UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Niagara Mohawk Power Corporation

v. Docket No. EL03-27-001

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

ORDER DENYING REHEARING

(Issued December 22, 2003)

1. On April 14, 2003, Niagara Mohawk Power Corporation (Niagara Mohawk) petitioned for rehearing of an order issued March 14, 2003 in this proceeding.[1] The March 14 Order addressed Niagara Mohawk's complaint against six subsidiaries (the Generators) of NRG Energy, Inc. (NRG),[2] concerning alleged nonpayment for station power service. The Commission set the complaint for hearing and settlement judge procedures, and Niagara Mohawk asserts on rehearing that the Commission should have resolved the legal and policy issues presented in the complaint rather than initiating a hearing proceeding. For the reasons explained below, we deny the rehearing request. This order benefits customers by ensuring that the Commission will have all necessary information before it when ruling on the issues in the complaint.

[1] Niagara Mohawk Power Corp. v. Huntley Power LLC, et al., 102 FERC ¶ 61,295 (2003) (March 14 Order).

[2] The six subsidiaries are Huntley Power LLC; NRG Huntley Operations, Inc.; Dunkirk Power LLC; NRG Dunkirk Operations, Inc.; Oswego Harbor Power LLC; and NRG Oswego Operations, Inc. (collectively, Generators).

BACKGROUND

2. In its complaint, Niagara Mohawk claimed that the Generators have taken station power service from Niagara Mohawk since 1999, when NRG purchased three generating stations from Niagara Mohawk, but have refused to pay for the service. Niagara Mohawk sought from the Commission certain findings so that a pending state court proceeding to enforce payment could move forward.

3. The Generators countered in their answer that the generating stations had self-supplied most of their station power needs, and that there has been no sale of energy by Niagara Mohawk to the Generators. The Generators relied on Commission precedent that they asserted held that generators have the right to self-supply station power by netting consumption against output on a monthly basis (or other reasonable period).[3]

4. The Commission found in the March 14 Order that the parties raised a number of factual questions which were best determined in the context of a trial-type evidentiary hearing. The Commission enumerated at least three factual questions requiring a fuller record: (1) to what extent NRG's facilities are capable of self-supplying their station power needs; (2) whether NRG committed contractually to purchase station power from Niagara Mohawk; and (3) whether the facilities used to deliver NRG's station power are transmission or local distribution facilities. The Commission also held the hearing in abeyance pending settlement judge procedures.[4]

5. Niagara Mohawk objects in its request for rehearing that the factual issues described in the March 14 Order are neither disputed in this proceeding nor material to the resolution of the questions posed in the complaint. Niagara Mohawk asserts that the parties agree on the price for transmission service involved and only dispute the applicability of local delivery service charges levied pursuant to a state retail rate. Niagara Mohawk further argues that there was no need for the Commission to establish a refund effective date, as it did in the March 14 Order.

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[3] Citing, e.g., PJM Interconnection, L.L.C., et al., 95 FERC ¶ 61,333 (2001).

[4] After exhaustion of settlement judge procedures, a presiding administrative law judge was designated who established a procedural schedule. Subsequently, the parties filed a joint motion to waive an Initial Decision in the case, pursuant to Rule 710 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.710 (2003). The movants stated that the issues in the case could be presented to the Commission by means of a paper hearing. They proposed to file a joint stipulation of facts, followed by initial and reply briefs submitted directly to the Commission. The Commission granted the request to waive the Initial Decision. See Niagara Mohawk Power Corp. v. Huntley Power, LLC, et al., 104 FERC ¶ 61,229 (2003).

DISCUSSION

6. We disagree with Niagara Mohawk that there were no material facts in dispute on the record as developed at the time we issued the March 14 Order. While the Commission ultimately will address the questions raised by the complaint based on the record from the paper hearing that the parties subsequently agreed to, it was not possible to answer them based on the record before us when we issued the March 14 Order. For instance, the complaint and answer left unclear the extent to which (and in what manner) the Generators self-supplied station power. It is only in Niagara Mohawk's request for rehearing that it concedes, "NRG Generators are capable of supplying and did supply a large part of their station power 'behind the meter' at each power plant."[5] Further, it was not clear in Niagara Mohawk's complaint whether power is delivered to the Generators over transmission or distribution facilities; this fact is relevant given the Commission's precedent,[6] and this lack of clarity required further development of the record. The Commission further notes that the parties have since submitted a Joint Statement of Facts constituting hundreds of pages, as well as lengthy briefs. It would have been premature to attempt to resolve the issues with an incomplete record.

7. Thus, we will deny Niagara Mohawk's assertion that a hearing was unnecessary. As is well recognized, the Commission has broad discretion in managing its proceedings.[7] Based on the written submissions in this proceeding, we properly concluded in the March 14 Order that there were issues of material fact that were best resolved through further hearing.

8. Regarding Niagara Mohawk's contention that there was no need for the Commission to establish a refund effective date in the March 14 Order, we note that any time the Commission institutes a proceeding on complaint pursuant to Federal Power Act

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[5] Rehearing at 3.

[6] See KeySpan-Ravenswood, Inc v. New York Independent System Operator, Inc., 101 FERC ¶ 61,230 at P 20 (holding that, to the extent delivery of station power involves transmission facilities, it would be subject to NYISO's OATT).

[7] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); Michigan Public Power Agency, et al. v. FERC, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); Woolen Mill Assoc. v. FERC, 917 F.2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

(FPA) Section 206,[8] as was the case here, FPA Section 206 directs that the Commission must establish a refund effective date. Even if no refunds are forthcoming, or if refunds are not likely or even possible given the nature of the complaint, FPA Section 206 nevertheless requires that a refund effective date be established.

The Commission orders:

Niagara Mohawk's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

[8] 16 U.S.C. § 824e (2000).