

124 FERC ¶ 61,106  
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. ER08-552-000  
ER08-552-001

ORDER ACCEPTING AND SUSPENDING FORMULA RATE SUBJECT TO  
REFUND AND ESTABLISHING HEARING AND SETTLEMENT JUDGE  
PROCEDURES

(Issued July 29, 2008)

1. On February 11, 2008, Niagara Mohawk Power Corporation (Niagara Mohawk) filed to replace its stated rates for its Wholesale Transmission Service Charge (Wholesale TSC) in Attachment H to the New York Independent System Operator (NYISO) Open Access Transmission Tariff (OATT) with formula rates to become effective May 1, 2008. For the reasons discussed below, we will accept and suspend the proposed formula rates, to become effective October 1, 2008, subject to refund, and establish hearing and settlement judge procedures.

**I. Background**

2. Niagara Mohawk is a combination gas and electric utility that is primarily engaged in the transmission and distribution of electricity and the transmission and distribution of gas in the State of New York. Niagara Mohawk owns approximately 6,000 miles of electric transmission lines and 8,500 miles of main and distribution pipelines. All of Niagara Mohawk's bulk electric transmission facilities are under the operational control of the NYISO. Niagara Mohawk advises that approximately 30 municipal electric utilities in upstate New York and an additional 80 customers external to the NYISO's control area currently take service from its transmission facilities under its Wholesale TSC under the NYISO OATT.

**II. Filing**

3. Niagara Mohawk explains that in this filing it proposes to adopt a formula rate that uses monthly inputs to specific components of its Wholesale TSC. Specifically, Niagara Mohawk proposes to use monthly values in computing its Revenue Requirement (RR) component, Scheduling System Control and Dispatch Costs (CCC) component, and Annual Billing Units (BU) component of its Wholesale TSC. Niagara Mohawk states

that each transmission owner is entitled to amend these three components of Attachment H to the NYISO OATT on its own initiative. Niagara Mohawk explains that it seeks to revise its Wholesale TSC in order to ensure that wholesale customers are paying for transmission service at a level that reflects as closely as possible the actual costs of providing service.

4. Niagara Mohawk's formula will appear in the NYISO OATT as new section 9.0 of Attachment H, Original Sheet Nos. 413A through 413O. Niagara Mohawk proposes to calculate and update the RR component monthly using defined inputs.<sup>1</sup> Niagara Mohawk will set the CCC component of its Wholesale TSC equal to the annualized sum of its monthly Scheduling, System Control and Dispatch Costs charges from the NYISO. Finally, Niagara Mohawk proposes to initially set the BU component to equal its annualized estimated Corporate Load<sup>2</sup> and true-up the estimate once the NYISO's load data is available. Consistent with Commission precedent, Niagara Mohawk also expects to update its Post-Retirement Benefits Other Than Pensions annually with a section 205 rate filing limited to that issue.<sup>3</sup> Similarly, Niagara Mohawk's return on equity (ROE) will be set at a stated level and be subject to change only upon a further rate filing with

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<sup>1</sup> In each case, the cost data used in the formula will be cost data from Niagara Mohawk's official books and records for the month that ended one month prior to the month in which the TSC rate will be posted.

<sup>2</sup> The proposed tariff states:

Corporate Load is defined as the sum of all NYISO defined [Niagara Mohawk] subzones plus (i) historically based estimates for [Niagara Mohawk's] load modifiers, less (ii) estimated NYPA Municipal Loads, and less (iii) estimated NYMPA Loads. The Corporate Load will be further reduced by the most currently available NYISO monthly data for station power loads and station service loads.

Once the NYISO load data is available for a month, that month's TSC calculation will be recalculated with BU defined as the annualized sum of the total load for Niagara Mohawk and [Energy Service Companies] plus loads for the Power for Jobs, Replacement, Expansion and Economic Development NYPA programs. The resulting true-up adjustment will be treated as a Billing Adjustment.

Niagara Mohawk February 11, 2008 Filing at Attachment A, Proposed Original Sheet No. 413O.

<sup>3</sup> *Citing Maine Yankee Atomic Power Co.*, 66 FERC ¶ 61,375, at 62,252-3 & n.10 (1994), *clarified*, 68 FERC ¶ 61,190 (1994).

the Commission. Niagara Mohawk asserts that its proposed formula is fundamentally similar to New England Power Company's (an affiliate of Niagara Mohawk) Local Network Service, Schedule 21-NEP, under the ISO New England OATT.<sup>4</sup>

5. Niagara Mohawk contends that implementation of a formula rate for its Wholesale TSC is consistent with the Commission's policy of encouraging investment in transmission facilities to meet customer needs. Niagara Mohawk states that it has made significant investments in its transmission system since its Wholesale TSC rate was set using 1995 financial information. Niagara Mohawk adds that it committed last year to invest at least \$1.47 billion in its transmission and distribution system over the five-year period 2007-2011, of which approximately \$572 million is targeted for transmission. Niagara Mohawk also states that it has filed with the New York Public Service Commission (NYPSC) a capital investment plan under which Niagara Mohawk, with regulatory support from the NYPSC, could invest as much as \$2.4 billion in transmission and distribution over the same five-year period, of which approximately \$1.082 billion would be targeted for transmission investment.

6. Niagara Mohawk states that its consultant's testimony supports the proposed ROE based on a Discounted Cash Flow analysis, and that the consultant also confirmed these findings through an analysis of alternative ROE benchmarks developed using the Capital Asset Pricing Model and comparable earned rates of return expected for utilities and industrial firms. The consultant concluded that the range of reasonableness for Niagara Mohawk's ROE is from 7.9 percent to 15.9 percent, with a midpoint of 11.9 percent. Niagara Mohawk notes that the Commission has approved ROE's at or above this level in other cases. Niagara Mohawk states that its consultant then reviewed the standards governing the eligibility for a 50 basis point ROE adder for a public utility's membership in an ISO or Regional Transmission Organization (RTO), and concluded that Niagara Mohawk meets this standard as a voluntary participant in the NYISO. He then recommended that Niagara Mohawk's ROE be set at 12.4 percent, or 50 basis points above the midpoint of his estimated range of reasonableness. The consultant then reviewed Niagara Mohawk's actual capitalization, as reflected in the FERC Form 1, and concluded that an equity ratio for Niagara Mohawk in the range of 56 percent to 60 percent was reasonable.

7. Niagara Mohawk asserts that it has been the Commission's practice to permit such formula rate filings to become effective after a suspension period of no more than one

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<sup>4</sup> Niagara Mohawk explains that it has followed this approach to facilitate the Commission's review of its filing and to enable the Commission to accept the filing without investigation.

day.<sup>5</sup> Consistent with that policy, Niagara Mohawk respectfully requests that the formula rate and associated tariff revisions be accepted for filing effective as of May 1, 2008.

8. Niagara Mohawk states that since the NYISO administers the Wholesale TSC, it has consulted with the NYISO to determine a mutually acceptable means for it to exercise its section 205 rights with respect to changing the RR, CCC, and BU components of its Wholesale TSC. Niagara Mohawk requests that the Commission include in any order accepting the proposed amendment an order directing the NYISO to make a compliance filing implementing the proposed amendment, and any revisions that might be ordered by the Commission. Niagara Mohawk also requests waiver of the filing requirements prescribed in sections 35.9 and 35.10 of the Commission's Regulations<sup>6</sup> to give effect to the protocol that it has agreed upon with the NYISO to exercise its section 205 rights with respect to portions of the NYISO OATT.

9. On May 30, 2008, Niagara Mohawk supplemented its filing in response to a deficiency letter issued by the Commission staff on April 30, 2008. In its supplemental filing, Niagara Mohawk provided work papers and detailed explanations for its proposed ROE.

10. In response to staff's request for an explanation of how customers are adequately protected from paying excessive charges without a mechanism that allows them to review the inputs to the proposed formula rates on a periodic basis, Niagara Mohawk responded that customers are adequately protected by the Commission's approval of the rate formula as just and reasonable and the Commission's own policies regarding formula rates. Niagara Mohawk contends that where the Commission authorizes a formula rate it is well-established that the formula itself constitutes the rate, "and not the varying charges that result from the implementation of the formula."<sup>7</sup> Niagara Mohawk contends that, contrary to the implication of the question, formal periodic review of inputs to a formula rate is not necessary to ensure that the charges produced by a formula rate are not excessive, and such review is not required by Commission precedent.<sup>8</sup>

11. With respect to staff's inquiry as to how much Backbone transmission (comprised of facilities at 765 kV, 345 kV and 230 kV) Niagara Mohawk has and whether Niagara

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<sup>5</sup> *Citing Allegheny Power System Operating Cos*, 111 FERC ¶ 61,308, at P 51 (2005), *order on reh'g*, 115 FERC ¶ 61,156 (2006).

<sup>6</sup> 18 C.F.R. §§ 35.9 and 35.10 (2008) (dealing with the identification and numbering of rate schedules and with the form and style of rate schedules, respectively).

<sup>7</sup> *Citing Alabama Power Co.*, 5 FERC ¶ 61,274, at 61,588 (1978).

<sup>8</sup> Niagara Mohawk May 30, 2008 Response at 4.

Mohawk's lower voltage facilities meet the Commission's Order No. 888's seven-factor test used to distinguish between transmission and local distribution facilities, Niagara Mohawk provided the plant balances for its lower voltage facilities (Attachment 3) and contends that all of its classified transmission facilities qualify for the 50 basis point ROE incentive adder for RTO participation. In support of its assertion, Niagara Mohawk states that the Commission recently approved 50 basis point adders for "all transmission facilities" in recognition of continued participation in an RTO.<sup>9</sup> Niagara Mohawk explains that, like service in PJM Interconnection, L.L.C. (PJM), transmission service in the NYISO is provided under a single rate schedule. In contrast, Niagara Mohawk argues that in ISO-New England, where the Commission has declined to approve an ROE incentive for all transmission facilities, transmission service under low voltage facilities may be provided under local service rate schedules that are maintained separately by each individual transmission owner under the umbrella of the ISO-New England OATT. Niagara Mohawk adds that the New England transmission owners retain authority to file under section 205 of the FPA to revise the rate design or any other provision governing local network service.<sup>10</sup> In contrast, Niagara Mohawk explains that its section 205 rights under the NYISO are limited to the RR, CCC, and BU components of NYISO's generally applicable formula rate for transmission service.<sup>11</sup>

12. Niagara Mohawk states that while the NYPSC has reviewed the Commission's seven-factor test and has recommended adoption of several additional factors specific to New York,<sup>12</sup> the NYPSC has not issued a decision applying such a test to the facilities of Niagara Mohawk or, for that matter, the facilities of any other New York utility. However, Niagara Mohawk notes that the Commission has previously determined that the sub-transmission facilities of Niagara Mohawk serve a transmission function on an everyday basis.<sup>13</sup> Niagara Mohawk states that the Commission agreed with the Administrative Law Judge that Niagara Mohawk's sub-transmission lines support higher voltage transmission lines and carry bulk power from points of power supply to points of

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<sup>9</sup> Citing, e.g., *Baltimore Gas & Elec. Co.*, 120 FERC ¶ 61,084, at P 31 (2007); and *Baltimore Gas & Elec. Co.*, 121 FERC ¶ 61,167 (2007).

<sup>10</sup> Citing ISO-New England Transmission Owners Agreement at § 3.04.

<sup>11</sup> Citing NYISO FERC Electric Tariff, Original Volume No. 1, Attachment H, Substitute First Revised Sheet No. 397 & First Revised Sheet No. 400.

<sup>12</sup> Citing Case No. 97-E-0251 – *Proceeding on Motion of the Commission to Distinguish Bulk Electric Transmission System from Local Distribution Facilities*, Opinion 97-12 (July 24, 1997).

<sup>13</sup> Citing *Niagara Mohawk Power Corp.*, 42 FERC ¶ 61,143, at 61,532-33 (1988).

distribution.<sup>14</sup> Niagara Mohawk notes that generators deliver power into the transmission system at voltage levels from 23 kV to 345 kV, and Niagara Mohawk has interconnections for power purchases and reliability purposes at voltages as low as 34.5 kV.<sup>15</sup> Niagara Mohawk contends that under Commission precedent, when facilities are integrated and thus provide system wide benefits, facilities' costs generally are rolled-in and charged to all customers served.<sup>16</sup>

### **III. Notice, Interventions, Comments, and Protests**

13. Notice of Niagara Mohawk's filing was published in the *Federal Register*, 73 Fed. Reg. 9,784 (2008), with interventions and protests due on or before March 3, 2008. On February 21, 2008, the New York Association of Public Power (NYAPP) filed a motion for an extension of time to file comments and protests. On February 25, 2008, Multiple Intervenors filed a motion for an extension of time to March 17, 2008, to file comments and protests. On February 27, 2008, the Commission granted an extension of time to March 17, 2008, for filing interventions, comments, and protests.

14. NYPSC filed a notice of intervention. Timely motions to intervene were filed by Allegheny Electric Cooperative, Inc.; Central Hudson Gas & Electric Company; Consolidated Edison Company of New York Inc., and Orange and Rockland Utilities (Con Edison and Orange and Rockland); the City of Cleveland, Ohio, and the Connecticut Municipal Electric Energy Cooperative (Cleveland and AEC); the Long Island Power Authority (LIPA); Massachusetts Municipal Wholesale Electric Company, Pascoag Utility District and the Public Power Association of New Jersey; Multiple Intervenors; New York Municipal Power Agency (NYMPA); New York State Electric and Gas Corporation and Rochester Gas and Electric Corporation (NYSEG and RGE); New York Power Authority (NYPA); the NYISO; Saint Regis Mohawk Tribe; and the Vermont Department of Public Service. Timely comments or protests were also filed by Cleveland and AEC, Con Edison and Orange and Rockland, Multiple Intervenors, LIPA, NYAPP, NYISO, NYMPA, NYPA, and NYSEG and RGE. On April 1, 2008, Niagara Mohawk and NYAPP filed answers to the protests and comments.

15. On May 30, 2008, Niagara Mohawk supplemented its filing in response to a Commission issued deficiency letter. Notice of Niagara Mohawk's response to Commission staff's deficiency letter was published in the *Federal Register*, 73 Fed. Reg.

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<sup>14</sup> *Id.*

<sup>15</sup> *Citing Niagara Mohawk Power Corp.*, 33 FERC ¶ 63,002, at 65,021 (1985).

<sup>16</sup> *Citing, e.g., Otter Tail Power Co.*, 12 FERC ¶ 61,169, at 61,420-21 (1980); *Utah Power & Light Co.*, 28 FERC ¶ 61,068 (1984).

33,074 (2008), with interventions and protests due on or before June 20, 2008. Timely supplemental protests or comments were filed by Cleveland and AEC, Multiple Intervenors, NYAPP, and NYMPA.

16. Several of the protesters contend that Niagara Mohawk has not justified transforming its largely-fixed Wholesale TSC into a formula rate and they request that the Commission reject the filing. NYAPP contends that Niagara Mohawk's tariff amendment to the NYISO OATT is unduly vague, unsupported, and contrary to Commission requirements that rates be based on known and measurable data.<sup>17</sup> Multiple Intervenors complains that Niagara Mohawk has proffered little justification for a proposed increase of over 71 percent in Wholesale TSC.<sup>18</sup> NYMPA contends that Niagara Mohawk failed to provide information necessary to evaluate its proposed rates.<sup>19</sup> NYAPP states that the fact that the Commission approved a settlement in ISO New England that allowed a portion of the rate for Local Network Service to be calculated on a monthly basis is no reason to impose Niagara Mohawk's overly broad and complex formula rate proposal on transmission customers without their consent.

17. NYPA contends that Niagara Mohawk has neither demonstrated that its proposed formula nor the imposition of a 71 percent increase is just and reasonable. NYPA states that, according to Niagara Mohawk, customers of the municipal utilities and rural electric

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<sup>17</sup> NYAPP cites to *Pac. Gas and Elect. Co.*, 100 FERC ¶ 61,160, at P 22 (2002). Specifically, NYAPP complains that the proposed rate fluctuates each month, using an amalgamation of some projected data, some unaudited data from the prior month, and some data received from the NYISO regarding transactions approximately five months prior. NYAPP March 17, 2008 Protest at 3.

<sup>18</sup> Specifically, Multiple Intervenors states that it is not aware of any large-scale transmission projects undertaken by Niagara Mohawk since it had accepted the transmission rate settlement in 1999. Multiple Intervenors also contends that Niagara Mohawk's commitment to undertake certain actions in the future does not justify the increase at this time. Multiple Intervenors March 17, 2008 Protest at 5-6.

<sup>19</sup> For example, NYMPA notes that Niagara Mohawk's joint Statement BG/BH (Exhibit No. NMP-40) includes only present and proposed rates for each customer and a calculation of the difference between the two, without the underlying data. NYMPA requests that the Commission find the filing deficient and direct Niagara Mohawk to provide the billing units to calculate the present and proposed revenues for Period I and Period II and in total for each of those two periods. NYMPA also states that because Niagara Mohawk has not provided all of the data necessary to calculate the Wholesale TSC, the Commission would be required to utilize NYPSC reports and that Niagara Mohawk failed to support its claimed cash working capital with a fully developed lead-lag study.

cooperatives would see retail rate increases from 5 percent to 15 percent. NYPA is particularly concerned with the rate impacts on such customers since they have limited financial reserves and may be hard pressed to meet these higher payments. NYPA suggests that the sheer magnitude of the proposed increase should indicate to the Commission that a hearing is necessary. NYPA further states that if the Commission were to approve the proposal without a hearing, NYPA is concerned that many of the smaller municipal systems would need time to adjust their own billing systems in order to recover these higher costs from their retail ratepayers. Accordingly, NYPA requests that the Commission issue an order setting this proceeding for hearing and consider a phase-in for whatever portion of the proposed increase is found to be just and reasonable.

18. NYAPP argues that numerous elements of the filing are contrary to Commission policy and precedent, and would result in cross-subsidization, and rates substantially in excess of just and reasonable levels. NYAPP states that the proposed use of monthly annualized revisions to the transmission rate, partially based on un-audited books, and partially based on projected data is inconsistent with the Commission's known and measurable standards, is unnecessarily complex, would produce unreasonably volatile rates, and would be susceptible to manipulation. NYAPP further states that the long period of time since the last review of Niagara Mohawk's Transmission Accounts calls into question the reasonableness of allowing the implementation of a formula rate, much less allowing it to become effective without suspension or hearing.

19. NYAPP also raises a number of inconsistencies concerning the inputs to the formula rate. NYAPP states that it is unclear whether certain investments were booked late thereby inflating the amount due to the failure to properly depreciate the assets. NYAPP also questions the substantial variation since 1995 in the depreciation reserves, arguing that one would expect them to increase steadily from year to year. NYAPP also states that although Niagara Mohawk has received various payments that should have been credited to (and lowered) Niagara Mohawk's Transmission RR, the formula does not reflect these payments. Thus, NYAPP argues that there are material facts at issue and, therefore, the Commission should allow for discovery and a hearing.<sup>20</sup>

20. Protesters further argue that the proposed formula rate does not provide for periodic customer or regulatory review, it lacks transparency, and it affords the customer no real opportunity to evaluate whether monthly changes to the costs are properly

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<sup>20</sup> NYAPP March 17, 2008 Protest at 7-10, 12 and 13. For example, NYAPP questions the propriety of Niagara Mohawk's plant balances and accumulated depreciation, the transmission wages and salaries allocation factor and the treatment of Niagara Mohawk's retail customers in the Billing Unit (BU) component.

included in Niagara Mohawk's TSC.<sup>21</sup> NYMPA submits that its only option would be to file a complaint under section 206 of the Federal Power Act.<sup>22</sup> Multiple Intervenors suggests that said rate should only be updated on an annual – as opposed to a monthly – basis, with an annual process to review the formulaic TSC.<sup>23</sup> Con Ed and Orange and Rockland argue that, contrary to the finding in *PATH*<sup>24</sup> that all data inputs to a formula rate must be provided in sufficient detail to identify the components of the revenue requirement, Niagara Mohawk's formula rate filing lacks a procedure for review of updates to the formula rate with respect to the accuracy of the inputs and data, prudence of new costs, and consistency with the formula. Customers complain that the inputs to the formula rely on information not filed with the Commission, items not generally available to customers, unaudited data and utility-initiated adjustments. They complain that Niagara Mohawk justifies the formula rate by relying on orders that accept very different formula rates from that proposed here.<sup>25</sup>

21. Protesters argue that the minimum slate of protections that should be included in the formula rate are: (a) submission of input data to customers on a periodic basis; (b) holding a customer meeting at least two months after customers receive the input data to explain and discuss that data and the resulting charges; and (c) presenting an opportunity for customers to inquire about, and to challenge, the implementation of the formula rate.<sup>26</sup> In addition, NYAPP notes that the use of public data (i.e., FERC Form 1) has also been recognized as an important measure to facilitate the transparency of a formula rate.<sup>27</sup>

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<sup>21</sup> NYAPP June 20, 2008 Supplemental Comments at 4-5; NYMPA June 20, 2008 Supplemental Protest at 6-9 (*citing Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188, at P 146 (2008) (*PATH*); and PJM Open Access Transmission Tariff (OATT), section 34.1, *et al.*).

<sup>22</sup> *Citing* 16 U.S.C. § 824e (2000), NYMPA March 17, 2008 Protest at 15.

<sup>23</sup> Multiple Intervenors March 17, 2008 Protest at 13–14.

<sup>24</sup> *Citing PATH*, 122 FERC ¶ 61,188, at P 146 (stating that “[f]ormula rates must contain enough specificity to operate without discretion in their implementation” and that “[a] formula rate with adequate specificity coupled with timely available, transparent inputs to the formula rate satisfies the Commission’s requirements”).

<sup>25</sup> NYAPP March 17, 2008 Protest at 4.

<sup>26</sup> NYAPP June 20, 2008 Supplemental Comments at 3.

<sup>27</sup> *Citing American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at P 33 (2007).

Protesters request that, if the Commission should approve the use of a formulaic TSC or does not reject the filing, the Commission should suspend Niagara Mohawk's filing for five months and set the case for hearing.

22. NYMPA contends that Niagara Mohawk's formula is not sufficiently transparent to track new transmission costs to ensure against double recovery. According to NYMPA, Niagara Mohawk's filing fails to satisfy the rate harmonization requirement for transmission owners that participate in regional transmission planning and also recover costs for regional transmission planning.<sup>28</sup> NYMPA states that the NYISO, in compliance with Order Nos. 890 and 890-A, has proposed a methodology for allocating costs for new transmission projects that improve reliability or decrease congestion, but Niagara Mohawk does not address how these costs ultimately allocated to it under the NYISO's Order No. 890 compliance proposal will be harmonized with its existing transmission facility embedded cost rates.<sup>29</sup>

23. LIPA filed comments raising concern that Niagara Mohawk's formula rate could complicate the forthcoming filing by the NYISO to collect the charges for the backstop reliability projects approved as a result of the NYISO comprehensive regional planning process. LIPA advises that the NYISO is developing a Reliability Facilities Charge (RFC) that is expected to be part of the NYISO's compliance filing under Order No. 890<sup>30</sup> to be filed in June 2008. Specifically, LIPA also cites to a tariff provision in sheet No. 413N<sup>31</sup> and advises that any potential Niagara Mohawk investment in a

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<sup>28</sup> *Citing Allegheny Power System Operating Cos.*, 106 FERC ¶ 61,003, at P 32 (2004) ("In order to ensure that each [Transmission Owner] does not over-recover its costs when its pre-existing rates for transmission and the rates at issue here for transmission are considered together, we will institute an investigation of the [Transmission Owners'] existing transmission rates").

<sup>29</sup> NYMPA June 20, 2008 Supplemental Protest at 13.

<sup>30</sup> *Citing Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs., Regulations Preambles ¶ 31,241, at P 435 (2007).

<sup>31</sup> LIPA quotes section 9 as follows:

The Annual Revenue Requirement for specific charges related to transmission service under the NYISO tariff, not already provided for under this Transmission Service Charge (TSC), shall be determined by multiplying the year-end Gross Plant Investment associated with the specific transmission investment for that transmission service and the average Annual Transmission Carrying Charge.

reliability backstop project that should properly be collected by an RFC should not be included in Niagara Mohawk's year-end Gross Plant Investment and used as the basis for future collections in the TSC. LIPA requests that the Commission declare in any order accepting Niagara Mohawk's submission for filing that the treatment of any revenue requirement adjustments in this proceeding will not prejudice the development or Commission consideration of the RFC that the NYISO files in June 2008.

24. Protesters raise a number of issues related to the ROE. Several protesters argue that Niagara Mohawk's proposed ROE of 12.4 percent is excessive and raise concerns over Niagara Mohawk's proposed proxy group of utilities.<sup>32</sup> Cleveland and AEC note that the consultant's proxy group of 15 utilities is the same as was presented in past cases, and more recently in *PATH*.<sup>33</sup> Cleveland and AEC argue that the proper proxy group for Niagara Mohawk should not include companies such as Constellation and PPL Corporation, which have substantial non-regulated and foreign investments, and others that have diversified to the point where the returns demanded by investors have little to do with the domestic regulated electric utility industry. Cleveland and AEC point out that Niagara Mohawk's Standard & Poor's (S&P) rating is an A- and claim that, based on the Commission's decision in *PATH*, only companies within one step of this rating—effectively companies with ratings of A, A- and BBB+—should be included in the proxy group.<sup>34</sup> According to Cleveland and AEC, more than half of Niagara Mohawk's proxy group must be excluded by this screening test, raising the question of whether the much smaller group that survives is adequate. Multiple Intervenors also complains that a projected growth rate of 11 percent and a required risk premium of 8.4 percent are substantially excessive, particularly given a forecasted period of low or negative growth in the country.<sup>35</sup>

25. NYAPP, NYMPA, and Multiple Intervenors oppose the 50 basis point adder that Niagara Mohawk seeks for RTO participation, arguing that the Commission intended such ROE adders for the rate base of regional facilities “under the control of an independent entity, not local facilities that continue to operate under the control of the

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<sup>32</sup> Cleveland and AEC March 17, 2008 Protest at 4, Multiple Intervenors March 17, 2008 Protest at 7-8, NYAPP March 17, 2008 Protest at 11, and NYMPA March 17, 2008 Protest at 4-5.

<sup>33</sup> 122 FERC ¶ 61,188 at P 62.

<sup>34</sup> *Citing PATH*, 122 FERC ¶ 61,188, at P 96 (2008).

<sup>35</sup> Multiple Intervenors March 17, 2008 Protest at 8.

individual Transmission Owner.”<sup>36</sup> In comments regarding Niagara Mohawk’s supplemental filing, NYAPP argues that because Niagara Mohawk failed to address whether its sub-transmission facilities meet the seven-factor test, the costs associated with sub-transmission facilities should not be eligible for an incentive ROE. NYAPP contends that the only Niagara Mohawk facilities that are eligible for the basis point adder would be those rated at 230 kV and above unless they are otherwise on the NYISO’s A-1 or A-2 list of facilities comprising the New York Bulk Transmission System. AEC adds that Niagara Mohawk failed to show whether its low-voltage facilities are appropriate for inclusion in the formula.

26. NYAPP, NYMPA, and Cleveland and AEC also take issue with the use of the midpoint instead of the median of the data set. Cleveland and AEC argue that the median is the best measure of central tendency of a group of ROE results and that the Commission has found that the median should be used when the ROE is being determined for a single utility and where the proxy group is made up of utilities with approximately the same risk as the subject utility. According to Cleveland and AEC, by excluding all data between the highest and lowest points from consideration—as the midpoint does—the development of the rest of the proxy group becomes a “virtual nullity.”<sup>37</sup> In its supplemental protest, NYAPP contends that when it is appropriate to eliminate a high-end or low-end return for a single company, all results for that company should be eliminated.<sup>38</sup> NYAPP also contends that in evaluating a single company (such as Niagara Mohawk) rather than a whole RTO, it is the median value (not the midpoint) that is most important.<sup>39</sup>

27. Protesters raise other arguments that suggest the ROE is overstated. Specifically, Cleveland and AEC argue that the reduced risk that results from shifting to a formula rate from a stated rate should be recognized, resulting in a lower ROE. Multiple Intervenors notes that Niagara Mohawk’s equity ratio is higher than those of other companies in the proxy group, and argues that Niagara Mohawk is therefore less risky and deserves a lower ROE.

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<sup>36</sup> NYAPP March 17, 2008 Protest at 12, *citing ISO New England Inc.*, 106 FERC ¶ 61,280 (2004), *order on reh’g*, 109 FERC ¶ 61,147, at P 201-2 (2006), *aff’d. sub nom. Me. Pub. Util’s Comm’n. v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

<sup>37</sup> AEC March 17, 2008 Protest at 10.

<sup>38</sup> *Citing PATH*, 122 FERC ¶ 61,188 at P 101.

<sup>39</sup> *Citing Virginia Electric and Power Co.*, 123 FERC ¶ 61,098, at P 66; and *Golden Spread Electric Coop., Inc.*, 123 FERC ¶ 61,047, at P 63-64 (2008).

28. The NYISO filed comments claiming that Niagara Mohawk's proposed billing adjustments calculated as the result of the updated load data provided to it by NYISO should apply to future service, and should not be used to revise Wholesale TSC posted by the NYISO for past service. Specifically, the NYISO cites a tariff provision<sup>40</sup> and states that it seeks to clarify the meaning of "recalculated" in that provision. The NYISO advises that the recalculation contemplated is actually an adjustment applied to rates for prospective service only, and not a revision of rates for past service.<sup>41</sup> The NYISO states that not only would the changed rate be unfair to transmission customers, but it would also impose a burden on the NYISO. The NYISO explains that its software is currently configured to permit postings of Wholesale TSCs as they are submitted by the individual transmission owners, but does not contain the functionality required to allow already-posted TSCs to be revised on a regular basis to reflect updated data, and that to do so would require NYISO to make software changes. Further, the NYISO states that revising the applicable TSCs would appear to have little benefit to Niagara Mohawk or its customers, and the rates would be only marginally more accurate.

29. NYSEG and RGE filed comments in support of Niagara Mohawk's filing. They generally support the use of a formula rate mechanism to encourage transmission investment. They also state that customers benefit in that the formula rate should ensure that there is an accurate recovery of actual costs that changes over time as those costs change.

#### IV. Discussion

##### A. Procedural Matters

30. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>40</sup> Specifically, the NYISO cites, in part, to language in the formula for the Calculation of BU:

Once the NYISO load data is available for a month, that month's TSC calculation will be recalculated with BU defined as the annualized sum of total load for Niagara Mohawk and ESCO's plus loads for the Power for Jobs, Replacement, Expansion and Economic Development NYPA programs. (Original Sheet No. 4130)

<sup>41</sup> The NYISO notes that this interpretation is consistent with the rule against retroactive ratemaking, which prohibits retroactive revisions to filed rates charged to customers. *Citing Consolidated Edison Company of New York, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

31. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2008), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by the NYAPP and Niagara Mohawk and will, therefore, reject them.

### **B. Formula Rate**

32. We accept and suspend Niagara Mohawk's proposed transmission cost of service formula rate for Wholesale TSC, to become effective October 1, 2008, subject to refund, and establish hearing and settlement judge procedures.

33. Several protesters complain that Niagara Mohawk has not justified transforming its largely fixed Wholesale TSC into a formula rate, and they request that the Commission reject Niagara Mohawk's filing. We agree with Niagara Mohawk and NYSEG and RGE that having a formula cost recovery system in place should eliminate the need for frequent rate adjustment filings, ensure that rates reflect the actual cost of providing transmission service, and incent needed transmission investment. The Commission has found that the use of formula rates encourages the construction and timely placement into service of needed transmission infrastructure<sup>42</sup> and has approved the use of formula rates by a number of transmission-owning utilities.

34. Niagara Mohawk's proposed formula rate is based on actual monthly cost data from Niagara Mohawk's books and records. Further, the estimated data used for the BU component of its rates is trued-up once actual data is provided by the NYISO. However, parties have questioned various formula inputs contained in Niagara Mohawk's instant filing. Accordingly, we will allow Niagara Mohawk and the parties to explore their concerns about the formula inputs in the hearing that we order below.

### **C. ROE**

35. We will grant up to 50 basis points of incentive ROE for Niagara Mohawk's continued participation in NYISO, subject to the conditions of this order and the zone of reasonable returns determined following the hearing ordered below.<sup>43</sup> Our decision to

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<sup>42</sup> See *Northeast Utilities Service Co.*, 105 FERC ¶ 61,089, at P 23 (2003).

<sup>43</sup> See, e.g., *San Diego Gas & Elec. Co.*, 118 FERC ¶ 61,073, at P 25-26 and n.30 (2007) (*SDG&E*); *American Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at P 34 (2007); *order on reh'g*, 121 FERC ¶ 61,245, at P 4 (2007). We recognize that the amount of the 50 basis point incentive that Niagara Mohawk could receive may be limited by the top of the zone of reasonableness that we ultimately adopt in this proceeding after hearing. Accordingly, we grant Niagara Mohawk the full 50 basis point ROE incentive for participation in the NYISO only so long as the additional 50 basis points do not result

grant Niagara Mohawk an incentive for participation in the NYISO is consistent with the stated purpose of section 219 of the FPA<sup>44</sup> – that the incentive applies to all utilities joining the transmission organization – and is intended to encourage Niagara Mohawk’s continued involvement with NYISO.<sup>45</sup> Granting up to 50 basis points of incentive ROE does not imply that Niagara Mohawk would ultimately receive that amount, nor does granting up to 50 basis points of incentive remove any issue pertaining to the ROE from consideration during the hearing and settlement procedures.

36. Further, we will allow application of the 50 basis points of incentive ROE to all of Niagara Mohawk’s properly classified transmission facilities. We have previously found that Niagara Mohawk’s sub-transmission facilities are integrated within the higher voltage New York State backbone facilities.<sup>46</sup> Therefore they are eligible for the 50 basis point adder.<sup>47</sup> Nevertheless, we will allow the intervenors to explore at the hearing discussed below whether Niagara Mohawk has improperly included local distribution facilities in its wholesale transmission rate base, as protesters have asserted. We will also set the matter of the appropriate ROE for hearing.

#### **D. Hearing and Settlement Judge Procedures**

37. With the exception of the 50 basis point incentive ROE, approved above, Niagara Mohawk’s proposed rate schedule raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

38. Our preliminary analysis of the components of Niagara Mohawk’s proposed formula rate, including its rate base, its proposed ROE and composition of the proxy group, lack of any review procedures, lack of transparency, the monthly billing units, and monthly annualized payments, indicates that Niagara Mohawks proposed formula rate

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in a final ROE above the zone of reasonableness, as determined in the hearing ordered in this proceeding.

<sup>44</sup> 16 U.S.C § 824s (2006).

<sup>45</sup> See *SDG&E*, 118 FERC ¶ 61,073, at P 26 (2007) (finding that there are considerable benefits associated with a utility’s membership in a transmission organization).

<sup>46</sup> See *supra* notes 13-14 and accompanying text.

<sup>47</sup> *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 326, *order on reh’g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007).

has not been shown to be just and reasonable and may be unjust and unreasonable, unduly discriminatory or preferential or otherwise unlawful.

39. In *West Texas*, the Commission explained that, when its preliminary examination indicates that the proposed rates may be unjust and unreasonable and substantially excessive, as defined in *West Texas*, the Commission will impose a maximum, five-month suspension.<sup>48</sup> In the instant proceeding, our preliminary analysis indicates that the proposed rates may be substantially excessive. Niagara Mohawk's proposed revenue requirement is \$23,076,439, an increase of \$9,599,248, which amounts to a 71.2 percent increase above the existing revenue requirement. Further, intervenors raise numerous issues of material fact regarding the reasonableness of the proposed formula rate that we cannot resolve based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures. Therefore, we will accept Niagara Mohawk's filing, suspend it for five months, to become effective October 1, 2008, subject to refund, and set it for hearing and settlement judge procedures.

40. 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 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.<sup>49</sup> 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.<sup>50</sup> 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.

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<sup>48</sup> *West Texas Utilities Co.*, 18 FERC ¶ 61,189, at 61,374–75 (1982) (*West Texas*).

<sup>49</sup> 18 C.F.R. § 385.603 (2008).

<sup>50</sup> 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 and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

The Commission orders:

(A) Protesters' motion to reject the formula rate filing is hereby denied, as discussed in the body of this order.

(B) Niagara Mohawk's proposed formula rate is hereby accepted for filing and suspended for five months, to become effective October 1, 2008, subject to refund, and to the outcome of the hearing and settlement judge procedures ordered below as discussed in the body of this order.

(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 Niagara Mohawk's proposed formula rate. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering 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 (2008), 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.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and with 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 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 this proceeding in a hearing room of the Commission, 888 First Street, N.E., 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.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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