

126 FERC ¶ 61,299
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

National Grid Generation, LLC

Docket No. ER09-628-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF SHEETS, AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 31, 2009)

1. On January 30, 2009, pursuant to section 205 of the Federal Power Act (FPA),¹ National Grid Generation LLC (NGG) filed revised tariff sheets² to amend its rates under the Power Supply Agreement (PSA) between it and the Long Island Power Authority (LIPA). For the reasons discussed below, the Commission accepts NGG's proposed tariff sheets and suspends them for a nominal period, to be effective February 1, 2009, as requested, subject to refund and establishes hearing and settlement judge procedures.

I. Background

2. The PSA sets forth the terms and conditions for the sale and delivery of electric capacity, energy conversion and ancillary services by NGG to LIPA.³ Under the PSA,

¹ 16 U.S.C § 824d (2006).

² See Appendix A.

³ NGG is the successor-in-interest to KeySpan Generation, LLC (KeySpan). The parties to the PSA have undergone various name changes, in part due to the Long Island Lighting Company splitting off its on-Long Island electric generating plants from its other generating business. The on-Long Island plants became GENCO, a subsidiary of MarketSpan Corporation, which thereupon changed its name to MarketSpan Generation, L.L.C and, effective October 21, 1998, MarketSpan Generation L.L.C. became KeySpan Generation L.L.C., a subsidiary of MarketSpan Corporation d/b/a KeySpan Energy, the holding Company. See *Long Island Lighting Company*, 87 FERC ¶ 63,002, at 65,002, n.2 (1999).

approximately 4000 MW of Long Island Lighting Company's former generating facilities, which are now owned by NGG and which are listed in Appendix C of the PSA (Generating Facilities), are devoted entirely to providing service to LIPA. NGG sells and delivers to LIPA all of the capacity from the Generating Facilities and converts LIPA's fuel input to the Generating Facilities into energy for LIPA's account. The Generating Facilities only run when requested by LIPA. While LIPA is not obligated to purchase energy or ancillary services from NGG under the PSA, LIPA is required to purchase capacity from NGG.

3. Under the terms of the PSA, sales of capacity and energy are made under cost-based formula rates incorporating fixed and variable components. There are five primary components to the formula: (a) the Monthly Capacity Charge, which recovers the fixed costs of the Generating Facilities, (b) the Monthly Variable Charge of \$0.90/MWh, which is the variable cost of supplying energy to LIPA, (c) the Monthly Ancillary Services Charge, which allows NGG to pass on any ancillary services costs it incurs in providing power to LIPA, (d) the Monthly Capacity Payment Adjustment Charge, which is a charge to cover any non-variable expenses that cannot be planned for and are outside the control of NGG, and (e) the Monthly Variable Adjustment Charge, which is the payment for the provision of starts and swaps of energy and fired hours of operation after the threshold is met as outlined in Appendix B of the PSA. The PSA also provides for a true-up adjustment, which is an annual lump sum surcharge or credit for the tax true-up and the plant additions true-up. The PSA also provides various efficiency and reliability performance related incentives and penalties for NGG, as well as a property tax incentive.

4. The PSA's term is for 15 years and allows NGG to recalculate the revenue requirement in the seventh and the twelfth contract years (i.e., 2004 and 2009).⁴ The revenue requirement was last reset for the seventh contract year following a section 205 filing made in Docket No. ER04-112-000 on October 31, 2003, by KeySpan, NGG's predecessor-in-interest. On December 30, 2003, the Commission issued an order accepting in part, rejecting in part, and suspending for a nominal period KeySpan's proposed rates, to be effective January 1, 2004, subject to refund and setting them for hearing.⁵ The hearing was held in abeyance to allow the parties to engage in settlement

⁴ Ex. NGG-1 at 7-8. *See also*, PSA Articles 8 & 9, and Appendix A, Sections I.C. and II.

⁵ *See KeySpan Generation, LLC*, 105 FERC ¶ 61,391 (2003) (December 30, 2003 Order).

proceedings. The parties subsequently reached a settlement resolving all issues in the proceeding and the Commission approved the settlement on September 24, 2004.⁶

5. Following the 2004 rate reset and prior to the present rate filing, LIPA and NGG adopted three separate amendments to the PSA. The fourth amendment to the PSA,⁷ filed with the Commission on August 21, 2008 in Docket No. ER08-1098-002, amends the PSA to: (a) provide a mechanism for the recovery of costs associated with the operating and efficiency upgrades at the Northport and Port Jefferson generating stations; and (b) clarify the treatment of merger-related synergy savings to be paid over time to LIPA. The fifth and sixth amendments to the PSA, filed in Docket Nos. ER09-205 and ER09-358, respectively, each extended the date on which NGG would make its section 205 filing to revise its rates for the twelfth contract year. Specifically, the sixth amendment provided that NGG would not make its twelfth contract year filing before January 30, 2009, for rates to become effective no earlier than February 1, 2009.⁸ The parties also agreed that the rates and charges in effect under the PSA during calendar year 2008 shall remain in effect for January 2009.

II. Details of Filing

6. On January 30, 2009, in Docket No. ER09-628-000, NGG filed revised rates under the PSA. NGG states that section 1.C of Appendix A to the PSA permits NGG to reset its rates for contract years twelve through sixteen by recalculating its revenue requirement in accordance with Articles 8 and 9 of the PSA.⁹ NGG states that the revenue requirement presented in its filing was determined using a conventional cost of service methodology in accordance with the Commission's regulations and the provisions of the PSA. NGG is proposing a total revenue requirement for calendar year 2009 of \$462,997,000, which is an increase of \$92 million over actual revenues for calendar year 2007. If NGG were to continue service to LIPA under the PSA without resetting revenue

⁶ See *KeySpan Generation, LLC*, 109 FERC ¶ 61,011 (2004).

⁷ The Second and Third Amendments to the PSA predated the National Grid acquisition and were never executed.

⁸ *National Grid Generation, LLC*, Docket No. ER09-358-000 (January 6, 2009) (unpublished letter order).

⁹ Contract years twelve through sixteen are calendar years 2009, 2010, 2011, 2012 and 2013 (to May 2013).

requirements, NGG states, the revenue deficiency would be \$32 million because of the operation of the true-up and reconciliation mechanisms in the PSA.¹⁰

7. NGG states that it is not requesting a change in the basic rate design applicable to service to LIPA under the PSA. NGG proposes to set the Annual Capacity Charge to \$450,308,000 and the annual Variable Charge of \$0.90 per MWh is projected to produce revenues of \$4,529,000 during the twelfth year of the PSA.¹¹ NGG states that property tax increases of \$37 million account for a large part of the new revenue requirement. The rate of return on rate base has been updated to reflect current market conditions. NGG also forecasts increases in (a) benefits, due to significant projected increases in medical and dental insurance, and (b) pension and other post-employment benefits (OPEB), as a result of the performance of equity and bond markets over the past five years. NGG also claims higher operation and maintenance (O&M) expenses attributed to increased labor, contractor and materials costs and the loss of certain economies of scale due to the sale of the Ravenswood generating facilities on August 26, 2008.¹²

8. NGG notes that Articles 7 and 8 of the PSA provide for a pass-through to LIPA of all environmental costs as they relate to the Generating Facilities, such as the cost of all air emissions.¹³ NGG states that the Regional Greenhouse Gas Initiative, a new regulatory program that requires the Generating Facilities to acquire sufficient carbon dioxide (CO₂) emission allowances to match their total actual CO₂ emissions accumulated at the end of each three-year compliance period, will impact NGG and the PSA. NGG states that the Regional Greenhouse Gas Initiative becomes effective in 2009 and compliance is mandatory.

9. NGG requests a rate of return on equity of 11.9 percent, which NGG states is based on a risk-comparable proxy group that reflects the same financial and business risks as the Generating Facilities. NGG states that this return is appropriate because it falls at the midpoint of the range of returns calculated using the Commission's discounted cash flow (DCF) method. Despite the fact that NGG plans to maintain an equity ratio of approximately 61 percent through the end of the PSA, NGG is proposing to use a capital structure with a 50 percent equity component for ratemaking purposes.¹⁴ NGG claims

¹⁰ NGG January 30, 2009 Transmittal at 3.

¹¹ *Id.* at 3.

¹² Ex. NGG-1 at 14-15.

¹³ *Id.* at 10-12.

¹⁴ For seventh through eleventh contract years, the rate of return on equity was 9.5 percent using a capital structure with a 40 percent equity component.

that its level of financial risk is approximately equal to its proxy group of electric utilities. Finally, NGG states that the cost of equity does not fully reflect the impact of current market conditions as the costs of all forms of permanent capital have risen since the period for which the proxy group data was analyzed.¹⁵

10. NGG also proposes to revise the mechanism for the property tax true-ups and create a mechanism for adjusting pensions and OPEB expenses for contract years 13 through 16.¹⁶ NGG proposes to reset the level of property taxes in base rates to the forecast level for 2009 of \$186,348,000 and to use forecasted levels of property taxes for the current contract year rather than the actuals from the previous year for the remaining contract years of the initial term. NGG states that actual property taxes have increased significantly over the last five contract years and that the rate of increase is likely to continue over the next five years at a rate of approximately 7 percent. NGG claims that the existing true-up mechanism results in a large surcharge and that NGG experiences a lag in its recovery until the surcharge is paid.

11. Further, NGG proposes that 2009 pension and OPEB expenses are recovered (a) at current actuarial levels of \$17.0 million, (b) with additional pension funding above the current actuarial projected liability for 2009 of \$5.0 million, and (c) by increasing the amortization of the OPEB transition obligation by \$1.0 million to \$7.3 million.¹⁷ For contract years 13 through 16, the second and third components would remain the same, but the first item would be adjusted each year to reflect new actuarial levels for the current contract year's pension and OPEB expenses.

12. NGG proposes to continue the four performance incentives/disincentives provided for in the PSA that are aimed at assuring the Generating Facilities are operated efficiently and at the lowest reasonable cost.¹⁸ NGG claims that the Heat Rate Incentive no longer functions properly as a result of significant changes in its steam plant operations. While NGG has begun discussions with LIPA to redesign this incentive pursuant to Section IV of Appendix F, NGG has not included the proposed modifications as part of the filing.

13. NGG seeks waiver of section 35.3 of the Commission's regulations to permit the revised tariff sheets to become effective on less than sixty days notice, requesting an effective date of February 1, 2009. Further, NGG argues that the proposed tariff sheets

¹⁵ Ex. NGG-1 at 15-17.

¹⁶ *Id.* at 18-19.

¹⁷ *Id.* at 19-20.

¹⁸ *Id.* at 21-23.

are just and reasonable and meet the Commission standard for granting a suspension of the proposed rates to one day under its suspension policy.

III. Notice, Interventions and Protests

14. Notice of NGG's filing was published in the *Federal Register*, 74 Fed. Reg. 7,417 (2009), with interventions and protests due on or before February 20, 2009. LIPA filed a motion to intervene, protest and motion for summary disposition, or, in the alternative, suspension and investigation. On March 9, 2009, NGG filed an answer to LIPA's motion. On March 12, 2009, LIPA filed a motion for leave to reply and reply to NGG's answer. On March 19, 2009, NGG filed an answer to LIPA's motion for leave to reply and reply.

15. As discussed in more detail below, LIPA contends that NGG's filing seeks an increase of more than \$60 million over existing rates.¹⁹ LIPA contends that \$46.5 million²⁰ should be deducted from the capacity charge because these proposed costs are contractually barred or unsupported, unjust and unreasonable. LIPA further contends the revenue requirement should be reduced by an additional \$22.8 million to reflect a combination of a more reasonable return on equity no higher than 10.23 percent and a 24 percent equity / 76 percent debt capital structure that is consistent with the level at NGG's corporate parent. LIPA also seeks summary disposition of certain of NGG's proposed revisions on the grounds that they are unauthorized under the *Mobile-Sierra*²¹ public interest standard. In its reply, LIPA clarifies that it is not seeking summary disposition with respect to NGG's "attempted over-recovery" due to an unreasonably high return on equity, inappropriate capital structure, and unsupported increases in O&M expenses, and it is not seeking summary disposition with respect to NGG's restated revenue requirement. However, LIPA states, it is seeking summary disposition with respect to NGG's modifications to the cost recovery mechanisms of the PSA. LIPA argues that it was determined during the prior rate case that revisions not contemplated under the PSA are subject to review under the *Mobile-Sierra* public interest standard.

¹⁹ LIPA February 25, 2009 Protest at 3. LIPA's February 25, 2009 protest was an errata to its February 20, 2009 protest. LIPA's initial motion inadvertently contained pagination issues which it resolved in its subsequent filing.

²⁰ The summing of the contested items actually results in a total of \$47.5 million.

²¹ LIPA February 25, 2009 Protest at 4, citing, *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power*, 350 U.S. 348 (1956).

A. Ravenswood Plant Costs

16. LIPA contends that NGG should not be permitted to charge LIPA for \$6 million in costs associated with the Ravenswood plant. LIPA argues that this allocation should be removed from the capacity charge because: (a) under the terms and conditions of the PSA, only the fixed costs associated with operating the Generating Facilities on Long Island and dedicated to LIPA may be passed on through the capacity charge;²² (b) Ravenswood was a merchant facility under KeySpan ownership and therefore never had any approved service allocation; and (c) FERC's approval of the sale of Ravenswood to TransCanada USA in Docket No. EC08-75 was predicated on assurances from KeySpan and TransCanada USA to the Commission that the proposed transactions would not adversely affect jurisdictional rates.²³

17. In its answer, NGG states that the \$6 million of costs that formerly were allocated to Ravenswood are not stranded costs, but are ongoing costs incurred by NGG to provide service to LIPA under the PSA. NGG acknowledges that certain of the costs of the functions that are now allocated to services under the PSA were once shared with Ravenswood, but claims that there was no commitment under the PSA by NGG to continue to allocate costs to Ravenswood or any other entity once Ravenswood was sold. NGG argues that the fact that LIPA may have benefited from certain economies of scale when NGG and Ravenswood were affiliated does not mean LIPA continues to be entitled to such economies where they no longer exist. NGG further states that the allocation of these costs to LIPA in this proceeding should only be dependant upon whether the Commission finds that they represent reasonable costs recoverable under the PSA. NGG also argues that the representation that KeySpan made to the Commission in Docket No. EC08-75 applied to Ravenswood only. NGG states that the PSA was not the subject of the representation and LIPA was not an intended beneficiary.

B. Return on Equity

18. LIPA protests NGG's requested 11.9 percent return on equity, stating that NGG does not provide a fair application of the discounted cash flow analysis mandated by the

²² LIPA contends that, because the term "Generating Facilities," as defined in the PSA, does not include the Ravenswood facility, any stranded costs associated with the divestiture of Ravenswood cannot be lawfully passed on to LIPA through the capacity charge. LIPA February 25, 2009 Protest at 12.

²³ LIPA contends that increasing its annual capacity charge by \$6 million due to the divestiture of Ravenswood constitutes a significant "adverse" impact on jurisdictional rates, and is contradicted by KeySpan's representations in Docket No. EC08-75. *Id.* at 13.

Commission because it does not account for NGG's minimal business risk and uses an inappropriate proxy group of utilities.²⁴ LIPA argues that NGG wrongly includes in the DCF analysis utilities that (a) have regulated operations constituting a minority of revenues, (b) are far smaller than NGG's parent, and (c) are not listed in Value Line's Electric Utility industry. LIPA asserts that the selection of a more appropriate and risk-comparable group of utilities will result in a proxy group with a median return on equity closer to 10 percent.

C. 50/50 Capital Structure

19. LIPA protests NGG's use of a hypothetical 50 percent equity / 50 percent debt capital structure. LIPA states that NGG's proposed 50 percent equity component of the capital structure is 10 percentage points higher than the 40 percent equity capital structure under the current rates, and 26 percentage points higher than the capital structure of NGG's publicly traded holding company, National Grid plc, which is comprised of only 24 percent equity and 76 percent debt.²⁵ LIPA states that NGG, as the subsidiary of its publicly financed British parent company, National Grid plc, has an artificial capital structure that does not reflect debt and equity investment in the firm but rather reflects whatever capital structure the corporate parent wants. LIPA argues that, as such, NGG is requesting that its weighted average cost of capital reflect a hypothetical capital structure that has more than double the equity percentage than that of its parent.

D. O&M Expenses

20. LIPA claims that NGG has overstated its operation and maintenance (O&M) expenses by at least \$15 million, even after deducting the improper \$6 million Ravenswood allocation. LIPA states that without the benefit of additional time and discovery through the hearing process, it is impossible to tell what caused the jump in O&M expense.²⁶

²⁴ *Id.* at 14.

²⁵ *Id.* at 16-17.

²⁶ *Id.* at 22-23. In particular, LIPA is concerned with the increase in O&M expenses between 2006 and 2007. LIPA states that the O&M expenses in years 2004-2006 were fairly consistent at \$61.7 million, \$68.9 million, and \$61.4 million, respectively, before the jump to \$77.3 million dollars in 2007.

E. Estimated Energy Output

21. LIPA argues that NGG's proposed Capacity Charge is overstated by \$2.3 million due to NGG substantially understating the estimated energy output for 2009. LIPA states that the estimate of the revenues NGG will recover through the variable energy charge depends on the amount of generation estimated and that a low estimate in the test year (5,032 GWh versus the 7,600 GWh projected by LIPA) will permit NGG to over-recover its revenue requirements. LIPA states that NGG's estimated energy output is not justified or explained and is inconsistent with runs performed by LIPA to project its energy consumption from the Long Island facilities in 2009. LIPA states that this issue needs to be further investigated at hearing.²⁷

F. Mobile-Sierra Claim

22. LIPA states that it is seeking summary disposition of certain of NGG's proposed revisions on the grounds that such revisions are unauthorized under the *Mobile-Sierra* public interest standard. Those proposed revisions include:

(a) NGG's modification of the cost recovery mechanism for property taxes in sections I.F. and III.B of Appendix A. LIPA contends that NGG's proposal to recover the "forecast property tax expense" through the capacity charge each year would effectively increase rates by over \$18 million a year.

(b) NGG's modification of the cost recovery for pension and OPEB in the new section I.H of Appendix A. LIPA claims that NGG's proposal to allow it to recover "an additional \$5,000,000 to be used for additional pension funding" in contract years twelve through sixteen in addition to the "current actuarial-determined expense" for each year would increase rates by at least \$5 million a year.

(c) NGG's modification to the interest rate paid on true-up amounts in Sections III.A and V.O. of Appendix A. LIPA states that, under Section III.A of Appendix A of the PSA, interest on true-up amounts is to be computed at the Base Interest Rate, defined in Article 1 of the PSA as 6 months LIBOR. LIPA states that NGG's proposal to recover a "Financial Carrying Charge" on true-up amounts roughly equivalent to its pre-tax rate of return on rate base

²⁷ LIPA February 25, 2009 Protest at 23-24.

(“PTROR”) would increase by approximately \$1 million per year the carrying charges due on true-up amounts.

23. LIPA argues that these NGG-proposed modifications amount to unilateral modifications of a bilateral power supply contract. LIPA asserts that it and NGG specifically stipulated to these formula rate provisions in Appendix A of the PSA, and did not agree to reopen that agreement for the changes that NGG now proposes. Accordingly, LIPA argues, if NGG wants the Commission to approve these modifications, it must make a showing of harm to the public under the *Mobile-Sierra* doctrine, which LIPA maintains NGG has failed to do.²⁸ LIPA states that these proposed modifications present no issue of material fact and thus, they can and should be decided by the Commission as a matter of law on summary disposition.

24. NGG responds that LIPA’s *Mobile-Sierra* claims should be rejected because they are based on the erroneous premise that the PSA precludes NGG from proposing changes to Appendix A to address the methodology under which property taxes, pension and OPEB expenses, and carrying costs are assessed and reconciled during contract years twelve through sixteen. NGG states that the unambiguous terms of the PSA not only permit NGG to re-determine its rates in its section 205 filing, but those terms also permit NGG to propose certain modifications to the reconciliation mechanisms set forth in the ratemaking provisions of the PSA in order to provide for the full recovery of the costs to be reconciled during contract years thirteen through sixteen. NGG further states that, any such proposals made by NGG, like the revised rates themselves, are subject to review by the Commission under the just and reasonable standards set forth in section 205 of the FPA.

25. NGG maintains that the issue has already been decided by the Commission in NGG’s favor, when the rates and reconciliation mechanism were last reviewed to establish rate and reconciliation terms for contract years seven through eleven in Docket No. ER04-112. NGG states that, in that proceeding, the Commission found that KeySpan was within its rights to file similar amendments to the PSA under the section 205 standard of review.²⁹ Further, NGG contends that the provisions of the current Appendix A that govern the reconciliation of property taxes and pension and OPEB costs expressly apply only to contract years eight through eleven and are therefore subject to modifications under the section 205 filing being made for contract year twelve.

26. LIPA answers that it is seeking summary disposition with respect to NGG’s modifications to the cost recovery mechanisms of the PSA. LIPA argues that it was

²⁸ *Id.* at 4.

²⁹ NGG March 9, 2009 Answer at 7, citing December 30, 2003 Order at P 11.

determined during the prior rate case that revisions not contemplated under the PSA are subject to review under the *Mobile-Sierra* public interest standard.

27. Specifically, LIPA asserts that the “Certification of Uncontested Settlement” in Docket No. ER04-112,³⁰ which the Commission approved, describes two categories of rate changes – those that are required under the PSA and those that are not:

[1] The rate changes that KeySpan Generation is required to file in the calendar year 2004, pursuant to Appendix A of the PSA, are subject to review under the “just and reasonable” standard ... [2] any proposed rate change submitted to the Commission not contemplated under the PSA and Appendix A will be subject to review under the *Mobile-Sierra* public interest standard.³¹

28. LIPA argues that the recalculation of NGG’s revenue requirement falls into the first category, which is subject to the just and reasonable standard of review, while NGG’s other proposed modifications (the three listed above) fall into the second category, which it asserts must be reviewed under the *Mobile-Sierra* public interest standard of review.

IV. Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), LIPA’s unopposed motion to intervene serves to make it a party to this proceeding.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept NGG’s March 9, 2009 answer and LIPA’s March 12, 2009 answer because each has provided information that assisted us in our decision-making process. We are not persuaded to accept NGG’s March 19, 2009 answer in opposition to LIPA’s motion for leave to answer and answer and will, therefore, reject it.

³⁰ LIPA March 12, 2009 Answer at 4, citing *KeySpan Generation, LLC*, 108 FERC ¶ 63,046 (2004)(*KeySpan*).

³¹ LIPA March 12, 2009 Answer at 4, citing *KeySpan*, 108 FERC ¶ 63,046 at P 29.

B. Mobile-Sierra Issue

31. Consistent with the Commission's finding in the December 30, 2003 Order, we find that NGG is within its rights to propose modifications to the recovery mechanism for property taxes, pension and OPEB expenses, and carrying charges on true-up payment amounts under the just and reasonable standard of review. In the December 30, 2003 Order, the Commission found that KeySpan was within its rights under the PSA to file under section 205 to amend certain components of the capacity charge, which filing included proposed revisions to rate methodology provisions of the PSA by: (a) eliminating a gross receipts tax true-up; (b) making an annual revision to the property tax base to reflect actual, most recent prior year property taxes; and (c) adding OPEB expenses and pension true-up and amortization for existing and future amounts of pension and OPEB expenses.³² So the Commission has already ruled on this issue and in favor of NGG.³³

32. In addition, we agree with NGG that rate methodology provisions of the existing Appendix A of the PSA that govern the reconciliation of property taxes and pension and OPEB costs expressly apply only to contract years eight through eleven. Under the PSA, the requirement applicable to Contract Year 12 and later years, which the instant filing covers, is that such filings, which are to be made pursuant to section 205 of the FPA, "shall be determined under Articles 8 and 9 of the PSA." And neither Article specifies what rate methodologies must be applied for Contract Year 12 and later. Article 8.1.1 (Monthly Capacity Charge) provides that the rates shall compensate for fixed costs of generating electricity from the subject generating facilities and then provides a list of what are included as such costs.³⁴ Further, there is nothing in the PSA that bars or otherwise restricts NGG's right to propose in the instant section 205 filing (which LIPA agrees NGG is permitted to make) rate methodologies that are different than those that governed the prior 5-year contract period.

33. Further, LIPA has incorrectly interpreted the Settlement approved in Docket No. ER04-112-000 by taking a statement of the Settlement Judge out of context. Contrary to LIPA, the settlement in that proceeding did not recognize that the just and reasonable standard would apply only to "rate changes that KeySpan Generation is required to file . . . pursuant to Appendix A of the PSA" (emphasis added). As noted by the Settlement Judge in the Certification Order, the settlement, in fact, provided:

³² See December 30, 2003 Order, 105 FERC ¶ 61,391 at P 25, n.11.

³³ LIPA did not seek rehearing of that finding of the December 30, 2003 Order.

³⁴ Article 9 deals with budget matters.

“Appendix A of the PSA provides for adjustments of revenue levels and resulting rates over the next five years through its formula rate adjustment procedure without either party unilaterally requesting that the Commission make changes, except for those changes permitted in the PSA and Appendix A. Proposed rate change submitted to the Commission not contemplated under the PSA or Appendix A should be subject to review under the *Mobile-Sierra* public interest standard.”³⁵

As we discussed above, NGG is not “required” by any provision of the PSA to file to continue previously-approved rate methodologies. Thus, the rate changes “permitted” by the PSA and Appendix A thereto are only required to comply with Articles 8 and 9, which do not restrict what rate methodologies may be filed to only include previously-approved methodologies applicable to prior contract periods, and are to be filed under section 205 and be subject to the just and reasonable standard of review. Moreover, the existing rate methodologies clearly expire after the eleventh contract year, leaving the expectation that new (prospective) methodologies will be filed. As long as the proposed formula rates recover fixed costs consistent with Article 8, and are filed in a section 205 filing, such rate changes are “contemplated” under the PSA and Appendix A and are subject to the just and reasonable standard, not the *Mobile-Sierra* public interest standard of review. Indeed, the Settlement Judge confirmed this interpretation of the PSA as permitting NGG’s predecessor, KeySpan, to file under section 205 to propose changes in rate methodology. The Certification Order stated: “The parties provided the following information regarding the standard of review. The rate changes that KeySpan Generation filed in this proceeding were pursuant to Appendix A of the PSA.”³⁶

34. Accordingly, we find that NGG is within its contractual rights under the PSA to propose modifications to the recovery mechanisms for property taxes, pension and OPEB expenses, and carrying charges. Therefore, the rate changes and recovery mechanisms proposed by NGG in the instant filing are subject to review under the “just and reasonable” standard of review.

C. Suspension, Hearing and Settlement Judge Procedures

35. With the exception of the issue of the standard of review applicable to certain proposed changes, which we resolve above, NGG’s proposed tariff sheets raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

³⁵ *KeySpan*, 108 FERC ¶ 63,046, P 4.

³⁶ *Id.*

36. Our preliminary analysis indicates that NGG's proposed tariff sheets have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept NGG's proposed tariff sheets for filing, suspend them for a nominal period, make them effective February 1, 2009, subject to refund, and set them for hearing and settlement judge procedures.

37. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁸ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) NGG's proposed tariff sheets are hereby accepted and suspended for a nominal period, to become effective February 1, 2009, subject to refund, as discussed in the body of this order.

(B) 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 the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of NGG's proposed tariff sheets, as discussed in the body of this order. However, the hearing will be held in abeyance to

³⁷ 18 C.F.R. § 385.603 (2008).

³⁸ 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 – click on Office of Administrative Law Judges).

provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

National Grid Generation, LLC
FERC Electric Rate Schedule No. 1
Tariff Sheets to be Effective February 1, 2009

First Revised Sheet No. 45
First Revised Sheet No. 46
Original Sheet No. 46A
First Revised Sheet No. 47
First Revised Sheet No. 48
First Revised Sheet No. 49
First Revised Sheet No. 50
First Revised Sheet No. 51
Original Sheet No. 51A
First Revised Sheet No. 52
Original Sheet No. 52A
First Revised Sheet No. 56
First Revised Sheet No. 57
Original Sheet No. 57A
Original Sheet No. 57B