

126 FERC ¶ 61,173  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Niagara Mohawk Power Corporation

Docket No. ER08-552-002

ORDER ON REHEARING

(Issued February 25, 2009)

1. In this order the Commission grants, in part, and denies, in part, rehearing of its July 29, 2008 order<sup>1</sup> which accepted and suspended Niagara Mohawk Power Corporation's (Niagara Mohawk) proposed formula rates, made them effective October 1, 2008, subject to refund, and established hearing and settlement judge procedures.

**I. Background**

2. On February 11, 2008, as supplemented on May 30, 2008, Niagara Mohawk filed to replace its stated rates for its Wholesale Transmission Service Charge in Attachment H to the New York Independent System Operator (NYISO) Open Access Transmission Tariff (OATT) with formula rates proposed to become effective May 1, 2008.

3. In the July 29, 2008 Order, the Commission determined that issues of material fact regarding Niagara Mohawk's proposed transmission cost of service formula rates could not be resolved based on the record, and the Commission accepted and suspended the formula rates, to become effective October 1, 2008, and established hearing and settlement judge procedures to explore the parties' concerns. The Commission also granted up to 50 basis points of incentive Return on Equity (ROE) for Niagara Mohawk's continued participation in NYISO, and it allowed application of the basis points of incentive ROE to all of Niagara Mohawk's properly classified transmission facilities. The Commission stated that "[w]e have previously found that Niagara Mohawk's sub-transmission facilities are integrated within the higher voltage New York State backbone facilities. Therefore they are eligible for the 50 basis point adder."<sup>2</sup> However, the

---

<sup>1</sup> *Niagara Mohawk Power Corp.*, 124 FERC ¶ 61,106 (2008) (July 29, 2008 Order).

<sup>2</sup> July 29, 2008 Order, 124 FERC ¶ 61,106 at P 36.

Commission set for hearing the matter of the appropriate ROE and the issue of whether Niagara Mohawk has improperly included local distribution facilities in its wholesale transmission rate base.

4. The Commission, citing *West Texas Utilities Company*,<sup>3</sup> stated that when its preliminary examination indicates that the proposed rates may be unjust and unreasonable and substantially excessive, the Commission will impose a maximum, five-month suspension, and the Commission concluded that in the instant proceeding, its preliminary analysis indicated that the proposed rates may be substantially excessive. The Commission thus suspended Niagara Mohawk's filing for five months, to become effective October 1, 2008, subject to refund, and set it for hearing and settlement judge procedures.<sup>4</sup>

## **II. Requests for Clarification or Rehearing**

5. On August 8, 2008, the City of Cleveland, Ohio (Cleveland) submitted a request for rehearing. On August 14, 2008, New York Municipal Power Agency (NYMPA) and Multiple Intervenors (MI) submitted a request for clarification or, in the alternative, rehearing. On August 23, 2008, New York Association of Public Power (NYAPP) submitted a request for rehearing. On August 22, 2008, Niagara Mohawk filed an answer to Cleveland's request for rehearing. On September 3, 2008, Cleveland filed a response to Niagara Mohawk's answer.

## **III. Discussion**

### **A. Procedural Matters**

6. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2008), prohibits an answer to a request for rehearing. Accordingly, Niagara Mohawk's answer and Cleveland's response will be rejected.

### **B. Commission Determination**

#### **1. Calculation of the Effective Date**

7. As noted earlier, on February 11, 2008, Niagara Mohawk filed tariff sheets reflecting formula rates that it proposed become effective May 1, 2008. The Commission found Niagara Mohawk's February 11, 2008 filing incomplete and notified Niagara Mohawk in an April 30, 2008 deficiency letter of the information needed to cure the

---

<sup>3</sup> 18 FERC ¶ 61,189, at 61,374–75 (1982) (*West Texas*).

<sup>4</sup> July 29, 2008 Order, 124 FERC ¶ 61,106 at P 40.

deficiency, stating that the information requested in that letter would constitute an amendment to the filing. Further, the letter stated that a notice of amendment would be issued upon receipt of the response and that, pending receipt of the information requested in the deficiency letter, a filing date would not be assigned to its filing.<sup>5</sup> Niagara Mohawk filed its response to the deficiency letter on May 30, 2008, providing the required information, thereby curing the deficiency in its February 11, 2008 filing. In the July 29, 2008 Order, the Commission stated that it was accepting Niagara Mohawk's filing, suspending it for five months, to become effective October 1, 2008, subject to refund, and setting it for hearing and settlement judge procedures.<sup>6</sup>

8. Cleveland, NYMPA, MI, and NYAPP argue that the Commission erred in setting an October 1, 2008 effective date and assert that the correct effective date should have been December 29, 2008. They assert that the Commission erred in calculating the five-month suspension period by counting from the May 1, 2008 effective date requested in Niagara Mohawk's original filing. They assert that the five-month suspension period should have commenced sixty days from May 30, 2008, the date on which the filing was complete, i.e., the date Niagara Mohawk responded and cured the deficiency in its original filing. They note that the April 30, 2008 deficiency letter stated that the February 11, 2008 filing was deficient and a filing date would not be assigned to its filing until the deficiencies in the filing are cured. They state that the Commission's policy, as set forth in its regulations,<sup>7</sup> is unequivocal that the 60-day statutory notice period commences only after a filing date has been established and a deficient filing is cured and that a suspension will commence at the conclusion of that notice period. Specifically, they note that section 35.2(c) of the Commission's regulations states in pertinent part: "The term *filing date* as used herein shall mean the date on which a rate schedule filing is completed by the receipt in the Office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part." Accordingly, they assert that the filing date was May 30, 2008, and, therefore, the 60-day prior notice requirement of section 205 of the Federal Power Act (FPA) did not commence until that date. They note that the Commission did not grant waiver of the 60-day prior notice requirement and, therefore, assert that the correct effective date - consistent with a 60-day prior notice period commencing May 30, 2008, followed by a five-month suspension from the conclusion of the 60-day prior notice period - is December 29, 2008.

---

<sup>5</sup> Office of Energy Market Regulation April 30, 2008 Deficiency Letter at 3; *see* 18 C.F.R. § 375.307(a)(1)(v) (2008).

<sup>6</sup> July 29, 2008 Order, 124 FERC ¶ 61,106 at P 40.

<sup>7</sup> *Citing* 18 C.F.R. § 35.2 (2008).

9. We deny rehearing on the issue of the calculation of the effective date of the instant filing. A public utility's filing under section 205 of the FPA, 16 U.S.C. § 824d (2006), drives two dates: the date the Commission must act on a filing, and the date that the proposed rates, terms, and conditions will become effective. Section 205(d) provides that no change in rates, terms, or conditions shall be made "except after sixty days notice to the Commission and to the public." Section 205(d) separately also states that the Commission "may allow changes to take effect without requiring the sixty days' notice herein provided for."<sup>8</sup> The former means that the Commission typically must act on proposed changes within 60 days of the date of their filing.<sup>9</sup> The latter allows the Commission to make proposed changes effective on less than sixty days' notice. When a filing is incomplete, i.e., deficient, the Commission need not address the filing on the merits; the Commission can await the completion of the filing, i.e., the curing of the deficiency, before acting. Once the filing is complete, i.e., once the deficiency is cured, the Commission typically must act within 60 days of the date of completion. The deficiency and the cure do not, however, change the Commission's authority to make the proposed changes effective on a date earlier than after 60 days from the date of the completed filing. That is, the fact that the filing was originally incomplete and deficient, and now is complete, does not mean that the Commission somehow has lost the option granted by section 205(d) to make the proposed changes effective on a different, earlier date than after sixty days from the date the filing was completed. The two are separate and distinct.<sup>10</sup>

10. The Commission recognizes that, pursuant to section 35.2(c) of the Commission's regulations, the "filing date" of Niagara Mohawk's revised tariff sheets was defined as May 30, 2008. Further, in the absence of waiver, the Commission recognizes that a 60-day prior notice period must precede the effective date and any suspension of the effective date of a filing under section 205 of the FPA<sup>11</sup> and that, here, the Commission could have set an effective date as late as December 29, 2008, using the timeline identified by Cleveland, NYMPA, MI, and NYAPP. However, consistent with its statutory right to do so, the Commission chose to calculate the start of the 60-day prior

---

<sup>8</sup> 16 U.S.C. § 824d(d) (2006).

<sup>9</sup> *But see, e.g.*, PJM Interconnection, LLC, 111 FERC ¶ 61,134, at P 19, n.20 (2005); *New England Power Co.*, 53 FERC ¶ 61,106, at 61,341 & n.2, *reh'g denied*, 53 FERC ¶ 61,268 (1990).

<sup>10</sup> *Cf. Florida Power & Light Co.*, 91 FERC ¶ 61,269, at 61,920 (2000) (suspension analysis and waiver analysis can and do differ).

<sup>11</sup> *See Southern Co. Services, Inc.*, 60 FERC ¶ 61,297, at 62,065–66 & n.12 (1992).

notice period and subsequent five-month suspension of the effective date based on the original May 1, 2008 requested effective date,<sup>12</sup> rather than the later May 30, 2008 “filing date” established by section 35.2(c) – which the Commission has discretion to do.<sup>13</sup> Consistent with section 205(d), the Commission selected a date that was earlier than 60 days from the date of the completion of the filing and then suspended the filing for five months from that date, i.e., to October 1, 2008.<sup>14</sup>

11. In this regard, section 35.2(e) of the Commission’s regulations states: “the effective date [of a rate schedule] shall be 60 days after the filing date, *or such other date as may be specified by the Commission.*”<sup>15</sup> In addition, the United States Court of Appeals for the District of Columbia Circuit has held that the Commission “retains broad discretion to determine the adequacy of a filing to satisfy the objective of affording notice to the Commission and to the public.”<sup>16</sup> The fact that section 35.2(c) provides that the “filing date” was May 30, 2008, does not dictate what effective date the Commission ultimately may set, contrary to what Cleveland, NYMPA, MI, and NYAPP assert; indeed, section 205(d) distinguishes the two, as do the regulations. Pursuant to section 35.2(e), the effective date ultimately specified by the Commission can be, as it was here, tied to the original proposed effective date of May 1, 2008. It is not limited to a particular period following the date the company files its response to a deficiency letter.<sup>17</sup>

---

<sup>12</sup> Niagara Mohawk originally requested an effective date of May 1, 2008, which date fell after the 60-day prior notice period following the original February 11, 2008 filing, and so the original filing would otherwise have gone into effect by operation of law on May 1, 2008, absent Commission action (here, the issuance of the deficiency letter). In the absence of action by the Commission, a filing under section 205 of the FPA will become effective the later of the proposed effective date or after 60 days from the filing. *See, supra* note 10.

<sup>13</sup> *See, e.g., Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 61,339 n.10, *order on reh’g*, 61 FERC ¶ 61,089 (1992); *accord Alabama Power Co. v. FERC*, 22 F.3d 270, 272–73 (11<sup>th</sup> Cir. 1994).

<sup>14</sup> *See supra* notes 8 & 13.

<sup>15</sup> 18 C.F.R. § 35.2(e) (2008) (emphasis added).

<sup>16</sup> *Kentucky Utilities Co. v. FERC*, 689 F.2d 207, 211(D.C. Cir. 1982) (citing *City of Groton v. FERC*, 584 F.2d 1067, 1070 (D.C. Cir. 1978)).

<sup>17</sup> *See supra* note 13.

12. Here, the Commission reasonably exercised its discretion consistent with section 205(d), section 35.2(e), and its precedent to establish an effective date for the filed rates by reference to the original requested effective date of May 1, 2008, and not May 30, 2008. The original February 11, 2008 filing with its original May 1, 2008 requested effective date gave notice of the rates to be charged despite certain deficiencies in the underlying supporting workpapers and other materials included in that filing. As such, the statutory 60-day prior notice was provided. Thus, no waiver of the 60-day prior notice requirement was required here. Further, the Commission followed its suspension policy as the five-month suspension period allowed by section 205 commenced on the originally requested effective date, May 1, 2008, a date that was more than sixty days after the original filing date.

13. Cleveland, NYMPA, MI, and NYAPP are not correct in asserting that Commission policy is unequivocal that the 60-day statutory notice period and five-month suspension period commence only after the date of a supplemental filing curing a deficient filing. There is no hard and fast Commission policy on what effective date the Commission must choose in the case of a deficient filing. Both the statute and the regulations grant the Commission discretion. The Commission thus has frequently used the original filing date in the case of an initially deficient filing to calculate the effective date. In its August 3, 1992 order in *Central Hudson*,<sup>18</sup> the Commission clarified:

In circumstances where a rate increase filing is amended in a good faith effort to cure a deficiency and no customer contests the rate increase or the proposed effective date, we will also measure the 60-day notice period from the initial filing date, rather than the date the filing was completed.

14. In later cases involving deficient filings, the Commission similarly has established effective dates by reference to the original filing date including in the case of protested filings. For example, in an order issued shortly after *Central Hudson*, on September 25, 1992, in *Vermont Electric Power Co.*,<sup>19</sup> the Commission measured the notice and suspension periods from the original filing date of a protested section 205 filing rather than from the date of the company's deficiency response. There, after denying waiver of the 60-day prior notice requirement and suspending for a nominal period, the Commission set an effective date of March 23, 1992 for a protested formula rate filing made on January 23, 1992, despite the fact that the company filed its response to a deficiency letter on July 30, 1992. In its August 1, 2005 order on rehearing in

---

<sup>18</sup> *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 62,339 n. 10 (*Central Hudson*).

<sup>19</sup> 60 FERC ¶ 61,296 (1992).

*Milford Power Company, LLC*,<sup>20</sup> the Commission affirmed an earlier order setting the effective date for a Reliability Must Run Agreement for a nominal period measured from the original filing date, despite a later supplemental filing containing modifications to the agreement to cure deficiencies in the original filing and despite opposition to the filing. The Commission clarified that:

Here, where a supplemental filing is made in a good faith attempt to cure a deficiency, the Commission can and here reasonably did allow the applicant to retain its initial filing date as there was good cause shown for the lateness of the initial filing. Moreover, parties were given notice of the proposed rate and the proposed rate did not change between the time of Milford's initial filing and its supplemental filing.<sup>21</sup>

15. More recently, in its order in *Virginia Electric and Power Company*,<sup>22</sup> the Commission granted the company's request for a January 1, 2008 effective date for a protested October 25, 2007 formula rate filing despite the fact that, as in the instant case, the Commission had issued a deficiency letter (stating that a filing date would not be assigned pending a response). The responses to the Commission's deficiency letter were filed between January 10, 2008 and February 29, 2008, dates later than the requested (and ultimately adopted) January 1, 2008 effective date.

16. In the instant case, Niagara Mohawk's supplemental filing, as in *Milford*, was made in a good faith attempt to cure a deficiency in the initial filing. Further, as in *Milford*, parties were given notice of the proposed formula rate in the original February 11, 2008 filing and the proposed rate did not change between Niagara Mohawk's original filing and its supplemental filing. Accordingly, in these circumstances, the Commission believes that it was reasonable to set the effective date by reference to the original filing date but, as discussed below, nonetheless impose a five-month suspension.

---

<sup>20</sup> 112 FERC ¶ 61,154 (2005) (*Milford*).

<sup>21</sup> *Id.* P 10.

<sup>22</sup> 123 FERC ¶ 61,098 (2008); *see also* *Midwest Independent Transmission System Operator Inc.*, 116 FERC ¶ 61,252, at P 43 (2006) (setting an effective date following suspension for a nominal period that was tied to the original filing date, despite a later supplemental filing in response to a Deficiency Letter); *Duquesne Light Co.*, 118 FERC ¶ 61,087 (2007) (ordering a nominal suspension period and granting requested December 1, 2006 effective date of a protested section 205 formula rate filing despite a later response to a deficiency letter dated December 8, 2006).

17. As noted above, the Commission's policy regarding initially deficient filings as clarified in *Central Hudson, Milford*, and other cases is not to "punish" a company with a delayed effective date if it makes a good faith effort to correct a filing's deficiency. On the other hand, the Commission's policy in *West Texas* is that the Commission will impose a maximum suspension when preliminary analysis indicates that the proposed rates may be substantially excessive. Here, we stated in the July 29, 2008 Order, 124 FERC ¶ 61,106 at P 39, that our preliminary analysis indicated that Niagara Mohawk's proposed formula rates, may be substantially excessive. Therefore, while we used the original February 11, 2008 filing date and the original May 1, 2008 requested effective date at the outset to calculate an effective date, we also reflected the *West Texas* suspension policy by suspending the effectiveness of the rate for the maximum five months from the date the rate would otherwise have gone into effect had the original filing not been deficient. The result was a five-month suspension from May 1, 2008, leading to an October 1, 2008 effective date.<sup>23</sup> We believe that action was reasonable and fully consistent with our statutory discretion in the circumstances of this case.

18. Accordingly, we deny the requests for rehearing on this issue.

## **2. 50 Basis Point ROE Incentive**

19. NYMPA, MI and NYAPP request clarification or rehearing of the Commission finding that all of Niagara Mohawk's properly classified transmission facilities, including sub-transmission facilities, are eligible for the incentive ROE adder.<sup>24</sup> They state that section 2.01 of the Independent System Operator (ISO)/Transmission Owner (TO) Agreement separates transmission facilities into three groups: Appendix A-1 lists transmission facilities under ISO control, Appendix A-2 lists facilities requiring ISO notification with respect to certain actions, and the ISO/TO Agreement at page 3 defines Local Area Transmission Facilities as those not designated as being under ISO control or requiring ISO notification (The ISO/TO Agreement states that "each Transmission Owner shall have sole responsibility for the operation of its Local Area Transmission Facilities."). They object to applying the incentive ROE adder to facilities not under NYISO's control.

20. NYAPP explains that section 1.26b of the NYISO OATT defines the New York Control Area as "[t]he Control Area that is under the control of the ISO which include

---

<sup>23</sup> See *Florida Power & Light Co.*, 91 FERC ¶ 61,269, at 61,920 (2000) (discussing the relationship between the Commission's waiver policy and its suspension policy).

<sup>24</sup> See July 29, 2008 Order, 124 FERC ¶ 61,106 at P 35–36.

transmission facilities listed in the ISO/TO Agreement Appendices A-1 and A-2.”<sup>25</sup> NYAPP asserts that the Commission erred by not limiting application of the 50 basis point adder to those transmission facilities that are under the direct operational control of NYISO. NYAPP contends that Commission policy and precedent limit the ROE adder to the rate base for transmission facilities under the control of an independent entity and that local facilities that continue to operate under the control of the individual transmission owner are not eligible for the adder.<sup>26</sup> NYAPP states that the Commission ignores Niagara Mohawk’s obligation to demonstrate that NYISO has operational control of any facilities for which Niagara Mohawk seeks to obtain the 50 basis point adder. NYAPP adds that, if the Commission intended to change the standard for eligibility for the 50 basis point adder from that set forth in Order No. 679 and *ISO New England, Inc.*, it must acknowledge the change of course and provide a reasoned analysis for that change.<sup>27</sup>

21. NYAPP contends that it is a matter of fact as to which transmission facilities are under the operational control of NYISO and this should be determined on a facility by facility basis as part of the evidentiary hearing if one is necessary. NYAPP argues that it is clear that the third group, the Local Area Transmission Facilities, are under the sole operational control of Niagara Mohawk. NYAPP adds that the mere fact that transmission service over these facilities is available under the NYISO OATT does not resolve the issue of whether those facilities are under the operational control of NYISO; instead the issue of operational control must be determined on a case-by-case basis and thus, is an issue to be resolved at the hearing established in this proceeding.

22. NYMPA and MI assert that the issue is not one of “local distribution” versus “transmission” or even “sub-transmission” versus “transmission” as the July 29, 2008 Order suggests, but rather the contractual arrangements between Niagara Mohawk and NYISO that restrict NYISO’s operational control over certain transmission facilities. They further assert that Article 2.0, section 2.01 of the NYISO-TO Agreement grants NYISO operational control over only the subset of transmission facilities specifically set forth in Appendix A-1. According to NYMPA and MI, Appendix A-2 lists transmission facilities over which NYISO does not have operational control and is entitled only to receive notification with respect to certain Transmission Owner actions. NYMPA and MI add that operation of the third group, the Local Area Transmission System Facilities, is the sole responsibility of the transmission owner. NYMPA and MI argue that,

---

<sup>25</sup> New York Indep. Sys. Operator, Inc., FERC Electric Tariff, Original Vol. No. 1, Fifth Revised Sheet No. 39a, section 1.26b.

<sup>26</sup> *Citing ISO New England, Inc.*, 109 FERC ¶ 61,147, at P 201–02 (2004).

<sup>27</sup> *Citing Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

consistent with Commission precedent, the 50 basis point ROE incentive should be limited to only those facilities provided for in Appendix A-1, the only facilities over which NYISO has operational control.

23. NYMPA and MI distinguish the 50 basis point adder for all transmission facilities in PJM from the adder at issue here, arguing that PJM has operational control of all PJM transmission owner transmission facilities that are subject to its OATT, while NYISO has operational control only over the Appendix A-1 facilities. Similarly, NYMPA and MI also contend that the fact that the New York State Public Service Commission has found Niagara Mohawk's sub-transmission facilities serve a transmission function is irrelevant here where the issue is one of NYISO's direct operational control.

24. We grant rehearing as to application of the 50 basis point ROE incentive. We find that application of the 50 basis point adder should be limited to those facilities under NYISO's operational control. Limiting the incentive to those facilities under the operational control of the RTO/ISO offers the appropriate incentive to transfer control to the RTO/ISO. In the Commission's policy statement on Regional Transmission Organization (RTO) formation incentives, the Commission stated that "any entity that transfers operational control of transmission facilities to a Commission-approved RTO would qualify for an incentive adder of 50 basis points on its ROE for all such facilities transferred."<sup>28</sup>

25. In *ISO New England v. New England Power Pool*, the Commission similarly stated that the 50 basis point adder was intended to serve as "an incentive for transmission owners to turn over the operational control of their transmission facilities to an entity responsible for providing regional transmission service under the terms and conditions of a regional tariff."<sup>29</sup> As such, the Commission denied incentive adders for facilities covered by local network service schedules despite the coordinating role played by ISO New England regarding certain functions and services relating to these facilities. The Commission found that ISO New England had less control over these facilities, *inter alia*, because these facilities were administered by each transmission owner under an individual tariff for local service and the transmission owners reserved the right to file for changes in the terms and conditions for local service.<sup>30</sup>

---

<sup>28</sup> *Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid*, 102 FERC ¶ 61,032, at P 24 (2003).

<sup>29</sup> 106 FERC ¶ 61,280, at P 247 (2004).

<sup>30</sup> *Id.* P 247–48.

26. In its April 19, 2007 order,<sup>31</sup> addressing request for rehearing of Order No. 679-A, and clarifying that the Transmission Organization ROE incentive is not tied to new construction, the Commission again stated that “a public utility member of an RTO is eligible for the Transmission Organization incentive rate treatment as to all of its jurisdictional transmission facilities that have been turned over to the operational control of the Transmission Organization.”

27. In the instant case, NYISO’s operational control is limited to those facilities listed in Appendix A-1. Accordingly, we grant rehearing on this issue, and we find that the 50 basis point adder is to be applied only to those facilities listed in Appendix A-1. A mere notification requirement does not constitute operational control and, therefore, we do not find that the facilities listed in Appendix A-2 are under NYISO control for purposes of application of the incentive ROE adder. And facilities in the third group, the Local Area Transmission Facilities, are clearly not under NYISO’s operational control either.

The Commission orders:

The requests for clarification or rehearing of the July 29, 2008 Order are hereby denied, in part, and granted, in part, as discussed in the body of this order.

By the Commission. Commissioner Kelliher is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

---

<sup>31</sup> *Promoting Transmission Investment through Pricing Reform*, 119 FERC ¶ 61,062, at P 21 (2007).