

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
102 FERC ¶ 61,295

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Niagara Mohawk Power Corporation

v.

Docket No. EL03-27-000

Huntley Power LLC; NRG Huntley Operations,
Inc.; Dunkirk Power LLC; NRG Dunkirk
Operations, Inc.; Osewgo Harbor Power LLC;
NRG Oswego Operation, Inc.

ORDER SETTING COMPLAINT FOR HEARING, ESTABLISHING HEARING
PROCEDURES AND SETTLEMENT JUDGE PROCEDURES

(Issued March 14, 2003)

1. On November 26, 2002, Niagara Mohawk Power Corporation (Niagara Mohawk) filed a complaint in this proceeding against six subsidiaries of NRG Energy, Inc. (NRG),¹ alleging that they have refused to pay Niagara Mohawk for station power received since 1999 or for the delivery of that power. For the reasons explained below, the Commission will set the complaint for hearing and investigation and establish settlement judge procedures. This order benefits customers by establishing hearing and settlement judge procedures to resolve the complaint.

Background

2. Niagara Mohawk is an electric and natural gas utility operating in New York that owned and operated several electric generating stations. NRG purchased from Niagara Mohawk three generating stations with an aggregate net capacity rating, accounting for

¹The six subsidiaries are Huntley Power LLC; NRG Huntley Operations, Inc.; Dunkirk Power LLC; NRG Dunkirk Operations, Inc.; Osewgo Harbor Power LLC; NRG Oswego Operation, Inc. (collectively, Generators).

station power consumption, of 3,060 MW. Each of these stations, the Dunkirk, Huntley, and Oswego Stations, were and still are connected directly to the interstate transmission grid.

3. Niagara Mohawk claims that NRG has received station power service since 1999 but has refused to pay for the service. Niagara Mohawk contends that NRG's facilities are physically unable to self-supply station power from on-site generation for a large portion of their station power needs, that none of the generators can self-supply station power remotely, and that Niagara Mohawk supplied the service and is entitled to payment in accordance with a retail tariff. Niagara Mohawk states that it does not seek Commission enforcement of its retail tariff, but rather requests certain Commission findings so that a pending state court proceeding to enforce payment may move forward.

4. Niagara Mohawk states that the central issue in dispute is whether NRG has self-supplied its station power. According to Niagara Mohawk, NRG takes the position that it is required to pay only the wholesale spot market price for energy, not the retail price due under Niagara Mohawk's retail tariff, nor retail tariff charges for local delivery service. Niagara Mohawk asserts, however, that under Commission precedent, facilities configured as NRG's are cannot self-supply from on-site generation, are not available to net station power requirements against gross output,² and thus must purchase the power as an end-user under the provider's retail tariff.³

5. As further evidence of the absence of self-supply by NRG, Niagara Mohawk states (1) that NRG made no arrangements to acquire station power from any party other than Niagara Mohawk, and (2) that NRG committed to purchase station power from Niagara Mohawk in the Asset Sale Agreement and the Interconnection Agreements entered into at the time NRG purchased the facilities, and thus it has a contractual obligation to pay for the service. Finally, Niagara Mohawk asserts that NRG also must pay for the delivery of the power under Niagara Mohawk's local delivery tariff, because the delivery involves local delivery service subject to state jurisdiction. Citing concerns about NRG's financial condition, Niagara Mohawk requests that the Commission resolve the complaint expeditiously and not initiate settlement judge procedures.

²Citing PJM Interconnection, L.L.C., *et al.*, 95 FERC ¶ 61,333 at 61,890 n.55 (2001) (PJM III).

³Citing PJM Interconnection, L.L.C., *et al.*, 94 FERC ¶ 61,251 at 61,893 (2001) (PJM II).

6. NRG counters in its answer that its units have self-supplied most of their station power needs. Thus, according to NRG, each of the three stations contain multiple generating units, and station power service loads (including primary start-up and loads that serve common functions for all of the units) are provided from the combined output of the units that are operating. NRG claims this is accomplished using a very discrete and small portion of Niagara Mohawk's interstate transmission system.⁴ NRG relies on Commission precedent that it claims holds that generators have the right to self-supply station power by netting consumption against output on a monthly basis for its position that NRG should be entitled to net over some reasonable period.⁵

7. NRG contends that during pre-closing negotiations, NRG clearly and unequivocally informed Niagara Mohawk that it intended to net the station power service against generation output at each of the three stations, and that it planned for the capacity of the units to be reduced by the capacity required for station power service. According to NRG, Niagara Mohawk stated that it would prefer to provide retail station power service. Niagara Mohawk and NRG were not able to resolve the issue before closing. NRG asserts that it has consistently requested Niagara Mohawk to report net generation to the New York Independent System Operator, Inc. (NYISO) or to allow NRG to do so, but that Niagara Mohawk has refused.

8. In addition, NRG states that a portion of its station power is delivered over transmission facilities, but that no local distribution facilities are utilized. NRG argues that, since there is no sale of energy, and since no local distribution facilities are used by the generators to self-supply, there is no valid reason for Niagara Mohawk to charge for station power service. NRG believes that it should, at most, be liable to Niagara Mohawk for the NYISO OATT charge for the transmission services rendered.

9. NRG states that it is willing to participate in settlement judge procedures.

Interventions and Responsive Pleadings

10. Notice of Niagara Mohawk's filing was published in the Federal Register, 67 Fed. Reg. 72,667 (2002), with motions to intervene and protests due on or before January 10,

⁴NRG contends that, because of the configuration of the stations, a portion of the self-supplied station power necessarily leaves each station, travels a short distance to a transmission switchyard and returns to the plant over transmission facilities, but that no local distribution facilities are utilized.

⁵Citing PJM III, 95 FERC at 62,182.

2002. Timely motions to intervene raising no substantive issues were filed by the NYISO, KeySpan - Ravenswood, LLC, and Exelon Corporation. Northeast Utilities Service Company (NUSCO) filed a timely motion to intervene and comments in support of Niagara Mohawk's complaint. AES NY, L.L.C. and AES Eastern Energy, L.P. (AES) jointly filed a timely motion to intervene and comments opposing the complaint.

11. NUSCO comments that direct, third party provision of station power is a state-jurisdictional sale for end-use, and the final transfer of power does not constitute a sale for resale subject to Commission jurisdiction. NUSCO continues that, while any transmission service may be subject to this Commission's jurisdiction, if retail energy service has been unbundled, then delivery may require the use of local distribution facilities as well as transmission facilities. NUSCO asks that the Commission find in this case that there is a local distribution element to every delivery of station power regardless of the nature of the facilities used.

12. AES charges that Niagara Mohawk's arguments are an impermissible collateral attack on a prior order, attempting to severely restrict the ability of merchant generators to net their station power requirements. AES argues that, under KeySpan Ravenswood, Inc., generators may net station power against energy produced in a given month, "no matter at what voltage or meter" the power is received, and that for station power supplied from on-site over a monthly netting period, no delivery charges apply.⁶

13. On January 26, 2003, Niagara Mohawk filed a motion for leave to file an answer and answer reiterating earlier arguments and correcting what Niagara Mohawk claims are certain factual misstatements made by NRG. In addition, Niagara Mohawk urges that, because of the risk of bankruptcy by NRG, if the Commission decides to appoint a settlement judge, then it should require NRG to place the disputed funds into an escrow fund.

DISCUSSION

Procedural Matters

14. Pursuant to Rule 214(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2002), the timely, unopposed motions to intervene serve to make the movants parties to this proceeding. We will reject Niagara Mohawk's answer to the

⁶101 FERC ¶ 61,230 at 62,002 (2002), reh'g pending.

extent that it is an impermissible answer to an answer under Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2002).

Complaint

15. Although the Commission has held that a generating facility whose configuration prevents on-site self-supply cannot net its station power requirements against gross output, as Niagara Mohawk contends,⁷ that finding relates to facilities whose station power requirements were always supplied from an off-site source.⁸ In this case, the record suggests that NRG may be able to self-supply at least some of its station power requirements, and so would be eligible for netting. That being said, the Commission concludes that the parties raise a number of issues that are questions of fact which would best be determined in the context of a trial-type evidentiary hearing. These issues include: (1) to what extent NRG's facilities are capable of self-supplying their station power requirements; (2) whether NRG committed contractually to purchase station power from Niagara Mohawk; (3) and whether the facilities used to deliver NRG's station power are properly classified as transmission or local distribution facilities, in order to then determine the applicability of a Commission-jurisdictional rate. Accordingly, we will set the complaint for investigation and hearing under Section 206 of the Federal Power Act (FPA).⁹

16. The Commission believes that it would be in the best interest of the parties to resolve their dispute expeditiously and consensually, rather than litigating. Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁰ If the parties desire,

⁷PJM II, 94 FERC at 61,890 n.55.

⁸Id., emphasis added. See also id. at 61,893 (clarifying that facilities incapable of self-supplying station power under any circumstances must purchase station power under an appropriate retail tariff (emphasis added)).

⁹16 U.S.C. § 824e (2000). We will deny Niagara Mohawk's request that we require NRG to place the disputed amounts into an escrow fund. We are not persuaded that this is necessary in this instance.

¹⁰18 C.F.R. § 385.603 (2002).

they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge.¹¹

17. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the FPA, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,¹² we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, January 25, 2003.

18. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date has passed, the Commission cannot follow its normal procedure.

19. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that the presiding judge would be able to issue an initial decision within approximately eight months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by October 31, 2003. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by March 31, 2004.

¹¹If 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. FERC's website contains a listing of Commission Judges and a summary of their background and experience. (www.ferc.gov - click on Office of Administrative Law Judges.)

¹²*See, e.g.,* Seminole Electric Cooperative, Inc. v. Florida Power & Light Company, 65 FERC ¶ 61,413, at 63,139 (1993); Canal Electric Company, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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 the Federal Power Act, particularly Section 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 this complaint, as discussed in the body of this order. As discussed in the body of this order, we will hold the hearing in abeyance to provide time for settlement judge procedures.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, 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. To the extent consistent with this order, the designated settlement judge shall have all power and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(C) Within sixty (60) days of the date of this order, the settlement judge shall issue a report to the Commission. The settlement judge shall issue a report every sixty (60) days thereafter, apprising the Commission of the parties' progress toward settlement.

(D) If the settlement discussions fail, and the case goes to hearing, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in the proceeding, to be held within approximately 15 days of the designation of the presiding judge in a hearing room of the Federal Energy Regulatory Commission, 888 First St., N.E., Washington, D.C. 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.

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(E) The refund effective date established pursuant to Section 206(b) of the Federal Power Act is January 25, 2003.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.