

150 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

New York Independent System Operator, Inc.
Niagara Mohawk Power Corporation

Docket No. ER14-543-000

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 19, 2015)

1. On December 6, 2013, pursuant to section 205 of the Federal Power Act (FPA),¹ Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) filed proposed tariff revisions to certain National Grid-specific components of the Wholesale Transmission Service Charge (Wholesale TSC) formula under Attachment H of the New York Independent System Operator, Inc.'s (NYISO) Open Access Transmission Tariff (OATT) (December 6, 2013 Filing). Specifically, National Grid proposed to amend its formula rate to incorporate the costs it incurs for Reliability Support Services (sometimes referred to here as RSS) provided pursuant to two RSS agreements (RSSA) with NRG Energy (NRG), which agreements were included in the filing. On February 4, 2014, the Commission accepted and suspended National Grid's proposed tariff modifications to its Wholesale TSC formula rate, and granted National Grid's request for waiver of the 60-day prior notice requirement, permitting the modifications to become effective July 1, 2013, subject to refund and further order of the Commission.²

2. As discussed below, in this further order, we establish hearing and settlement judge procedures regarding whether National Grid's proposed Wholesale TSC formula rate revisions, and the Dunkirk RSSA charges are just and reasonable.³

¹ 16 U.S.C. § 824d (2012).

² *Niagara Mohawk Power Corp.*, 146 FERC ¶ 61,065 (2014) (February 4, 2014 Order).

³ This order is being issued concurrently with an order in Docket No. ER14-543-001 denying the Municipal Electric Utilities Association of New York's (MEUA) request

(continued ...)

I. Background

3. On March 10, 2012, NRG filed a notice with the New York Public Service Commission (New York Commission), stating its intention to mothball its Dunkirk generating station as of September 10, 2012. National Grid conducted an analysis of the reliability impacts of the planned mothballing and determined that its transmission system would suffer adverse reliability impacts. Accordingly, it entered into negotiations with NRG.⁴ On July 12, 2012 NRG filed an unexecuted reliability service agreement with the Commission in Docket No. ER12-2237-000, under which Dunkirk would remain in service.⁵ Dunkirk also filed a “Term Sheet” summarizing its RSSA with the New York Commission on July 20, 2012.

4. On August 16, 2012, the New York Commission approved the parties’ proposed term sheet summarizing the provisions under which National Grid would procure Reliability Support Services from Dunkirk from September 1, 2012, to May 31, 2013 under an RSSA entered into with NRG (2012 Dunkirk RSSA).⁶ The 2012 Dunkirk RSSA provided that NRG would defer mothballing two Dunkirk units and keep them available during the nine-month term of the agreement. Under the agreement, National Grid agreed to pay NRG a fixed charge of \$2,924,324/month, or \$26,318,916 for the 9-month period, with additional cost adjustments for tax expenditures and coal contract costs, and with credits for any capacity market revenues earned by Dunkirk. According

for rehearing of the Commission’s February 4, 2014 Order on the issue of the effective date of National Grid’s December 6, 2013 Filing. *Niagara Mohawk Power Corp.*, 150 FERC ¶ 61,207 (2015).

⁴ For a complete discussion of the background of this proceeding, see the February 4, 2014 Order.

⁵ On February 19, 2015, in Docket No. ER12-2237-002, the Commission rejected NRG’s filing on procedural grounds. *Dunkirk Power LLC*, 150 FERC ¶ 61,114 (2015).

⁶ *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corp. d/b/a National Grid for Electric Service*, Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements, Case 12-E-0136 (New York Public Service Commission, August 16, 2012) (2012 New York Commission RSSA Order). In that order, the New York Commission estimated that approximately 7.5 percent of the RSSA costs could be recovered from National Grid’s wholesale transmission customers. 2012 New York Commission RSSA Order at 25.

to National Grid, the total cost of the 2012 Dunkirk RSSA was approximately \$33.3 million.

5. On October 24, 2012, in response to a directive in the New York Commission 2012 RSSA Order, National Grid issued a request for proposals (RFP) to address its continuing reliability need beyond May 31, 2013, when the 2012 Dunkirk RSSA terminated. National Grid stated that it received three responses, including one from NRG, for the continued provision of Reliability Support Services from Dunkirk. National Grid states that after extensive review, it determined that NRG's proposal provided the preferred solution both from reliability and cost perspectives.

6. On March 4, 2013, National Grid and NRG entered into the 2013 Dunkirk RSSA, under which Dunkirk would continue to provide Reliability Support Services from June 1, 2013 through May 31, 2015, which was ultimately approved by the New York Commission.⁷ The monthly fixed-price charge under the agreement is \$2,076,076/month, with the same cost-adjustment mechanisms as the 2012 Dunkirk RSSA.⁸

7. On March 29, 2013, in Docket No. ER13-1182-000, National Grid made a filing in which it sought to revise its Wholesale TSC formula rate to recover the costs incurred under RSSAs, such as the 2012 and 2013 Dunkirk RSSAs (March 29, 2013 Filing).⁹ On August 30, 2013, the Commission rejected that filing without prejudice to National Grid making a new FPA section 205 filing that provided additional support for recovery of RSS costs. The Commission stated that National Grid would "at a minimum need to file the underlying RSS agreements for Commission review, and support the proposed rates."¹⁰

⁷ *Petition of Dunkirk Power LLC and NRG Energy, Inc. for Waiver of Generator Retirement Requirements – Order Deciding Reliability Need Issues and Addressing Cost Allocation and Recovery*, Case 12-E-0136 (New York Public Service Commission, May 20, 2013) (2013 New York Commission Order).

⁸ Unlike the 2012 New York Commission RSSA Order, the 2013 New York Commission RSSA Order did not provide any estimate of what percentage of the RSSA charges could be recovered from National Grid's wholesale transmission customers.

⁹ Under NYISO's Wholesale TSC, the actual RSSA charges incurred during the prior year would be passed through in Wholesale TSC rates starting July 1 each year.

¹⁰ *New York Independent System Operator, Inc.*, 144 FERC ¶ 61,172, at P 39 (2013) (August 30, 2013 Order).

II. National Grid's December 6, 2013 Filing

8. National Grid's December 6, 2013 Filing proposed to add a new item, entitled Transmission Support Payments, to the Historical Transmission Revenue Requirement (Historical TRR) component of its overall Revenue Requirement, as specified in section 14.1.9.2(a) of NYISO OATT Attachment H.¹¹ National Grid proposed to define these payments in section 14.1.9.1 of Attachment H as "expenses accepted by FERC for inclusion in the Historical [TRR] pursuant to agreements entered into with generators or other similar resources for the purpose of supporting transmission reliability that have been submitted to FERC for review," and to include them in its Transmission Operation and Maintenance Expense, which, pursuant to section 14.1.9.1.41 of Attachment H, equals the sum of FERC Account Nos. 560 and 562 through 574.¹² Due to the uncertainty associated with forecasting the RSS cost-crediting mechanisms in the Dunkirk RSSAs outlined above, National Grid further proposed to modify the description of the Wholesale TSC formula rate to include only actual Transmission Support Payments.

9. National Grid asserted that its proposal to include RSS costs in its Wholesale TSC is appropriate because these costs directly relate to the functioning of National Grid's transmission system. National Grid further stated that RSS allows it to continue to reliably operate its transmission system pending, or in lieu of implementing upgrades to the transmission system, and RSS costs should therefore be treated just as those directly incurred for reinforcements or other upgrades to the transmission system.

10. National Grid stated that, at the time of its December 6, 2013 Filing, National Grid anticipated that the need for continued RSS would continue until at least June 2015, at which point the transmission reinforcements necessary to negate the need for Dunkirk's continued operation were planned to be in service.

11. National Grid requested that the Commission permit an effective date of July 1, 2013, for its filing, asserting that its transmission customers were on notice that it

¹¹ National Grid's December 6, 2013 Filing included, among other things, the 2012 and 2013 Dunkirk RSSAs, and exhibits regarding National Grid's reliability analyses, and New York Commission's reliability determinations.

¹² FERC Uniform System of Account Nos. 560 and 562 to 574 relate to costs associated with the operation, maintenance and planning of the transmission system, including labor costs, station expenses, line expenses, rents, communication equipment, computer software and the costs associated with maintaining those assets.

planned to include RSS costs in its Wholesale TSC formula rate by virtue of its previous filing in Docket No. ER13-1182-000 to recover these costs.

III. Responsive Pleadings

12. As further detailed in the February 4, 2014 Order, protestors to National Grid's December 6, 2013 Filing raised several issues related to National Grid's proposed formula rate revisions, as well as the costs associated with the 2012 and 2013 Dunkirk RSSAs.¹³ Protestors argued that the filing would result in a significant increase in costs to wholesale transmission customers, but would not provide a commensurate increase in benefits to those customers.¹⁴ To that end, protestors challenged National Grid's reliance on a New York Commission determination as to the appropriate wholesale recovery of RSSA costs, arguing that this Commission has exclusive jurisdiction over wholesale cost recovery. Accordingly, protestors argued that the Commission must review the 2012 and 2013 Dunkirk RSSAs pursuant to section 205, and that, without such review, wholesale ratepayers would have to pay charges that would not be subject to either the discipline of the market or regulatory oversight.¹⁵ Protestors asserted that National Grid failed to provide cost support for the RSSA costs in accordance with the August 30, 2013 Order, which, according to protestors, makes it difficult for the Commission to determine whether the RSSA costs were prudently incurred, and to determine which customers should bear them.¹⁶ Protestors also contended that the Dunkirk RSSA costs should be allocated to other users of the transmission system in western New York, such as the New York State Electric and Gas Corporation (NYSEG).¹⁷

¹³ As noted in the February 4, 2014 Order, timely interventions and protests were filed by the New York Association of Public Power (NYAPP), Allegheny Electric Cooperative, Inc. (Allegheny) and the Municipal Electric Utilities Association of New York (MEUA). These parties are collectively referred to here as "protestors."

¹⁴ MEUA Protest at PP 1-2, 7-8.

¹⁵ MEUA Protest at 8-9; New York Association of Public Power (NYAPP) Protest at 8-9.

¹⁶ MEUA Protest at 14-15; NYAPP Protest at 5-7. NYAPP further requested that if the Commission did not reject National Grid's filing, the Commission should set the filing for hearing. NYAPP Protest at 9, 12.

¹⁷ MEUA Protest at 17 (citing 2012 RSSA Order, *supra* note 6).

13. In response, National Grid asserted that it included the Dunkirk RSSAs, along with witness testimony and cost support justifying the need for the RSSAs, as well as for National Grid's proposed formula rate revisions, and that it planned to include the RSSA costs in FERC Account 566, which reflects miscellaneous expenses related to transmission operation, providing transparency.¹⁸ National Grid also asserted that it was appropriate not to allocate any of the RSSA costs to NYSEG, because the New York Commission specifically declined to require the allocation of RSSA costs to NYSEG on the grounds that any benefits to NYSEG by virtue of the RSSAs were *de minimis*.¹⁹ National Grid next contended that, even assuming that the loss of Dunkirk created a reliability need as contemplated under Attachment Y of the NYISO OATT, nothing in section 31.5.1.6 of Attachment Y prohibits transmission owners from seeking cost recovery from wholesale transmission customers with the Commission.²⁰ National Grid added that if the Commission determines that it has a separate 205 filing obligation for the RSSAs, then National Grid submits the RSSAs for Commission review pursuant to section 205, and will include the RSSAs as rate schedule attachments to Attachment H in a compliance filing.

14. In their answers to National Grid's answer, protestors contend that National Grid's proposal to incorporate a cost allocation component designed by the New York Commission into a FERC-jurisdictional formula rate undermines the Commission's exclusive authority over wholesale transmission rates, and therefore should be rejected.²¹ Protestors further argued that National Grid knew or should have known that Dunkirk would be needed for local system reliability, and should have taken that into consideration when determining whether RSSA costs are more fairly borne by wholesale transmission customers, or shareholders.²²

15. In a second answer, National Grid contended that RSSA costs are appropriately recovered through its wholesale transmission formula rate. National Grid asserted that the Commission has found that the costs associated with reliability agreements provide

¹⁸ National Grid January 10, 2014 Answer at 6-7.

¹⁹ National Grid January 10, 2014 Answer at 11 (citing 2012 RSSA Order at 25).

²⁰ *Id.* at 13-14.

²¹ MEUA Answer at 10.

²² MEUA Answer at 11.

benefits that should be paid for by all users of its grid, including wholesale transmission customers.²³

IV. Commission Determination

16. As an initial matter, we note that by order issued February 19, 2015, the Commission instituted a proceeding under section 206 of the FPA²⁴ directing NYISO to establish provisions in its tariff governing the retention of and compensation to generating units required for reliability, also referred to as reliability-must-run (RMR) services, including procedures for designating such resources, the rates, terms and conditions for RMR service, provisions for the allocation of costs of RMR service, and a *pro forma* RMR service agreement.²⁵ The order also clarified, however, that NYISO's RMR proposal will not require Dunkirk to enter into new *pro forma* agreements for the 2012 and 2013 RSSAs, while noting that the costs at issue in this proceeding and related to those agreements remain pending.²⁶ Accordingly, while the Commission has jurisdiction over the provision of RMR services in NYISO's markets, we will not revisit the reliability determinations underlying the 2012 and 2013 RSSAs. Yet, we continue to have concerns regarding the costs reflected in those agreements.

17. Our preliminary analysis continues to indicate that National Grid's proposed formula rate revisions, and the Dunkirk RSSA charges have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. National Grid's proposed Wholesale TSC formula rate revisions and the charges that would recover the costs associated with the 2012 and 2013 Dunkirk RSSAs raise issues of material fact that cannot be resolved on the record before us, and

²³ National Grid January 31, 2014 Answer, at 4 (citing *Pacific Gas and Electric Co.*, 100 FERC ¶ 61,160, at PP 15-16, 21 (2002)).

²⁴ 16 U.S.C. § 824e (2012).

²⁵ *New York Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015) (February 19, 2015 Order).

²⁶ *Id.* at P 11 n. 21 (“[T]he Commission clarifies that NYISO’s RMR proposal will not require Dunkirk to enter into new *pro forma* agreements for the 2012 and 2013 RSS agreements The Commission also notes that the costs at issue in the Niagara Mohawk Power Corp. filing in Docket No. ER14-543-000, related to the 2012 and 2013 Dunkirk RSSAs, remain pending before the Commission in Docket No. ER14-543-000.”).

that are more appropriately addressed in the hearing and settlement judge procedures ordered below.²⁷

18. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes 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.²⁸ 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.²⁹ 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.

19. With respect to protestors' challenges to National Grid's proposed July 1, 2013 effective date, the Commission addresses that issue in a concurrently-issued order addressing MEUA's request for rehearing in Docket No. ER14-543-001.³⁰

The Commission orders:

(A) 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

²⁷ We clarify that the hearing need not address issues regarding the Commission's jurisdiction over RMR agreements or whether the Commission should review the reliability determinations underlying these specific agreements, as those issues are discussed in the February 19, 2015 Order.

²⁸ 18 C.F.R. § 385.603 (2014).

²⁹ 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>).

³⁰ Thus, the hearing established in this proceeding need not address the effective date.

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 whether National Grid's proposed Wholesale TSC formula rate revisions, and the Dunkirk RSSA charges are just and reasonable. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), 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.

(C) 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.

(D) 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)

Kimberly D. Bose,
Secretary.