

124 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Niagara Mohawk Power Corporation

Docket Nos. ER08-611-000
ER08-611-001
ER08-613-000
ER08-613-001

ORDER ACCEPTING JURISDICTIONAL AGREEMENTS
AND ORDERING REFUNDS

(Issued July 7, 2008)

1. In this order the Commission accepts effective April 29, 2008, a substation service agreement (SSA) between Niagara Mohawk Power Corporation (Niagara Mohawk) and Nine Mile Point Nuclear Station LLC (Nine Mile) and a facilities agreement (FA) between Niagara Mohawk and the Power Authority of the State of New York (NYPA)¹ and finds that the SSA, prior to February 28, 2006, and the FA are subject to the Commission's jurisdiction. In addition, the Commission directs Niagara Mohawk to refund the time value of revenues collected under these agreements and file a refund report with the Commission as discussed below.

I. Niagara Mohawk's Filing

2. On February 28, 2008, Niagara Mohawk filed the SSA between Niagara Mohawk and Nine Mile in Docket No. ER08-611-000 and the FA between Niagara Mohawk and NYPA in Docket No. ER08-613-000. Niagara Mohawk requests that the Commission issue an order finding that the SSA and FA are not subject to the Commission's

¹ Original Service Agreement Nos. 1170 and 1171 under the New York Independent System Operator, Inc.'s (NYISO), FERC Open Access Electric Tariff Original Volume No. 1.

jurisdiction. Niagara Mohawk explains that, after a Commission order² expressing concern with the number of agreements Niagara Mohawk has filed after the commencement of service, it conducted an internal review to identify any jurisdictional agreements which had not previously been filed with the Commission. Niagara Mohawk further explains that, while it does not believe that the SSA and the FA are subject to the Commission's jurisdiction, it has filed them out of an abundance of caution.

3. In regard to both agreements, Niagara Mohawk urges that, if the Commission finds them jurisdictional, the Commission should find the charges to be just and reasonable. Niagara Mohawk acknowledges that the Commission's Prior Notice Order requires utilities to refund to their customers the time value of revenues collected, calculated pursuant to section 35.19a of the Commission's regulations (18 C.F.R. § 35.19a), for the period that a jurisdictional rate was collected without Commission authorization. Niagara Mohawk provides a refund calculation based on the amounts paid relevant to each agreement.

4. On April 8, 2008, the Commission's Director of Tariffs and Market Development-East issued a deficiency letter directing Niagara Mohawk to respond to a series of questions about the February 28, 2008 filings within 30 days of the issuance of the deficiency letter. On May 8, 2008, Niagara Mohawk filed responses to the deficiency letter and provided, in Attachment 1, three sets of Substation Operating Guidelines dated April 4, 2002, June 7, 2002, and February 2, 2006, respectively. Niagara Mohawk also provided a copy of its Maintenance Criteria for Bulk Power System Protection and numerous work orders.

A. SSA Between Niagara Mohawk and Nine Mile

5. Niagara Mohawk states that Nine Mile is a limited liability company and a wholly-owned indirect subsidiary of Constellation Energy Group, Inc. (Constellation). Niagara Mohawk states that on December 11, 2000, Constellation entered into an asset purchase agreement with Niagara Mohawk and others to purchase 100 percent ownership interest in Nine Mile Point Unit No. 1 and 82 percent ownership interest in Nine Mile Point Unit No. 2, including the Scriba substation and certain associated assets. Niagara Mohawk states that the nuclear generating facilities and the Scriba substation are located within the New York Independent System Operator, Inc. (NYISO) control area and are interconnected to the transmission facilities of Niagara Mohawk. Niagara Mohawk states that it currently buys 90 percent of its entitlement to capacity, energy, and ancillary

² *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,104, at P 24–25 (2007).

services from the Nine Mile generating units under long-term purchase power agreements.³

6. Niagara Mohawk states that the SSA with Nine Mile was initially executed on November 25, 2003, and amended twice: (1) on February 28, 2006, it was amended to clarify that the operation and maintenance (O&M) services were to be provided only upon the written request of Nine Mile beginning January 1, 2006; (2) on March 12, 2007, it was amended to revise the charges for the O&M services paid by Nine Mile, and to extend the term of the SSA, which will terminate on December 31, 2008. Niagara Mohawk states

to the extent there were any differences in the O&M procedures applicable to Niagara Mohawk's performance of the SSA between the time the SSA was executed on November 25, 2003 until it was amended on February 28, 2006, such differences are reflected in (i) the revisions to the Nine Mile Point Nuclear Station LLC – Niagara Mohawk, Substation Operating Guidelines (first issued on 4/4/02, revised on 6/7/02 and revised again on 2/22/06) provided in Attachment 1 hereto; and (ii) the revisions to the Electric Operation Procedures Manual delineated in the index of published materials provided in Attachment 2 hereto.⁴

7. Niagara Mohawk states that the SSA sets forth the terms and conditions for providing the following three categories of services regarding the Scriba substation assets owned by Nine Mile: (1) Relay and Control Support Service; (2) Breaker/Transformer Maintenance and Testing; and (3) Scriba Substation Switchyard Operation Services, (collectively, O&M services). Niagara Mohawk states that Nine Mile pays Niagara Mohawk a set hourly rate for specific services rendered, plus materials, out-of-pocket expenses, and overtime.

8. Niagara Mohawk asserts that it performed the O&M services solely under the authority of section 3.1 of the SSA, which has always required Niagara Mohawk to perform the support services specified in Appendix A of the SSA and that operation services were provided in accordance with Substation Operating Guidelines and Electric Operation Procedures. Niagara Mohawk adds that from time to time, as appropriate, it would advise Nine Mile of the need to perform certain maintenance activities, but the scheduling and performance of these activities was always coordinated with Nine Mile

³ Nine Mile was granted market-based rate authority by the Commission in 2001. See *Nine Mile Point Nuclear Station, LLC*, 95 FERC ¶ 61,202 (2001).

⁴ Niagara Mohawk May 8, 2008 Response to the Deficiency Letter at 3–4, & n7. Niagara Mohawk states that the texts of these manuals are voluminous and would provide them if requested by the Commission.

and only performed with Nine Mile's authorization. Niagara Mohawk also states that the maintenance was often performed only during refueling or outages at the Nine Mile facilities and as the Nine Mile employees became more familiar with the operation and maintenance required at the Scriba substation facility, Nine Mile performed these activities. Niagara Mohawk states the February 28, 2006 amendment to the SSA simply documented and formalized the process that Nine Mile had put in place over this time period as it gained experience and expertise regarding the operation and maintenance of the Scriba substation facility.⁵

9. Niagara Mohawk contends that under the test provided in the Prior Notice Order⁶ and as applied in *Puget Sound Power & Light Company*,⁷ Niagara Mohawk does not qualify as an "operator" of the Scriba substation and therefore the SSA does not fall under Commission jurisdiction. Niagara Mohawk states that it, like the subject utility in *Puget Sound*, has almost no discretion to perform the O&M services specified under the SSA. In support Niagara Mohawk states that (1) all support services must be requested in writing by Nine Mile and without such a request it has no authority to provide the O&M services specified in the SSA; (2) Niagara Mohawk must perform the O&M services under the SSA using Niagara Mohawk's electric operating procedures; (3) the SSA provides that for the equipment owned by Nine Mile at the Scriba Substation, Niagara Mohawk agrees to perform only the O&M support services specified in Appendix A of the SSA. Therefore, according to Niagara Mohawk, it does not qualify as an "operator" of the Scriba substation facilities. Further, Niagara Mohawk submits that, inasmuch as the SSA is limited to facilities owned by Nine Mile, it cannot be said to "own" any of the facilities at issue. Niagara Mohawk concludes that, since it neither owns nor operates the facilities which are the subject of the O&M services it provides, the Commission should disclaim jurisdiction over the SSA.

10. In its May 8, 2008 response to the deficiency letter, Niagara Mohawk also contends that the services it provides under the SSA do not "relate to" wholesale sales or transmission systems within the meaning of section 205 of the Federal Power Act (FPA) or section 35.1(a) of the Commission's regulations, as the Commission has applied those provisions in the Prior Notice Order and other cases.⁸ Niagara Mohawk states that the Nine Mile-owned equipment at the Scriba substation is part of the 115 kV and 345 kV

⁵ Niagara Mohawk May 8, 2008 Response to Deficiency Letter at 4.

⁶ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,993-94 (1993) (Prior Notice Order).

⁷ 64 FERC ¶ 61,335, at 63,427 (1993) (*Puget Sound*).

⁸ Niagara Mohawk May 8, 2008 Response to Deficiency Letter at 6.

systems within the substation needed for Nine Mile to deliver the output of the Nine Mile-1 and Nine Mile-2 nuclear generating facilities.⁹ Niagara Mohawk asserts that the SSA makes no reference to any “transmission system” but rather that the services are associated with 115 kV and 345kV systems in the Scriba Substation Switchyard, which are located on the generator side of the delivery point as defined in the interconnection agreement. Niagara Mohawk acknowledges that these support services facilitate the operation of a facility that ultimately produces energy sold in interstate commerce, but argues that both the Commission and courts interpreting the FPA have made it clear that only certain agreements that are in some way “related” to wholesale sales or transmission services must be filed with the Commission.¹⁰

11. Finally, Niagara Mohawk states that if the Commission finds the SSA to be jurisdictional that the Commission should also find the charges for the O&M services to be just and reasonable, and Niagara Mohawk has provided a calculation of the time value of the revenues collected under the SSA.

B. FA Between Niagara Mohawk and NYPA

12. Niagara Mohawk states that under the FA, which was executed on July 23, 2001, and which has a forty (40) year term, Niagara Mohawk engineered, constructed, and currently performs certain operation and maintenance work (O&M work) on a Capacitor Bank owned by NYPA. Niagara Mohawk states that NYPA is a corporate municipal instrumentality and political subdivision of the State of New York which is exempt from the Commission’s jurisdiction and general ratemaking authority under sections 201, 205, and 206 of the FPA.

13. Niagara Mohawk states that as part of a project to relieve congestion on the New York transmission system and facilitate the electricity supply markets in New York, NYPA requested that a 200 MVAR Capacitor Bank and associated equipment be installed at Niagara Mohawk’s 345 kV Edic substation located in Marcy, New York. Niagara Mohawk states that the FA provides in relevant part: (1) NYPA would own the Capacitor Bank; (2) Niagara Mohawk would engineer and construct the Capacitor Bank

⁹ *Id.* at 6.

¹⁰ *Citing* Prior Notice Order, 64 FERC at 61,988, quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (“[There] is an infinitude of practices affecting rates and service. The statutory directive must reasonably be read to require the recitation of only those practices that affect rates and service *significantly*, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous. It is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive.”).

for a lump sum payment of \$3.5 million; (3) Niagara Mohawk would be responsible for operation, maintenance, and repair work, which is performed at NYPA's request, for a monthly fee; (4) Niagara Mohawk would operate and maintain the Capacitor Bank in accordance with Niagara Mohawk's standard procedures; (5) Niagara Mohawk's maintenance would consist of periodic inspections, preventative and remedial maintenance, and Niagara Mohawk would be required to perform ordinary and emergency repairs, as necessary; and (6) in the event Niagara Mohawk determines that the Capacitor Bank requires an extraordinary repair which Niagara Mohawk estimates will exceed \$25,000, it shall notify NYPA, who will then determine if it wishes the repairs to be effected.

14. Further, Niagara Mohawk states that the FA provides that NYPA will apply to NYISO for Transmission Congestion Contracts (TCCs) associated with the increased transfer capability resulting from the project and provides for an allocation of a portion of the rents and revenues associated with such TCCs from NYPA to Niagara Mohawk.¹¹

15. Niagara Mohawk states that the same criteria set forth in the Commission's Prior Notice Order and in *Puget Sound* regarding the Commission's non-jurisdictional determination applies to the FA. To support its non-jurisdictional argument, Niagara Mohawk claims that under the FA, it must receive prior approval for engineering, procuring, installing, testing, and operating and maintaining the Capacitor Bank. Niagara Mohawk states that it does not have discretion in operating and maintaining the Capacitor Bank and must do so in accordance with Niagara Mohawk's standard procedures. Niagara Mohawk also states that the FA limits its discretion to perform O&M work to periodic inspections, preventative and remedial maintenance, and ordinary and emergency repairs, and it must receive prior approval from NYPA for repairs in excess of \$25,000. Niagara Mohawk states that it does not have the latitude to simply perform the O&M work in accordance with a general standard, such as a prudent utility practice, it must instead perform the O&M work in accordance with procedural standards specified in the FA. Therefore, according to Niagara Mohawk, the Commission should find that NYPA has control and the decisionmaking authority over the O&M work and should determine that the FA is non-jurisdictional.

16. In addition, Niagara Mohawk argues that the charges in the FA are not "for transmission or sale of electric energy subject to the jurisdiction of the Commission" and do not "affect or relate to any such rate or service" as these statutory provisions have been interpreted and applied by the Commission. Niagara Mohawk states that while NYPA is a member of the NYISO and has placed its transmission system under the operational control of NYISO, it did so expressly reserving its non-jurisdictional status. Thus, according to Niagara Mohawk, it provides services to an entity which is not subject

¹¹ See Article 7 of the FA.

to Commission jurisdiction and for NYPA-owned equipment, which also is not subject to Commission jurisdiction.¹²

17. Niagara Mohawk states that regarding the engineering and construction work provided under the FA, an agreement providing for customer payments for construction of facilities is subject to the Commission's jurisdiction only when the subject facilities are used in connection with transmission service subject to the Commission's jurisdiction under section 205. Niagara Mohawk claims that because the facilities used to transfer power are owned by NYPA, the engineering and construction work performed under the FA is not for, or in connection with, interstate transmission service and is not subject to the Commission's jurisdiction under section 205.

18. Niagara Mohawk requests that, if the Commission finds the FA to be jurisdictional, it also find the charges for the O&M work to be just and reasonable. Niagara Mohawk has provided a calculation of the time value of the revenues collected under the FA.

19. Niagara Mohawk also requests that if the Commission finds the provisions of the FA governing the engineering and construction to be jurisdictional, it should also find the \$3.5 million lump sum charges for these services to be just and reasonable. Niagara Mohawk has provided a calculation of the time value of the revenues collected under the FA.

II. Notices, Interventions and Comments

20. Notice of Niagara Mohawk's February 28, 2008 filings were published in the *Federal Register*, 73 Fed. Reg. 12,971 (2008), with interventions and protests due on or before March 20, 2008. Motions to intervene were filed by Nine Mile and NYPA. Notice of Niagara Mohawk's May 8, 2008 response to the Commission's deficiency letter was published in the *Federal Register*, 73 Fed. Reg. 31,850 (2008), with interventions and protests due on or before May 29, 2008. None was filed.

21. NYPA comments that while it has no objection to Niagara Mohawk's request, it wishes to correct Niagara Mohawk's statement in its February 28, 2008 filing that "NYPA has stated that it will recover payments made to Niagara Mohawk under the Facilities Agreement through its [Transmission Adjustment Charge]." NYPA states that, in fact, it does not recover its payments made to Niagara Mohawk under the FA through the Transmission Adjustment Charge but, rather, it finances the entire project, including associated O&M, through the TCCs revenues provided to NYPA from NYISO. NYPA

¹² Citing Prior Notice Order, 64 FERC at 61,986; *American Municipal Power-Ohio*, 57 FERC ¶ 61,358 (1991), *reh'g denied*, 58 FERC ¶ 61,183 (1992); *New York State Electric & Gas Corp.*, 63 FERC ¶ 61,318 (1993).

concludes that these NYPA-funded monthly payments have no impact on the level of the Transmission Adjustment Charge or any other transmission charge subject to the Commission's jurisdiction.

III. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

23. The Commission stated in the Prior Notice Order that two related inquiries must be answered in the affirmative to determine that the Commission has jurisdiction over an agreement: (1) Does the agreement contain rates or charges for or in connection with transmission or sales for resale in interstate commerce, or does it in any manner affect or relate to jurisdictional rates or services? and (2) Does a public utility provide the O&M service?¹³ The Commission explained that the answer to the second question turns on who "owns" or "operates" a facility and that defining an "operator" depends on which entity has control and decisionmaking authority over major matters. The Commission stated "[i]f the entity performing the O&M service under the agreement acts merely as the agent of another party wielding authority to make main operational decisions, then it is not "operating" the facility."¹⁴ The Commission added that where a utility's discretion was limited only by a "prudent utility practice" standard, the Commission has held that that utility is an "operator" but, in contrast, where an entity has to have permission for all O&M actions beyond those that are routine or emergency in nature, the Commission has held that that entity is not the "operator" of the facility.

24. In *Puget Sound*, the Commission inquired whether the entity performing the O&M service under the agreement was acting merely as the agent of another party wielding authority to make main operational decisions. Puget Sound Power and Light Company (Puget) provided primarily routine maintenance services although from time to time it de-energized and re-energized the facilities while performing basic maintenance and repair. Puget stated that Whatcom County made all significant decisions and provided approval of Puget's actions and that Puget had no control or decisionmaking authority over the operation of the facilities, except for minor repairs and emergencies. The Commission upon examining the agreement found that many of Puget's activities were either routine

¹³ Prior Notice Order, 64 FERC at 61,993.

¹⁴ *Id.* at 61,993–94.

or emergency in nature, and that other activities required Whatcom County's prior direction or approval. The Commission held that, because Puget had little discretion, if any, to perform the necessary O&M work, it was not "operating" the facilities and thus the O&M service was not jurisdictional. The Commission stated:

Whatcom specifically limited in the agreement the operation and maintenance services that Puget may perform without prior direction or approval. In contrast, Whatcom could simply have directed that Puget operate and maintain the facilities in accordance with some general standard, such as prudent utility practice. In the latter case, the agreement would have given Puget control and decisionmaking authority over the operation of the facilities --and would have transformed the agreement into a jurisdictional agreement requiring prior filing with, and review by, the Commission.¹⁵

1. SSA

25. Niagara Mohawk relies on both prongs of the Prior Notice Order to support its position that the SSA is not subject to the Commission's jurisdiction. Niagara Mohawk asserts that the SSA does not in any manner affect or relate to jurisdictional rates or services and that it neither owns nor operates the facilities that provide the O&M services under the SSA. The Commission finds that, consistent with its Prior Notice Order and *Puget Sound*, the SSA is connected with transmission or sales for resale in interstate commerce and Niagara Mohawk, during the period from November 25, 2003 to February 28, 2006, continued to exercise operational control of the facilities under the SSA, thus making the SSA, during that period, subject to Commission jurisdiction.

26. With regard to the first prong of the Prior Notice test, Niagara Mohawk acknowledges that the subject support services support the operation of a facility that produces energy sold in interstate commerce,¹⁶ but argues that, nonetheless, the specific agreement at issue here is not significantly related to jurisdictional rates or services. In the Prior Notice Order, the Commission stated that it may require any matter that forms any significant part of the calculation of the rate customers actually pay for jurisdictional service to be filed for Commission review¹⁷ and noted that case law indicates that the

¹⁵ *Puget Sound*, 64 FERC at 63,428.

¹⁶ The Nine Mile / Niagara Mohawk joint operating guidelines state that "the Nine Mile 1 & 2 are an important component of the New York State electric power system. As such, it plays a critical role in both normal and emergency operation of the power grid, which is coordinated by the New York Independent System Operation (NYISO)." Niagara Mohawk May 8, 2008 Response to Deficiency Letter, Attachment 1 at 11.

¹⁷ Prior Notice Order, 64 FERC at 61,988.

Commission may exercise significant judgment in these matters.¹⁸ The Commission gave examples to illustrate agreements or charges that must be filed with the Commission and those that the utility need not file under section 205. The Commission directed a utility to file its planning reserve, and directed the filing of an agreement providing for customer payment of contributions in aid of construction. In contrast, a utility is not required to file a contract under which it rents its outdoor poles to a cable television company. Two utilities urged the Commission to disclaim jurisdiction over O&M agreements. The Commission did not disclaim jurisdiction but instead stated “if the payment has to do with jurisdictional services, it has satisfied the first prong, because the payment for O&M service constitutes, at a minimum, a payment affecting a section 205 rate (for the customers ultimately pay for O&M service in their rates).”¹⁹ Likewise, in the instant case, the first prong of the test is met because the SSA affects a section 205 rate in that the customers ultimately pay for this O&M service in their rates.

27. With regard to the second prong, Niagara Mohawk argues that it is not an “operator” of the subject facilities because it lacks operational control. The Commission is not persuaded that Niagara Mohawk has lacked operational control since the inception of the SSA. Niagara Mohawk has performed and is performing the same service using the same procedures it used when it owned the substation.

28. The requirement that Niagara Mohawk have written authorization to perform the O&M services was not added to the SSA until February 28, 2006, more than two years after the SSA was first executed. For over two years, Niagara Mohawk performed the O&M services under the SSA without any prior written authorization from Nine Mile and used its decision making authority to exercise considerable operational control over the facilities. Both during that time period and currently, according to Niagara Mohawk, the O&M services procedures are reflected in the joint Nine Mile / National Grid (Niagara Mohawk) Substation Operating Guidelines. Nine Mile and Niagara Mohawk amended the SSA in 2006 to provide

On or after January 1, 2006, Nine Mile shall request in writing that specific items of maintenance as provided in sections 1 through 3 of this Appendix A, for equipment owned by Nine Mile at Scriba Substation, be performed by [Niagara Mohawk] in accordance with this [SSA]. The Parties agree that [Niagara Mohawk] shall not perform any maintenance without such written request provided by Nine Mile. Such written request shall be provided seven (7) business days prior to the date of the requested maintenance, unless otherwise agreed to by [Niagara Mohawk].

¹⁸ *Id.* at 61,987.

¹⁹ *Id.* at 61,993.

29. Appendix A states that Niagara Mohawk and Nine Mile shall comply with the Substation Operating guidelines insofar as such guidelines relate to Scriba substation.

30. Section 3 of these joint Nine Mile / Niagara Mohawk guidelines sets forth notification responsibilities for both Niagara Mohawk and Nine Mile, and indicates a relationship of mutual coordination between Niagara Mohawk and Nine Mile rather than an owner/agent relationship. Niagara Mohawk notifies Nine Mile of routine work activities and of emergent events that threaten the possibility of a grid emergency condition. Nine Mile, on the other hand, notifies Niagara Mohawk if plant conditions cannot safely support scheduled 115kV or 345 kV work.²⁰ The guidelines indicate that access to the Scriba substation is equally shared between Niagara Mohawk and Nine Mile employees, and the guidelines prohibit Nine Mile from limiting access by Niagara Mohawk to the Scriba substation in all situations.²¹ Section VII B states that “the [Scriba 345 kV] busses are under the mutual controllership of Nine Mile and [Niagara Mohawk].”²² Further, the procedures to be followed are those of Niagara Mohawk.²³

31. The Commission concludes that for the period prior to February 28, 2006, Niagara Mohawk’s authority over Nine Mile owned equipment extended beyond that of a mere agent of another party wielding authority to make main operational decisions. During that period, in contrast to *Puget Sound*, where Puget is specifically required to get written authorization for anything going beyond specified routine and emergency procedures, Niagara Mohawk was not limited by any such requirement and thus, the Commission finds that Niagara Mohawk, from November 25, 2003 until February 28, 2006 exercised operational control over the assets at the Scriba substation. The Commission further finds that with the February 28, 2006 amendment to the SSA, Niagara Mohawk’s control was limited by the requirement that it not perform any maintenance without written request provided seven business days prior to the date of the maintenance. At this point, consistent with the Commission’s ruling in *Puget Sound*, the agreement was no longer jurisdictional.

32. Accordingly, from November 25, 2003 until February 28, 2006, the Commission finds that (1) the SSA relates to jurisdictional rates and (2) Niagara Mohawk, a public utility, provided the O&M service in that it made main operational decisions. Thus,

²⁰ Niagara Mohawk May 8, 2008 Response to Deficiency, Attachment 1, Nine Mile Operating Guidelines Issued 2-22-06 at 6.

²¹ *Id.* at 5.

²² *Id.* at 12.

²³ Niagara Mohawk February 28, 2008 Filing, Attachment A at Appendix A.

during that time period, the SSA was a jurisdictional agreement requiring prior filing with, and review by, the Commission.

33. The Commission finds the O&M services charges provided under the SSA to be just and reasonable. Additionally, Niagara Mohawk is directed to refund the time value of revenues collected under the SSA from November 25, 2003 through February 27, 2006, and file a refund report with the Commission within 30 days of the date of this order to reflect payment of refunds in compliance with section 39.19 of the Commission's regulations.

34. The Commission also finds that the SSA is missing information and contains incorrect information. Section 3.1 of the SSA states in part that, "NMPC and Nine Mile shall comply with the Substation and Operating Guidelines set forth in Appendix 'B' attached hereto (as modified from time to time as contemplated therein) in so far as such guidelines relate to Scriba Substation." The Commission's review indicates that Appendix B, which should contain the joint Nine Mile / Niagara Mohawk Substation Operating Guidelines, is missing from the SSA. Niagara Mohawk did, however, file these joint guidelines as part of its response to the Commission's April 8, 2008 deficiency letter.

2. FA

35. The Commission also rejects Niagara Mohawk's argument that the Commission does not have jurisdiction over the FA because Niagara Mohawk lacks operational control over the NYPA Capacitor Bank and because the FA is not related to wholesale sales or transmission in interstate commerce. Niagara Mohawk contends that neither the construction work nor the O&M work is a service that affects or relates to rates or service for the transmission or wholesale sales of electricity subject to the Commission's jurisdiction. However, as Niagara Mohawk states, the services provided pursuant to the FA support a NYPA project to relieve congestion on the transmission system operated by the NYISO and facilitate the electricity supply market in New York.²⁴ Niagara Mohawk also states that the FA provides that NYPA will apply to NYISO for TCCs to increase the transfer capability of certain NYPA transmission assets and thereby increases the transfer capability of the transmission system operated by the NYISO.²⁵ Accordingly, the Commission finds that the FA affects and/or relates to rates or service for the transmission or wholesale sales of electricity subject to the Commission's jurisdiction.

²⁴ Niagara Mohawk May 8, 2008 Response to Deficiency Letter at 9–10.

²⁵ See Article 7 of the FA and Niagara Mohawk May 8, 2008 Response to Deficiency Letter at 10.

36. Niagara Mohawk further contends that the fact that NYPA recovers its costs for the O&M work through its Transmission Adjustment Charge should not render the FA subject to the Commission's jurisdiction because NYPA's transmission rates are exempt from Commission jurisdiction. However, Niagara Mohawk, a jurisdictional utility, is performing a jurisdictional function in operating the Capacitor Bank, and NYPA's nonjurisdictional status does not insulate the jurisdictional operator of its facilities from the obligation to file the agreement with the Commission.

37. Turning to the second prong of the Prior Notice Order test, Niagara Mohawk argues that it is not the jurisdictional "operator" of the facilities. Niagara Mohawk states that it mutually agreed with NYPA that it would perform the O&M work in "accordance with Niagara Mohawk's standard procedures" which is intended to mean those procedures that Niagara Mohawk has in place to maintain and operate its own substation needed to provide service to its own customers.²⁶ The Commission finds that Niagara Mohawk's use of its own standard O&M procedures, not NYPA's, does not support NYPA's operational control and decision making authority of the facilities under the FA.

38. Section 5.5 of the FA requires Niagara Mohawk to obtain NYPA's permission to conduct repairs that Niagara Mohawk estimates will cost more than \$25,000, a provision that Niagara Mohawk uses to support the assertion that it lacks discretion in operating and maintaining the Capacitor Bank. Niagara Mohawk states there have been no repairs at the Capacitor Bank which meets the requirements of section 5.5 of the FA. However, Niagara Mohawk also notes that it completed O&M work on January 12, 2007, in the amount of \$93,234, but this work did not constitute an extraordinary repair under section 5.5 of the FA because the cost of the work was covered by General Electric's warranty of the equipment and therefore it did not require NYPA's prior written authorization.²⁷ The Commission disagrees with Niagara Mohawk's reasoning. The FA provides the \$25,000 figure as the threshold for distinguishing extraordinary repairs from routine repairs. The question of who paid the \$25,000 is irrelevant to this determination. Niagara Mohawk acknowledges that it did the repair without written authorization, thus the Commission finds, in this instance, the facts show that Niagara Mohawk performed as the operator of the Capacitor Bank. In contrast to *Puget Sound*, Niagara Mohawk is not strictly limited to routine activities and exercises a considerable amount of control and decisionmaking authority.

39. Accordingly, the Commission finds that the FA (1) relates to jurisdictional rates and (2) Niagara Mohawk, a public utility, is the operator of the facilities. Accordingly, the FA is subject to the Commission's jurisdiction.

²⁶ See Niagara Mohawk May 8, 2008 Response to Deficiency Letter at 12.

²⁷ See Niagara Mohawk May 8, 2008 Response to Deficiency Letter at 16, n. 30.

40. Lastly, the Commission finds the monthly charges for the O&M work and the lump sum payment of \$3.5 million for the engineering and construction paid to Niagara Mohawk under the FA to be just and reasonable. Additionally, Niagara Mohawk is directed to refund the time value of revenues collected under the FA from July 23, 2001 through April 29, 2008, and file a refund report with the Commission within 30 days of the date of this order to reflect payment of refunds in compliance with section 39.19 of the Commission's regulations.

The Commission orders:

(A) Niagara Mohawk's SSA and FA are accepted for filing, effective April 29, 2008.

(B) Niagara Mohawk is directed make refunds and file a refund report as discussed in the body of this order, within 30 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.