

104 FERC ¶ 61,279  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Niagara Mohawk Power Corporation

Docket Nos. ER03-989-000  
ER03-990-000  
ER03-991-000  
ER03-992-000

ORDER ACCEPTING PROPOSED AMENDMENTS, SUSPENDING IN PART,  
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE  
PROCEDURES

(Issued September 12, 2003)

1. In this order, we accept for filing, suspend in part, make effective subject to refund, and set for hearing and settlement judge procedures various agreements related to specialized power sales programs between Niagara Mohawk Power Corporation (Niagara Mohawk) and the Power Authority of the State of New York (NYPA). This order benefits customers by ensuring just and reasonable rates.

**Background**

2. On June 30, 2003, Niagara Mohawk filed four amended unexecuted agreements in the above-captioned dockets, as follows: First Revised Rate Schedule FERC No. 159 (filed in Docket No. ER03-989-000, herein referred to as RS 159) involves the transmission of Expansion Power, allocated pursuant to New York State law on a competitive basis to businesses located within 30 miles of the Niagara Power Project; First Revised Service Agreement Nos. 224, 225, and 226 under Niagara Mohawk's FERC Electric Tariff, Original Volume No. 3 (filed in Docket No. ER03-990-000, herein referred to as SA 224, SA 225, and SA 226 or Service Agreements) involve the transmission of "Power for Jobs" pursuant to New York State law; First Revised Rate Schedule FERC No. 19 (filed in Docket No. ER03-991-000, herein referred to as RS 19) involves the transmission of Replacement Power, which has its origins in the 1957 Niagara Redevelopment Act

(NRA);<sup>1</sup> and First Revised Rate Schedule FERC No. 249 (filed in Docket No. ER03-992-000, herein referred to as RS 249) involves the transmission of Economic Development Power pursuant to New York State law. Niagara Mohawk documents NYPA as the transmission customer under all of the agreements for bulk power transmission service, and the final retail consumer as the transmission customer for Niagara Mohawk transmission services beyond the bulk power transmission system.

3. All of these agreements are grandfathered requirements agreements whereby NYPA supplies power and Niagara Mohawk provides transmission service at rates determined by NYPA. The terms of these agreements were revised through a settlement agreement accepted by the Commission on May 18, 2000.<sup>2</sup> This settlement was designed to hold the NYPA Power Program Customers (users of Economic Development Power, Expansion Power, Replacement Power and Power for Jobs energy) harmless from ancillary services charges expected to be imposed as a result of the implementation of the New York Independent System Operator, Inc. (NYISO) in November 1999. The settlement was also intended to compensate Niagara Mohawk for ancillary services costs imposed upon Niagara Mohawk by the NYISO, to the extent practicable. The settlement is due to expire August 31, 2003. Therefore, Niagara Mohawk seeks to incorporate revised terms and conditions for transmission service from NYISO's Open Access Transmission Tariff (OATT), as well as prior settlement agreements accepted by the Commission in other orders, to replace the expiring terms and conditions approved in the May 18<sup>th</sup> Settlement Order.

4. The amended agreements incorporate the charges assessed on the transmission of power, pursuant to the NYISO OATT Attachment K. Attachment K allows for grandfathered transmission service agreements to be amended to designate the transmission customer as the responsible party to compensate the NYISO for certain transmission-related costs, including the costs of ancillary services, marginal losses, the NYPA Transmission Adjustment Charge and congestion, on the same basis as all transmission customers taking service under the NYISO OATT. Attachment K also requires that the transmission customer comply with the scheduling provisions of the NYISO OATT. Specifically,

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<sup>1</sup> 16 U.S.C. §§ 836, 836a (2000).

<sup>2</sup> The settlement was filed on February 4, 2000 and accepted in New York State Electric and Gas Corporation, 91 FERC ¶ 61,145 (2000) (May 18th Settlement Order).

Niagara Mohawk proposes that the following NYISO charges that it incurs for the transmission of the power will be charged to NYPA's Power Program Customers: (1) Ancillary Services 1 through 6; (2) NYISO Marginal Losses, either through supplying energy in-kind or by paying the NYISO's charges directly; (3) the NYPA Transmission Adjustment Charge; (4) congestion charges; (5) any and all other charges, assessments, or other amounts due to the NYISO under the provisions of its OATT; and (6) any transmission of electricity in excess of the capacity reservations as outlined in Attachment L of the NYISO OATT. In return, NYPA will be entitled to receive grandfathered Transmission Congestion Credits through the NYISO OATT.

5. Niagara Mohawk proposes amendments to two of the agreements to recover Niagara Mohawk's transmission costs beyond the bulk power transmission system (in addition to the NYISO transmission charges discussed above). Particularly, Niagara Mohawk proposes to raise its transmission loss factors for RS 19 and RS 159 from 1.98 percent to 2.67 percent for transmission over 60 kV, from 4.24 percent to 5.30 percent for transmission between 22 kV and 50 kV, and to decrease the loss rate from 7.31 percent to 6.94 percent for transmission between 2.2 kV and 15 kV. Niagara Mohawk proposes that these loss factors be applied to transmission lines beyond the bulk power transmission system (in addition to the loss factors already proposed to be applied for the bulk power transmission system). Niagara Mohawk proposes to increase its demand charges for transmission service under RS 19, from 31.5¢/kV for delivery at 115 kV and 50¢/kV for delivery below 115 kV, to a flat rate \$1.52/kV for delivery at any voltage. Niagara Mohawk also proposes minimum bill provisions in RS 19. Niagara Mohawk additionally proposes to remove retail energy sales provisions from some of the agreements, in compliance with Order No. 614. Niagara Mohawk requests an effective date of September 1, 2003 for the agreements.

### **Notices, Interventions, Protests and Answer**

6. Notices of Niagara Mohawk's filings were published in the Federal Register, 68 Fed. Reg. 41,134 (2003) with motions to intervene and protests due on or before July 21, 2003. Timely motions to intervene and protests were filed by Multiple Intervenors<sup>3</sup> in all four dockets and by Occidental Chemical Corporation (Occidental) in Docket Nos. ER03-989-000 and ER03-991-000. Occidental requests that Niagara Mohawk's filings be rejected, and, if not rejected,

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<sup>3</sup> Multiple Intervenors is an unincorporated association of about 55 large industrial energy consumers operating facilities throughout the New York State, including facilities in Niagara Mohawk's service territory.

suspended for the maximum period and set for hearing. Multiple Intervenors and Occidental protest that certain provisions Niagara Mohawk seeks to amend are not subject to this Commission's jurisdiction. Multiple Intervenors and Occidental also claim that Niagara Mohawk has not met its burden of showing that the changes are warranted.

7. NYPA filed an intervention and conditional protest in all four dockets, asserting that it should not be responsible for paying Niagara Mohawk's transmission costs. However, NYPA states that it will lift its conditional protest if the following conditions are met. First, NYPA must be allowed to modify its existing non-jurisdictional service tariffs to permit the recovery of these NYISO costs from the recipients of the NYPA power. Second, Niagara Mohawk must agree on a procedure for providing NYPA with NYPA power recipients' billing and load profile data. Third, Niagara Mohawk must agree to modify RS 19 as detailed below.

8. ISG Lackawana Inc. (ISG) filed a motion to intervene out-of-time in Docket No. ER03-991-000.

9. Niagara Mohawk filed an answer to the protests. Occidental moved to respond to the answer, which Niagara Mohawk subsequently opposed.

## **Discussion**

### **I. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene of the entities that filed them make them parties in the proceedings in which they were filed. We will grant ISG's motion to intervene out-of-time given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. Although Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), generally prohibits an answer to a protest, we will accept Niagara Mohawk's answer because it provides information that assists our understanding of the issues raised in these proceedings. We will, however, reject Occidental's and Niagara Mohawk's responses as impermissible answers to answers.

## II. Jurisdictional Issues

### A. Background

11. Niagara Mohawk states that, despite the agreements being structured as sales of electricity by NYPA to Niagara Mohawk on the condition that Niagara Mohawk resell such electricity to NYPA customers on specified terms, the Commission has consistently held that such “buy-sell” agreements constitute a provision of unbundled retail transmission by Niagara Mohawk, subject to the jurisdiction of the Commission under the FPA.<sup>4</sup>

12. In compliance with Order No. 614,<sup>5</sup> Niagara Mohawk proposes to remove, as non-jurisdictional: (1) New York State Service Tariff No. 46 from RS 159, governing sales of Expansion Power to retail customers, (2) provisions of New York State Contracts NS-1, NP-F1, and NP-S1 from RS 19, which do not relate to the transmission of Replacement Power, and (3) New York State Service Tariff Nos. 50 and 51, Contract UD-5 from RS 249, governing non-jurisdictional retail sales of Economic Development Power.

### B. Comments

13. Multiple Intervenors state that Niagara Mohawk’s proposed amendments to RS 249 would revise portions of the rate schedule that do not relate to Attachment K, and request that the Commission reject the amendments as changes to non-jurisdictional services. Multiple Intervenors and Occidental assert that Niagara Mohawk seeks to impose its own transmission losses and demand rates on retail customers as a component of a retail sale that is subject to the New York Public Service Commission’s (NYPSC) jurisdiction and utilizes local distribution facilities, and that therefore the rates are not subject to FERC jurisdiction. Multiple Intervenors states that, to the extent that Niagara Mohawk seeks to impose a charge on Economic Development Power customers in RS 249 for unspecified transmission costs incurred by NYPA, it is a retail rate issue that is not properly before this Commission.

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<sup>4</sup> See New York State Electric & Gas Corp., 83 FERC ¶ 61,203 (1998) (NYSEG I).

<sup>5</sup> Designation of Electric Rate Schedule Sheets, Order No. 614, FERC Stats. & Regs. ¶ 31,096 (2000).

14. Multiple Intervenors state that the Commission lacks jurisdiction over transmission loss factors and rates associated with Niagara Mohawk's transmission deliveries of Replacement Power (RS 19), Expansion Power (RS 159), and Economic Development Power (RS 249).

15. Occidental asserts that the Niagara Mohawk's Replacement Power contracts (RS 19) do not constitute "buy-sell" agreements where Niagara Mohawk provides only unbundled retail transmission service. Whereas in previous cases NYPA determined which businesses would get Economic Development Power and in what amounts and at what price, Occidental argues here it is Niagara Mohawk that determines who receives Replacement Power. Occidental further asserts that the provision of Replacement Power is not a straight pass-through of energy, but rather, a bundled retail sale that is not under the Commission's jurisdiction per NYSEG I, 83 FERC at 61,902. Occidental requests that the Commission reject Niagara Mohawk's amendments to RS 19 because the contracts constitute bundled retail services, or else set the issue for hearing or technical conference.

16. Finally, Multiple Intervenors protest Niagara Mohawk's removal of Contract UD-5 and Service Tariff Nos. 50 and 51, governing Economic Development Power sales, stating that these contracts govern retail service, and therefore are not under the Commission's jurisdiction. NYPA comments that the Service Tariffs are non-jurisdictional and need not be filed with the Commission.

### **C. Answer**

17. Niagara Mohawk clarifies that SA 224, SA 225, and SA 226 are fully unbundled service agreements under the Niagara Mohawk grandfathered OATT and are not provided pursuant to a "buy-sell" agreement. Niagara Mohawk states that all of these Service Agreements have been previously determined by the Commission to be under the Commission's jurisdiction and therefore that issue cannot be relitigated. Niagara Mohawk also states that the Commission has previously determined Expansion Power, Economic Development Power, and Replacement Power contracts under RS 159, RS 249, and RS 19 to be "buy-sell" contracts where the contracts were in fact unbundled retail transmission contracts, and not, as certain parties claim, bundled retail transmission and energy contracts outside of the Commission's jurisdiction.

18. Niagara Mohawk further states that Occidental is mistaken in its claims that Replacement Power differs from Economic Development Power because Niagara

Mohawk purchases Replacement Power but not Economic Development Power in a fixed block and then resells only a portion of that energy and capacity to eligible industrial customers, and because Niagara Mohawk alone decides whether a customer may increase its energy demands. Niagara Mohawk states that, on the contrary, the Economic Development Power contracts that Occidental refers to also contained “fixed block” provisions which did not affect the Commission determination of jurisdiction over them.<sup>6</sup> Thus, Niagara Mohawk asserts that RS 19, 159, and 249 all involve retail sales by NYPA and the provision by Niagara Mohawk of unbundled retail transmission service.

#### **D. Commission Determination**

19. We agree with Niagara Mohawk that the types of transactions represented in RS 159 and 249 have been previously determined by this Commission to be “buy-sell” agreements, and therefore are unbundled retail transmission agreements subject to the Commission’s jurisdiction.<sup>7</sup> In Order No. 888, we discussed the demarcation between Federal and state jurisdiction over unbundled retail transmission contracts involving “buy-sell” transactions where the end user purchased energy from a third party:

A final jurisdictional issue raised in the Open Access NOPR concerns buy-sell transactions. We remain concerned, just as we were with buy-sell arrangements in the gas industry, that buy-sell arrangements can be used by parties to obfuscate the true transactions taking place and thereby allow parties to circumvent Commission regulation of transmission in interstate commerce. Thus, we reaffirm our conclusion that we have jurisdiction over the interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third-party.<sup>8</sup>

20. Additionally, we have previously determined jurisdiction over RS 19 and 159 by virtue of their utilizing the integrated transmission system, affirming the finding that the lower voltage transmission lines used in transmitting Replacement

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<sup>6</sup> Niagara Mohawk Power Corp., 78 FERC ¶ 61,004 (1997).

<sup>7</sup> New York State Electric & Gas Corp., 77 FERC ¶ 61,044 (1996), reh’g denied, 83 FERC ¶ 61,023 (1998).

<sup>8</sup> Order No. 888 at 31,785; see also id. at 31,779-85.

Power and Expansion Power served a network transmission function and were integrated with the higher voltage bulk power system lines.<sup>9</sup> Thus, Rate Schedules 19, 159 and 249 are subject to our jurisdiction. We also agree with Niagara Mohawk that Service Agreements 224, 225, and 226 are Commission jurisdictional unbundled retail transmission agreements as defined in Order No. 888.

21. We also clarified in Order No. 888<sup>10</sup> that it is irrelevant to determining Commission jurisdiction whether the final transmission customer is retail or wholesale in nature. What is relevant is the nature of the transmission itself, not necessarily the nature of the customer. We determined in Order No. 888 that unbundled transmission in interstate commerce provided by public utilities is a Commission-jurisdictional service. All of these agreements involve transmission over the bulk power transmission system and thus are subject to this Commission's jurisdiction. More importantly, we also determined that transmission of electric energy that is being sold for resale, as is the case with all of these agreements, is under the Commission's jurisdiction.<sup>11</sup>

22. Multiple Intervenors do not provide a specific reference regarding their concern that Niagara Mohawk is submitting amendments which establish charges for service to the final retail customers in RS 249. All of the proposed amendments to RS 249 are to rates that will be charged to NYPA and payable to the NYISO, or to rates that will be charged to Niagara Mohawk, payable to

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<sup>9</sup> Niagara Mohawk Power Corp., 33 FERC ¶ 63,002, affirmed, 42 FERC 61,143 (1988). See also New York State Electric & Gas Corp., 103 FERC ¶ 61,085 (2003).

<sup>10</sup> See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,689 (1996) (Order No. 888), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>11</sup> Id. at 31,783.

NYPA. On the contrary, the terms and conditions governing the retail rates charged to the final customers in RS 249 are governed by Service Tariff 50, which we emphasize is not under our jurisdiction. We do not attempt in this order to act on the rates in Service Tariff 50, only RS 249. For this reason, Niagara Mohawk proposes to delete the components of Service Tariff 50 from RS 249, and we accept this amendment to remove non-jurisdictional rates, terms, and conditions. Niagara Mohawk provides further clarification in Section II(a) of RS 249, which states:

Company (Niagara Mohawk) shall resell and deliver all Business Economic Development Power to Economic Development Power Customers in amounts up to their individual allocations at the rates set forth in the EDPR as may be amended from time to time by the Company and approved by the NYPSC adjusted for transmission and distribution losses on the Company's system as determined by the Company. Such losses shall be consistent with loss factors approved by the [NYPSC] for similarly situated retail customers.

Thus, the NYPSC reviews these retail customers' rates.<sup>12</sup>

23. Finally, in Boston Edison Company, 98 FERC ¶ 61,292 at P17 (2002), we determined that tariffs and rate schedules should not include rates, terms and conditions that are not Commission-jurisdictional. Therefore, to the extent that the protested rates, terms and conditions that Niagara Mohawk proposes to remove are not subject to the Commission's jurisdiction (such as retail energy sales as represented in the service tariffs), Niagara Mohawk is compliant with prior Commission direction.

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<sup>12</sup> We note that RS 19 and 159 include Customer Transition Charges (CTC). We have previously found that the assessment of retail CTCs against retail customers of NYPA is a state matter. See Niagara Mohawk Power Corp., Docket Nos. EL97-29-000 and ER97-2006-000 (unpublished letter order issued on October 23, 1997). As such, New York regulatory authorities will continue to deal with any stranded costs with respect to the transition to retail open access.

### **III. Standard of Review**

#### **A. Background**

24. Although the amendments are unexecuted, Niagara Mohawk requests that the Commission accept these amendments pursuant to Section 205 of the FPA,<sup>13</sup> because NYPA was one of the New York Transmission Owners that jointly sponsored the NYISO OATT, including Attachment K. Niagara Mohawk states that since NYPA was one of the parties sponsoring the NYISO OATT, it has already indirectly consented to these provisions. Niagara Mohawk further argues that, to the extent that NYPA consents to the changes, the Commission must review the amendments under the “just and reasonable” standard of Section 205 of the FPA.

25. Niagara Mohawk attests that it has also reserved the right to file unilaterally to amend RS 159 in Section H(5)(b) of the rate schedule, which reads:

Changes to Exhibit I. The Company shall have the right to revise Exhibit I by unilateral filing with the Federal Energy Reserve [sic] Commission (FERC), or any other appropriate regulatory body, in accordance with the applicable rules and regulations of such regulatory body....

26. Niagara Mohawk states that it has reserved the right under Section 9 of its OATT to file unilaterally changes in Service Agreements 224, 225, and 226:

Nothing contained in the Tariff or any Service Agreement shall be construed as affecting in any way the right of the Transmission Provider to unilaterally make application to the Commission for a change in rates terms and conditions, charges, classifications of service, Service Agreement, rule or regulation under Section 205 of the Federal Power Act and pursuant to the Commission’s Rules and Regulations promulgated thereunder.<sup>14</sup>

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<sup>13</sup> 16 U.S.C. § 824d (2000).

<sup>14</sup> Niagara Mohawk Power Corporation FERC Electric Tariff, Original Volume No. 3, Sheet No. 35.

27. Niagara Mohawk states that it has reserved the right to file unilaterally to amend RS 19 under Section 205 of the FPA in Article VI, which provides that transmission and delivery charges and loss allowances “shall be subject to review and redetermination quinquennially.” Niagara Mohawk states that since these provisions have not been changed in the last five years, it may make changes now.

28. Niagara Mohawk clarifies that for RS 249, the right to file unilaterally under Section 205 has been reserved by virtue of the rates and charges not being “fixed.” (There are no provisions specifying either the transmission rate or loss adjustment.)

29. Niagara Mohawk requests that, in the event that the Commission does not accept the unilateral filing of these amendments under Section 205, the Commission consider them under Section 206 of the FPA.<sup>15</sup>

## **B. Comments**

30. NYPA filed a conditional protest to Niagara Mohawk’s proposed amendments. NYPA states that if its conditions, enumerated below, cannot be met reasonably before the Commission issues a determination, NYPA, as the other party in the bilateral agreements, protests unconditionally.

31. Multiple Intervenors state that Attachment K of the NYISO OATT does not require Niagara Mohawk to change Rate Schedule 249, as Niagara Mohawk purports. Multiple Intervenors cite Order No. 888, in which the Commission determined that it “does not take contract modification lightly,”<sup>16</sup> and that utilities seeking modification to contracts will have a heavy burden in justifying contract modification. Multiple Intervenors state that Niagara Mohawk has not met the heavy burden required under Order No. 888 and reiterated in the Commission’s January 27, 1999 and July 29, 1999 Orders in Docket Nos. ER97-1523-000, et al.<sup>17</sup>

32. Occidental asserts that Niagara Mohawk is not permitted to file these amendments without NYPA’s consent under Section 205, and therefore, these

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<sup>15</sup> 16 U.S.C. § 824e (2000).

<sup>16</sup> Order No. 888 at 31,665.

<sup>17</sup> Central Hudson Gas & Electric Corp., et al., 88 FERC ¶ 61,138 at 61,388 (1999).

amendments should be rejected. Occidental states that, although NYPA was involved in establishing the NYISO OATT, these amendments were made without NYPA's consent, and emphasizes Niagara Mohawk's request to NYPA that NYPA "reconfirm" its consent to these amendments. Occidental asserts that Niagara Mohawk's RS 19 filing is patently deficient because the replacement power contracts (such as RS 19) provide no unilateral right to file changes pursuant to Section 205. Occidental cites Niagara Mohawk's justification for filing under Section 205, which is Article IV of amended Rate Schedule 19:

Contracts for the sale of replacement power shall be in a form acceptable to [NYPA] and shall contain the substance of the provisions set forth in Exhibit B. The transmission and delivery charge and the loss allowance therein provided shall be subject to review and redetermination quinquennially.

33. Occidental asserts that the statement on 'redetermination' is not an explicit reservation of rights under Mobile-Sierra<sup>18</sup> that would allow a unilateral filing under Section 205 of the FPA, and that because there is no mention of the Commission or the FPA, the only plausible reading of the provision is that these changes were subject to review and redetermination by the parties hereto.

### C. Answer

34. Niagara Mohawk replies that it is not required to include proof of NYPA's consent in its filings to modify the agreements because such a requirement would deprive utilities of the right to ever seek to amend their agreements where the utility has expressly reserved its right to unilaterally file under Section 205.

35. Niagara Mohawk asserts that NYPA has either agreed to permit Niagara Mohawk to file the amendments to RS 19 and RS 159 unilaterally via its participation in the development of the NYISO OATT, or has waived its right to challenge Niagara Mohawk's right to file unilaterally. Niagara Mohawk points out that NYPA has not disputed in any of its interventions Niagara Mohawk's right to unilaterally file any of the challenged amendments. Niagara Mohawk asserts that because of NYPA's waiver of its right to assert that Niagara Mohawk is barred from making any such filings under Section 205, the Commission must review these filings under the "just and reasonable" standard of Section 205.

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<sup>18</sup> See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956) (Sierra).

36. Niagara Mohawk argues that Multiple Intervenors and Occidental are precluded from enforcing a limitation on Niagara Mohawks' unilateral filing rights, and that only NYPA as the other party to the agreements has that right. Niagara Mohawk asserts that the Commission has held in prior orders that consent is required only from parties to the agreement.<sup>19</sup> Niagara Mohawk argues that even if the Commission concluded that NYPA had neither consented to the amendments nor waived its right to object to Niagara Mohawk's unilateral filing, the Commission would still be required to review the agreements under Section 205 since each of the agreements includes provisions allowing for unilateral filing. Niagara Mohawk further elucidates that with regard to RS 159, Section H(5)(h) provides that: "The Company shall have the right to revise Exhibit I by unilateral filing with the Federal Energy Regulatory Commission (FERC), or any other appropriate regulatory body..."

#### **D. Commission Determination**

37. Niagara Mohawk's Service Agreements and RS 159 contain provisions reserving its right to file unilaterally. The changes to the Service Agreements and RS 159, therefore, will be reviewed under Section 205 of the FPA. However, such provisions are lacking in RS 19 and 249. That is, there are no provisions in RS 19 and 249 that permit Niagara Mohawk to file unilaterally. We find the fact that the rates are reviewed quinquennially does not constitute a right to file unilaterally. Nor do we consider that a lack of such provisions preserves the right to file unilaterally, as in the case of RS 249. On the contrary, Section E in Exhibit A of RS 19 reads, "The rate schedules specified in this contract shall be subject to successive modification by [NYPA] through the promulgation of superceding rate schedules," indicating that NYPA has preserved its right to modify RS 19's terms and conditions.

38. Hence, we turn to the question whether NYPA has consented to the changes. Given NYPA's protest (albeit conditional), it is apparent that NYPA does not consent to the amendment of RS 19 or 249. Therefore, we must determine whether Niagara Mohawk may file for review of RS 19 and 249 under Section 206 of the FPA.

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<sup>19</sup> Power Authority of the State of New York v. Long Island Lighting Co., 60 FERC ¶ 61,069 (1992) (rejecting the efforts of downstream customers of NYPA to exercise NYPA's right to consent themselves, as third party beneficiaries).

#### **IV. Review of RS 19 and RS 249 Amendments under Section 206**

##### **A. Background**

39. Niagara Mohawk requests that, in the event that the Commission does not accept the unilateral filing of RS 19 and 249 under Section 205, the Commission allow review under Section 206 of the FPA. Niagara Mohawk states that the fact that the proposed amendments are mandated by Attachment K of the NYISO OATT is conclusive that these changes are required.

40. For RS 19, Niagara Mohawk proposes its own transmission loss factors to be assessed on transmission facilities beyond the bulk power transmission system (in addition to the NYISO transmission loss factors). Niagara Mohawk states that the proposed transmission loss rates are the same loss rates used to develop Niagara Mohawk's retail transmission rates for non-NYPA power filed with and approved by the NYPSC. Niagara Mohawk explains that the losses are higher due to the fact that considerable time has elapsed since Niagara Mohawk last revised the loss rates. Niagara Mohawk also proposes to change its own transmission demand rate under RS 19.

##### **B. Comments**

41. Multiple Intervenors and Occidental state that Niagara Mohawk's assertion that the changes are required by Attachment K of the NYISO OATT is untrue. Occidental states that neither Attachment K nor other provisions of the NYISO OATT can generically modify these grandfathered contracts or preclude independent review. Occidental states that Niagara Mohawk is effectively seeking to avoid meaningful review of the contracts under Sections 205 or 206 by stating that the NYISO OATT already mandates the changes and meets any conceivable standard for review, including the public interest standard of review. Occidental states that this is contrary to Commission intent, as the Commission had previously ordered:

[I]t is inappropriate to increase the rates under existing bilateral agreements with respect to losses or any other rate component generically. To the extent that the existing agreements permit unilateral rate increases, Member Systems are free to propose amendments changing the rates in existing agreements. Any

concerns that a customer has with respect to such a rate change can be addressed in the separate proceeding under Section 205 or 206.<sup>20</sup>

42. Occidental argues that Niagara Mohawk's amendment of RS 19 violates the statutory purpose mandated by Congress in the NRA, which governs replacement power contracts. Occidental cites section 1(b)(3), in which Niagara Mohawk is required to resell replacement power it has purchased from NYPA to industries "in order as nearly as possible to restore low power costs to such industries..."<sup>21</sup> Occidental states that Niagara Mohawk's proposed changes will raise its overall annual power costs under RS 19 by approximately \$2 to \$3 million, and directly contradict Congress' interest in ensuring the provision of low-cost power.

43. Occidental argues that Niagara Mohawk provides no rate support or justification for its proposed changes in transmission loss factors or demand charge increases in RS 19, which it claims are excessive. Occidental states that Niagara Mohawk proposes to increase the transmission loss factors by five times, from 0.5 percent to 2.67 percent (in addition to the transmission loss charges from the bulk power transmission system, which Occidental estimates as 3 percent). Occidental states that Niagara Mohawk attributes this jump in the transmission loss factor to the amount of time that has elapsed since the last revision, as well as indicating that the transmission loss factors have been revised to exclude all losses incurred on the bulk power transmission system. Occidental states that, not only does this not justify the increase in rates, it does not discuss the fact that this separate non-bulk power transmission system loss factor will cause additional costs to be incurred by customers, including Occidental. Occidental states that Niagara Mohawk also does not identify what the non-bulk power transmission system facilities are, and whether the transmission losses are already being collected through state-jurisdictional retail rates.

44. Occidental argues that Niagara Mohawk does not justify the increase in the transmission demand rate in RS 19 from 31.5 ¢ to \$1.52. Occidental notes Niagara Mohawk's statement in its transmittal letter that "these minimum bill provisions appear to require such customers to pay NYPA's demand charge twice, but do not require the customer to pay Niagara Mohawk's transmission

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<sup>20</sup> Central Hudson Gas & Electric Corp., 86 FERC ¶ 61,062 at 61,217-18 (1999).

<sup>21</sup> 16 U.S.C. § 836(b)(3) (2000).

demand charges.”<sup>22</sup> Occidental states that Niagara Mohawk does not explain how customers were being double-charged for demand, and how customers will not continue to be double-charged for a single demand service under its proposal. Occidental also questions how the substitution of one demand charge for another could result in demand charges four times higher than those under the current schedule. Occidental states that it is unclear from Niagara Mohawk’s proposal whether the new demand charges that Niagara Mohawk proposes will be added to Rate I or Insert C to Rate II under the agreement. Further, Occidental asserts that Niagara Mohawk has not explained its proposal or the ramifications of its proposal.

45. Occidental states that if Niagara Mohawk’s filing is not rejected, it should be suspended for the maximum period and set for hearing, because it proposes to increase rates from 2 to 5 times existing levels, and may be substantially excessive, as described in West Texas Utilities Co.<sup>23</sup>

46. NYPA requests that Niagara Mohawk modify RS 19 to ensure that: (1) Niagara Mohawk includes only transmission costs related to serving industrial customers; (2) the transmission costs related to the delivery of all possible products under RS 19 are included; (3) Paragraph (d) on Original Sheet No. 17 is deleted (governing the inclusion of the transmission and delivery charge in Rate II); and (4) the new loss allowances in Original Sheet No. 18 are deleted, as they have not been shown to be just and reasonable.

### **C. Answer**

47. Niagara Mohawk notes that Section 1.0 of Attachment K of the NYISO OATT provides:

This Attachment describes the treatment of Existing Transmission Agreements (“ETA”), including Transmission Wheeling Agreements.... The applicability of the Attachment with the exception of Section 6.0 of this Attachment, is subject to the

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<sup>22</sup> Transmittal Letter at 6 (Docket No. ER03-991-000).

<sup>23</sup> 18 FERC ¶ 61,189 at 61,374-75 (1982) (West Texas) (explaining that when our preliminary examination indicates that proposed rates may be unjust and unreasonable, and may be substantially excessive, we would generally impose a 5 month suspension).

effective date of any necessary Section 205 filing pursuant to the FPA....<sup>24</sup>

48. Niagara Mohawk interprets this provision, along with the mandatory nature of the obligations imposed on all transmission customers by Attachment K, as requiring Niagara Mohawk to submit amendments to the NYPA Agreements under Sections 205 or 206 of the FPA. Niagara Mohawk acknowledges that the Commission has required that these changes be implemented through individual filings made under Section 205 and/or Section 206. Niagara Mohawk also notes that the Commission has determined these amendments to be just and reasonable in other cases.<sup>25</sup>

49. Niagara Mohawk argues in response to protests that the NRA does not, in fact, limit Niagara Mohawk's right to amend RS 19. Niagara Mohawk points out that nothing in the NRA bars Niagara Mohawk from modifying the contracts under Sections 205 or 206 under the FPA, nor does the NRA explicitly limit the Commission's review and acceptance of changes to these agreements.

50. Niagara Mohawk states that it had erroneously conveyed in its transmittal letter that the minimum bill provisions of RS 19 for Replacement Power II appeared to impose a double recovery of NYPA's demand charges, but did not make an allowance for payment of Niagara Mohawk's transmission rates. In its answer, Niagara Mohawk corrects this, stating that the provisions of Attachment B do require Replacement Power II customers to pay Niagara Mohawk's transmission charges at all times. Niagara Mohawk states that rather than modifying the rights of the parties to RS 19, Niagara Mohawk's proposed changes merely clarify the provisions.

51. Niagara Mohawk states that the Commission should reject Occidental's request for a five month suspension, asserting that a nominal suspension period will fully protect Occidental.

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<sup>24</sup> New York ISO FERC Electric Tariff, Original Vol. No. 1, Attachment K, Original Sheet No. 501.

<sup>25</sup> E.g., Central Hudson Gas & Electric Corp., 95 FERC ¶ 63,013 (2001), aff'd, Opinion No. 457, 100 FERC ¶ 61,023 (2002), reh'g denied, Opinion No. 457-A, 103 FERC ¶ 61,143 (2003).

#### **D. Commission Determination**

52. We concur with commenters that Attachment K of the NYISO OATT does not require Niagara Mohawk to amend RS 19, but we also point out that Attachment K of the NYISO OATT does permit Niagara Mohawk to file the proposed changes with the Commission to be reviewed individually through, in this case, a Section 206 filing. In response to concerns that the amendments to RS 19 would violate the NRA, we agree with Niagara Mohawk that the NRA does not preclude this Commission from reviewing the rates under the FPA.

53. Niagara Mohawk proposes to introduce in RS 19 transmission loss charges, a demand charge, and minimum bill provisions which increase significantly from the current rates. Niagara Mohawk has filed this proposed increase with no cost support, no showing that these rates have been previously reviewed by the Commission, and no showing that these rates are reasonable. As a consequence, we will set these rates for hearing.

54. Further, Niagara Mohawk has not made a convincing showing for RS 19 that allocating NYISO transmission charges to NYPA customers is appropriate. Therefore, will we set this issue for hearing as well.

#### **V. Section 205 Review for Service Agreements and RS 159**

##### **A. Background**

55. As determined earlier in this order, the proposed amendments for RS 159 and the Service Agreements will be reviewed under Section 205 of the FPA.

##### **B. Comments**

56. Occidental and Multiple Intervenors state that Niagara Mohawk has not provided the cost justification necessary under Section 205 of the FPA. Further, Occidental estimates that Niagara Mohawk's proposed increased transmission charges will increase Occidental's costs under RS 159 by \$1-2 million, yet will provide no new or improved service under RS 159. Occidental states that the Commission has a responsibility to ensure that the rates are just and reasonable, and that Niagara Mohawk has not satisfied this standard under Section 205.

**C. Answer**

57. Niagara Mohawk points out that the Commission has consistently rejected claims that utilities restructuring their existing transmission arrangements to accommodate the implementation of regional transmission tariffs should be required to relitigate cost-of-service issues. Niagara Mohawk states that the Commission has recognized that strict application of such filing requirements would act as an unnecessary impediment to the formation of ISOs and RTOs, and that the utilization of previously-determined revenue requirements were acceptable in determining transmission service charges.

**D. Commission Determination**

58. We agree with Niagara Mohawk that the required cost support for the NYISO transmission charges has already been reviewed by the Commission in other filings. The NYISO has already performed a full cost support and revenue requirement justification in its prior tariff filings. Niagara Mohawk is not required to resubmit its revenue requirements and cost analysis each and every time an individual contract is amended. Although the justness and reasonableness of the NYISO rates themselves has already been reviewed, we will set for hearing the issue of whether the NYISO rates should be applied to RS 159 and, if so, whether there is a need to provide NYPA with the billing and load profiling data necessary to process NYISO transmission charges.

59. We will accept the amendments to the Service Agreements since the amendments are governed by Niagara Mohawk's OATT and NYISO's OATT. The terms and conditions of the OATTs provide for the NYISO charges to be collected from customers under these Service Agreements. However, we will direct Niagara Mohawk to amend the agreements to outline a method of providing NYPA with the necessary billing and load profiling data to process the NYISO charges.

60. We note that in RS 159, similar to RS 19, Niagara Mohawk has included Niagara Mohawk transmission loss factors that have not been previously

considered by this Commission, unlike the NYISO rates.<sup>26</sup> Therefore, we will set these provisions for hearing, as discussed below.

## **VI. Determination of Cost Responsibility for NYISO Charges**

### **A. Background**

61. Niagara Mohawk proposes to amend all of the agreements to require the transmission customer to compensate the NYISO for ancillary services, marginal losses, congestion charges, and the NYPA Transmission Adjustment Charge.

### **B. Comments**

62. NYPA protests that the customers under the rate schedules and Service Agreements get their deliveries from the Niagara Mohawk transmission system, and are, in fact, Niagara Mohawk customers and not NYPA customers. Therefore, NYPA argues that Niagara Mohawk is responsible for the NYISO charges related to the transmission of NYPA power, not NYPA. NYPA clarifies that NYPA sells power to Niagara Mohawk, who in turn sells and delivers it to the ultimate customers. Further, NYPA attests that Niagara Mohawk has billing relationships with these customers, and Niagara Mohawk should continue to have the responsibility for the costs associated with deliveries.

63. NYPA states that RS 19 is a Replacement Power contract, requiring NYPA to sell to Niagara Mohawk 445 MW of power for resale to Niagara Mohawk customers; as Niagara Mohawk serves the customers on the retail level, NYPA argues that the transmission costs should be the responsibility of Niagara Mohawk, not NYPA. Although NYPA acknowledges that the Commission has ruled in other orders<sup>27</sup> that the nature of NYPA's Economic Development Power and

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<sup>26</sup> We note that the demand charge of \$1.52/kV listed in RS 159 was previously approved by unpublished letter order in Docket No. ER89-354-000 on June 6, 1989.

<sup>27</sup> NYSEG I, 83 FERC at 61,905 (“NYPA also makes up for transmission losses, pays for transmission to the point of delivery to NYSEG’s and Niagara Mohawk’s systems, schedules for the delivery of Economic Development Power, and reimburses NYSEG and Niagara Mohawk for the costs of installing equipment and meters to serve qualified businesses. The qualified businesses are, for purposes of the Economic Development Power program, NYPA’s customers; they are not NYSEG’s or Niagara Mohawk’s Customers.”); New York State Electric & Gas Corp., 103 FERC ¶ 61,085 at P 14 (2003).

Expansion Power programs are such that the qualified businesses were deemed NYPA's customers, and not the utility's that bought the Economic Development Power and then resold it, NYPA asserts that the Commission has never decided this circumstance in the case of Replacement Power, which is designed differently. NYPA asserts that to apply the rulings on Economic Development Power and Expansion Power to Replacement Power would contradict the NRA. NYPA states that both NYPA and Niagara Mohawk jointly serve Load Serving Entity (LSE) functions such as determining who will receive Replacement Power, when they will receive it, how much they will receive, and what delivery price they will pay. NYPA states that Niagara Mohawk also continues to pay the costs of installing equipment and meters serving Replacement Power customers, further indicating that Niagara Mohawk's customer relationship with Replacement Power recipients has not been altered by electric restructuring.

64. NYPA also states that RS 159 explicitly acknowledges that NYPA sells Expansion Power to Niagara Mohawk for resale. NYPA argues that Niagara Mohawk continues to perform LSE functions on behalf of Expansion Power customers, such as determining when the customers will receive Expansion Power, how much they will receive, and what delivery price they will pay. NYPA makes the same arguments for the Service Agreements and RS 249. NYPA asserts that these transactions do not constitute "buy-sell" arrangements as had been described in NYSEG I.<sup>28</sup>

### **C. Answer**

65. Niagara Mohawk reiterates that the issues raised by NYPA have already been litigated and resolved in prior orders. Niagara Mohawk argues that NYPA is the LSE under RS 19, and that Niagara Mohawk resells electric energy to industrial customers at a NYPA-determined price. Niagara Mohawk does not dispute, however, that NYPA and Niagara Mohawk jointly determine the allocation of Replacement Power.

### **D. Commission Determination**

66. In NYSEG I, we determined that; "NYPA also makes up for transmission losses, pays for transmission to the point of delivery to NYSEG's and Niagara Mohawk's systems, schedules the delivery of Economic Development Power, and

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<sup>28</sup> NYSEG I, 83 FERC at 61,902.

reimburses NYSEG and Niagara Mohawk for the costs of installing equipment and meters to serve qualified businesses. The qualified businesses are, for purposes of the Economic Development Power program, NYPA's customers; they are *not* NYSEG's or Niagara Mohawk's Customers."<sup>29</sup>

67. In the case of RS 159, NYPA determines who will be the Expansion Power customers, determines how much Expansion Power energy to supply, and determines the rates charged to Expansion Power customers. Niagara Mohawk is prohibited from charging energy and capacity rates that differ from those determined by NYPA. Niagara Mohawk serves as a conduit distributing energy and capacity to customers determined by NYPA, at rates determined by NYPA, and at allocations set by NYPA. Niagara Mohawk earns no profit on energy or capacity. The only revenues in excess of those outlined in the tariff that Niagara Mohawk collects are the transmission expenses it incurs, and payment for taxes resulting from the transactions. The only difference between the situation represented in NYSEG I and the one here is that, rather than NYPA reimbursing Niagara Mohawk for the cost of installing meters to serve the businesses (as was the case in NYSEG I), the businesses themselves reimburse Niagara Mohawk for costs incurred. Based on these facts, we find that under RS 159, RS 249, SA 224, SA 225, and SA 226, NYPA is the LSE, that NYPA actually sells Expansion Power, Economic Development Power, and Power for Jobs directly to eligible retail customers, and that Niagara Mohawk simply provides unbundled delivery services subject to the Commission's jurisdiction. Thus, it is reasonable for NYPA to be responsible for the NYISO charges for these services.

68. It is undisputed that the NYISO provides transmission services for these contracts, and the customers to these contracts utilize the benefits of the bulk power transmission system. The NYISO should be reimbursed for the services it provides. NYISO's Attachment K governing grandfathered contracts outlines the cost responsibility for these transmission costs, stating that the **transmission customer** is responsible for such costs.<sup>30</sup> As determined above and in prior orders, NYPA is the transmission customer for Power for Jobs, Economic Development Power and Expansion Power and should be required to compensate the NYISO for services that the NYISO provides in connection with the transmission services provided under these contracts. Accordingly, we will accept the proposed

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<sup>29</sup> Id. at 61,905.

<sup>30</sup> New York Independent System Operator, Inc. FERC Electric Tariff Original Vol. No. 1, Attachment K.

amendments to transfer NYISO cost responsibility for RS 159, RS 249, and the Service Agreements to NYPA.

69. However, it is not apparent from the conflicting representations of the parties to RS 19 who the LSE is, and therefore, who is responsible for the NYISO charges. NYPA represents that NYPA and Niagara Mohawk jointly determine who will receive Replacement Power, when they will receive it, how much they will receive, and what price they will pay. Niagara Mohawk represents that it is solely NYPA that determines these factors, making the present RS 19 a simple unbundled transmission service agreement with NYPA as the transmission customer. In light of these conflicting attestations, we set the issue of who the LSE is for Replacement Power under RS 19 for hearing.

70. Certain parties protest the pass-through of NYISO costs by NYPA to its customers. This issue is not within the Commission's jurisdiction.<sup>31</sup>

## **VII. Acceptance, Suspension and Evidentiary Hearing**

71. Upon review, the Commission finds that the proposed amendments to the Service Agreements in Docket No. ER03-990-000 appear to be just and reasonable and have not been shown to be unjust, unreasonable, or unduly discriminatory or preferential or otherwise unlawful. Accordingly, the Commission will conditionally accept these amendments subject to the provision of certain customer data, as discussed above.

72. The Commission's preliminary analysis indicates that Niagara Mohawk's proposed amendments in Docket Nos. ER03-989-000, ER03-990-000, and ER03-991-000 have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Although these proposed changes represent a considerable increase over current rates, our preliminary analysis does not indicate that the increases will produce substantially excessive revenues; Niagara Mohawk points out, some of the

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<sup>31</sup> See Central Hudson Gas & Electric Corp., 95 FERC ¶ 63,013 at 65,171 (2001) (finding that the retail energy sales contract between NYPA and its customers are not within the Commission's jurisdiction, and any objections to the pass-through of costs at the retail level must be brought before a court of competent jurisdiction, not before this Commission), aff'd, Opinion No. 457, 100 FERC ¶ 61,023 at P 5 (2002), reh'g denied, Opinion No. 457-A, 103 FERC ¶ 61,143 (2003).

existing rates were initially established over 40 years ago. Accordingly, we will accept the proposed amendments in Docket Nos. ER03-989-000, ER03-991-000, and ER03-992-000 for filing, suspend them for a nominal period, to become effective September 1, 2003, subject to refund, and set them for hearing and settlement judge procedures. Because Docket Nos. ER03-989-000, ER03-991-000, and ER03-992-000 raise common issues of law and fact, we will consolidate them for the purposes of hearing and decision.

73. While we are setting these issues for a trial-type, evidentiary hearing, we encourage the parties, before hearing procedures are commenced, to first make every effort to settle their dispute. To aid the parties in their settlement efforts, the hearing we have ordered shall be held in abeyance and a settlement judge shall be appointed to assist the parties in reaching a settlement.<sup>32</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>33</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

The Commission orders:

(A) Niagara Mohawk's proposed amendments to Service Agreements 224, 225, and 226 are hereby conditionally accepted for filing, to become effective September 1, 2003, as requested. Niagara Mohawk is hereby directed to amend the Service Agreements to outline a method of providing NYPA with the necessary billing and load profiling data to process the NYISO charges

(B) Niagara Mohawk's proposed amendments to Rate Schedules 19, 159, and 249 are hereby accepted for filing and suspended for a nominal period, to become effective September 1, 2003, subject to refund.

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<sup>32</sup> 18 C.F.R. § 385.603 (2003).

<sup>33</sup> 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 and a summary of their background and experience. ([www.ferc.gov](http://www.ferc.gov) - click on Office of Administrative Law Judges).

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the justness and reasonableness of Niagara Mohawk's proposed amendments to RS 19, 159, and 249. However, this hearing will be held in abeyance pending the settlement judge procedures ordered below.

(D) Docket Nos. ER03-989-000, ER03-991-000, and ER03-992-000 are hereby consolidated for the purposes of hearing and decision.

(E) Pursuant to Rule 603 of the Commission's rules of Practice and Procedure, 18 C.F.R. §385.603, 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 a settlement judge.

(F) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and the Commission 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 every 30 days thereafter, apprising the Chief Judge and the Commission of the parties' progress toward settlement.

(G) If the settlement discussions fail, an administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately 15 days of the date on which the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First St., N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to

rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.