

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell and Joseph T. Kelliher,

Central Hudson Gas & Electric Corporation	Docket Nos.	ER97-1523-065
Consolidated Edison Company of New York, Inc.		ER97-1523-067
Long Island Lighting Company		OA97-470-060
New York State Electric & Gas Corporation		OA97-470-062
Niagara Mohawk Power Corporation		ER97-4234-058
Orange and Rockland Utilities, Inc.		ER97-4234-060
Rochester Gas and Electric Corporation		
New York Power Pool		

Niagara Mohawk Power Corporation	Docket No.	OA96-194-010
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ORDER ACCEPTING COMPLIANCE FILING, ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES AS TO REFUND REPORTS AND  
CONSOLIDATING DOCKETS

(Issued October 8, 2004)

1. In this order, the Commission addresses a compliance filing and two refund reports submitted by Niagara Mohawk Power Corporation (Niagara Mohawk). Niagara Mohawk submitted the first refund report in Docket No. OA96-194-010, pursuant to a Commission order issued in that proceeding on July 2, 2002 (July 2 Order).<sup>1</sup> Niagara Mohawk submitted the compliance filing and second refund report in Docket Nos. ER97-1523-065, *et al.*, pursuant to the provisions of a settlement agreement filed in that proceeding on November 17, 1999 and approved by Commission letter order issued on July 31, 2000 (July 31 Letter Order).<sup>2</sup> The primary issue raised by both refund reports is whether Niagara Mohawk must issue refunds for unbundled retail transmission service it provided to certain retail customers. As discussed below, we will accept the compliance filing, establish hearing and settlement judge procedures as to the refund reports, and consolidate these proceedings. This action benefits customers by providing parties with a forum in which to resolve a protracted refund dispute.

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<sup>1</sup> *Niagara Mohawk Power Corporation*, 100 FERC ¶ 61,019 (2002).

<sup>2</sup> *Members Systems of the New York Power Pool*, 92 FERC ¶ 61,128 (2000).

**I. Docket No. OA96-194-010****A. Background**

2. Niagara Mohawk submitted its open access transmission tariff (Filed OATT) on July 9, 1996, pursuant to Order No. 888.<sup>3</sup> By order issued September 25, 1996, the Commission determined that the rates set forth in the Filed OATT were not shown to be just and reasonable and set the matter for hearing.<sup>4</sup> On April 1, 1997, all parties to the proceeding, except Multiple Intervenors and Sithe/Independent Power Partners, L.P. (Sithe), reached a settlement in principle on all issues (Settlement). The Commission approved the Settlement by order issued June 15, 2000.<sup>5</sup> Multiple Intervenors and Sithe, who had contested the Settlement, proceeded to hearing regarding the Filed OATT. An initial decision following the hearing was issued on March 12, 1998 (Initial Decision).

3. In Opinion No. 448,<sup>6</sup> the Commission affirmed in part, clarified in part, and reversed in part the Initial Decision. The Commission directed Niagara Mohawk to make various changes to its Filed OATT, issue refunds due as a result of those adjustments, and file a report showing the computation of refunds and interest paid.

4. On July 17, 2001, Niagara Mohawk submitted its compliance filing and refund report pursuant to Opinion No. 448. In its refund report, Niagara Mohawk asserted that no refunds were due because: (1) neither Sithe nor Multiple Intervenors had ever executed a service agreement or taken wholesale transmission service under the Filed OATT prior to November 18, 1999, when that OATT was superseded by the New York Independent System Operator (NYISO) OATT; and (2) prior to November 18, 1999, only one member of Multiple Intervenors – SUNY Buffalo – had taken retail delivery service and it had done so under the provisions of Niagara Mohawk's Retail Tariff (Retail Tariff)

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<sup>3</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom.* Transmission Access Policy Study Group, *et al.* v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.* New York v. FERC, 535 U.S. 1 (2002).

<sup>4</sup> *Long Sault, Inc., et al.*, 76 FERC ¶ 61,313 (1996).

<sup>5</sup> *Niagara Mohawk Power Corporation*, 91 FERC ¶ 61,274 (2000).

<sup>6</sup> *Niagara Mohawk Power Corporation*, 92 FERC ¶ 61,168 (2000).

on file with the New York State Public Service Commission (New York Commission). Niagara Mohawk argued that, while it provided the transmission component of its retail service to SUNY Buffalo under the Filed OATT, customers receiving retail delivery services under the Retail Tariff pay only the retail delivery charge established in that tariff. Niagara Mohawk claimed that, under the Retail Tariff, the actual rates customers pay remains fixed at the levels prescribed by the New York Commission, regardless of the wholesale transmission service charge under the Filed OATT. Niagara Mohawk argued that there was no basis for awarding a refund to customers receiving retail delivery services under the Retail Tariff and, further, that the Commission lacked jurisdiction over the charges established by state authorities for local delivery services.

5. In the July 2 Order, the Commission rejected Niagara Mohawk's refund report. With regard to Niagara Mohawk's argument that the Commission lacks authority to order refunds in this case, it stated:

Niagara Mohawk admits that it provided unbundled retail transmission service under its Filed OATT. As recently affirmed by the Supreme Court, the Commission has jurisdiction over unbundled retail transmission service and has the authority to establish just and reasonable rates, terms and conditions for that service. That Niagara Mohawk may, in practice, have billed a Commission-jurisdictional service at a state-set rate does not alter the fact that the Commission has exclusive jurisdiction over the unbundled transmission component of the transaction and, accordingly, the authority to establish the just and reasonable rate level for that transmission service.<sup>7</sup>

6. The Commission found that Niagara Mohawk's argument that no refunds are due under the Filed OATT should have been raised in a timely rehearing request of Opinion No. 448 (in which the Commission directed Niagara Mohawk to issue refunds and file a refund report). Accordingly, we again directed Niagara Mohawk to issue refunds due under the Filed OATT, as adjusted by Opinion No. 448, and file a refund report accordingly.<sup>8</sup>

**B. August 15 Refund Report**

7. On August 15, 2002, Niagara Mohawk submitted the refund report at issue here (August 15 Refund Report). Niagara Mohawk again asserts that no refunds are due. As an initial matter, Niagara Mohawk utilizes a refund period of approximately one year, from November 1, 1998, when the "retail access" program was approved by the New

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<sup>7</sup> July 2 Order at P 17.

<sup>8</sup> July 2 Order at P 16.

York Commission, to November 18, 1999, the date NYISO commenced operations. According to Niagara Mohawk, this refund period is appropriate because: (1) the July 1 Order requires refunds only to members of Multiple Intervenors who are “Eligible Customers,” as defined in Order No. 888-A,<sup>9</sup> i.e., customers who received retail transmission service under the Filed OATT pursuant to a state requirement that such service be provided or pursuant to a voluntary offer of such service; and (2) the July 2 Order does not require refunds beyond the effective date of the NYISO OATT.

8. Niagara Mohawk contends that, for the stated refund period, no members of Multiple Intervenors were Eligible Customers. Niagara Mohawk maintains that no member received retail transmission service pursuant to a state requirement that such service be provided; rather, Multiple Intervenors members purchased electricity from Energy Service Companies (ESCOs).<sup>10</sup> Niagara Mohawk states that, in accordance with its Retail Tariff, ESCOs, not Multiple Intervenors members, were the entities that initially received retail transmission service under Niagara Mohawk’s Filed OATT, and the ESCOs were billed Settlement, not Filed, OATT rates.<sup>11</sup>

9. Indeed, Niagara Mohawk contends that, prior to June 1, 1999, Multiple Intervenors were precluded by the provisions of Niagara Mohawk’s Retail Tariff from taking retail transmission service in their own names, since they were not ESCOs approved by the New York Commission. Niagara Mohawk states that, after that date, only one member of Multiple Intervenors – SUNY Buffalo – became a direct transmission service customer under the Filed OATT. Niagara Mohawk argues that the remaining Multiple Intervenors who continued to take service from ESCOs after June 1, 1999 waived any right to refunds for all transmission services Niagara Mohawk provided to those ESCOs.

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<sup>9</sup> *Order No. 888-A*, section 1.11 of the *pro forma* OATT.

<sup>10</sup> Niagara Mohawk cites Rule 1.26 of its Retail Tariff P.S.C. No. 207 – Electricity, First Revised Leaf No. 22-E (effective June 1, 1999), which defines an ESCo as any “non-utility entity that can perform energy and customer service functions in a competitive environment including the provision of Electric Supply Service and the assistance in the efficiency of its use.”

<sup>11</sup> Niagara Mohawk further contends that the ESCOs are not entitled to refunds because they did not contest the Settlement in this proceeding.

10. Relying again upon the definition of Eligible Customers, Niagara Mohawk concedes that it voluntarily offered to provide retail transmission service to the New York Power Authority (NYPA) for certain economic development programs.<sup>12</sup> However, Niagara Mohawk argues that NYPA, and the retail customers who received power delivered for NYPA, did not contest the Settlement and are therefore bound by it and entitled to no refunds. In any case, Niagara Mohawk states that Multiple Intervenors are not among the retail customers who participated in these economic programs.

11. In addition, Niagara Mohawk argues that New York law prohibits it from charging any rates for services provided under its Retail Tariff that are different from the rates established in that tariff, or from providing any customer with a discount or rebate not authorized by that tariff.<sup>13</sup> Accordingly, Niagara Mohawk states that it has no choice under state law but to maintain the same total charges to customers regardless of how individual rate components are adjusted, and that any alteration of the transmission component of such rates would trigger an offsetting adjustment to other components of the rates. Niagara Mohawk states that, under New York law, any amounts the Commission compels it to refund must be surcharged back to the same customers, which would create an unnecessary administrative burden.

12. Further, Niagara Mohawk states that many members of Multiple Intervenors entered into individually negotiated contract rate agreements with Niagara Mohawk under the Retail Tariff. Niagara Mohawk argues that allowing refunds to those customers would abrogate the payment commitments contained in those contracts.

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<sup>12</sup> Niagara Mohawk states that it provides High Load Factor Fitzpatrick Power to certain economic development customers selected by NYPA's Trustees and provides transmission service to NYPA for the delivery of Power for Jobs power to certain economic development customers. We note that, on June 11, 1997, in Docket Nos. ER97-2006-000 and EL97-29-000, Niagara Mohawk filed an offer of settlement under which it agreed to wheel High Load Factor Power and Economic Development Power to certain retail customers of NYPA, including Multiple Intervenors members who are located in the service territory of Niagara Mohawk. That offer of settlement (between Niagara Mohawk, NYPA and the New York State Department of Public Service) placed the transmission service associated with these NYPA sales under Niagara Mohawk's Filed OATT. The offer of settlement also noted that the rates under Niagara Mohawk's Filed OATT were currently at issue in Docket No. OA96-194-000.

<sup>13</sup> Niagara Mohawk cites New York Pub. Serv. L. § 66(12)(d) (McKinney 2000).

13. Finally, Niagara Mohawk contends that, while it recognizes that the transmission component of a utility's unbundled retail sales may be subject to Commission jurisdiction, Commission policy during the stated refund period did not require the transmission component of Niagara Mohawk's retail sales to Multiple Intervenors to be provided on an unbundled basis.

**C. Notice of the Filing and Responsive Pleadings**

14. Notice of the August 15 Refund Report was published in the *Federal Register*<sup>14</sup> with interventions, comments and protests due on or before September 5, 2002. Multiple Intervenors filed a timely protest.

15. Multiple Intervenors state that Niagara Mohawk utilizes an inappropriate refund period. Multiple Intervenors contend that the refund period should begin, at the latest, on March 20, 1998, when the New York Commission conditionally accepted Niagara Mohawk's retail PowerChoice Settlement Agreement (PowerChoice Settlement). Multiple Intervenors state that the PowerChoice Settlement provides for the unbundling of Niagara Mohawk's retail transmission rates. Multiple Intervenors further contend that the refund period should run to the present, rather than terminate on the same date that NYISO commenced operations, *i.e.*, November 18, 1999. Multiple Intervenors state that NYISO's OATT specifically recognizes that Niagara Mohawk retains the refund obligation in this proceeding.<sup>15</sup>

16. Multiple Intervenors further contend that, contrary to Niagara Mohawk's assertions, ESCos do not provide transmission service to Multiple Intervenors. Rather, members of Multiple Intervenors who purchase electricity supply from ESCos purchase delivery service, including transmission services, under the utility's OATT, in this case,

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<sup>14</sup> 67 Fed. Reg. 55,400 (2002).

<sup>15</sup> Multiple Intervenors cites NYISO OATT 2<sup>nd</sup> Revised Sheet No. 404, as stating: "Niagara Mohawk will make a separate compliance filing to conform its 'filed' [transmission service charge] with [Opinion No. 448] and will make refunds as appropriate."

Niagara Mohawk's Filed OATT.<sup>16</sup> Multiple Intervenors state that, since the unbundled retail transmission rates charged by Niagara Mohawk are derived directly from the Filed OATT, regardless of the electricity supply provider, there is no basis for denying refunds to customers who purchase supply through an ESCo.

17. Multiple Intervenors also contend that nothing in the July 2 Order supports Niagara Mohawk's assertion that its refund obligation is limited to Multiple Intervenors who took direct service under the Filed OATT. Multiple Intervenors state that the July 2 Order reflects the Commission's intent to extend refunds to those Multiple Intervenors who were overcharged through the retail rate.

18. Multiple Intervenors further dispute Niagara Mohawk's assertion that New York law prohibits or is inconsistent with the refunds directed in this case. Multiple Intervenors contend that, in approving the PowerChoice Settlement, the New York Commission explicitly recognized that transmission service is an unbundled service provided under the Filed OATT, as applicable to each customer.

19. Finally, Multiple Intervenors assert that allowing refunds in this case would not abrogate individually negotiated contracts, as Niagara Mohawk contends. Multiple Intervenors argue that the terms of certain contracts may allow, or even contemplate, such refunds.

20. On September 24, 2002, Niagara Mohawk filed an answer to Multiple Intervenors' protest. Niagara Mohawk disputes Multiple Intervenors' assertion that the refund period should begin on March 20, 1998, the effective date of the PowerChoice Settlement. Niagara Mohawk reiterates its argument that only Multiple Intervenors who received Filed OATT service pursuant to a state requirement or voluntary offer of such service are

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<sup>16</sup> On September 9, 1997, prior to the issuance of Opinion No. 448, Niagara Mohawk filed a form of transmission service agreement in Docket No. ER97-4568-000. That form set forth the terms and conditions applicable to ESCos in order to implement Niagara Mohawk's retail access pilot program. The Commission accepted that filing subject to the outcome of this proceeding and directed Niagara Mohawk to unbundle the transmission components of its retail rates by separately stating the rates for transmission and ancillary services that would be billed under its pilot program. *Niagara Mohawk Power Corp.*, 81 FERC ¶ 61,180 (1997). On December 5, 1997, Niagara Mohawk made its compliance filing in Docket No. ER97-4568-001, which used the Settlement OATT rates to unbundle the transmission component and ancillary rates. By Delegated Letter Order (issued on February 2, 1998), those revisions were accepted for filing, subject to refund and subject to the outcome of Docket No. OA96-194-000.

entitled to refunds. Niagara Mohawk contends that New York's retail access program was phased in over time, beginning one month after the PowerChoice Settlement was implemented.

**D. Procedural Matters**

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Niagara Mohawk's answer because it has provided information that assisted us in our decision-making process.

**E. Discussion**

22. The Commission stated in the July 2 Order that although Niagara Mohawk might have billed a Commission-jurisdictional service at a state-set rate, the Commission retains jurisdiction over the unbundled transmission component of the transaction.<sup>17</sup> The same reasoning holds true here. While Niagara Mohawk argues that New York law and certain provisions of its Retail Tariff are inconsistent with, or even prohibit, Niagara Mohawk from refunding amounts charged in excess of the Filed OATT rates, as adjusted by Opinion No. 448, the fact remains that the Commission has exclusive jurisdiction over the Filed OATT rates.

23. We further find disingenuous Niagara Mohawk's argument that, even if the Commission possesses jurisdiction over the service at issue, Niagara Mohawk was unaware that, during the November 1, 1998-November 17, 1999 timeframe (Niagara Mohawk's stated refund period), it was required to provide the transmission component of its retail sales on an unbundled basis. In 1997, Niagara Mohawk twice amended its Filed OATT in order to unbundle its transmission rates, and each time those revisions were accepted for filing.<sup>18</sup>

24. While we emphasize that how Niagara Mohawk billed a Commission-jurisdictional service has no bearing upon whether we retain jurisdiction over that service (we do), Niagara Mohawk now argues further that, in fact, no Multiple Intervenors member ever paid the transmission service charge at issue or directly received unbundled retail transmission service. Rather, Niagara Mohawk contends Multiple Intervenors

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<sup>17</sup> July 2 Order at P 17.

<sup>18</sup> See *Niagara Mohawk Power Corp.*, 81 FERC ¶ 61,180 (1997) and Docket No. ER97-4568-001, Delegated Letter Order issued Feb. 2, 1998. We note that those filings were accepted subject to the outcome of this proceeding.

purchased electricity supply from ESCos. On the other hand, Multiple Intervenors argue that its members who purchased electricity supply from ESCos also purchased transmission services pursuant to Niagara Mohawk's Filed OATT.

25. The parties also dispute the appropriate refund effective date. While Niagara Mohawk argues that the refund period should commence on November 1, 1998, when New York's retail access program was approved by the New York Commission, Multiple Intervenors argue that Niagara Mohawk agreed to provide unbundled retail transmission service, and did provide such service, as of March 20, 1998.<sup>19</sup>

26. Based upon the foregoing, we find that Niagara Mohawk's August 15 Refund Report raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we will set for hearing and settlement judge procedures the following issues: (1) which Multiple Intervenors customers took unbundled retail transmission service from Niagara Mohawk, either directly or indirectly; (2) when they took such service; (3) what rate they paid; and (4) how much Niagara Mohawk owes in refunds to those customers.

27. 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 commence. 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>20</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding;

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<sup>19</sup> We note that in *Order No. 888*, FERC Stats. & Regs. ¶ 31,036 at 31,783-4 (1996), the Commission reaffirmed its conclusion that this Commission has exclusive jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce by public utilities and held that the rates, terms and conditions of unbundled retail transmission must be filed at the Commission. Indeed, on March 24, 1999, in Docket No. ER99-2244-000, Niagara Mohawk filed unbundled transmission rates, terms and conditions under which a transmission customer could take retail transmission service under Niagara Mohawk's Retail Tariff. The filing included Attachment J to the Filed OATT, Form of Service Agreement for Retail Transmission Service, and included unbundled Settlement OATT rates to become effective on April 2, 1999. In response to Multiple Intervenors' protest that its members should not be forced to accept the Settlement OATT rates, the Commission directed that the Settlement OATT rates would be subject to the outcome of the proceeding in Docket No. OA96-194-000. See *Niagara Mohawk Power Corp.*, 87 FERC ¶ 61,171 (1999).

<sup>20</sup> 18 C.F.R. § 385.603 (2004).

otherwise, the Chief Judge will select a judge for this purpose.<sup>21</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

28. Having stated the foregoing, we will resolve the issue of when the refund period should end. We agree with Niagara Mohawk that, for purposes of this proceeding only, the refund period should end on the effective date of NYISO's OATT, *i.e.*, November 18, 1999. This does not mean that Multiple Intervenors lose their refund protection as of that date, because NYISO's OATT, like the Filed OATT, falls within our jurisdiction. As further discussed below, to the extent Multiple Intervenors members are owed refunds for Commission-jurisdictional service received on or after November 18, 1999, those refunds are provided for in our discussion below of the proceeding in Docket Nos. ER97-1523-065, *et al.*

## **II. Docket No. ER97-1523-065, et al.**

### **A. Background**

29. On January 31, 1997, the Member Systems,<sup>22</sup> including Niagara Mohawk, filed a proposed open access transmission tariff (OATT) in order to establish the NYISO. By order issued January 27, 1999 (January 27 Order), the Commission conditionally accepted the NYISO OATT for filing and established hearing and settlement judge procedures for issues concerning certain calculations.<sup>23</sup>

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<sup>21</sup> If the parties decide to request a specific judge, they may 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).

<sup>22</sup> The Members System include: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, New York State Electric & Gas Corporation, Niagara Mohawk, Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corporation, and the New York Power Authority.

<sup>23</sup> *Central Hudson Gas & Electric Corp., et al.*, 86 FERC ¶ 61,062 at 61,240 (1999) (Ordering Paragraph (P)).

30. On November 17, 1999, the Member Systems filed a joint settlement agreement (Member Systems Settlement Agreement) among all parties, except Sithe/Independent Power Partners, LP (Sithe), in order to resolve all issues set for hearing.<sup>24</sup> Most relevant here, the Member Systems Settlement Agreement required Niagara Mohawk to submit a compliance filing establishing its revenue requirement for use in calculating the transmission service charge applicable to wholesale transmission service in Niagara Mohawk's transmission region provided under NYISO's OATT. The compliance filing was to be based upon Niagara Mohawk's revenue requirement under its own Filed OATT, which was in dispute in Docket No. OA96-194-000. Furthermore, the Member Systems Settlement Agreement required the compliance filing to be submitted within 30 days of a final Commission order in that proceeding.

31. In the July 31 Letter Order, the Commission approved the Member Systems Settlement Agreement and directed Member Systems participants to refund amounts collected in excess of the settlement rates.

32. On July 17, 2001, pursuant to the Member Systems Settlement Agreement, Niagara Mohawk submitted the compliance filing and refund report at issue here (July 17 Compliance Filing and July 17 Refund Report, respectively).<sup>25</sup>

**B. Motion for Leave to File Out of Time**

33. Niagara Mohawk seeks permission to file the July 17 Compliance Filing one day out of time. As stated above, the Settlement Agreement required the compliance filing to be submitted within 30 days of a final Commission Order in Docket No. OA96-194-000. The Commission issued its final order in Docket No. OA96-194-000 on August 17, 2000, and, on June 15, 2001, the Commission issued its order on rehearing requests.<sup>26</sup> Niagara Mohawk states that its compliance filing was due on June 16, 2001, and accepting it one day out of time will not prejudice interested parties.

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<sup>24</sup> As noted in the Settlement Agreement, Sithe raised certain issues with respect to marginal losses methodology which the Member Systems did not agree were set for hearing and therefore did not address in the settlement.

<sup>25</sup> In response to a deficiency letter issued in this proceeding on October 31, 2001, Niagara Mohawk submitted an amendment to its compliance filing on November 30, 2001. Unless otherwise indicated, the compliance filing, as amended, will be referred to as the July 17 Compliance Filing, and the refund report will be referred to as the July 17 Refund Report.

<sup>26</sup> *Niagara Mohawk Power Corporation*, Opinion No. 448, 92 FERC ¶ 61,168 (2000), *order denying reh'g*, 95 FERC ¶ 61,411 (2001).

### **C. July 17 Compliance Filing and Refund Report**

34. In its July 17 Compliance Filing, Niagara Mohawk states that its filed revenue requirement under the NYISO OATT is \$140,754,449 and that its filed rate for transmission service is \$4.22/MWh. Attachment A to Niagara Mohawk's filing includes work papers in support of its calculations. Niagara Mohawk further provides an explanation for each line in that attachment.

35. In its July 17 Refund Report, Niagara Mohawk maintains that it owes no refunds as the result of its adjusted filed revenue requirement under the NYISO OATT. Niagara Mohawk states that the only two parties subject to the filed revenue requirement, Sithe and Multiple Intervenors, have not taken wholesale transmission service in Niagara Mohawk's transmission region since November 18, 1999, the effective date of NYISO's OATT.

36. Niagara Mohawk concedes that certain Multiple Intervenors members received delivery service under Niagara Mohawk's Retail Tariff on file with the New York Public Service Commission (New York Commission) and that the transmission component of this service was provided under the provisions of NYISO's OATT. However, Niagara Mohawk states that, in accordance with NYISO's OATT, those customers paid only the retail transmission rates established in the Retail Tariff, rather than the transmission service charge at issue here. Niagara Mohawk claims that its Retail Tariff expressly excludes the wholesale transmission service charge from the charges that retail customers must pay. Accordingly, Niagara Mohawk states that the actual retail delivery rate paid by such customers remains fixed at the levels prescribed by the New York Commission, regardless of the wholesale transmission service charge under NYISO's OATT. Moreover, Niagara Mohawk contends that the Commission has no jurisdiction over the charges established by state authorities for local delivery services.

### **D. Notice of the Filing and Responsive Pleadings**

37. Notice of Niagara Mohawk's compliance filing and refund report, as first submitted on July 17, 2001, was published in the *Federal Register*,<sup>27</sup> with comments, protests, and interventions due on or before September 24, 2001. Multiple Intervenors filed a timely protest.

38. Notice of Niagara Mohawk's November 30, 2001 amendment to its compliance filing was published in the *Federal Register*,<sup>28</sup> with comments, protests, and interventions due on or before January 3, 2002. None was submitted.

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<sup>27</sup> 66 Fed. Reg. 48,035 (2001).

<sup>28</sup> 66 Fed. Reg. 67,240 (2001).

39. Multiple Intervenors argue that, contrary to Niagara Mohawk's assertion, the Commission's jurisdiction over interstate transmission under section 201 of the Federal Power Act (FPA)<sup>29</sup> extends to unbundled retail transmission and associated transmission rates. Moreover, Multiple Intervenors maintain that section 205 of the FPA<sup>30</sup> requires refunds in this case, in order to produce just and reasonable rates.

40. Multiple Intervenors further contend that, pursuant to a settlement agreement approved by the New York Commission, the transmission component of Niagara Mohawk's retail access tariffs must be provided under Niagara Mohawk's OATT, as applicable to each customer. To that end, they raise all of the arguments they raised in response to Niagara Mohawk's first compliance filing in Docket No. OA96-194-008.

#### **E. Procedural Matters**

41. Given the absence of undue delay or prejudice, we will grant Niagara Mohawk's motion to file its compliance filing one day out of time.

#### **F. Discussion**

##### **1. July 17 Compliance Filing**

42. We will accept Niagara Mohawk's July 17 Compliance Filing. We find that Niagara Mohawk's adjusted revenue requirement of \$140,754,449 is consistent with the Member Systems Settlement Agreement and July 2 Order. Furthermore, we find adequate Niagara Mohawk's cost support for that calculation. Indeed, no party argues to the contrary.

##### **2. July 17 Refund Report**

43. For the reasons stated above, we reject Niagara Mohawk's assertion that the Commission lacks jurisdiction to direct refunds in this case. We further find that Niagara Mohawk's July 17 Refund Report raises issues of material fact, similar to those raised by its August 15 Refund Report, namely, which customers actually took the transmission service at issue here, and whether they paid the transmission service charge provided for under NYISO's OATT. These issues cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. Therefore, we will set for hearing and settlement judge procedures the following issues: (1) which Multiple Intervenors customers took unbundled retail

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<sup>29</sup> 16 U.S.C. § 824, *et seq.* (2000).

<sup>30</sup> 16 U.S.C. § 824d (2000).

transmission service from Niagara Mohawk, either directly or indirectly; (2) when they took such service; (3) what rate they paid; and (4) how much Niagara Mohawk owes in refunds to those customers.

44. 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 commence. 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>31</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>32</sup> The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order 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.

45. Because the issues raised in this proceeding and those raised in Docket No. OA96-194-010 (discussed above) involve common issues of law and fact, we will consolidate the proceedings for purposes of hearing and settlement judge procedures.

The Commission orders:

(A) The July 17 Compliance Filing is hereby accepted for filing.

(B) Docket Nos. OA96-194-010 and ER97-1523-065, et al., are hereby consolidated for purposes of hearing and decision.

(C) 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 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 the August 15 and July 17 Refund Reports, with

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<sup>31</sup> 18 C.F.R. § 385.603 (2004).

<sup>32</sup> If the parties decide to request a specific judge, they may 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).

regard to the following issues: (1) which Multiple Intervenors customers took unbundled retail transmission service from Niagara Mohawk, either directly or indirectly; (2) when they took such service; (3) what rate they paid; and (4) how much Niagara Mohawk owes in refunds to those customers. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), 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 in writing or by telephone within five (5) days of the date of this order.

(E) Within sixty (60) days of the date of this order, 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.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Such 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. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Acting Secretary.