148 FERC ¶ 61,176
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 Nos. EL14-29-000

v.

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

Municipal Electric Utilities Association of New York — EL13-16-000 (Consolidated)

v.

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

New York Association of Public Power

v. — EL12-101-000 (Consolidated)

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

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued September 8, 2014)

1. On February 6, 2014, 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 (OATT) is unjust and unreasonable, and should be replaced with a 9.36 percent ROE (NYAPP February 2014 Complaint). In this order, we set the NYAPP February 2014 Complaint for hearing and settlement judge procedures, and consolidate the NYAPP February 2014 Complaint with the ongoing hearing and settlement judge procedures established in Docket Nos. EL12-101-000 and EL13-16-000. Further, we set a refund effective date of February 6, 2014, as requested.

I. Background

2. Niagara Mohawk recovers its transmission revenue requirements through the Niagara Mohawk Wholesale Transmission Service Charge (Transmission Charge) included in the NYISO OATT. The Transmission Charge is calculated using a formula rate contained in the NYISO OATT. 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 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] On September 11, 2012, in Docket No. EL12-101-000, NYAPP filed a complaint pursuant to FPA section 206[3] against Niagara Mohawk and NYISO alleging that the current 11.5 percent ROE is unjust and unreasonable and should be replaced with a just and reasonable ROE of 9.49 percent (NYAPP September 2012 Complaint).

3. On November 2, 2012, in Docket No. EL13-16-000, the Municipal Electric Utility Association of New York (MEUA) filed a complaint pursuant to FPA section 206[4] against Niagara Mohawk and the NYISO alleging that Niagara Mohawk's Transmission Charge is unjust and unreasonable and should be replaced with a just and reasonable Transmission Charge (MEUA Complaint) that includes a ROE of 9.25 percent instead of the current 11.5 percent. Concurrently with this order, the Commission is issuing orders setting the complaints in Docket Nos. EL12-101-000 and EL13-16-000 for hearing and

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[1] 16 U.S.C. § 824e (2012).

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

[3] 16 U.S.C. § 824e (2012).

[4] 16 U.S.C. § 824e (2012).

settlement judge procedures, consolidating the complaints in those dockets, and establishing a refund effective date of November 2, 2012.[5]

II. Complaint

4. NYAPP asserts that, due to significantly changed economic circumstances since the ROE was established, 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 8.10 percent and 11.90 percent with a median of 8.86 percent. NYAPP contends that the just and reasonable ROE is 9.36 percent, inclusive of the 50 basis point adder for membership in an ISO or RTO and based on the 8.86 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 21 companies.[6] NYAPP states that the analysis excludes eight companies due to their ongoing or recently completed merger or acquisition activity.

6. NYAPP states that the resulting overall weighted average cost of capital (WACC), using its recommended 9.36 percent ROE and the formula rate capitalization percentages and rates, is 6.60 percent. NYAPP states that the impact of this new WACC on the before-tax investment return is a reduction of $22,498,653.

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[5] *N.Y. Ass'n of Pub. Power v. Niagara Mohawk Power Corp. and N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,177 (2014); *Mun. Elec. Utility Ass'n of N.Y. v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,175 (2014).

[6] 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). NYAPP states that Dr. Lesser relaxed the $1 billion threshold to account for the considerable decrease in Niagara Mohawk's revenues in 2012, which resulted in the inclusion of two additional utilities and yielded a proxy group of 21 utilities.

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.

8. NYAPP asserts that a new 15-month refund period is warranted because utility risks and capital market conditions have changed since the filing of the NYAPP September 2012 Complaint. NYAPP states that its complaint is consistent with Commission precedent permitting multiple complaints where new facts are presented and a new refund effective date is sought.[7]

III. Notice and Responsive Pleadings

9. Notice of the NYAPP February 2014 Complaint was published in the *Federal Register*, 79 Fed. Reg. 9,197 (2014), with protests and interventions due on or before February 26, 2014. On February 11, 2014, a motion to intervene and comments in support of the complaint were filed by Allegheny Electric Cooperative, Inc.

10. On February 26, 2014, Niagara Mohawk filed an answer to the complaint. On March 13, 2014, NYAPP submitted an answer to Niagara Mohawk's answer.

11. On March 20, 2014, NYISO filed a motion for dismissal as a party to the proceeding.

A. Niagara Mohawk's Answer

12. In its answer, Niagara Mohawk argues that the NYAPP February 2014 Complaint improperly attempts to circumvent the FPA's maximum 15-month refund period by requesting that the Commission grant a second refund period covering virtually the same issues and facts that were the subjects of NYAPP's September 2012 Complaint. Niagara Mohawk argues that the NYAPP February 2014 Complaint does not fall within the FPA 206 statutory exception to the 15-month refund period for dilatory conduct, and there is no categorical exception for all ROE complaints. Furthermore, Niagara Mohawk argues that precedent cited by NYAPP is distinguished from this instance because in those cases the Commission allowed a second complaint given the significant time gap between complaints and to avoid delay from reopening an already closed record.[8]

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[7] Complaint at 14 (citing *Southern Co. Servs., Inc.*, 83 FERC ¶ 61,079, at 61,385-86 (1998) (*Southern*)).

[8] Niagara Mohawk Answer at 13-14 (citing *Southern*, 83 FERC ¶ 61,079 at 61,386; *Consumer Advocate Div. of the Pub. Serv. Commission of W.V. v. Allegheny*

13. Niagara Mohawk asserts that NYAPP repeats factual errors that it made in the NYAPP September 2012 Complaint, such as exaggerating the impact of a change in ROE on ratepayers. Niagara Mohawk also contends that the current ROE is within Dr. Lesser's zone of reasonableness, and the Commission is without statutory authority to change an existing ROE unless the existing ROE is entirely outside the zone of reasonableness.[9]

14. Niagara Mohawk states that Dr. Lesser's analysis is flawed in a number of ways, including the application of the merger criterion in selection of the proxy group, the methodology used to calculate the dividend yield component of the DCF model, calculation of growth rates, its evaluation of low-end outliers in selection of the proxy group, evaluation of the ROE range based on averages of low and high DCF results, and reliance on the median of the range of reasonableness to set the ROE. Niagara Mohawk also argues that alternative methods of calculating ROEs do not corroborate NYAPP's DCF analysis. If the Commission does not reject the instant complaint, Niagara Mohawk requests that the Commission institute a trial-type hearing.

B. NYAPP's March 13, 2014 Answer to Niagara Mohawk's Answer

15. In its answer, NYAPP asserts that the Commission has made clear that concerns that multiple ROE complaints are an end run around section 206 are unfounded, and has explained that an ROE found to be reasonable in one time period may be unreasonable in another time period.[10] NYAPP argues that precedent cited by Niagara Mohawk for the proposition that identical complaints are not permitted are inapplicable to the instant case. NYAPP also argues that the statutory exception to the 15-month refund period for dilatory conduct is inapplicable because it relates to a single complaint, not multiple complaints.

16. NYAPP argues that it has demonstrated that the existing 11.5 percent ROE is unjust and unreasonable, even though it falls at the far end of the zone of reasonableness. NYAPP states that the Commission has previously rejected claims that company-specific ROEs are exempt from review under section 206 because they fall within the zone of reasonableness.[11] Furthermore, NYAPP contends that Niagara Mohawk's alternative

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Generating Co., 67 FERC ¶ 61,288 (1994)).

[9] Niagara Mohawk Answer at 22 (citing *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,056, at 61,150 & n.6 (1985)).

[10] NYAPP March 13, 2014 Answer at 3 (citing *Southern*, 83 FERC ¶ 61,079 at 61,386; *Consumer Advocate Div. of the Pub. Serv. Comm'n of W.V. et al. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at 62,000 & n.7 (1994) (*Allegheny*)).

analyses and challenges to NYAPP's DCF methodology are contrary to Commission precedent and should be rejected.

C. NYISO's Motion for Dismissal as a Party

17. NYISO moves for its dismissal as a party to the proceeding, arguing that NYISO is neither a beneficiary of, nor responsible for establishing the level of, Niagara Mohawk's ROE. NYISO states that it simply administers the OATT in which the Niagara Mohawk Transmission Charge is described, and that it will submit through eTariff any revisions to its OATT 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.[12]

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[13] the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[14] prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept NYAPP's March 13, 2014 answer to Niagara Mohawk's answer because it has aided us in our decision-making.

20. We will grant NYISO's motion for dismissal as a party to this proceeding. We agree with NYISO that it simply administers the OATT in which the Niagara Mohawk Transmission Charge is 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.[15] In addition, NYISO's motion was not protested.

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[11] *Id*. (citing *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,038 (2008)).

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

[13] 18 C.F.R. § 385.214 (2014).

[14] 18 C.F.R. § 385.213(a)(2) (2014).

[15] 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 OATT, and any change in the stated ROE would require a tariff revision filing by NYISO. NYAPP February 2014 Complaint at 4-5.

B. Substantive Matters

21. We find that the NYAPP February 2014 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 NYAPP February 2014 Complaint for investigation and a trial-type evidentiary hearing and settlement judge procedures under section 206 of the FPA.

22. The Commission recently issued Opinion No. 531,[16] 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.

23. Because of the existence of common issues of law and fact, we will consolidate the proceeding in Docket No. EL14-29-000 with the consolidated proceedings in Docket No. EL12-101-000 and Docket No. EL13-16-000.[17] 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. Consistent with our general policy of providing maximum protection to customers,[18] we will set the refund effective date at the earliest date possible in this docket, i.e., February 6, 2014. Concurrently with the instant order, the Commission in the other two consolidated proceedings, Docket Nos. EL12-101-000 and EL13-16-000, is establishing a refund effective date of November 2, 2012.[19]

24. 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

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

[17] *See Missouri River Energy Services*, 124 FERC ¶ 61,309, at P 39 (2008).

[18] *See, e.g.*, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

[19] *N.Y. Ass'n of Pub. Power v. Niagara Mohawk Power Corp.n and the N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,177 (2014); *Mun. Elec. Utility Ass'n of N.Y. v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,175 (2014).

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]

25. While Niagara Mohawk raises arguments as to the propriety of allowing the complaint, the Commission has previously allowed successive complaints when presented with a new analysis.[21] Contrary to Niagara Mohawk's assertions, the Commission has not made a finding that successive complaints are only permitted when there is a significant time gap between complaints or when the record on the prior complaint has already closed. In this case, Complainants have submitted a new DCF analysis with new, more current data in support of a proposed lower ROE, and accordingly we will set the complaint for hearing and settlement judge procedures, consistent with our precedent.

26. 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.[22] 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.[23] The settlement judge

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[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] *See Allegheny*, 67 FERC ¶ 61,288 at 62,000, *order on reh'g*, 68 FERC ¶ 61,207 (1994) (*Allegheny II*); *Southern*, 68 FERC ¶ 61,231, *order on reh'g*, 83 FERC ¶ 61,079 (1998) (*Southern II*); *see also San Diego Gas & Elec. Co. v. Pub. Serv. Co. of New Mexico*, 85 FERC ¶ 61,414 (1998), *reh'g denied*, 86 FERC ¶ 61,253 (1999), *reh'g denied*, 65 FERC ¶ 61,073 (2001). *But see, EPIC Merchant Energy NJ/PA, L.P. v. PJM Interconnection, LLC*, 131 FERC ¶ 61,130 (2010), *reh'g denied*, 136 FERC ¶ 61,041 (2011) (rejecting the "pancaked" complaint, by distinguishing it from the three other proceedings in this string citation).

[22] 18 C.F.R. § 385.603 (2014).

[23] 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

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.

27. 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 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. We estimate that we would be able to issue our decision within approximately eight months of the filing of briefs opposing exceptions, or, if the case were to go to hearing immediately, we would be able to issue our decision by July 31, 2016.

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proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

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 (C) and (D) below.

(B) Docket No. EL14-29-000 is hereby consolidated with Docket Nos. EL13-16-000 and EL12-101-000 for purposes of hearing and decision.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), 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.

(D) 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.

(E) 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.

(F) The refund effective date in Docket No. EL14-29-000, established pursuant to section 206(b) of the FPA, is February 6, 2014.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.