

130 FERC ¶ 61,274  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

National Grid Generation LLC

Docket No. ER10-705-000

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

(Issued March 31, 2010)

1. On February 1, 2010, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> National Grid Generation LLC (National Grid) filed revised tariff sheets<sup>2</sup> 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 April 2, 2010, as requested, subject to refund and the outcome of hearing and settlement judge procedures.

**I. Background**

2. NGG owns and operates certain generating facilities, as defined in the PSA, including the Northport generating facility (Northport Station) and the Port Jefferson generating facility (Port Jefferson Station). The PSA sets forth the terms and conditions for the sale and delivery of electric capacity, energy conversion and ancillary services by National Grid to LIPA.<sup>3</sup>

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<sup>1</sup> 16 U.S.C § 824d (2006).

<sup>2</sup> See Appendix A.

<sup>3</sup> 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  
(continued...)

3. Under the PSA, National Grid sells and delivers to LIPA all of the capacity from certain generation facilities and converts LIPA's fuel input to the several 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 National Grid under the PSA, LIPA is required to purchase capacity from National Grid.

4. Further, pursuant to 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, which is the variable cost of supplying energy to LIPA, (c) the Monthly Ancillary Services Charge, which allows National Grid 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 National Grid, 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 National Grid, as well as a property tax incentive.

5. The PSA's term is for 15 years and allows National Grid to recalculate the revenue requirement in the seventh and the twelfth contract years (i.e., 2004 and 2009).<sup>4</sup>

6. National Grid acquired ownership of these generation facilities and this PSA from KeySpan Generation, LLC through National Grid's merger (the parent of National Grid) with KeySpan Corporation (the parent of KeySpan Generation, LLC). On March 22, 2007, National Grid, Keyspan Corporation, its affiliate, and LIPA, entered into an "Agreement and Waiver" as part of National Grid's merger agreement with KeySpan

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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).

<sup>4</sup> PSA Articles 8 & 9, and Appendix A, Sections I.C. and II. The revenue requirement was last reset for the twelfth contract year following a section 205 filing made in Docket No. ER09-628-000 on January 30, 2009, by NGG. *See National Grid Generation, LLC*, 130 FERC ¶ 61,006 (2010).

Corporation. Without this “Agreement and Waiver,” the merger would have allowed LIPA to terminate the PSA, among other things. As part of the Agreement and Waiver, LIPA agreed not to terminate its agreements with KeySpan. In exchange for LIPA’s waiver and as part of this Agreement and Waiver, National Grid agreed to provide LIPA with certain benefits under the PSA, including turbine improvements and new emissions controls for Northport Station Units 1, 2, 3, and 4, and new emissions controls at the Port Jefferson Station Units 3 and 4.

7. LIPA and National Grid have adopted four separate amendments to the PSA.<sup>5</sup> National Grid agreed under the fourth amendment to make certain capital improvements to the generating facilities and to bear the risk of recovery of those additions through a mechanism that limits recovery to fuel and emission savings realized by LIPA as calculated pursuant to the fourth amendment. The fourth amendment was filed the Commission in Docket No. ER08-1098-002; it amended the PSA to include the aforementioned Agreement and Waiver as Appendix A. Among other things, Appendix A contained the general method for measuring the costs and benefits associated with the turbine improvements at the Northport and Port Jefferson generating stations.<sup>6</sup> This filing was subsequently approved by letter order dated March 3, 2009.

8. The rates charged by National Grid to LIPA under the PSA were recently revised in accordance with the terms of a settlement agreement among National Grid, LIPA and its operating subsidiary Long Island Lighting Company d/b/a LIPA that was approved by the Commission on January 5, 2010.<sup>7</sup> Under the PSA as amended by the settlement, the rates and charges assessed by National Grid are adjusted annually for changes in a number of costs including changes in the revenue requirement associated with incremental plant additions.<sup>8</sup>

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<sup>5</sup> The Second and Third Amendments to the PSA predated the National Grid acquisition and were never executed.

<sup>6</sup> The provisions containing the turbine upgrade and emission control installation and cost recovery were accepted as Original Sheet Nos. 74 through 85. These tariff sheets were later renumbered as a result of the Commission-accepted settlement approving the twelfth contract year revisions to the revenue requirement in *National Grid Generation LLC*, 130 FERC ¶ 61,006 (2010).

<sup>7</sup> See *National Grid Generation LLC*, 130 FERC ¶ 61,006 (2010).

<sup>8</sup> See Appendix A to the PSA, Sections I. B. and III.

## II. Details of Filing

9. On February 1, 2010, National Grid filed revisions to Appendix A to add a specific formula for calculating the annual revenue requirement for the turbine improvements and emission controls at the Northport and Port Jefferson generating stations (the Annual Capacity Charge).<sup>9</sup>

10. National Grid explains how it will calculate this Annual Capacity Charge for the turbine improvements and emissions controls, and that it will be trued up to actual costs in the fourth month following the end of the contract year.<sup>10</sup> The Annual Capacity Charge includes, in part, a rate of return based on “100% debt financing with an interest rate equal to that obtainable by an A rated issuer of 20-year fixed rate tax exempt debt determined as of June 30, 2007.”<sup>11</sup>

11. In addition, National Grid states that for each year of the contract, this Annual Capacity Charge will not exceed the fuel and emissions cost savings (herein, the savings) that are expected to be realized as a result of these improvements. National Grid states that in the years where the Annual Capacity Charge exceeds the savings, National Grid will refund LIPA the difference. In years where the savings exceeds the Annual Capacity Charge, the excess savings will be deferred into a separate cumulative account (“cumulative excess savings”). National Grid asserts that if the PSA is not renewed on substantially the same terms at the expiration of the initial term of the PSA, then LIPA will pay National Grid a lump sum payment of these cumulative excess savings, but only to the extent that these savings haven’t already been applied in prior year’s Annual Capacity Charges, and only to the extent that these savings haven’t previously been recovered. National Grid claims that LIPA will not be charged any more than the Annual Capacity Charge in each year.

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

<sup>10</sup> National Grid Transmittal at 4, proposed Appendix A modifications to FERC Electric Rate Schedule No. 1, First Rev. Sheet No. 46A, Second Rev. Sheet No. 47.

<sup>11</sup> Appendix A modifications to FERC Electric Rate Schedule No. 1, First Rev. Sheet No. 47A.

12. National Grid states that this rate schedule change will not effectuate a rate increase beyond the rates that are currently authorized under the PSA.<sup>12</sup>

13. National Grid explains the formula for calculating these savings that are applied to the Annual Capacity Charge for each year, starting with determining the turbine fuel efficiency before improvements and the turbine efficiency after improvements.<sup>13</sup> National Grid states that three months prior to the installation, it will run several tests to determine the efficiency of the unit. Within three months after the installation of the upgrade, a turbine test will be run again to determine the efficiency improvement. These savings will be used to populate a formula that takes into account heat rates, fuel costs, and the price of emissions as reported in “Air Daily” or other similar trade publications.

14. National Grid avers that the modifications also reflect what will be done with excess emissions credits associated with the units. To the extent the credits are not required to satisfy obligations associated with the units, these credits will be pooled with credits from National Grid’s other generating stations, and applied pro-rata to the other generating stations to meet compliance obligations under law. National Grid states that to the extent that the emissions credits associated with the Northpoint and Port Jefferson plants are sold, LIPA will receive 100 percent of the net proceeds. All other emissions credits will be split pursuant to the sharing provisions of the Merger Agreement and PSA.<sup>14</sup>

### **III. Notice, Interventions, and Protests**

15. Notice of National Grid’s filing was published in the *Federal Register*, 75 Fed. Reg. 6,652 (2010), with interventions and protests due on or before February 22, 2010. LIPA filed a motion to intervene, protest and motion for summary disposition, or, in the alternative, suspension and hearing. On March 15, 2010, National Grid filed an answer to LIPA’s motion.

#### **A. Method for Calculating Fuel and Emissions Savings**

16. LIPA protests National Grid’s filing, stating that the settlement agreement doesn’t permit National Grid to accumulate unused fuel and emissions costs savings from year to year, i.e., the amount by which these savings may exceed the annual revenue

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<sup>12</sup> National Grid Transmittal at 4.

<sup>13</sup> National Grid Transmittal at, proposed Appendix A modifications to FERC Electric Rate Schedule No. 1, First Rev. Sheet Nos. 52A-52B.

<sup>14</sup> National Grid Transmittal at 7.

requirement, for use as an offset to future revenue requirements during the duration of the PSA. LIPA argues that these unused savings which have not been previously applied are collectable only at the end of the term of the PSA, which is 2013 or the end of any extension period, and only to the extent the savings have not been previously collected.

17. LIPA claims that the proposed methodology for calculating the percentage improvement of turbine efficiency should only consider the improvement in efficiency attributable to the turbine upgrades, and should therefore subtract out the efficiencies attributable to a turbine overhaul without new installation. LIPA argues that while it agrees with the use of National Grid's test, the test fails to isolate the efficiency gain attributable only to the turbine upgrades, as contemplated by the settlement. LIPA states that the typical percentage improvement in performance gained from overhauling (not replacing) a turbine is approximately 3.5 percent, and this should be reflected.

18. In response to LIPA's statements regarding fuel savings, National Grid agrees that excess fuel savings that accrue from year to year will be deferred until the expiration of the PSA, and that within four months of the PSA's expiration, LIPA is required to pay these unpaid balances.

19. National Grid asserts that LIPA's attempt to revise the previously-agreed on testing procedure for the fuel and emissions savings, is not supported by the unambiguous and express language of the settlement agreement. National Grid argues that a contract is not ambiguous simply because the parties disagree as to its interpretation, but rather, the standard is whether the contract language is reasonably susceptible to different constructions or interpretations. National Grid argues that in this case, it is not. Furthermore, National Grid contends the costs that are ultimately recoverable by National Grid are far lower than what LIPA would pay for other plant upgrades under the PSA. National Grid argues that LIPA has not provided the "public interest" demonstration necessary to abrogate the agreed-upon settlement terms.<sup>15</sup>

#### **B. Method for Calculating Return on Equity**

20. LIPA also protests several aspects of National Grid's requested return. LIPA argues that it should be a stated rate, rather than a rate of return based on "100% debt financing with an interest rate equal to that obtainable by an A rated issuer of 20-year fixed rate tax exempt debt determined as of June 30, 2007" proposed by National Grid.

21. LIPA also disagrees with National Grid's choice of sources for interest rates to be used in the rate of return calculation. LIPA argues that the agreed upon settlement language that provided for an interest rate equal to a rate "obtainable by an A rated issuer

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<sup>15</sup> National Grid Answer at 11-12 (internal citations omitted).

of 20-year fixed rate tax exempt debt determined as of June 30, 2007.” LIPA states that it has learned from discussions with National Grid that National Grid used a range of these rates from seven different firms ranging in value from 4.87 percent to 5.30 percent. LIPA argues that National Grid should use Thomson’s Municipal Market Data which reflects a rate of 4.65 percent. LIPA argues that it would also consider Standard and Poors, Moody’s or Fitch Ratings Service to determine this rate. Finally, LIPA argues that it appears that National Grid included the cost of issuance in some of these interest rates.

22. National Grid answers that there is no dispute between the parties that the rate of return assumes “100% debt financing with an interest rate equal to that obtainable by an A rated issuer of 20-year fixed rate tax exempt debt determined as of June 30, 2007.” National Grid argues however, that LIPA’s assertions fail to reflect the intent of the parties in settlement discussions. Specifically, National Grid argues that LIPA’s rate of 4.65 percent is derived from data published over a two day period from June 29, 2007 and July 2, 2007 in Thomson’s Municipal Market Data (MMD) for an “A rated electric revenue MMD” for a 20 year maturity. However, LIPA’s rate, based on secondary market information, fails to comport with the rate that could have been obtained by National Grid to finance the upgrades at the Northport station. Furthermore, National Grid argues that this rate is based on a 20 year issue of *new* tax exempt debt, includes more than just the proposed published interest rate. National Grid argues that such a rate includes the costs of selling, issuance expenses, and other market-imposed premiums. National Grid claims that LIPA’s rate does not take this into consideration, and LIPA’s preferred published interest rate is not a substitute for a rate of return that could be obtained on a new issuance of twenty-year tax-exempt debt.

23. National Grid maintains that this is hardly reasonable, particularly when National Grid agreed to bear the costs of these upgrades, and that this rate of return is less than half of the agreed-on rate of return in the PSA of 11.83 percent. National Grid provides additional support for its proposed rate of return in its attached affidavit of James Holodak and Exhibits from JP Morgan and Mesirow Financial supporting rates of 5.19 percent and 5.30 percent available to an investor-owned utility in the State of New York at the time.<sup>16</sup>

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<sup>16</sup> National Grid Answer at 8-10, Holodak Aff.

#### **IV. Discussion**

##### **A. Procedural Matters**

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), LIPA's unopposed motion to intervene serves to make it a party to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or answer unless otherwise

ordered by the decisional authority. We will accept National Grid's March 15, 2010 answer because it has provided information that assisted us in our decision-making process.

##### **B. Suspension, Hearing and Settlement Judge Procedures**

26. National Grid'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.

27. Our preliminary analysis indicates that National Grid'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 National Grid's proposed tariff sheets for filing, suspend them for a nominal period, make them effective April 2, 2010, subject to refund and to the outcome of the hearing and settlement judge procedures established herein.

28. 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.<sup>17</sup> 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.<sup>18</sup> The settlement judge

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<sup>17</sup> 18 C.F.R. § 385.603 (2009).

<sup>18</sup> 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](http://www.ferc.gov) – click on Office of Administrative Law Judges).

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 proposed tariff sheets are hereby accepted and suspended for a nominal period, to become effective April 2, 2010, subject to refund and to the outcome of hearing and settlement judge procedures, 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 National Grid's proposed tariff sheets, as discussed in the body of this order. However, the hearing will 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 (2009), 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, 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.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

**APPENDIX A**

National Grid Generation, LLC  
FERC Electric Rate Schedule No. 1  
Tariff Sheets to be Effective April 2, 2010, Subject to Conditions

Second Revised Sheet No. 45  
Second Revised Sheet No. 46  
First Revised Sheet No. 46A  
Second Revised Sheet No. 47  
First Revised Sheet No. 47A  
First Revised Sheet No. 47B  
Second Revised Sheet No. 48  
Second Revised Sheet No. 49  
Second Revised Sheet No. 50  
Second Revised Sheet No. 51  
First Revised Sheet No. 51A  
Second Revised Sheet No. 52  
First Revised Sheet No. 52A  
First Revised Sheet No. 52B