

123 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Niagara Mohawk Power Corporation

Docket Nos. ER07-1019-003,
ER07-1019-004, ER07-1020-004,
ER07-1020-003, ER07-1021-004,
and ER07-1021-003

ORDER ON REHEARING AND COMPLIANCE

(Issued May 15, 2008)

1. In an order issued October 30, 2007 (October 30 Order), among other things, the Commission accepted three unexecuted interconnection agreements (IA), subject to conditions, approved an uncontested settlement, and directed Niagara Mohawk Power Corporation (Niagara Mohawk) to file a refund report¹. On November 29, 2007, Alliance Energy, New York LLC, AG-Energy, LP (AG-Energy), Seneca Power Partners, LP (Seneca), and Sterling Power Partners, LP (Sterling) (collectively, Alliance) filed a request for rehearing of the October 30 Order. On the same date, Niagara Mohawk submitted a filing to comply with the October 30 Order. For the reasons discussed below, the Commission grants Alliance's request for rehearing and accepts Niagara Mohawk's compliance filing, subject to conditions.

I. Background

2. On June 8, 2007, Niagara Mohawk filed three late-filed executed 1998 amended and restated interconnection agreements (Amended IAs) between Niagara Mohawk and, respectively, AG Energy, Seneca, and Sterling and also filed three unexecuted IAs between the same parties intended to supersede the late-filed executed IAs. On August 31, 2007, Niagara Mohawk also submitted an uncontested settlement of certain refund issues with respect to the late-filed executed IAs. Neither the Amended IAs nor the three unexecuted IAs that Niagara Mohawk submitted on June 8, 2007 had been previously

¹ *Niagara Mohawk Power Corporation*, 121 FERC ¶ 61,104 (2007).

filed with the Commission. Niagara Mohawk acknowledged that it owed refunds under the Amended IAs. Niagara Mohawk stated that there were only minor differences between the unexecuted IAs and the New York Independent System Operator, Inc.'s (NYISO) *pro forma* IA. Niagara Mohawk also stated that it was filing the unexecuted IAs absent the customers' signatures because the parties were unable to agree on whether certain facilities should be classified as interconnection or network facilities. On July 31, 2007, the Commission Staff issued a deficiency letter regarding the June 8, 2007 filing. On August 31, 2007, Niagara Mohawk filed a response to the deficiency letter which included an uncontested settlement of issues related to the Amended IAs.

3. On October 30, 2007, the Commission issued an order conditionally accepting the unexecuted IAs, subject to them being re-filed as executed IAs within 30 days from the date of the order; approving the settlement agreement; requiring Niagara Mohawk to file a refund report to reflect refunds made under the settlement agreement; and directing the Office of Enforcement to conduct an audit of Niagara Mohawk's practices, procedures, and agreements to evaluate whether Niagara Mohawk is complying with the Commission's requirements for filing and preservation of records. On November 14, 2007, Niagara Mohawk filed a refund report as directed by the October 30 Order. The refund report was accepted by delegated letter order on December 17, 2007.² On November 29, 2007, Niagara Mohawk re-filed the three unexecuted Alliance IAs with modifications to comply with the October 30 Order.

II. Notice and Responsive Filing

4. Notice of Niagara Mohawk's November 29, 2007 compliance filing was published in the *Federal Register*, 72 Fed. Reg. 70,321 (2007), with comments due on or before December 20, 2007. Comments were filed by Alliance.

III. Discussion

A. Request for Rehearing – Docket Nos. ER07-1019-003, ER07-1020-004, and ER07-1021-004

5. In its June 8, 2007 filing, Niagara Mohawk proposed language in section 5.17.6 of the unexecuted IAs that is different from that contained in the NYISO *pro forma* IA. Specifically, the non-conforming section 5.17.6 provides that the Developer may have liability for subsequent taxable events, within 10 years from the date the IA becomes effective (June 6, 2007). However, section 5.15.6 of the NYISO *pro forma* IA provides that the Developer may have liability for subsequent taxable events, within 10 years from

² *Niagara Mohawk*, Docket Nos. ER07-1019-002, ER07-1020-002 and ER07-1021-002 (Dec. 17, 2007) (unpublished letter order).

the date the relevant Transmission Owner Attachment Facilities are placed in service. The Commission did not address the non-conforming language in the October 30 Order.

6. In its request for rehearing, Alliance argues that the non-conforming section 5.17.6 of the unexecuted IAs substantially extends the number of years that Alliance could remain liable for subsequent taxable events. Alliance contends that because the Attachment Facilities necessary to accommodate the Alliance interconnection were placed in service in the early 1990s, it should not be under any obligation, going forward, for the consequence of subsequent taxable events. Alliance argues that the Commission should reject the non-conforming section 5.17.6 language because Niagara Mohawk has not demonstrated that the proposed revisions in the unexecuted IAs are “consistent with or superior” to the NYISO *pro forma* IAs language.

Commission Determination

7. We grant Alliance’s request for rehearing. We find that Niagara Mohawk did not follow the NYISO IA *pro forma* language in section 5.17.6 of the unexecuted IAs. Nor, as Alliance points out, has Niagara Mohawk shown that the proposed non-conforming language is consistent with or superior to the NYISO *pro forma* language. The *pro forma* language provides that Alliance only would be obligated for the consequences of taxable events for a ten-year period from the date the pertinent facilities were placed in service. We find that it is unjust and unreasonable for Niagara Mohawk to include revisions that make Alliance liable for subsequent taxable events for a further ten-year period.³ Accordingly, Niagara Mohawk is directed to revise section 5.17.6 to eliminate the non-conforming language that would cause Alliance to be liable for any taxable events for a ten year period commencing June 6, 2007 and file the revised IA with the Commission within 30 days of the issuance of this order.

B. Compliance Filing – Docket Nos. ER07-1019-004, ER07-1020-003, and ER07-1021-003

8. As discussed above, the October 30 Order required Niagara Mohawk to submit the unexecuted IAs as executed agreements within 30 days from the date of the order.⁴ On

³ In any event, if the pertinent Attachment Facilities were placed in service in the early 1990’s, any subsequent taxable event should have already occurred within the ten-year period following such in-service date as contemplated by the IAs.

⁴ The October 30 Order accepted the unexecuted IAs, subject to Niagara Mohawk removing all language from the unexecuted AG-Energy and Seneca IAs that would permit it to recover operation and maintenance (O&M) costs from Alliance related to the three-breaker ring bus configurations and associated system protection and communication equipment. Niagara Mohawk removed the language when it re-filed the agreements.

November 29, 2007, Niagara Mohawk re-filed the three unexecuted IAs, stating that Alliance did not execute the IAs because it intended to request rehearing of the October 30 Order.

9. On December 20, 2007, Alliance filed comments regarding Niagara Mohawk's compliance filing. Alliance submits that the issue raised in its request for rehearing must be resolved before Alliance will voluntarily submit to the terms of the unexecuted IAs. Alliance requests that the Commission issue an order granting its rehearing request prior to issuing an order on the compliance filing to mitigate the possibility that the Commission fully accepts IAs containing unjust and unreasonable terms and conditions.

Commission Determination

10. We will conditionally accept Niagara Mohawk's compliance filing, subject to Niagara Mohawk revising the non-conforming language in section 5.17.6 as directed above. The Commission's granting of Alliance's rehearing request should resolve its reservations regarding the signing of the unexecuted IAs.⁵

The Commission orders:

(A) Alliance's request for rehearing is granted, as discussed in the body of this order.

(B) Niagara Mohawk's November 29, 2007 compliance filing is accepted, subject to Niagara Mohawk re-filing the IAs submitted with the compliance filing with modifications, as discussed in the body of this order, within 30 days of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵ We will not require Niagara Mohawk to file executed, as opposed to unexecuted, IAs in its compliance filing as previously directed in the October 30 Order. *See California Independent System Operator Corp.*, 115 FERC ¶ 61,237, at P 26 (2006).