

November 2, 2011

The Honorable Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Re: Niagara Mohawk Power Corporation, d/b/a National Grid  
Docket No. ER12-\_\_\_\_\_  
First Revised Service Agreement No. 1742  
Under New York Independent System Operator, Inc.,  
FERC Electric Tariff, Original Volume No. 1**

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act (“FPA”) (16 U.S.C. § 824d), Sections 35.7, 35.9, and 35.10 of the Commission’s regulations (18 C.F.R. §§ 35.7, 35.9, 35.10 (2011)), and Order No. 714 (*Electronic Tariff Filings*, FERC Stats. & Regs. ¶ 31,276 (2008)), National Grid USA (“National Grid”), on behalf of itself and its affiliate Niagara Mohawk Power Corporation d/b/a National Grid, hereby submits for Commission acceptance a First Revised Service Agreement No. 1742 (“SA 1742”) under the New York Independent System Operator, Inc.’s (“NYISO”) Open Access Transmission Tariff (“OATT”).<sup>1</sup>

SA 1742, formerly designated Niagara Mohawk Power Corporation Rate Schedule FERC No. 19 (“RS 19”), is a “grandfathered transmission agreement” under NYISO OATT Attachment L.<sup>2</sup> As discussed below, this filing proposes certain amendments to SA 1742 to implement the Agreement Regarding Treatment of Allocations of New York Power Authority Expansion Power and Replacement Power Beginning January 1, 2012 and Thereafter (the “Phase-In Agreement”) between and among National Grid, the Power Authority of the State of New York (“NYPA”), Power for Economic Prosperity (“PEP”), and Multiple Intervenors (“MI”). A copy of the Phase-In Agreement is attached hereto as Attachment A.<sup>3</sup>

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<sup>1</sup> NYISO has informed National Grid that this amended Service Agreement is being filed under the NYISO’s e-tariff for administrative convenience only, and thus that this filing does not constitute an admission that the service being provided under this Service Agreement is being provided by the NYISO. NYISO has reserved the right to take the position that this service is being provided by National Grid or some other entity rather than by NYISO.

<sup>2</sup> Upon formation of NYISO in 1999, certain existing New York Power Pool transmission agreements were grandfathered, by agreement of the parties and approval of the Commission. NYISO OATT Attachment L lists these agreements, as well as the dates when their grandfathered status will terminate.

<sup>3</sup> In a separate filing submitted today, National Grid has submitted for Commission acceptance revisions to Service Agreement 1743 under the NYISO OATT, a service agreement governing the jurisdictional delivery of Expansion Power (“EP”), another NYPA low-cost hydropower economic development program; these amendments likewise are intended to support implementation of the Phase-In Agreement.

A primary purpose of the Phase-In Agreement, and of the proposed amendments to SA 1742 implementing it, is to provide an appropriate transition for retail transmission services that National Grid currently provides to NYPA for the delivery of certain allocations of low-cost NYPA hydropower made available to qualifying businesses for economic development purposes, and a phase-in of the increases in delivery rates that will result from this transition. The category of low-cost economic development power addressed in this filing, Replacement Power (“RP”), is delivered to eligible retail customers connected to National Grid’s delivery system in western New York under a grandfathered pre-OATT service agreement filed with the Commission as NYISO SA 1742. SA 1742 currently expires according to its terms on December 31, 2011.

As listed in Attachment L of the NYISO OATT, which catalogs grandfathered transmission agreements, the period during which SA 1742 is grandfathered does not expire until December 31, 2012. Upon the expiration of grandfathered service under this agreement, NYPA will receive delivery service for Existing Allocations of RP under Section 5 of the NYISO OATT and the provisions of National Grid’s Retail Tariff PSC No. 220, at rates substantially higher than those currently in effect under SA 1742. Under a settlement agreement that the Commission approved in 2004, rates for transmission and distribution of Existing Allocations of RP were frozen through December 31, 2011.<sup>4</sup>

The costs associated with delivery of RP are paid by NYPA’s RP customers. Thus, in the absence of the Phase-In Agreement, costs to customers for the delivery of RP would increase substantially on January 1, 2012, when this delivery service becomes subject to standard Commission-jurisdictional retail transmission and NYPSC-jurisdictional local distribution delivery rates. Under the Phase-In Agreement, and the implementing amendments to SA 1742 discussed below, these delivery rates will instead increase gradually over the phase-in period. The Phase-In Agreement also provides for certain other accommodations intended to simplify billing and settlement processes. The Phase-In Agreement and this filing are supported by NYPA, which is the transmission customer for RP service, as well as by two organizations of industrial and commercial customers that receive Existing Allocations of RP.

National Grid respectfully requests Commission approval of the amendments to SA 1742 proposed herein effective January 1, 2012, the date on which the Phase-In Agreement is to go into effect.

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<sup>4</sup> *Niagara Mohawk Power Corp.*, 108 FERC ¶ 61,035 (2004). That settlement set the delivery rates for Existing Allocations of RP and EP through and until the earlier of December 31, 2011 or the date on which the New York Public Service Commission (“New York PSC”) established new rates for Niagara Mohawk in a general rate case. Although new electric delivery rates were established for Niagara Mohawk as of February 1, 2011 in NY PSC Case No. 10-E-0050, in that case the Company, NYPA and Staff of the Department of Public Service entered into a Stipulation and Agreement Regarding Rate Design, Customer, and Markets Mandatory Hourly Pricing Issues, which froze the delivery rates for Existing Allocations at the current level during the calendar year 2011. The Commission subsequently approved the Company’s filing to extend the \$1.52 per kW-month rate for Existing Allocations of EP and RP through December 31, 2011.

## **I. Background**

National Grid is a public utility subject to the Commission's jurisdiction that owns facilities located in the State of New York. National Grid's high-voltage New York transmission facilities have been placed under the operational control of NYISO. National Grid's local delivery, distribution, and retail sales operations are subject to the jurisdiction of the New York Public Service Commission ("New York PSC").

NYPA is the nation's largest state public power authority, and is an instrumentality of the State of New York. Among other functions, NYPA generates low-cost power at its Niagara Hydroelectric Project, and sells it to industrial and commercial customers for economic development and job retention purposes. NYPA is not subject to the Commission's jurisdiction.

PEP is a coalition of large NYPA RP customers.

MI is an unincorporated association of large commercial and industrial consumers with facilities located, inter alia, in National Grid's New York service territory, and a number of whom receive Existing Allocations of RP.

Replacement Power, or RP, is a category of low-cost NYPA hydropower, allocations of which are made to qualifying industrial and commercial end-users under criteria established by New York State law,<sup>5</sup> and which are intended to promote economic development in the state. SA 1742 is a bilateral agreement between NYPA and National Grid governing the retail transmission portion of delivery service for RP. National Grid has provided delivery service for RP since February 10, 1961.<sup>6</sup> The provisions under which Niagara Mohawk provides the retail transmission portion of this service were originally filed with the Commission as Niagara Mohawk Rate Schedule FERC No. 19 ("RS 19").

The retail transmission service provided under RS 19 predated the formation of the NYISO, and so was included in the list of grandfathered transmission agreements contained in Attachment L of the NYISO OATT. Also, attachment K of the NYISO OATT required the New York utilities to submit certain amendments to these grandfathered agreements in order to allow the transmission service provided thereunder to be coordinated with the new NYISO OATT transmission regime. However, NYPA and certain industrial customers taking delivery of low-cost NYPA power protested the proposed amendments, and the controversy sparked thereby was resolved in two settlements approved by the Commission.<sup>7</sup> The current structure and operation of SA 1742 is largely a product of the latter of these

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<sup>5</sup> See N.Y. Pub. Auth. Law § 1005(13).

<sup>6</sup> Niagara Contract NS-1 Governing the Sale, Transmission and Distribution of Power to Niagara Mohawk, dated February 10, 1961.

<sup>7</sup> The first settlement was approved by the Commission in an Order dated May 18, 2000 in Docket No. ER97-1523-030, *Niagara Mohawk Power Corp.*, 91 FERC ¶ 61,145 (2000), the second in *Niagara Mohawk Power Corp.*, 108 FERC ¶ 61,035 (2004).

settlements (the “2004 Settlement”), which applied to RS 19 and certain other rate schedules governing delivery of low-cost NYPA power.<sup>8</sup>

Among other provisions, the 2004 Settlement divided RP into two categories: Existing Allocations and New Allocations. Pursuant to the 2004 Settlement, retail transmission service to New Allocations (allocations of Expansion Power made after September 1, 2003, the effective date of the settlement) is already provided under Section 5 of the NYISO OATT. By contrast, transmission service for Existing Allocations (allocations of RP made before the effective date of the settlement) continues to receive retail transmission service under the grandfathered provisions of SA 1742. The requested changes to SA 1742 apply differently to Existing and New Allocations of RP, as we discuss below.

Under SA 1742 and Retail Tariff rates approved by the New York PSC, the total charge for delivery of Existing Allocations of RP is currently \$1.52 per kW-month. Corresponding delivery rates under full NYISO OATT / Retail Tariff rates range from \$2.32 per kW-month to \$9.08 per kW-month. An immediate transition to the higher rates has the potential to cause significant bill impacts for industrial and commercial customers utilizing RP.

Given the fragile condition of the upstate New York economy and the potentially harmful impact of an immediate change to substantially higher rates, NYPA and certain industrial customer groups approached National Grid with a proposal to phase in the higher rates over several years. The parties also discussed making certain other changes to resolve transitional issues and simplify billing and settlement.

To address these issues, the parties negotiated the Phase-In Agreement. National Grid filed the Phase-In Agreement with the New York PSC for approval of its state-jurisdictional provisions on September 29, 2011. (This was the latest date on which National Grid could file with the New York PSC in order to obtain its approval of the Phase-In Agreement by January 1, 2012.) We are also filing the implementing amendments to SA 1742 proposed herein, with the Commission, with a requested effective date of January 1, 2012.<sup>9</sup> The Phase-In Agreement and this filing are supported by NYPA, which is the transmission customer for RP delivery service, as well as by PEP and MI on behalf of industrial and commercial customers that receive allocations of RP.

The amendments for which Commission approval is sought herein will allow SA 1742 to implement, in part, the initial stage of the transition mechanism contemplated by the Phase-In Agreement.

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<sup>8</sup> The Commission earlier this year accepted some additional minor changes to RS 19, as well as its re-designation as a SA 1742. Letter Order, June 24, 2011, Docket No. ER11-3465-000.

<sup>9</sup> National Grid is also filing with the Commission separately today amendments to another service agreement, SA 1743, also intended to implement the Phase-In Agreement.

## II. Discussion

Two changes to SA 1742 are proposed in this filing, to be effective for the 12 months from January 1, 2012 (the effective date of the amendments for which approval is sought herein) until December 31, 2012 (the new termination date for SA 1742 requested herein). The changes proposed to SA 1742 are:

- Extension of SA 1742's termination date from December 31, 2011 to December 31, 2012; and
- Modification of delivery rates for Existing Allocations of RP, including application to any challenges to these rates of the just and reasonable standard with the *Mobile-Sierra* presumption in place.

We discuss these proposed changes below.

### A. Extension of Termination Date To December 31, 2012

#### 1. Proposed Change.

As National Grid proposes to implement it, the transition contemplated under the Phase-In Agreement will have two stages. In the first stage, the transitional arrangements are implemented by the amended NYISO SA 1742 (submitted in this filing) and the amended NYISO SA 1743 (submitted in a separate Commission filing today); in the second stage, the Phase-In Agreement (to be submitted in a separate Commission filing) governs the transitional arrangements from the termination of SA 1742 and SA 1743 until expiration of the phase-in provisions.<sup>10</sup>

As part of this implementation approach, the Phase-In Agreement provides that, with the approval of the Commission, SA 1742's termination date will be extended until December 31, 2012, to be coterminous with its grandfathering date as prescribed in NYISO OATT Attachment L. See Phase-In Agreement, paragraphs 8) and 11) a. (ii). Currently, while NYISO OATT Attachment L contemplates that SA 1742 (referred to therein by its earlier designation, "RS 19") will retain its grandfathered status until December 31, 2012, the termination date in SA 1742 itself is December 31, 2011.

Under the 2004 Settlement, RS 19 was amended to "remain in effect for the duration of the Rate Plan Period, unless further extended by written agreement of the Authority [i.e., NYPA] and Contractor [i.e., National Grid]." Art. IX. (The grandfathered date of RS 19 in Attachment L to the NYISO OATT was not modified, however). The "Rate Plan Period"

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<sup>10</sup> National Grid is requesting this two-phase implementation of the phase-in to accommodate the parties' familiarity and comfort level with the existing grandfathered agreements (SA 1742 and SA 1743) to the maximum extent possible, and at the same time work within the current structure of the NYISO OATT, under which grandfathered transmission service agreements expire no later than the grandfathering dates provided in Attachment L.

referred to was a rate freeze that had been ordered by New York PSC some years earlier.<sup>11</sup> While the Rate Plan Period had been expected to expire on December 31, 2011, it actually expired on February 1, 2011, when the New York PSC placed new National Grid rates into effect. At the request of some of its customers and of NYPA, National Grid earlier this year requested,<sup>12</sup> and the Commission granted,<sup>13</sup> extension of the transmission agreement (under its new designation as SA 1742) until December 31, 2011, the date it would have expired had the Rate Plan Period ended as previously expected.

Approval of an extension of the termination date until December 31, 2012 is consistent with the terms of SA 1742 itself, and with Commission precedent. As approved by the Commission earlier this year, SA 1742 provides that it “shall remain in effect through and until December 31, 2011, unless further extended by written agreement of the Authority [NYPA] and Contractor [National Grid].” Art. IX. The Phase-In Agreement constitutes such an agreement between NYPA and National Grid to extend the term of SA 1742.<sup>14</sup> Thus, under the Commission-approved terms of SA 1742, such an extension is appropriate.

The Commission has recognized the propriety of similar contract extensions to agreements listed in NYISO OATT Attachment L. Thus, in 2001 the Commission approved a request by National Grid to extend the termination date of another grandfathered rate schedule providing for transmission of low-cost NYPA power, its Rate Schedule FERC No. 138 (“RS 138”). Like SA 1742, the termination date provided for in RS 138 itself was earlier than the grandfathered date listed in NYISO OATT Attachment L. The Commission held: “The Commission will . . . accept this TSA as just and reasonable because it merely extends the term of Rate Schedule FERC No. 138 in a manner consistent with the term of grandfathering previously authorized in Attachment L for this rate schedule.”<sup>15</sup> (The Commission also approved an extension of SA 1742’s termination date earlier this year, as discussed above.) As discussed previously, Attachment L of the NYISO OATT lists the date that grandfathering will terminate for SA 1742 as December 31, 2012. Thus, under Commission precedents, extension of the term of SA 1742 to December 31, 2012 is just and reasonable, and ought to be approved.

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<sup>11</sup> RS 19, Definitions, paragraph (m); the Rate Plan was approved in Case 01-M-0075, Joint Petition of Niagara Mohawk Holdings, Inc., Niagara Mohawk Power Corporation, National Grid Group plc and National Grid USA for Approval of Merger and Stock Acquisition, Opinion and Order Authorizing Merger and Adopting Rate Plan, Opinion No. 01-6 (New York State Public Service Commission, Issued and Effective Dec. 3, 2001).

<sup>12</sup> April 29, 2011 filing in Docket No. EL11-3465-000.

<sup>13</sup> Letter Order issued June 24, 2011 in Docket No. EL11-3465-000.

<sup>14</sup> SA 1742 also contained a *Mobile-Sierra* clause providing a “public interest” standard of review for changes to the termination date of the service agreement. Art. XI. Article XI by its own terms does not apply to changes made after the end of the Rate Plan Period. As explained above, the Rate Plan Period ended on February 1, 2011 when NYPSA placed new Niagara Mohawk retail rates into effect. Thus, Article XI poses no barrier to the Commission’s acceptance of a change in the termination date of SA 1742 under FPA Section 205.

<sup>15</sup> *Niagara Mohawk Power Corporation*, 96 FERC ¶ 61,363, at 62,365 (2001).

Consequently, National Grid respectfully requests that the Commission approve amendment of SA 1742's termination date from December 31, 2011 to December 31, 2012.

## 2. Implementation.

As indicated above, Article IX of SA 1742 currently provides that the service agreement will terminate on "December 31, 2011, unless further extended by written agreement of the Authority [i.e., NYPA] and Contractor [i.e., National Grid]." National Grid proposes to simply substitute the numeral "2012" for "2011" in this sentence, and then to remove the rest of the text after the numeral.

These proposed changes can be seen in the amended version of SA 1742, attached hereto in redline as Attachment B and in a clean version as Attachment C.

### B. Modification of Delivery Rates For Existing Allocations of RP

#### 1. Proposed Change.

Paragraph 1 of the Phase-In Agreement sets forth two schedules of rates. Both are intended to gradually phase in delivery rate increases that the transition to NYISO OATT / Retail Tariff rates will cause New York businesses with Existing Allocations of RP. Note that all New Allocations of RP are already delivered at full OATT / Retail Tariff delivery rates, so the phase-in of rates will not apply to them.

Currently, under SA 1742, customers with Existing Allocations of RP pay a total delivery rate of \$1.52 per kW-month of contract demand. Corresponding delivery rates under current full NYISO OATT / Retail Tariff rates range from \$2.32 per kW-month to \$9.08 per kW-month, depending on customer class and delivery voltage. An immediate transition to the higher rates has the potential to cause serious bill impacts for these RP customers. Such impacts could cause hardships to businesses in upstate New York, particularly under the difficult economic conditions prevailing there. Given New York's policy of attempting to ensure competitive power costs to businesses in the state,<sup>16</sup> National Grid believes that the rate phase-in for which approval is requested here is a suitably balanced approach that will both support New York's economy and businesses at this difficult time and simultaneously bring the affected customers into the standard NYISO OATT transmission regime over a reasonable transition period.

Phase-In Agreement Paragraph 1) a. sets forth the phase-in schedule applicable to the large majority of customers with Existing Allocations of RP.<sup>17</sup> Paragraph 1) b. sets forth the

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<sup>16</sup> For example, the State Legislature recently enacted the Recharge New York law, providing additional low-cost power support to New York industrial electric customers. N.Y. Econ. Dev. Law § 188-a; N.Y. Public Auth. Law §§ 13-a, 13-b.

<sup>17</sup> The phase-in paragraph 1(a) of the Phase-In Agreement will apply to 62 of the 67 EP and RP customers with Existing Allocations.

phase-in schedule applicable to a small group of such customers to which the increase from SA 1742 to full standard delivery rates could be most disruptive due to their size, the amount of RP they consume, or other factors.<sup>18</sup> For the larger class of customers, Phase-In Agreement paragraph 1) a. provides for a four-year phase-in during which rates increase from 80% of full rates in 2012 to full rates by January 1, 2016. For the second, much smaller class of customers, Phase-In Agreement paragraph 1) b. provides for a six-year phase-in during which rates increase from 35% of full rates in 2012 to full rates by January 1, 2018.

As can be seen from these phase-in schedules, the first 12 months of the contemplated discounted rates take place during the period when SA 1742, as amended in accordance with the previous section of this filing letter, will still be in effect. In order to ensure a smooth transition to full standard delivery rates in accordance with the Phase-In Agreement, National Grid respectfully requests that the Commission approve a change in the rate provisions of SA 1742: in place of SA 1742's current retail transmission rate, National Grid proposes to substitute standard retail transmission rates discounted as specified in the Phase-In Agreement. More specifically, National Grid proposes that for the period January 1, 2012 through December 31, 2012, customers specified in paragraph 1) a. of the Phase-In Agreement<sup>19</sup> would pay 80% of the full applicable NYISO OATT / Retail Tariff retail transmission rate,<sup>20</sup> and customers specified in paragraph 1) b. of the Phase-In Agreement<sup>21</sup> would pay 35% of the full applicable NYISO OATT / Retail Tariff retail transmission rate.<sup>22</sup>

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<sup>18</sup> The phase-in in paragraph 1(b) of the Phase-In Agreement will apply to 5 of the 67 EP and RP customers with Existing Allocations. For both of these categories, the Phase-In Agreement uses retail tariff rate classification and the voltage level at which NYPA power is delivered as objective proxies for the size and vulnerability to harm due to sudden rate increases of the various customers taking NYPA power.

<sup>19</sup> The Phase-In Agreement describes these customers as:  
customers with: (i) Primary voltage delivery levels (2.2-15kV) whose parent rate class is Service Classification 3 and for whom non-NYPA electric demand accounted for more than 15% of their total electric demand during the time period July 1, 2010 through June 30, 2011, (ii) Primary voltage delivery levels (2.2-15kV) whose parent rate class is Service Classification 3-A; (iii) Subtransmission voltage delivery levels (22-50 kV); and (iv) Transmission voltage delivery levels (over 60 kV)

Phase-In Agreement, Para. 1) a.

<sup>20</sup> *Id.*, Para. 1) a. i.

<sup>21</sup> The Phase-In Agreement describes these customers as:  
customers served at Primary voltage delivery levels (2.2-15 kV) whose parent delivery service classification is Service Classification 3 and for whom non-NYPA electric demand accounted for 15% or less of their electric demand during the time period July 1, 2010 through June 30, 2011

Phase-In Agreement, Para. 1) b.

<sup>22</sup> Phase-In Agreement Para. 1) b. i.



These rate changes to SA 1742 will implement the first year of the phase-in to full NYISO OATT / Retail Tariff delivery rates for RP customers with Existing Allocations, while retaining the service agreement's non-rate terms and conditions.

National Grid has also filed a request with the New York PSC to apply these same percentage discounts to the state-jurisdictional portion of the total delivery rate as part of the transition to full rates contemplated in the Phase-In Agreement.

## 2. Implementation.

SA 1742, Article V. and Exhibit B– Rate I e. define National Grid's delivery rate for Existing Allocations of RP, which is currently set at \$1.52 per kW-month. To implement the proposed Phase-In Agreement rates, National Grid respectfully requests that the Commission approve an amendment to Exhibit B-Rate I e. replacing the \$1.52 per kWh rate with a reference to Section 5 of the NYISO OATT (which provides for retail transmission) and the schedule of discounts under the Phase-In Agreement applicable to the standard tariff rates. Note that, other than the rate phase-in discussed above, this filing does not propose or contemplate changing in any respect how retail transmission service in New York is currently structured, provided, or administered.

The specific amendments proposed can be seen in Exhibit B – Rate I e., of SA 1742, attached hereto in redline as Attachment B and in a clean version as Attachment C.

## 3. Standard of Review Applicable to Rate Phase-In.

Paragraph 5) of the Phase-In Agreement provides, in relevant part:

PEP, MI, NYPA . . . agree not to challenge the phase-in to standard tariff delivery rates or to advocate for a separate delivery rate or service classification for RP . . . Allocations until after the phase-ins to standard tariff delivery rates . . . are complete (as set forth in Paragraph 1 of this Agreement), provided that nothing herein shall be read as preventing any Party or the customers from opposing (either during the phase-in period or thereafter) proposed increases to the standard delivery rates to which the discounts provided for in this Agreement apply.

This provision precludes parties from challenging the phase-in set forth in Paragraph 1) of the Phase-In Agreement or seeking a separate delivery rate or service classification for RP. It does not preclude National Grid from amending its standard tariff rates (i.e., the base rates to which Paragraph 1)'s discounts are applied) or the other parties from opposing such a filing by National Grid to increase its standard tariff rates.

The Commission has, in a similar context, recently interpreted and applied the doctrine set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*,

554 U.S. 527 (2008) (the “*Mobile-Sierra* doctrine”). In *Devon Power LLC*, 134 FERC ¶ 61208 (2011), the Commission recognized the Supreme Court’s holding that the Commission must presume “that contract rates freely negotiated between sophisticated parties meet the just and reasonable standard.”<sup>23</sup> Under this doctrine, the Commission may only modify or set aside such contracts if it concludes that they seriously harm the public interest.<sup>24</sup> The Commission then concluded that it was appropriate to use the *Mobile-Sierra* “public interest” presumption in evaluating a settlement agreement concluded by the *Devon* parties, despite the fact that it found that the rates established thereunder were tariff rather than contract rates.<sup>25</sup> The Commission held that application of the presumption was appropriate because the settlement rates had been arrived at in fair, arms-length negotiations between sophisticated parties,<sup>26</sup> would promote stability and predictability of rates,<sup>27</sup> were transitional, lasting only for a limited time,<sup>28</sup> and absent imposition of the higher standard of review, agreement on the rates among the parties might not have been possible.<sup>29</sup>

All of the factors listed above are also present here. The Phase-In Agreement was concluded as a result of arms’ length negotiations among sophisticated parties: National Grid (a utility company), NYPA (a state agency), and PEP and MI (industry organizations of large industrial and commercial customers). The rates will promote the stability and predictability necessary for the customers to maintain or expand their business operations in New York, and hire or retain employees. The rates are transitional, set to phase out in most cases in four years, and in a few cases in six. Finally, because a main purpose of the Phase-In Agreement is to provide customers with certainty that they will be able to benefit from the rate phase-in over the prescribed periods, it is very likely that the agreement could not have been concluded absent an agreement not to challenge the rates. Indeed, the ways in which the current case differs from *Devon Power* militate even further in favor of imposition of the *Mobile-Sierra* presumption as requested by the parties. For example, in this case, unlike *Devon*, the Phase-In Agreement is not a tariff of general application, but applies only to a limited set of entities, most or all of which were represented by the signatories;<sup>30</sup> the parties concluded and signed an actual contract, bringing the case within the core holding of *Morgan Stanley*;<sup>31</sup> also unlike *Devon*, here all the parties to the negotiations agreed to the Phase-In Agreement.<sup>32</sup>

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<sup>23</sup> *Devon Power*, P 6, citing *Morgan Stanley*, p. 699.

<sup>24</sup> *Id.*, P 24.

<sup>25</sup> *Devon Power*, P 2.

<sup>26</sup> *Id.*, PP 10, 16, 19.

<sup>27</sup> *Id.*, P 20.

<sup>28</sup> *Id.*, P 22.

<sup>29</sup> *Id.*, P 23.

<sup>30</sup> *See id.*, PP 12-13.

<sup>31</sup> *See id.*, PP 12, 14.

<sup>32</sup> *See id.*, P 4.

While under the Commission's precedents the *Mobile-Sierra* presumption is the default standard for an agreement like the Phase-In Agreement, the parties can also specify a less stringent standard of review for certain portions.<sup>33</sup> In view of this and the precedents and discussion set forth above, National Grid respectfully requests that the Commission implement Paragraph 5) of the Phase-In Agreement as written, and approve the following application of the standard of review with respect to any future filings regarding SA 1742:

- (i) if National Grid makes filings seeking to modify the standard tariff rates to which the discounts in Paragraph 1) of the Phase-In Agreement apply, the Commission will apply its just and reasonable standard of review under FPA Section 205 without application of the *Mobile-Sierra* presumption;
- (ii) filings made by parties other than National Grid opposing or responding to filings made by National Grid to modify its standard tariff rates will be reviewed using the just and reasonable standard of review under FPA Section 205 without application of the *Mobile-Sierra* presumption;
- (iii) the Commission will apply the just and reasonable standard of review under FPA Section 205 with application of the *Mobile-Sierra* presumption to filings by any party seeking to modify Paragraph 1) of the Phase-In Agreement or the phase-in schedule of discounts, or seeking a separate delivery rate or service classification for RP or EP.

In order to implement the application of the Commission's just and reasonable standard with the *Mobile-Sierra* presumption to the phase-in schedule and standard tariff rates as described above, National Grid proposes to amend SA 1742, Art. XI to detail the standards of review that shall apply to each aspect of the discounted rates set forth in Exhibit B – Rate I. The specific language proposed is set forth in Arts. V and XI of the amended SA 1742 provided in Attachments B and C hereto in redlined and clean format.<sup>34</sup>

### **III. Effective Date and Commission Regulations**

Pursuant to Section 35.3 of the Commissions Rules and Regulations (18 C.F.R. § 35.3), National Grid respectfully requests an effective date for the amendments to SA 1742 described herein of January 1, 2012.

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<sup>33</sup> See e.g. *Standard of Review for Modifications to Jurisdictional Agreements*, 125 FERC ¶ 61,310, P 4 (2008).

<sup>34</sup> While the Phase-In Agreement's prohibition of challenges to these provisions expires upon completion of the phase-in periods, such completion is scheduled to take place well after the termination of SA 1742 on June 30, 2013. Thus, it is not necessary to place a time limit upon the application of the *Mobile-Sierra* "public interest" standard to these subsections in SA 1742.

This filing substantially complies with the requirements of Part 35 applicable to filings of this kind. National Grid requests waiver of any applicable requirement of part 35 for which it has not specifically requested waiver or supplied data so that this filing may become effective as proposed.

#### **IV. Service Agreement Designation of the Amended SA 1742**

Pursuant to the Commission's directives in *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008), and consistent with NYISO practice, the amended SA 1742 shall continue to be designated NYISO Service Agreement 1742.

#### **V. Attachments**

In addition to this transmittal letter, the instant filing includes the following attachments:

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|--------------|---|
| Attachment A | Agreement Regarding Treatment of Allocations of New York Power Authority Expansion Power and Replacement Power Beginning January 1, 2012 and Thereafter, dated September 29, 2011.                                    |
| Attachment B | Blacklined version of Amended and Restated Agreement for The Retail Transmission of Replacement Power – First Revised Service Agreement No. 1742 – showing proposed amendments.                                       |
| Attachment C | Clean version of Amended and Restated Agreement for The Retail Transmission of Replacement Power – First Revised Service Agreement No. 1742 – incorporating amendments and formatted as required under Order No. 714. |

#### **VI. Communications and Service**

Communications regarding this filing should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary with respect to this docket:

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Copies of this filing have been served upon the parties to the Phase-In Agreement ,  
the New York PSC, NYPA and the NYISO.

## **VII. Conclusion**

For the foregoing reasons, National Grid respectfully requests that the Commission accept the amendments to SA 1742 described herein, as well as an effective date for these amendments of January 1, 2012.

Respectfully submitted,

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