

148 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
and Tony Clark.

National Grid Generation LLC

Docket No. ER13-1159-001

ORDER ACCEPTING PROPOSED TARIFF RECORD, SUBJECT TO REFUND, AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 30, 2014)

1. On May 30, 2014, National Grid Generation LLC (National Grid) filed a tariff record¹ to update information concerning pension and similar costs to be recovered through the monthly Capacity Charge pursuant to the terms of its “Amended and Restated Power Supply Agreement” (2012 Power Supply Agreement) with Long Island Lighting Company, d/b/a LIPA, a subsidiary of the Long Island Power Authority (LIPA). National Grid requests waivers so that it can recover increased pension expenses for calendar year 2013 and so that its proposed tariff record can be accepted effective January 1, 2013. As discussed below, we accept the filing, to become effective May 28, 2013, subject to refund, and establish hearing and settlement judge proceedings.

I. Background

2. The 2012 Power Supply Agreement, which is designated as National Grid Electric Rate Schedule No. 1, is a bilateral agreement under which National Grid provides LIPA 3,674 MW of capacity, energy conversion, and ancillary services from specific generating facilities and recovers the costs of these services in monthly charges to LIPA under a formula rate set forth in Appendix A of that agreement. The 2012 Power Supply Agreement was entered into on October 12, 2012 and became effective on May 28, 2013, and will expire on April 30, 2028, unless terminated earlier by LIPA.² Prior to the

¹ National Grid Generation LLC, Agreements and Schedules, Service Agreements and Rate Schedules, [Annual Reset, Annual Reset of Pension and OPEB Expenses Ending 12/31/13, 3.0.1](#).

² See *National Grid Generation LLC*, 143 FERC ¶ 61,163, at P 4 (2013) (May 28, 2013 Order).

current agreement, National Grid and LIPA had entered into a power supply agreement with similar terms that dated back to 1998 (1998 Power Supply Agreement),³ which expired May 27, 2013, and which was replaced and superseded by the 2012 Power Supply Agreement.⁴ The 2012 Power Supply Agreement provides for a cost-based formula rate, organized into a capacity charge (a monthly charge equal to 1/12 of the annual charge), a variable charge, a capacity payment adjustment charge, and a variable adjustment charge. The Formula Rate provisions of the 2012 Power Supply Agreement provide, as relevant here: “The annual Capacity Charge for the first Contract Year shall be \$415,293,000. For each Contract Year thereafter, the annual Capacity Charge shall be equal to the prior year's annual Capacity Charge plus the sum of the following adjustments: ...Rebased pension and other post-employment benefit expense...”⁵ Further, with regard to Pension and Other Post-Employment Benefits (“P&OPEB” in the quoted provision below), the 2012 Power Supply Agreement provides, in relevant part:

For each Contract Year, the Capacity Charge will be adjusted through a single purpose filing with the FERC in mid-year to reflect the actuarially determined amounts of P&OPEB expense for that Contract Year. [National Grid] shall fund its P&OPEBs at no less than the actuarial expense level to the extent it can do so on tax-effective basis. The Capacity Charge...does not include the 401(k) plan matching contribution which will be separately billed to LIPA.⁶

3. In the May 28, 2013 Order, the Commission accepted the 2012 Power Supply Agreement effective May 28, 2013, as requested, with a limited waiver for certain income tax matters.⁷

³ See *Long Island Lighting Company*, 82 FERC ¶ 61,129 (1998).

⁴ May 28, 2013 Order, 143 FERC ¶ 61,163 at P 1. The 2012 Power Supply Agreement contains provisions different from the 1998 Power Supply Agreement that add flexibility to address changing conditions, including the addition of repowering and ramp down provisions not present in the 1998 Power Supply Agreement. *Id.* P 12.

⁵ 2012 Power Supply Agreement, Appendix A, Article I, § B.

⁶ 2012 Power Supply Agreement, Appendix A, Article I, § G. “Contract Year” is defined in the 2012 Power Supply Agreement as “the period beginning with January 1 and ending December 31 in each calendar year of the Term, except that the first Contract Year shall begin on the Commencement Date [May 28, 2013] and the last Contract Year shall end on April 30.”

⁷ May, 28 2013 Order, 143 FERC ¶ 61,163, at PP 11-15.

II. May 30, 2014 Filing

4. National Grid submitted the instant filing of its Annual Reset of Pension and Other Post-Employment Benefits Expenses, in accordance with the terms of the 2012 Power Supply Agreement, as a compliance filing. National Grid claims that its annual expenses in these categories to be recovered for the twelve months ending December 31, 2013, are \$29,458,512, an increase in \$3,596,531 over the \$25,861,981 currently included in the capacity charge.⁸ This amount is based on actual expenses from January through March of 2013 and forecasted expenses for the remaining nine months of 2013 as determined from an actuarial report included with the filing dated May 1, 2013.⁹ National Grid claims that, "as specified in the "Stipulation and Settlement Agreement Among National Grid LLC, The Long Island Power Authority and LIPA" in Docket No. ER09-628, this amount was determined using three months of NGG's previous fiscal year's expense and nine months of the current fiscal year's expense."¹⁰

5. National Grid asserts that these are "expenses that should have been recovered through the annual Capacity Charge assessed pursuant to the [2012 Power Supply Agreement] for the twelve months ending December 31, 2013" and is not proposing to revise in any manner the provisions of the Agreement.¹¹ National Grid argues that, accordingly, section 35.13 of the Commission's regulations governing the filing of changes in rate schedules, tariffs, and service agreements is not applicable to this filing, but it requests waiver of that provision if the Commission disagrees.¹²

⁸ See National Grid May 30, 2014 Filing at 2. The increase consists of \$3,143,441 for Other Post Employment Benefits expenses and \$453,090 for Pension costs. See *id.*, Attachment A, Summary Schedule, Columns F and G, with the year-over-year changes set forth in Column H.

⁹ *Id.* Attachment B.

¹⁰ *Id.* Citing Order Approving Uncontested Settlement, *National Grid Generation LLC*, 130 FERC ¶ 61,006 (2010). The fiscal year commences April 1 each year and ends March 31 of the following year. See May 30, 2014 Filing, Attachment B.

¹¹ *Id.* at 2.

¹² See 18 C.F.R. § 35.13 (2013).

6. National Grid further requests waiver of any notice requirements, to the extent necessary, so that the annual Capacity Charge may “be assessed ... for the year ending December 31, 2013.” National Grid argues that good cause exists to grant this waiver because it permits recovery in the manner specified in the Agreement.¹³

III. Notice of Filing and Responsive Pleading

7. Notice of National Grid’s filing was published in the *Federal Register*, 79 Fed. Reg. 32,932 (2014), with interventions and comments due on or before June 20, 2014.

8. LIPA and its operating subsidiary, Long Island Lighting Company d/b/a Power Supply Long Island (jointly, LIPA)¹⁴ moved to intervene and protests National Grid’s filing. LIPA urges the Commission to order a nominal suspension, making the filing subject to refund, set the issues for a trial-type evidentiary hearing, and hold the hearing in abeyance for settlement judge proceedings. LIPA states that National Grid’s filing “lacks sufficient detail to enable [LIPA] to verify that the underlying data and assumptions are accurate.”¹⁵

9. More specifically, LIPA raises two objections. First, LIPA states that National Grid’s filing only contains actual expenses for January 2013 through March 2013, with the remaining nine months of the already completed year addressed by forecasted expenses. Second, LIPA estimates that only two-thirds of the expenses found in National Grid’s filing are associated with National Grid itself, i.e., National Grid Generation LLC. LIPA states that the remaining one-third is assigned from affiliates of National Grid using

¹³ National Grid May 30, 2014 Filing at 2-3 (citing *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 at 61,338, *reh’g denied*, 61 FERC ¶ 61,089 (1992)).

¹⁴ Although the 2012 Power Supply Agreement was designated as an agreement between LIPA and National Grid, the joint protest states that the 2012 Power Supply Agreement was between National Grid and LIPA’s operating subsidiary, Long Island Lighting Company d/b/a Power Supply Long Island. The protest states that, while LIPA is the counterparty to the 2012 Power Supply Agreement, as of January 1, 2014, LIPA’s wholesale market operations are being conducted under the trade name Power Supply Long Island. *See* LIPA Protest at n.1. Because this matter of nomenclature appears irrelevant to the issues at hand, and because the 2012 Power Supply Agreement was not revised to reflect such a change, we will continue to use the term LIPA to be consistent with the 2012 Power Supply Agreement and prior orders in this proceeding. *See also* May 28, 2013 Order, 143 FERC ¶ 61,163, at n.2.

¹⁵ LIPA Protest at 3.

unsupported allocation factors.¹⁶ LIPA further states that, accordingly, the references used in the supporting schedules suggest that the data and assumptions used may be outdated, if not erroneous.¹⁷

10. On July 22, 2014, National Grid filed a motion for leave to answer and an answer to LIPA's protest. National Grid includes responses to data requests from a rate proceeding when the Pension and Other Post Employment Benefits expense was first established.¹⁸ National Grid also provides a schedule that sets forth the derivation of the forecast service company labor expenses used to allocate Pension and Other Post Employment Benefits expenses based on its 2014 budgets. National Grid states that this schedule demonstrates that it prepared the May 30, 2014 Filing in a manner consistent with the methodology outlined in Docket No. ER09-628 and "followed ever since."¹⁹

IV. Discussion

A. Procedural Matters

11. National Grid instituted the instant docket by submitting the Annual Reset of Pension as a compliance filing (Code 80), associated with its baseline filing of the Agreement in Docket No. ER13-1159-000, rather than as a new Federal Power Act section 205 filing with a 60-day notice requirement.²⁰ Accordingly, the Commission is not required to act within 60-days.²¹ Pursuant to Rule 214 of the Commission's Rules of

¹⁶ LIPA further states that National Grid did not respond to requests of LIPA for supporting information. *Id.* at 3-4.

¹⁷ *Id.* at 4.

¹⁸ National Grid July 22, 2014 Answer at 3, citing Docket No. ER09-628-000.

¹⁹ *Id.*

²⁰ *See*

http://elibrary.ferc.gov/idmws/search/intermediate.asp?link_info=yes&doclist=14221303 (The instant filing is filed as Code 80, Compliance Filing) and <http://www.ferc.gov/docs-filing/etariff/types-filing-rules-table.pdf>.

²¹ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008), *clarified*, Order No. 714-A, FERC Stats. & Regs. ¶ 31,356 (2014) (cross-referenced at 147 FERC ¶ 61,115 (2014)); *see also Electronic Tariff Filings, Order Establishing Procedures Relating To Tariffs Filed Electronically*, 130 FERC ¶ 61,047, at P 5 & n.5 (2010).

Practice and Procedure,²² notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept National Grid's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

12. National Grid's filing presents factual issues that cannot be resolved on the record before us, but rather are more appropriately resolved in a trial-type evidentiary proceeding or by settlement, as appropriate. National Grid proposes to increase its monthly Capacity Charge to recover an increase in Pension and Other Post Employment Benefits for the year ending December 31, 2013, by \$3,596,531 based on 3 months of actual expenses for January – March 2013, and 9 months (April – December 2013) of “forecasted” expenses, which National Grid characterizes as “expenses that should have been recovered under the Capacity Charge in accordance with the [2012 Power Supply Agreement].”²³ The 2012 Power Supply Agreement, however, appears to provide for a “mid-year” filing to recover pension expense for the “Contract Year,” but the agreement is unclear if the “mid-year” filing is intended to adjust the prior contract year expenses or the current contract year amounts. Specifically, the 2012 Power Supply Agreement states: “For each Contract Year, the Capacity Charge will be adjusted through a single purpose filing with the FERC in mid-year to reflect the actuarially determined amounts of [Pension and Other Post-Employment Benefits] expense for that Contract Year.”²⁴

²² 18 C.F.R. § 385.214 (2013).

²³ National Grid May 30, 2014 Filing at 2. The May 1, 2013 actuarial report attached to the May 30, 2014 Filing provides actual expenses for the 2013 fiscal year (April 1, 2012, through March 31, 2013) and estimated expenses for the 2014 fiscal year (April 1, 2013, through March 31, 2014).

²⁴ National Grid May 30, 2014 Filing at 2. Further, National Grid states that, “[a]s specified” in its 2009 Settlement of the Docket No. ER09-628 proceeding, the increased expense was determined using three months of its 2013 fiscal year's expenses and nine months of its 2014 fiscal year's expenses. *Id.* However, it is unclear why that procedure would still apply because it appears that the 2009 Settlement of that earlier proceeding in Docket No. ER09-628 no longer governs. The 2009 Settlement only settled the issues raised in the Docket No. ER09-628 proceeding by the filing of the sixth amendment to the 1998 Power Supply Agreement, which expired of its own terms on May 27, 2013. Page 1 and footnote 2 of the 2009 Settlement Transmittal indicated that the 2009 Settlement resolved all issues arising in Docket No. ER09-628 and governs the rates
(continued...)

Section G states: “2013 levels will be determined in June 2013, or as soon thereafter as the actuarial data becomes available.” The actuarial report that the instant filing is based on is dated May 1, 2013. Further, the 2012 Power Supply Agreement did not become effective until May 28, 2013.

13. Whether National Grid complied with the 2012 Power Supply Agreement, and whether it is entitled to recovery for 2013 expenses as proposed, in this regard is unclear and should be addressed in the hearing and settlement judge proceedings we establish here. And as LIPA notes in its protest, National Grid’s filing only contains actual expenses for January 2013 through March 2013, with the remaining nine months of the already-completed 2013 year only being forecasted expenses from an actuarial report dated May 1, 2013.²⁵ In addition, as LIPA also notes, National Grid uses unsupported allocation factors to assign the estimated expenses to LIPA, referring to its FY2014 budget for the source of the factors, which should also be addressed.²⁶

14. Accordingly, we find that National Grid’s proposed annual formula rate reset filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Because the 2012 Power Supply Agreement was effective May 28, 2013, the instant May 30, 2014 Filing made pursuant to the provisions of that agreement cannot be effective prior to May 28, 2013. Therefore, we reject National Grid’s proposed January 1, 2013 effective date and will accept National Grid’s proposed tariff record, to be effective May 28, 2013, subject to refund and set it for hearing and settlement judge procedures.

15. 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.²⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding;

under the 1998 Power Supply Agreement, as amended by that settlement, through the 1998 Power Supply Agreement’s “Contract Year sixteen” which, according to footnote 2 and Appendix A, would be a partial year that ended on May 27, 2013.

²⁵ National Grid May 30, 2014 Filing, Attachment B.

²⁶ *Id.* Attachment A, Summary Schedule, n. 2. The referenced FY2014 budget is not included in the filing.

²⁷ 18 C.F.R. § 385.603 (2013).

otherwise, the Chief Judge will select a judge for this purpose.²⁸ 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) National Grid's May 30, 2014 Filing is hereby accepted for filing, effective May 28, 2013, 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 by the Federal Power Act, particularly sections 205 and 206 thereof, 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 2012 Power Supply Agreement between National Grid and LIPA. However, the hearing shall be held in abeyance to 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 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 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 5 days of the date of this order.

(D) Within 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 60 days

²⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

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 15 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Acting Chairman LaFleur is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.