

121 FERC ¶ 61,104
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
d/b/a National Grid

Docket Nos. ER07-1019-000,
ER07-1019-001, ER07-1020-000,
ER07-1020-001, ER07-1021-000,
and ER07-1021-001

ORDER ACCEPTING INTERCONNECTION AGREEMENTS
SUBJECT TO CONDITIONS, APPROVING SETTLEMENT,
AND INITIATING AUDIT

(Issued October 30, 2007)

1. In this order, the Commission conditionally accepts, effective June 8, 2007, subject to modification and execution, three unexecuted interconnection agreements (unexecuted IAs) between Niagara Mohawk Power Corporation, d/b/a National Grid (Niagara Mohawk) and AG Energy, LP (AG-Energy), Seneca Power Partners, LP (Seneca) and Sterling Power Partners, LP (Sterling) (collectively, Alliance). In addition, the Commission approves an uncontested settlement of certain refund issues raised by the June 8, 2007 filing with respect to certain executed, but late-filed, interconnection agreements (Amended IAs). Finally, the Commission initiates an audit by its Office of Enforcement of Niagara Mohawk's filing and record retention practices and procedures.

Background

2. On June 8, 2007, Niagara Mohawk filed three executed 1998 amended and restated IAs (Amended IAs) and three unexecuted IAs with AG-Energy, Seneca and Sterling. Niagara Mohawk states that the unexecuted IAs are intended to replace the Amended IAs with AG-Energy, Seneca and Sterling who were Qualifying Facilities (QFs) at the time the original IAs with these parties were executed in 1991 and 1994. It states that each of the original IAs were amended in 1998 (Amended IAs) as a result of the Master Restructuring Agreement (MRA) between Niagara Mohawk and a number of independent power producers, including Alliance. According to Niagara Mohawk, the Amended IAs were executed June 30, 1998, the date the MRA was consummated.

Niagara Mohawk states that it recently came to its attention that the Amended IAs were never filed with the Commission. Accordingly, it states that it included the Amended IAs in attachments to its June 8, 2007 filing. Niagara Mohawk further states that the parties agreed to terminate the Amended IAs and to replace them with the three unexecuted IAs included in its June 8, 2007 filing, to be effective June 8, 2007. Niagara Mohawk acknowledges that it must refund the time value of the monies collected under the Amended IAs. According to Niagara Mohawk, it is obligated to refund \$1,481,546 which represents the interest on operation and maintenance (O&M) and property taxes that Niagara Mohawk collected under the Amended IAs for the period July 1998 through June 2007.¹ In addition, Niagara Mohawk proposes to refund \$1,015,966 it has collected under the Amended IAs which represents one-third of the O&M and property taxes associated with the three-ring breaker buses located at the AG-Energy and Seneca facilities which the parties agree are properly classified as network facilities (i.e., circuit breaker No. 815 under the AG-Energy IA and circuit breaker No. 302 under the Seneca IA).

3. With regard to the unexecuted IAs, Niagara Mohawk states that there are only minor differences between these IAs and the New York Independent System Operator, Inc. (NYISO) *pro forma* IA. Niagara Mohawk explains that the differences only reflect that the unexecuted IAs are not new requests for interconnection service and that there are no proposed increases in capacity of or changes to the operating characteristics of the existing generating facilities. Niagara Mohawk states that while the unexecuted IAs have been filed under the NYISO Open Access Transmission Tariff (OATT), NYISO is not a signatory to the IAs. It also states that the parties were unable to agree on whether certain facilities should be classified as interconnection or network facilities and, therefore, it is filing these IAs as unexecuted agreements, with the understanding that the Commission will determine the appropriate classification of the interconnection facilities when it reviews and rules on these unexecuted IAs. Niagara Mohawk requests waiver of the Commission's sixty-day prior notice requirement to allow the unexecuted IAs to become effective June 8, 2007.

4. On July 31, 2007, 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 June 8, 2007 filing within 30 days of the issuance of the deficiency letter. On August 31, 2007, Niagara Mohawk filed public and non-public responses to the July 31, 2007 deficiency letter. The non-public response includes a settlement of issues related to the Amended IAs.

¹ Niagara Mohawk indicates in section 8 of each of the Amended IAs that the O&M component is based on a stated O&M amount charged under each IA plus an annual escalator of 1.5 percent.

Notice, Interventions, and Protests

5. Notice of Niagara Mohawk's June 8, 2007 filing was published in the *Federal Register* with interventions, protests and comments due on or before June 29, 2007.² On June 29, 2007, Alliance filed a motion to intervene and protest. On July 17, 2007, Niagara Mohawk filed an answer to the Alliance protest. On August 30, 2007, NYISO filed a late motion to intervene and comments in response to the Commission's deficiency letter. Notice of Niagara Mohawk's August 31, 2007 response to the Commission's deficiency letter was published in the *Federal Register* with interventions, protests and comments due on or before September 21, 2007.³ On September 21, 2007, Alliance filed comments on Niagara Mohawk's August 31, 2007 deficiency letter response and included comments in reply to NYISO's comments.

Discussion

Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures,⁴ timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures,⁵ the Commission will grant NYISO's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁶ prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept the answers submitted by Niagara Mohawk and Alliance because they have aided us in our decision-making process.

² 72 Fed. Reg. 33,998 (2007).

³ 72 Fed. Reg. 52,873 (2007). Niagara Mohawk's response to the deficiency letter was assigned Docket Nos. ER07-1019-001, ER07-1020-001 and ER07-1021-001, respectively.

⁴ 18 C.F.R. § 385.214 (2007).

⁵ 18 C.F.R. § 384.214(d) (2007).

⁶ 18 C.F.R. § 385.213(a)(2) (2007).

The Amended IAs

8. The deficiency letter, among other things, directed Niagara Mohawk to revise Attachment J to its filings to provide additional information regarding the time value of money calculation. The deficiency letter also directed Niagara Mohawk to provide the actual costs for the actual O&M work performed at each of the facilities and the actual property tax assessed to Alliance each year under the Amended IAs.
9. With regard to the time value of money calculation, Niagara Mohawk responds that it has revised Attachment J as directed, which includes all of the data Niagara Mohawk currently possesses with respect to the dates on which the payments were made by the customer to Niagara Mohawk and the amounts of those payments. Niagara Mohawk notes that it has been unable to retrieve complete data on the amounts invoiced and payments made by the Alliance subsidiaries and the previous owners of the three plants due to changes in its computer systems. Niagara Mohawk explains that because it does not have access to complete data on the amounts invoiced and payments made by the Alliance subsidiaries, it utilized data provided by the Alliance subsidiaries concerning O&M and tax payments in calculating time value of money refunds owed to them. In addition, Niagara Mohawk states that it will continue to provide interconnection services to the Alliance subsidiaries under the Amended IAs, until such time as the unexecuted IAs are approved by the Commission. Further, Niagara Mohawk states that it has agreed not to invoice the Alliance subsidiaries for any ongoing O&M or real estate taxes during the interim period, which means it will not collect any additional costs under the Amended IAs. With regard to the request for actual O&M and property tax data, Niagara Mohawk responds that it has not been able to locate any actual O&M costs prior to 2005. According to Niagara Mohawk, the actual O&M costs were never booked because the stated O&M charge in each IA was used as a proxy for actual O&M costs. Niagara Mohawk also claims that the stated rates and escalation factors provided certainty needed by the QFs to secure financing. Niagara Mohawk has provided actual property taxes charged under the Amended Seneca and Sterling IAs for the period 1999 through 2007 and the Amended AG-Energy IA for 2006.
10. Attachment 2 of Niagara Mohawk's non-public deficiency letter response includes a settlement agreement between Niagara Mohawk and Alliance which Niagara Mohawk states includes a settlement of issues, including refunds, related to the Amended IAs.⁷ Niagara Mohawk requests confidential treatment for the settlement.

⁷ Niagara Mohawk August 31, 2007 Filing at 6. According to Niagara Mohawk, it has already provided Alliance with a payment that includes time value of money refunds on May 3, 2007. *Id.*

Commission Determination

11. We find that the settlement agreement is uncontested and is fair and reasonable and in the public interest, as it resolves the time value of money issue and all other issues related to the Amended IAs. Accordingly, we will approve the settlement agreement. We note that approval of this settlement does not constitute approval or precedent regarding any principle or issue in these proceedings. Niagara Mohawk is directed to file a refund report to reflect the payment of refunds under the settlement within 15 days of the issuance date of this order.

The New, Unexecuted IAs

Disputed Facility Classifications

12. Article 10.5 (Operation and Maintenance Expenses) of the unexecuted IAs provides in part that the Transmission Owner shall be entitled to the recovery of incremental O&M expenses it incurs associated with System Upgrade Facilities if and to the extent provided for under Attachment S to the NYISO OATT.

13. In its protest to the June 8, 2007 filing, Alliance states that while Niagara Mohawk may be entitled to continue to charge for ongoing O&M expenses on interconnection facilities, it should not be allowed to do so on Network Facilities. In this regard, Alliance complains that Niagara Mohawk has improperly classified certain substations, circuit breakers and other protection equipment as interconnection facilities in order to continue to collect for O&M work performed on these facilities.⁸ Alliance also contends that the ongoing costs of certain communications circuitry associated with the protective systems at the AG Energy and Seneca generating facilities may also be misclassified as interconnection facilities.⁹ Alliance asks the Commission to reject Niagara Mohawk's proposal to directly assign the costs of these communication circuits at least until such time as Niagara Mohawk convincingly demonstrates that each circuit is properly classified as a system protection facility. Additionally, Alliance asks that the

⁸ The circuit breakers at issue are the three-breaker ring bus configurations located in the substations connecting the AG-Energy and Seneca plants to Niagara Mohawk's transmission system and the single circuit breaker located in the Oneida substation connecting the Sterling plant to Niagara Mohawk's transmission system. *See* interconnection facility diagrams included in Niagara Mohawk's June 8, 2007 filing.

⁹ The communication circuits at issue consist of telephone lines installed at the substations that house the circuit breakers that allow the clearing of any faults that might occur from within these substations. *See* Niagara Mohawk June 8, 2007 Transmittal Letter at 9.

Commission clarify that its “at or beyond rule” applies equally to system protection facilities and communication circuits in general.

14. Niagara Mohawk responds that the AG-Energy and Seneca three-breaker ring bus configurations are properly classified as Interconnection Facilities because they: (1) serve to isolate the plant from the system during a plant outage; and (2) provide the generating plants the opportunity to continue to participate in the marketplace when there is a fault on one section of the transmission line, by isolating such faults on the side on which they occur. Niagara Mohawk points to the Commission’s order in *Pacific Gas and Electric Company*¹⁰ where, it asserts, the Commission determined that certain circuit breakers located within a transmission provider’s substation were properly classified as interconnection facilities. It also points to *PG&E* in support of its claim that the single Oneida circuit breaker is an interconnection facility because, it asserts, its configuration is nearly identical to *PG&E*’s circuit breaker configuration because it is attached to a radial line located within the boundaries of the substation and only benefits the generator.

15. However, in its response to the July 31, 2007 deficiency letter, Niagara Mohawk acknowledges that under certain circumstances the AG-Energy and Seneca three-breaker ring bus configurations provide benefits to Niagara Mohawk’s other customers. Specifically, Niagara Mohawk explains that to accommodate the interconnection of the AG-Energy and Seneca plants, the existing transmission network circuit was split into two segments and rejoined by the three-breaker ring buses located at each substation. It notes that under circumstances where one of the circuit breakers is out of service, or open, power can be routed through the two other breakers at each substation, thus providing an alternate path through the station, and benefiting Niagara Mohawk’s other customers. Niagara Mohawk further explains that splitting the network using three-breaker ring buses enables the generator to remain operating if a fault occurs on either segment, improving the generation availability. According to Niagara Mohawk it also allows for power to continue to flow to any load connected to the segments if a fault occurs, which results in an increase in generator availability, and represents a benefit to both the generator and Niagara Mohawk’s other customers.

16. Alliance disagrees with Niagara Mohawk that two of the three-breaker ring buses are interconnection facilities for which direct assignment is appropriate. Alliance also contends that Niagara Mohawk’s reliance on *PG&E* is misplaced because Niagara Mohawk acknowledges that these facilities benefit other network customers by providing an alternate path through the stations and Niagara Mohawk books these facilities in its transmission accounts, thereby, requiring that the associated costs be rolled-in rather than directly assigned.

¹⁰ 105 FERC ¶ 61,020 (2003), *order on reh’g*, 106 FERC ¶ 61,303 (2004) (*PG&E*).

17. With regard to the system protection facilities, Niagara Mohawk states that it employs Direct Transfer Trips broadly throughout its system, providing protection for specific needs such as tripping a breaker when another breaker fails or tripping a generator if islanded. It notes that Special Protection Systems (SPS) are less common and used to handle generator rejection or overload conditions. Niagara Mohawk states that where system protection facilities have been built due to a new generator installation, the costs of the protection facilities are collected directly from the interconnecting generators and booked by Niagara Mohawk as transmission assets with a nominal value of \$1. Niagara Mohawk states that the costs of these facilities are not included in its rates to network facilities.

18. Alliance among other things argues that the SPS facilities, including the communication circuits, should not be directly assigned because Niagara Mohawk acknowledges that the SPS facilities may benefit other transmission customers and that the communication facilities are booked in its transmission accounts which require rolled-in rather than direct assignment of these costs. Further, Alliance contends that Niagara Mohawk has failed to show how these facilities meet NYISO's System Protection Facilities definition and fall under Attachment S of the NYISO OATT.

Commission Determination

19. Niagara Mohawk's answer and response to the deficiency letter demonstrate that the AG-Energy and Seneca three-breaker ring bus configurations are network facilities. We find that they provide benefits to both the generator and Niagara Mohawk's other customers. We also find that, unlike the facilities at issue in *PG&E*, these circuit breakers are at or beyond the point of interconnection (i.e., where the generator tie line connects to the three-breaker ring bus). Likewise, based on the information provided by the parties, it appears that the communication circuits and the other protective equipment at the substations serving the AG-Energy and Seneca generators are at or beyond the point of interconnection. Thus, both sets of facilities benefit both the generators and Niagara Mohawk's other customers and serve to maintain the reliability and integrity of Niagara Mohawk's transmission system. Accordingly, we find that these facilities are network facilities and, as such, Niagara Mohawk cannot directly charge only Alliance for the O&M performed on the three-breaker ring bus configurations or the system protection equipment located within the substations serving AG Energy and Seneca, including the communication circuits.¹¹ Accordingly, Niagara Mohawk is directed to remove all language from the unexecuted IAs with Alliance that would permit it to recover O&M costs on these facilities from Alliance. We do agree, however, that the single circuit breaker is nearly identical to the circuit breaker configuration in *PG&E* and is properly

¹¹ This is consistent with the Commission's determination in a Nevada Power Company order on remand. *Nevada Power Company*, 111 FERC 61,161 at P 12 (2005).

classified as an interconnection facility. We will therefore allow Niagara Mohawk to directly recover from Alliance its actual expenses associated with O&M work performed on this facility.

Requirement for NYISO to be a Signatory to the IAs

20. The deficiency letter, noting the Commission's determinations in *Cinergy Services, Inc.*, 107 FERC ¶ 61,260 (2004) (*Cinergy*) and *American Electric Power Service Corporation*, 110 FERC ¶ 61,276 (2005), *order on reh'g*, 112 FERC ¶ 61,128 (2005) (*AEP*), that an ISO or RTO must be a signatory to an order to operate safe and reliable transmission systems and account for changed circumstances in amended agreements, stated that NYISO must be a signatory to the unexecuted IAs when these agreements are re-filed.

21. Both NYISO and Niagara Mohawk argue that the circumstances surrounding the unexecuted IAs are unlike those in *Cinergy* and *AEP* because, among other things, NYISO is unwilling to become a party to the IAs and has no operating protocols or procedures in place requiring it to be a signatory to a grandfathered IA where there is no increase in capacity or material modifications to the operating characteristics of the generating facilities. In its September 21, 2007 comments, Alliance states that it takes no position as to whether NYISO should be a party to the unexecuted IAs.

Commission Determination

22. While we disagree with NYISO and Niagara Mohawk that the unexecuted IAs are grandfathered or amended agreements, we do find that they are not the type of new generator interconnection agreements envisioned by Order No. 2003;¹² rather they are more like after-the-fact interconnection operating agreements that govern the terms, conditions, and rates associated with the continuing operation and maintenance of previously constructed facilities built to accommodate the interconnection of the Alliance generators to Niagara Mohawk's transmission system. Accordingly, we will not require NYISO to be a signatory to these unexecuted IAs. However, any interconnections involving the interconnection of a new generating facility or involving increases in capacity or material modifications to the operating characteristics of existing generating facilities interconnected to Niagara Mohawk's or any other NYISO member's transmission system will require the NYISO to be a signatory to that IA.

¹² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

23. The Commission will conditionally accept the unexecuted IAs effective June 8, 2007, as requested, subject to re-filing as executed IAs with the modifications discussed above within 30 days of this order.¹³

Audit

24. The Commission is concerned with the number of agreements Niagara Mohawk has filed after the commencement of jurisdictional service.¹⁴ In regard to the agreements at issue here, Niagara Mohawk failed to comply with 18 C.F.R. § 35.3 (2007), which, implementing section 205 of the FPA, requires, *inter alia*, that, absent waiver, utilities file rates, terms, and conditions for jurisdictional service at least 60 days but not more than 120 days prior to the commencement of service. The Commission is concerned that there may be other agreements that Niagara Mohawk should have filed. Further, in light of the Commission's Preservation of Records requirements in 18 C.F.R. Part 125 (2007), the Commission is equally concerned with Niagara Mohawk's inability to provide complete information and cost support to facilitate its analysis.

25. To evaluate whether Niagara Mohawk is fully adhering to our prior notice regulations and record retention requirements we will direct the Commission's Office of Enforcement to conduct an audit of Niagara Mohawk. This audit should examine Niagara Mohawk's current practices, procedures, and agreements in effect to evaluate whether Niagara Mohawk is fully complying with the requirements for filing of rate schedules and tariffs under 18 C.F.R. Part 35 (2007) and the Commission's preservation of records requirements for public utilities under 18 C.F.R. Part 125 (2007).

The Commission orders:

(A) The unexecuted IAs filed June 8, 2007, are hereby conditionally accepted, to be effective June 8, 2007, subject to being re-filed as executed IAs with modifications, as discussed in the body of this order, within 30 days of this order.

(B) The settlement agreement submitted on August 31, 2007, is approved. Within 15 days of this order, Niagara Mohawk shall file a refund report to reflect the payment of refunds required under the settlement.

¹³ See *Central Hudson Gas and Electric Corp., et al.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

¹⁴ Niagara Mohawk has also submitted late-filed agreements in violation of Part 35 of the Commission's regulations in Docket Nos. ER07-539-000, ER07-540-000, ER07-1085-000, ER07-1094-000, ER07-1096-000, ER07-1103-000, ER07-1125-000, ER07-1126-000 and ER07-1276-000.

(C) The Office of Enforcement is hereby directed to conduct an audit of Niagara Mohawk, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.