its previous commitments.

C. Hearing and Settlement Judge Procedures

32. NYPA's proposed revised RR raises issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Con Ed, *et al.* request that the Commission require NYPA to make a supplemental filing demonstrating that its allocation of the proposed rate increase amongst its existing customers is reasonable and comports with the NTAC provisions of the NYISO OATT. We believe that the substance of Con Ed, *et al.*'s request can be addressed in the hearing and settlement judge procedures discussed below. Therefore, we deny Con Ed, *et al.*'s request.

33. Our preliminary analysis indicates that NYPA's proposed revised RR has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept NYPA's proposed revised RR for filing, to be effective as of August 1, 2012, as requested, and set all issues, except those decided below, for hearing and settlement judge procedures.

Cir. 2007) (*TANC*).

⁵⁵ *Id.* at 673-74.

⁵⁶ *Id.* at 674.

34. 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 the 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.⁵⁷ 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.⁵⁸ 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.

D. Other Issues

35. We accept NYPA's proposed revisions to section 14.2 of Attachment H of the OATT to include a number of ministerial subsection renumbering changes. We agree with NYPA and NYISO that the revisions are consistent with eTariff requirements.

36. Further, we grant NYPA's requested waiver of section 35.13 of the Commission's regulations. Because NYPA is not subject to section 205 of the FPA, it is not subject to the Commission's regulatory filing requirements. Nonetheless, in order to enable the Commission to conduct a section 205 evaluation of the justness and reasonableness of NYPA's RR as discussed above, there must be a sufficient record developed in order to permit the Commission to make such an evaluation.

37. Finally, we will grant NYPA's requested exemption from the filing fee. Section 381.108 of the Commission's regulations provides that municipalities are exempt from the filing fees required by Part 381 and may file a petition for exemption in lieu of the fee.⁵⁹ NYPA explains that it is a municipal utility organized under the laws of New York. Therefore, we find that NYPA is exempt from the filing fee required for a rate filing and grant its petition.

The Commission orders:

⁵⁷ 18 C.F.R. § 385.603 (2012).

⁵⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

⁵⁹ 18 C.F.R. § 381.108 (2012).

(A) NYPA's proposed RR, as incorporated in the filed revised tariff provisions, is hereby conditionally accepted for filing, effective August 1, 2012, as discussed in the body of this order.

(B) NYPA's petition for exemption from the filing fee is hereby granted, as discussed in the body of this order.

(C) NYPA's request for waiver of section 35.13 of the Commission's filing regulations is hereby granted, as discussed in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning NYPA's RR, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), 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.

(F) 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.

(G) 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.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.