

150 FERC ¶ 61,207
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. ER14-543-001

ORDER DENYING REHEARING

(Issued March 19, 2015)

1. On February 4, 2014,¹ the Commission issued an order which accepted and suspended for a nominal period, subject to refund and further order, a December 6, 2013 filing by Niagara Mohawk Power Corporation d/b/a/ National Grid (National Grid) to revise its Wholesale Transmission Service Charge (Wholesale TSC) formula rate under Attachment H of the New York Independent System Operator, Inc.'s (NYISO) Open Access Transmission Tariff (OATT) to incorporate the costs it incurs for Reliability Support Services (RSS) pursuant to two agreements with NRG Energy (NRG) for power purchased from NRG's Dunkirk generating facility. The February 4, 2014 Order also waived the 60-day prior notice requirement to permit National Grid's filing to become effective July 1, 2013, subject to refund and to further Commission order.²

2. On March 6, 2014, the Municipal Electric Utilities Association of New York State (MEUA) filed a request for rehearing of the Commission's February 4, 2014 Order. MEUA asserts that the Commission erred in waiving the 60-day prior notice requirement and permitting National Grid's proposed modifications to its Wholesale TSC formula to become effective on July 1, 2013. MEUA requests that the Commission grant rehearing and make the modifications effective on February 5, 2014, subject to refund. MEUA

¹ *Niagara Mohawk Power Corporation*, 146 FERC ¶ 61,065 (2014) (February 4, 2014 Order).

² Concurrently with this order, the Commission is issuing a further order in Docket No. ER14-543-000 setting certain issues in that docket for hearing and settlement judge procedures. However, the issues raised in MEUA's request for rehearing are addressed here.

additionally requests that the Commission grant rehearing and suspend the filing for the full five-month period permitted under section 205(e) of the Federal Power Act (FPA),³ i.e., until July 5, 2014. As discussed below, the Commission denies MEUA's request for rehearing in all respects.

I. Background

3. National Grid's Wholesale TSC formula is the result of a settlement agreement approved by the Commission in Docket No. ER08-522-000, *et al.* establishing the terms of a formula rate for the calculation of its charge for transmission service under Attachment H of the NYISO OATT, as well as procedures for the annual adjustment of certain inputs to that formula rate, and was approved by the Commission in an order issued June 22, 2009.⁴ Section 14.1.9.4 of Attachment H to the NYISO OATT directs National Grid, on or before June 14 of each calendar year to post the Annual Update on the NYISO website, submit the Annual Update to the Commission as an informational filing which requires no action by the Commission,⁵ and serve the Annual Update electronically on all interested parties.

4. National Grid initially sought to revise its Wholesale TSC formula to recover the RSS costs in a March 29, 2013 filing in Docket No. ER13-1182-000 (March 29, 2013 Filing). National Grid indicated that, if the filing were approved, it would incorporate the RSS expenses beginning with its 2013 Annual Update filing. On June 26, 2013, the Commission's staff issued a deficiency letter requesting additional information from National Grid regarding its March 29, 2013 filing.⁶ National Grid responded to the deficiency letter on July 1, 2013. In its response, National Grid explained that the Wholesale TSC charges during each rate year (July 1 through June 30) are based primarily on costs incurred during the previous calendar year. Accordingly, National Grid stated that the RSS expenses incurred from September 2012, through December 2012, would be recovered in the TSC charges for services rendered July 1, 2013, through June 30, 2014. Further, National Grid noted that RSS expenses incurred from the period

³ 16 U.S.C. § 824d(e) (2012).

⁴ *Niagara Mohawk Power Corp.*, 127 FERC ¶ 61,289 (2009).

⁵ National Grid's most recent informational filing of the Annual Update was submitted to the Commission on December 1, 2014.

⁶ *See Niagara Mohawk Power Corp.*, 144 FERC ¶ 61,172, at P 29 (2013) (August 30, 2013 Order).

January 1, 2013, through December 31, 2013, would be billed July 1, 2014, through June 30, 2015.⁷

5. In its July 1, 2013 response, National Grid reiterated its request that the tariff changes proposed in the March 29, 2013 filing, incorporating RSS expenses, be allowed to become effective for transmission services rendered on or after July 1, 2013.⁸

6. In its August 30, 2013 Order in Docket No. ER13-1182-000, the Commission rejected National Grid's proposed modifications to its Wholesale TSC formula, "without prejudice to National Grid making a new FPA section 205 filing providing additional support for recovery of RSS costs."⁹ In doing so, the Commission expressly noted that National Grid proposed to utilize the existing Annual Update Process, set forth in the NYISO OATT,¹⁰ as the mechanism to inform affected parties of the prior year's RSS expenses that would be included in and recovered through the revised Wholesale TSC formula rate, noting that the proposed formula rate revisions "essentially establish a placeholder that would allow the future pass-through of RSS costs."¹¹ For the Commission to approve a pass-through of RSS costs, the order added that National Grid would at a minimum need to file the underlying RSS agreements for Commission review, and support the proposed rates.¹²

7. On December 6, 2013, National Grid made a new section 205 filing to which it attached the two National Grid/NRG RSS agreements. In order to incorporate the RSS expenses into its Wholesale TSC formula rate, National Grid 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 Attachment H. National Grid proposed to define the 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

⁷ *Id.* P 30.

⁸ *Id.* P 34.

⁹ *Id.* P 39.

¹⁰ NYISO OATT, Attachment H, § 14.1.9.4.

¹¹ August 30, 2013 Order at P 39.

¹² *Id.*

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 574.¹³ National Grid asserted that this formulation complied with the August 30, 2013 Order’s admonitions because it ensured that National Grid will only be permitted to reflect RSS expenses in its Wholesale TSC incurred pursuant to RSS agreements that have been filed for Commission review.

8. National Grid requested that the Commission permit an effective date of July 1, 2013 for the December 6, 2013 filing, asserting that its transmission customers were on notice that it planned to include RSS expenses in its Wholesale TSC formula rate by virtue of its previous filing in Docket No. ER13-1182-000 to recover these costs.¹⁴

9. Of relevance to the issues MEUA now raises on rehearing, in MEUA’s protest to the December 6, 2013 filing, MEUA argued that accepting National Grid’s proposal for a July 1, 2013 effective date would violate the section 205 prohibition on retroactive ratemaking.¹⁵ MEUA asserted that, if the Commission does not reject the filing, it should set it for hearing and suspend its effectiveness for the maximum (5 month) period permitted under section 205 of the FPA.

10. In the February 4, 2014 Order, the Commission found good cause to grant waiver of the 60-day prior notice requirement to allow the proposed tariff revisions to be effective, subject to refund and further Commission order, on July 1, 2013, as requested.¹⁶ The Commission noted that a July 1, 2013 effective date matched the

¹³ 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.

¹⁴ See February 4, 2014 Order at P 7. Alternatively, if the Commission rejected that request, National Grid requested an effective date for the instant revisions of no later than February 5, 2014.

¹⁵ MEUA Protest at 18.

¹⁶ February 4, 2014 Order at P 45. See 16 U.S.C. § 824d(d) (2012); 18 C.F.R. § 35.11 (2014); see also *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170, at PP 84-86 (waiver of prior notice rule in order accepting a System Support Resource (SSR) agreement and associated rate schedule), *order on reh’g*, 144 FERC ¶ 61,128 (2013).

beginning of National Grid's formula rate year, July 1 through June 30, as prescribed by section 14.1.9.1.66 to NYISO's OATT, Attachment H.¹⁷

II. MEUA's Request for Rehearing

11. On March 6, 2014, MEUA filed a request for rehearing of two rulings made in the February 4, 2014 order.¹⁸ First, MEUA asserts that the Commission erred by granting waiver of the FPA's 60-day prior notice requirement and permitting National Grid's modifications to its Wholesale TSC formula rate to become effective July 13, 2013, subject to refund and further Commission order. MEUA asserts that section 205 of the FPA and the Commission's regulations require that a service provider must give its customers 60 days' notice of any rate change, unless the Commission grants a waiver for good cause shown if the filing is made less than 60 days in advance of, but prior to, the proposed effective date of the filing. MEUA states that generally, where a filing for a new service is made after the date on which service commenced, the Commission only grants waiver of the prior notice requirement upon a showing of extraordinary circumstances.¹⁹ MEUA requests that the Commission grant rehearing and make the formula rate modifications effective on February 5, 2014, subject to refund.²⁰

12. MEUA asserts the Commission erred in finding that National Grid had demonstrated good cause to establish an effective date that pre-dates its December 6, 2013 filing. MEUA rejects National Grid's argument that, because the company had previously sought to recover RSS expenses through its filing in Docket No. ER13-1182-000, its wholesale transmission customers have had sufficient notice of National Grid's intention to include the cost of the Dunkirk RSS agreements in the Wholesale TSC formula rate. MEUA states that it is incorrect to say that the parties had adequate notice of what rates National Grid would propose here. MEUA points out that the deficiency letter in Docket No. ER13-1182-000 asked National Grid to explain the nature of the RSS

¹⁷ February 4, 2014 Order at P 45 n.61.

¹⁸ On March 21, 2014, National Grid filed a Motion for Leave to Submit Answer to Request for Rehearing and Limited Answer. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014), prohibits an answer to a request for rehearing. Accordingly, we reject National Grid's answer.

¹⁹ MEUA Request for Rehearing at 2-3 (citing *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338-39 (1992) (*Central Hudson*), *reh'g denied* 61 FERC ¶ 61,089 (1992)).

²⁰ MEUA Request for Rehearing at 3, 7-8.

charges it intended to incorporate into its transmission formula rate and specifically to describe the expected RSS costs in the years 2013 through 2015. It cites National Grid's response that the company was not proposing the recovery of specific RSS costs but rather that it wanted to amend its formula rate to permit recovery of those costs when and if National Grid incurs them. MEUA contends that such speculative statements hardly constitute notice of the rates to which MEUA would be subject.²¹

13. MEUA avers that National Grid has not demonstrated that the extraordinary circumstances required to justify a waiver of the prior notice requirement where a filing for a new service is made after the date on which service has commenced exist.²² MEUA asserts that the exceptions previously recognized by the Commission to this requirement – where the late filing does not change rates or provides customers an opportunity to reduce their rates – do not apply here.²³

14. Second, MEUA asserts that the Commission erred by suspending the rates in the December 6, 2013 filing for a nominal period only, and not the full five-month period permitted under section 205(e) of the FPA. MEUA requests that the Commission grant rehearing and suspend the rate for the full five-month period, i.e., until July 5, 2014.²⁴ MEUA cites the Commission's policy that rate filings should generally be suspended for the maximum period permitted by the statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable or unduly discriminatory, or that may be inconsistent with other statutory standards. MEUA argues that the Commission generally suspends a requested rate increase for the maximum period where, as here, preliminary analysis indicates that 10 percent or more of the requested increase appears to be excessive.²⁵

²¹ MEUA Request for Rehearing at 5.

²² MEUA Request for Rehearing at 6 (citing *Central Hudson*, 60 FERC ¶ 61,106 at 61,338-39).

²³ MEUA Request for Rehearing at 6.

²⁴ Under MEUA's proposal, the rates would be effective July 5, 2014.

²⁵ MEUA Request for Rehearing at 7 (citing *Arizona Pub. Serv. Co.*, 145 FERC ¶ 61,086 (2013)(citing *West Texas Utilities Company*, 18 FERC ¶ 61,189 (1982) (*West Texas*)).

III. Commission Determination

15. We deny MEUA's request for rehearing. First, we find that, by its March 29, 2013 filing, National Grid gave adequate notice to its customers that it would be passing through to them – using the formula rate currently in the NYISO OATT, revised to incorporate the pass-through of RSS expenses – the costs it incurs under the Dunkirk RSS agreements.²⁶ Second, National Grid's customers are aware that National Grid recovers its Wholesale TSC through a formula rate which is updated each year effective July 1, and the charges are based on actual costs incurred in the prior calendar year.²⁷ Accordingly, National Grid's customers were on notice that RSS-type costs were being incurred and were to begin to be passed through in TSC charges beginning July 1, 2013, even though the exact costs would not be determined until a later time.²⁸

16. While the March 29, 2013 filing was rejected by the Commission, the rejection was expressly “without prejudice to [National Grid] making a new FPA section 205 filing providing additional support for recovery of RSS costs,”²⁹ and such rejection did not vitiate notice of National Grid's incurrence of RSS costs and the pass-through of such costs through the NYISO Tariff's formula rate. Further, National Grid's December 6, 2013 filing, at issue here, did not change the essence of that pass-through proposal; the only substantive changes from its earlier-rejected filing were to modify the pass-through to cover only actual RSS costs and to comply with the Commission's guidance in the

²⁶ The price and other terms of the RSS agreements were previously made public in New York Public Service Commission proceedings in 2012 and 2013. See *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 Orders Issued and Effective, August 16, 2012, and May 20, 2013).

²⁷ Cf. 18 C.F.R. § 35.13(d) (2014) (providing for use of an historical, prior period test year data to calculate rates, including use of a prior calendar year's data to calculate rates).

²⁸ Cf. *Central Hudson*, 60 FERC ¶ 61,106 at 61,338 (allowing waiver of the 60-day prior notice requirement for filings that increase rates when the rate change and the effective date are prescribed by contract, such as annual rate revisions required by contract to become effective on a date specified in the contract, i.e., where there is a contractual commitment as to the effective date which the Commission has already accepted).

²⁹ August 30, 2013 Order, 144 FERC ¶ 61,172 at P 39.

August 30, 2013 Order that, for the RSS costs to be recovered, the underlying RSS agreements, must be filed for Commission review.³⁰ Notice is key to any decision regarding whether to waive the 60-day prior notice requirement under FPA section 205,³¹ and in these circumstances we find that customers indeed had notice. As to MEUA's argument that, when a filing for a new service is made after the date on which service commenced, the Commission only grants waiver of the prior notice requirement upon a showing of extraordinary circumstances, we find that argument to be misplaced. That policy applies to filings establishing new services, whereas the subject National Grid filings were to establish an additional category of costs allowed to be passed through an existing tariff formula rate for existing transmission services.³² For the foregoing reasons, we deny rehearing regarding the Commission's acceptance of a July 1, 2013 effective date for the subject filing.³³

17. We also deny rehearing regarding MEUA's request for a five-month suspension. The Commission has broad discretion to determine the length of a suspension period.³⁴ The Commission appropriately exercised its discretion in this case, because a nominal suspension of National Grid's December 6, 2014 filing is consistent with allowing the filing to become effective July 1, 2013, to match the beginning of National Grid's formula rate year (an effective date we reaffirm for the reasons explained both above and in the February 4, 2014 Order).³⁵ MEUA relies on *West Texas*³⁶ to argue that the filing

³⁰ National Grid also proposed an accounting change to record the RSS costs as Transmission Operation and Maintenance Expense.

³¹ *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979).

³² *Central Hudson*, 60 FERC ¶ 61,106 at 61,339.

³³ However, we note that National Grid may not recover any RSS expenses it incurred prior to the July 1, 2013 effective date of the tariff provisions authorizing the recovery of such expenses. See *Sabine Pipe Line, LLC*, 134 FERC ¶ 61,270, at P 10 (2011) ("when implementing a new tracker and true-up mechanism, a pipeline may not include in the true-up any under-recoveries that occurred prior to the effective date of the tariff provision"); see also *Crossroads Pipeline Co.*, 121 FERC ¶ 61,249, at P 34 (2011); *Cameron Interstate Pipeline, LLC*, 134 FERC ¶ 61,270, at P 19 & n.20 (2011).

³⁴ See, e.g., *Central Hudson Gas & Electric Corp.*, 90 FERC ¶ 61,042, at 61,196 (2000).

³⁵ February 4, 2014 Order, 146 FERC ¶ 61,065 at P 45 n.61.

³⁶ 18 FERC ¶ 61,189 (1982).

here should have been suspended for the maximum period, i.e., five months. However, Commission decisions concerning the appropriate length of a suspension period must be made within a statutorily-defined, limited time based on a preliminary review of only the information available in the parties' pleadings.³⁷ As the Commission in *West Texas* explained, "preliminary analyses necessarily involve a number of judgment factors."³⁸ Experts may reasonably differ over suspension issues which involve numerous questions of judgment.³⁹ In this case, the Commission's preliminary analysis did not indicate that the proposed rate is "substantially excessive," the standard articulated in *West Texas* for imposing a maximum suspension.⁴⁰ Other than routine allegations and speculation that Niagara Mohawk's proposed tariff changes will result in a substantial increase in rates, the record did not, and does not now, support a finding that the filing will result in substantially excessive rates. Moreover, the Commission accepted Niagara Mohawk's filing effective July 1, 2013 subject to refund, and the reasonableness of the actual Dunkirk RSS charges is being pursued in the further proceedings established in the contemporaneous order referred to in note 2 above. To the extent charges are found to be excessive, customers are protected by the refund effective date.⁴¹

³⁷ *E.g.*, *NV Energy, Inc.*, 145 FERC ¶ 61,080, at P 9 (2013); *Southern Co. Services, Inc.*, 99 FERC ¶ 61,204, at P 21 (2002); *Southern California Edison Co.*, 116 FERC ¶ 61,099, at PP 9-12 (2006); *Appalachian Power Co.*, 59 FERC ¶ 61,313, at 62,158 (1992); *Jersey Central Power & Light Co.*, 56 FERC ¶ 61,376, at 62,435-36 (1991); and cases cited therein.

³⁸ *West Texas*, 18 FERC at 61,375.

³⁹ *Appalachian Power Co.*, 59 FERC at 62,158.

⁴⁰ *West Texas*, 18 FERC at 61,375.

⁴¹ *See, e.g.*, *NV Energy, Inc.*, 145 FERC ¶ 61,080, at P 9 (nominal suspension combined with waiver of advance notice filing requirement will allow rates to become effective when transmission line goes into service and to extent rates are found excessive, refund effective date offers protection). We further note that an extended discussion of what is to be a preliminary analysis for purposes of suspension would involve an inappropriate prejudgment of the merits of the issues set for hearing. *Appalachian Power Co.*, 59 FERC at 62,158.

The Commission orders:

MEUA's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.