148 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Municipal Electric Utilities Association of New York Docket Nos. EL13-16-000

v.

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

New York Association of Public Power

EL12-101-000
v. (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 November 2, 2012, pursuant to section 206 of the Federal Power Act (FPA),[1] the Municipal Electric Utility Association of New York (MEUA)[2] 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 Niagara Mohawk's Wholesale Transmission Service Charge (Transmission Charge) in the

[1] 16 U.S.C. § 824e (2012).

[2] MEUA is an unincorporated association of 40 municipal electric utilities in New York.

NYISO Open Access Transmission Tariff (Tariff) is unjust and unreasonable and should be replaced with a just and reasonable Transmission Charge (Complaint). In this order, we set the Complaint for hearing and settlement judge procedures and consolidate the Complaint with the ongoing hearing and settlement judge procedures established in Docket No. EL12-101-000. Further, we set a refund effective date of November 2, 2012.

I. Background

2. Niagara Mohawk recovers its transmission revenue requirements through the Transmission Charge, which 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 return on equity (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 which was accepted by the Commission on June 22, 2009.[3]

3. On September 11, 2012, in Docket No. EL12-101-000, the New York Association of Public Power (NYAPP) filed a complaint pursuant to FPA section 206[4] 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 Complaint). On February 6, 2014, in Docket No. EL14-29-000, NYAPP filed another complaint 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 9.36 percent. The Commission is issuing orders setting the complaints in Docket Nos. EL12-101-000 and EL14-29-000 for hearing and settlement judge procedures concurrently with this order.[5]

II. Complaint

4. MEUA asserts that it provides sufficient evidence for the Commission to find that: (1) Niagara Mohawk's existing Transmission Charge is unjust and unreasonable, (2) that MEUA's proposed Transmission Charge is just and reasonable, and (3) Niagara Mohawk was not authorized to recover merger-related costs. In the alternative, MEUA requests that the Commission institute an expedited hearing to investigate Niagara Mohawk's

[3] *Niagara Mohawk Power Corp.*, 127 FERC ¶ 61,289 (2009).

[4] 16 U.S.C. § 824e (2012).

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

existing Transmission Charge and establish a just and reasonable Transmission Charge. MEUA requests that the Commission direct NYISO to make any necessary changes to its Tariff to reflect the changes to Niagara Mohawk's Transmission Charge.

5. MEUA states that its witness, Mr. J. Bertram Solomon, performed a discounted cash flow (DCF) analysis, using a proxy group of companies with risk profiles comparable to Niagara Mohawk, and conforming to Commission policy and precedent. MEUA states that his DCF analysis yielded a zone of reasonableness from 6.71 percent to 10.89 percent.[6] MEUA explains that applying a Standard & Poor's corporate credit rating screen of A, A-, or BBB+, and a Moody's Investor Services, Inc. long-term issuer or senior unsecured rating screen of A2, A3, or Baa1, results in a proxy group that contains 10 companies, with a median ROE of 9.40 percent. MEUA argues that additional factors, described below, warrant a further reduction from the median.

6. MEUA argues that Niagara Mohawk's formula rate makes transmission service cost recovery sufficiently less risky to warrant an additional ROE reduction of 30 basis points from the median.[7] MEUA also argues that Niagara Mohawk should only apply the transmission organization incentive to facilities that Niagara Mohawk has transferred to NYISO's operational control, as listed in Appendix A-1 to the NYISO-Transmission Owners' Agreement (NYISO-TO Agreement) which would result in awarding Niagara Mohawk approximately 15 basis points instead of 50 basis points.[8] MEUA asserts that this results in a just and reasonable ROE of 9.25 percent. MEUA states that this ROE would reduce Niagara Mohawk's 2011 revenue requirement by approximately $21.4 million and that there would be similar reductions in future annual updates.[9]

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[6] MEUA states that Mr. Solomon selected a national group of proxy companies using the following criteria: (1) electric utilities that are covered by Value Line Investment Survey; (2) electric utilities that have a Standard & Poor's (S&P) corporate credit rating of A, A-, or BBB+ and a Moody's Investor Service, Inc. (Moody's) long-term issuer or senior unsecured rating of A2, A3, or Baa1; (3) electric utilities having a Thomson Financial/IBES published analysts' consensus 5-year earnings per share growth rate; (4) electric utilities that are not currently engaged in major merger or acquisition activity and were not so engaged during the six-month dividend yield analysis period; (5) electric utilities that paid dividends throughout the six-month dividend yield analysis period, did not cut dividends during the prior year, and are expected to continue to pay dividends; and (6) electric utilities that are covered by at least two generally recognized utility industry analysts. Complaint at 8-10.

[7] *Id*. at 10-12.

[8] *Id*. at 13-14.

7. MEUA also argues that the transmission labor allocator in Niagara Mohawk's formula rate should be reduced from a fixed 13 percent to 10.68 percent, which reflects Niagara Mohawk's own costs from its 2011 FERC Form No. 1.[10] MEUA states that this would reduce Niagara Mohawk's historical transmission revenue requirement by approximately $9.9 million.[11]

8. MEUA further argues that Niagara Mohawk should not be permitted to include in the Accumulated Deferred Income Tax (ADIT) Account 190 an "Allowance for Uncollectable Accounts" because it is related solely to retail service and not to wholesale transmission service. MEUA's witness Mr. Robert C. Smith describes these uncollectable accounts as bad debt expense, meaning that "customers have a debt to the Company for utility service but default on paying for the service, making the collection of revenues impossible."[12] MEUA states that removing approximately $63.6 million in uncollectable accounts allowance from Account 190 will save customers $2.06 million based on Niagara Mohawk's 2011 historical transmission revenue requirement.[13]

9. MEUA also contends that Niagara Mohawk has inappropriately collected costs related to the 2007 merger with KeySpan Corporation (KeySpan) in violation of (1) the Commission's October 26, 2006 order approving that transaction,[14] and (2) the requirement that applicants seeking to recover any merger-related costs must request Commission authorization through an FPA section 205 filing.[15] MEUA asserts that, in their request for approval for KeySpan to become an indirect, wholly-owned subsidiary of National Grid, National Grid and KeySpan committed to hold wholesale customers harmless from any rate increases resulting from costs related to the merger for a period of five years, to the extent that such costs exceeded merger-related savings.[16] MEUA

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[9] *Id*. at 18.

[10] *Id*. at 14.

[11] *Id*. at 19.

[12] *Id*. at 15 (citing Smith Testimony at 12).

[13] *Id*. at 19.

[14] *Id*. at 16 (citing *National Grid plc*, 117 FERC ¶ 61,080, at P 54 (2006) (*National Grid*)).

[15] *Id*. (citing *National Grid*, 117 FERC ¶ 61,080 at P 54; *E.ON U.S. LLC*, 133 FERC ¶ 61,083 (2010); *Puget Energy, Inc.*, 123 FERC ¶ 61,050, at P 27 (2008)).

[16] *Id*. (citing Application for Authorizations Under Section 203 of the Federal

explains that the Commission order approving the merger accepted all commitments the companies made, including the "hold harmless" requirement, but that Niagara Mohawk has recovered more than $2 million in merger-related costs from wholesale transmission customers beginning on January 1, 2009, and MEUA's research has not discovered an FPA section 205 filing to recover such costs.

III. Notice and Responsive Pleadings

10. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 67,642 (2012), with protests and interventions due on or before November 23, 2012. Motions to intervene were filed by NYAPP and Allegheny Electric Cooperative, Inc.

11. On November 9, 2012, the Commission issued a notice extending the comment date up to and including December 7, 2012. On December 7, 2012, Niagara Mohawk filed an answer to the Complaint. On December 21, 2012, MEUA submitted an answer to Niagara Mohawk's answer. On December 26, 2012, MEUA submitted an errata to its December 21, 2012 answer.[17]

12. On December 7, 2012, NYISO filed a motion for dismissal as a party to the proceeding. On December 28, 2012, MEUA submitted an answer to NYISO's motion.

13. On May 23, 2013, MEUA filed a motion to take official notice of the United States Court of Appeals for the District of Columbia Circuit's May 10, 2013 decision regarding use of the median value of the proxy group when calculating return on equity.[18]

A. Niagara Mohawk's Answer

14. In its answer, Niagara Mohawk requests that the Commission summarily dismiss the Complaint as procedurally deficient because MEUA fails to satisfy its two-part burden to (1) demonstrate that the existing rate is unjust and unreasonable, and (2) demonstrate the justness and reasonableness of the replacement rate. Niagara Mohawk contends that MEUA does not attempt to make the second showing because it mistakenly interprets FPA section 206 as imposing on the Commission, rather than on the complainant, the burden of determining the alternative just and reasonable rate.[19]

Power Act of National Grid plc and KeySpan Corp., Docket Nos. EC06-125-000 and EL06-85-000 (May 25, 2006)).

[17] In the errata, MEUA corrects a footnoting error and two sentences in its answer.

[18] MEUA May 23, 2013 Motion at 1 (citing *S. Cal. Edison Co. v. FERC*, No. 11-1471 (D.C. Cir. May 10, 2013)).

[19] Niagara Mohawk Answer at 6-8.

15. Niagara Mohawk contends that the Complaint fails to show that the approved formula rate is unjust and unreasonable and argues that Mr. Solomon's DCF analysis is flawed. Specifically, Niagara Mohawk argues that Mr. Solomon's analysis improperly excludes Northeast Utilities, a company whose merger was already completed at the time the Complaint was filed and for which there is no evidence that its data was distorted by merger activity.[20] Niagara Mohawk also argues that the bond rating test applied by Mr. Solomon, which requires both an S&P and Moody's credit rating within one notch of the company whose ROE is being reviewed, is contrary to the Commission's approved methodology and results in excluding nearly half of the utility companies in his proxy group.[21] In addition, Niagara Mohawk contends that Mr. Solomon incorrectly calculates the minimum threshold ROE value by simply adding 100 basis points to the average yield on the public bonds issued by the utility in question.[22] Niagara Mohawk further contends that Mr. Solomon's use of the median to identify his proposed ROE is incorrect in this case, and that a "risk adjustment" for Niagara's use of a formula rate would be contrary to Commission precedent.[23] Finally, Niagara Mohawk argues that the 50 basis point ROE adder for ISO participation should apply to all Niagara Mohawk facilities for which service is available under the NYISO Tariff, not only those facilities listed in Appendix A-1 to the NYISO-TO Agreement.[24]

16. Niagara Mohawk also describes a number of alternative methods for estimating ROEs and argues that they produce ROE estimates clustered around the 11-12 percent range.[25] Niagara Mohawk adds that adoption of MEUA's proposed ROE would be contrary to Commission policies because it would create a disincentive for inventors to support the expansion of the transmission grid.[26]

17. With respect to the other components of Niagara Mohawk's formula rates, Niagara Mohawk argues that MEUA incorrectly calculates the labor ratio for allocation of certain administrative costs, erroneously seeks to exclude bad debt deferred tax effects from the formula rate, and mischaracterizes Niagara Mohawk's process for including merger-related costs in the formula rate and the magnitude of those costs.[27] Niagara Mohawk

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[20] *Id*. at 12.

[21] *Id*. at 13-14.

[22] *Id*. at 14-15.

[23] *Id*. at 15-18.

[24] *Id*. at 31-37.

[25] *Id*. at 19-30.

[26] *Id*. at 38-41.

states that, at the time of the KeySpan merger, the Commission generally required only an informational filing, rather than an FPA section 205 filing, when merger-related costs were included in rates, and that Niagara Mohawk satisfied this requirement by submission of its annual informational filings.[28] Niagara Mohawk adds that MEUA's challenge to its rates is untimely and may not be applied retroactively.[29]

18. In the event that the Commission dismisses neither this Complaint nor the NYAPP Complaint, Niagara Mohawk requests that the Commission consolidate the two cases because they address the same subject matter and many of the same issues.[30] Niagara Mohawk argues that the refund effective date should be set for a date after MEUA has undertaken a good faith negotiation to settle the controversy.[31]

B. MEUA's Answer to Niagara Mohawk's Answer

19. In its answer, MEUA contends that Niagara Mohawk mischaracterizes MEUA's statements regarding its FPA section 206 burden and acknowledges that it has the burden as the complainant to establish that the current rate is unjust and unreasonable and its alternative rate proposal is just and reasonable.[32] MEUA reiterates its claim that its DCF analysis shows that Niagara Mohawk's current ROE is unjust and unreasonable. MEUA argues that the exclusion of Northeast Utilities from the proxy group was appropriate because Commission precedent supports excluding electric utilities engaged in major merger or acquisition activity currently or during the six-month dividend yield analysis period.[33] MEUA also argues that Mr. Solomon's bond rating test is consistent with Commission precedent because it provides both a 17-company proxy group based on companies within one notch of the S&P corporate credit rating and an alternative 10-company proxy group based on S&P and Moody's ratings.[34] MEUA contends that

[27] *Id*. at 41-50.

[28] *Id*. at 47-48.

[29] *Id*. at 50-52.

[30] *Id*. at 56-57.

[31] *Id*. at 54-55.

[32] MEUA Answer at 5-6.

[33] *Id*. at 8-10.

[34] *Id*. at 10.

Niagara Mohawk misinterprets Commission precedent in claiming that MEUA should have excluded two low-end DCF results.[35] With respect to Mr. Solomon's use of a median value, MEUA argues that Commission precedent requires the use of the median when an ROE is derived for a single utility of average risk, like Niagara Mohawk.[36]

20. MEUA also asserts that a 30 basis point ROE reduction is warranted because Niagara Mohawk's formula rate is less risky than many other formula rates and Niagara Mohawk's business risks are lower than total company risks.[37] MEUA contends that Commission precedent provides for adjustments above and below the base ROE to accommodate increased and decreased risks.

21. MEUA further argues that the Commission should reject Niagara Mohawk's attempts to supplant the Commission's accepted DCF methodology with alternative methods.[38] MEUA also argues that the Commission should reject Niagara Mohawk's argument that the 50 basis point adder should be applied to all of its transmission assets in New York.[39] Further, MEUA asserts that its proposed ROE will not have a chilling effect on investment.[40]

22. MEUA reiterates its claim that Niagara Mohawk is also over-recovering through other components of its formula rate, including by using a fixed labor allocator ratio of 13 percent and by including bad debt expense in its ADIT Account 190.[41] MEUA argues that the fact that the labor allocator was agreed to in a settlement does not preclude MEUA from challenging whether it is just and reasonable, and Niagara Mohawk offers no evidence demonstrating that it has incurred any bad debt relative to wholesale transmission service. With respect to MEUA's request for refund of all merger-related

[35] *Id*. at 11-13.

[36] *Id*. at 13-14.

[37] *Id*. at 15-25.

[38] *Id*. at 25-28.

[39] *Id*. at 28-37.

[40] *Id*. at 37-40.

[41] *Id*. at 40-42.

costs, MEUA contends that Niagara Mohawk's informational filing to the Commission was insufficient and its claim is not time-barred because there is no time-bar where the filed rate is violated.[42] MEUA states that it does not seek retroactive relief, as Niagara Mohawk suggests, but rather a change to the formula rate that will become effective as of the refund effective date set by the Commission.[43]

C. NYISO's Motion for Dismissal as a Party

23. 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 Transmission Charge. NYISO states that it simply administers the Tariff in which the Niagara Mohawk Transmission Charge is 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.[44]

D. MEUA's Answer to NYISO's Motion

24. MEUA states that, consistent with recent Commission precedent and based on NYISO's commitment to administer any changes to its Tariff that are made necessary by this proceeding, MEUA does not oppose dismissing NYISO as a respondent so long as the Commission concludes that NYISO is not a necessary party, and dismissal will not prejudice MEUA's ability to obtain relief.

IV. Discussion

A. Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[45] the timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding.

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[42] *Id*. at 43-50.

[43] *Id*. at 42.

[44] 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)).

[45] 18 C.F.R. § 385.214 (2014).

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[46] prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept MEUA's answer because it has aided us in our decision-making.

27. We will grant NYISO's motion for dismissal as a party to this proceeding. In doing so, we note that Complainants do not object to the motion, and, we agree with NYISO that it simply administers the Tariff 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 and dismissal of NYISO as a party will not prejudice MEUA's ability to obtain relief.

B. Substantive Matters

28. 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 and settlement judge procedures under section 206 of the FPA.

29. The Commission recently issued Opinion No. 531,[47] 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.

30. Because of the existence of common issues of law and fact, we will consolidate the proceeding in Docket No. EL13-16-000 with the proceeding in Docket No. EL12-101-000.[48] For the same reason, the Commission is also concurrently consolidating the proceeding in Docket No. EL14-29-000 with Docket No. EL12-101-000 and the instant proceeding.[49] 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,[50] we will set the

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[46] 18 C.F.R. § 385.213(a)(2) (2014).

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

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

[49] *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).

refund effective date at the earliest date possible in this docket, i.e., November 2, 2012. We decline to set the refund effective date for a date after MEUA has made efforts to negotiate, as requested by Niagara Mohawk. The Commission's regulations do not require a complainant to engage in dispute resolution prior to filing a complaint, but rather only require the complainant to state whether informal dispute resolution procedures were used or could successfully resolve the complaint.[51] MEUA explains that, given that its ROE is currently before the Commission in another proceeding, MEUA did not believe that Niagara Mohawk would be amenable to dispute resolution processes.[52]

31. Because the instant complaint and the complaint in Docket No. EL12-101-000 were filed within two months of each other and challenge the same rate, concurrently with this order the Commission finds in the order in Docket No. EL12-101-000 that establishing the same refund effective date in both dockets would best synchronize the two proceedings.[53] Therefore, in Docket No. EL12-101-000, the Commission concurrently with this order is exercising its discretion to set the refund effective date in that proceeding coincident with the refund effective date in the instant proceeding, i.e., November 2, 2012.[54] In the third consolidated proceeding, Docket No. EL14-29-000, the Commission is establishing a refund effective date of February 6, 2014.[55]

32. 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

[50] *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).

[51] 18 C.F.R. § 385.206(b)(9) (2014).

[52] MEUA Answer at 20.

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

[54] *Id.* P 27 (citing *Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co., et al.*, 50 FERC ¶ 61,193, at 61,629 (1990)).

[55] *N.Y. Ass'n of Pub. Power v. Niagara Mohawk Power Corp. and the N.Y. Indep. Sys. Operator, Inc*., 149 FERC ¶ 61,176 (2014).

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.[56]

33. 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.[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.

34. 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.

35. We decline to dismiss the Complaint as procedurally deficient. Niagara Mohawk argues that the Complaint should be summarily dismissed because, it asserts, MEUA

[56] *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.

[57] 18 C.F.R. § 385.603 (2014).

[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 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).

mistakenly interprets FPA section 206 as imposing on the Commission, rather than on the complainant, the burden of determining the alternative just and reasonable rate.[59] But MEUA in its answer acknowledges its burden as the complainant to make a demonstration both that the existing rates are unjust and unreasonable and its proposed replacement rate is just and reasonable.[60]

36. Furthermore, the Commission may grant summary disposition only where "there is no genuine issue of fact material to the decision of a proceeding."[61] Where there are significant material facts in dispute, "summary disposition is not appropriate."[62] As discussed above, genuine issues of material fact exist regarding Niagara Mohawk's Transmission Charge that cannot be resolved based upon the record before us. Accordingly, we find that summary disposition is not warranted.

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 the justness and reasonableness of Niagara Mohawk's Transmission Charge. 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 Nos. EL13-16-000 and EL12-101-000 are hereby consolidated 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 (2014), the Chief Administrative Law Judge is hereby directed to ~~appoint a settlement judge i~~n this proceeding within fifteen (15) days of the date of this

[59] Niagara Mohawk Answer at 6-8.

[60] MEUA Answer at 5-6.

[61] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs., et al.*, 135 FERC ¶ 61,177, at P 53 (2011) (citing 18 C.F.R. § 385.217(b) (2012); *Iroquois Gas Transmission Sys., L.P.*, 68 FERC ¶ 61,048, at 61,164 (1994) ("under Rule 217 of the Commission's Rules of Practice and Procedure summary disposition may be appropriate only if there are no genuine issues of material fact in dispute")).

[62] *Id*. (citing *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,047, at P 44 (2009); *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC ¶ 61,344, at P 69 (2003) ("if an issue of material fact is in dispute, then summary disposition is not appropriate")).

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. EL13-16-000, established pursuant to section 206(b) of the FPA, is November 2, 2012.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.