121 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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| Niagara Mohawk Power Corporation | Docket Nos. ER07-1096-000 |
| d/b/a National Grid | ER07-1096-001 |

ORDER CONDITIONALLY ACCEPTING INTERCONNECTION AGREEMENTS

(Issued November 19, 2007)

1. In this order the Commission conditionally accepts, effective August 28, 2007, an interconnection agreement (Rensselaer IA) and the first amendment to that interconnection agreement (Amended Rensselaer IA) between Niagara Mohawk Power Corporation, d/b/a National Grid (Niagara Mohawk) and Hadson Power Partners of Rensselaer (and the successor owners of the Rensselaer plant). In addition, the Commission directs Niagara Mohawk to refund the time value of revenues collected from June 30, 1998 through August 27, 2007.

## Background

2. On June 28, 2007, Niagara Mohawk filed the Rensselaer IA dated June 29, 1992, and the Amended Rensselaer IA dated May 7, 1998. The agreements govern the interconnection of the Rensselaer plant, a 79 MW topping cycle gas-fired cogeneration facility located in Rensselaer, New York, to Niagara Mohawk's transmission system.[1] Niagara Mohawk states that the Rensselaer IA was subject only to state jurisdiction because the full output of the Rensselaer plant was taken by Niagara Mohawk at that time.[2] Niagara Mohawk further states that the Rensselaer IA was amended in 1998 (Amended Rensselaer IA) as a result of the Master Restructuring Agreement (MRA) between Niagara Mohawk and a number of independent power producers, including the owner of the Rensselaer plant. According to Niagara Mohawk, the MRA, *inter alia*,

[1] The Commission certified the Rensselaer cogeneration facility as a qualifying facility (QF) on September 18, 1991. *Hadson Power Partners of Rensselaer*, 56 FERC ¶ 62,192 (1991).

[2] According to Niagara Mohawk, it entered into a power purchase agreement with Hadson Power Partners of Rensselaer for the purchase of the full output of the QF plant on December 23, 1987.

released Niagara Mohawk from the obligation of purchasing the full output of the Rensselaer plant under the existing power purchase agreement, and the Amended Rensselaer IA reflected the pending implementation of the MRA. The MRA was consummated on June 30, 1998, but Niagara Mohawk states that it continued to purchase the full output of the Rensselaer plant until March 31, 2001. Niagara Mohawk concludes that the earliest date the Rensselaer IA became subject to the Commission's jurisdiction is April 1, 2001, the date Niagara Mohawk ceased purchasing the full output of the Rensselaer plant.

3. Niagara Mohawk states that it recently came to its attention that the Amended IA was never filed with the Commission. It further states that the only charge it has collected under the Amended Rensselaer IA is an annual fee of $109,000 for operation, maintenance, replacement, repair, insurance, and tax costs associated with the interconnection facility. A total of $681,463.51 has been collected since April 1, 2001, the date Niagara Mohawk contends the Amended Rensselaer IA came under Commission jurisdiction. Niagara Mohawk adds that this fixed annual charge is approximately 2.1 percent of the capital costs of the interconnection facility and thus is consistent with prior interconnection agreements in which the Commission accepted a monthly facilities fee based on a percentage of the cost of the interconnection facility.

4. Niagara Mohawk acknowledges that it must refund the time value of the monies collected under the Amended Rensselaer IA. According to Niagara Mohawk, it is obligated to refund $160,153, which represents the interest on all funds collected under the Amended Rensselaer IA for the period April 1, 2001 through August 2007.

5. On August 21, 2007, the Commission's Director of Tariffs and Market Development – East issued a deficiency letter directing Niagara Mohawk to respond to a series of questions about the June 28, 2007 filing within 30 days of the issuance of the deficiency letter. On September 20, 2007, Niagara Mohawk filed a response to the August 21, 2007 deficiency letter. In its response, Niagara Mohawk states that it disagrees with the Commission's statement in its August 21, 2007 deficiency letter that Commission jurisdiction attached to the Amended Rensselaer IA as of June 30, 1998. Nevertheless, Niagara Mohawk submitted in its response a revised refund calculation that includes revenues received under the Amended Rensselaer IA from June 30, 1998 through August 2007 and indicates a total of $348,351 in interest for these revenues.

6. In its September 20, 2007 response, Niagara Mohawk asserts that the Commission's general rule regarding its jurisdiction over QF interconnection agreements is that Commission jurisdiction does not commence until the electric utility interconnecting with the QF does not purchase all of the QF's output and instead

transmits the QF power in interstate commerce.[3] Niagara Mohawk states that it believes that Commission jurisdiction attached to the Rensselaer IA on the date on which Niagara Mohawk no longer had the right of first refusal to purchase the full output of the Rensselaer plant. It further states that prior to April 1, 2001, the Rensselaer plant had the option to put a certain amount of energy and capacity to Niagara Mohawk each year, and Niagara Mohawk was obligated to purchase any such energy and capacity. Moreover, Niagara Mohawk states that under its Rensselaer power purchasing agreement, Rensselaer was required to provide Niagara Mohawk with notice and the right of first refusal prior to making any sales to third parties. Niagara Mohawk states that it never received notice that Rensselaer intended to sell any power or capacity to third parties and Rensselaer continued to sell its full output to Niagara Mohawk through March 31, 2001, thus Commission jurisdiction did not attach to the Rensselaer IA until April 1, 2001. Niagara Mohawk states that this position is consistent with the Commission ruling in *Pacific Gas and Electric Company*.[4]

**Notices, Interventions, and Protests**

7. Notice of Niagara Mohawk's June 28, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 38,074 (2007), with interventions, protests and comments due on or before July 19, 2007. Notice of Niagara Mohawk's September 20, 2007 response to the Commission's deficiency letter was published in the *Federal Register*, 72 Fed. Reg. 56,733 (2007), with interventions, protests, and comments due on or before October 11, 2007. On October 11, 2007, Rensselaer Cogeneration LLC (Rensselaer) filed a motion to intervene and comments. On November 5, 2007, the New York Independent System Operator, Inc. (NYISO) filed a late motion to intervene and comments in response to the Commission's deficiency letter.

8. In its comments Rensselaer states that it is concerned with (1) Niagara Mohawk's lack of supporting information for the calculation of the annual proxy operation and maintenance (O&M) charge under the Rensselaer IA and (2) the void of information concerning the actual O&M costs that Niagara Mohawk has incurred with respect to the Rensselaer plant's interconnecting facilities. Rensselaer further states that Niagara Mohawk's submittals of information for comparable interconnection facilities for generating plants indicates that Niagara Mohawk employed a variety of methods for

[3] *Citing Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 813 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

[4] 109 FERC ¶ 61,242 (2004) (*PG&E*).

calculating the proxy O&M charge and that the actual O&M cost, when provided, indicates that the proxy charge may overcompensate Niagara Mohawk. Rensselaer requests that the Commission further investigate Niagara Mohawk's calculation of the proxy O&M for Rensselaer. Additionally, Rensselaer states that the Commission, pursuant to section 205 of the Federal Power Act, should determine whether Niagara Mohawk met its burden of demonstrating that the rate in the Rensselaer IA is just and reasonable, and if the Commission determines that Niagara Mohawk charged Rensselaer an unjust and unreasonable rate under the Amended Rensselaer IA, then the Commission should direct it to refund to Rensselaer any amounts paid above the level determined by the Commission to be just and reasonable and modify the O&M charge in the Amended Rensselaer IA accordingly. Rensselaer states that in the alternative, the Commission should direct Niagara Mohawk to track the actual O&M charge associated with the Rensselaer IA so as to enable parties to fully evaluate the reasonableness of the O&M charge.

9. The NYISO, in its comments, responds to the Commission's deficiency letter directing Niagara Mohawk to include the NYISO as a signatory to the subject IA. The NYISO states that the Commission recently concluded that it was unnecessary for the NYISO to be a signatory to certain interconnection agreements between Niagara Mohawk and interconnection customers[5] and that this determination has equal force here. The NYISO adds that, similar to the interconnection agreements that were the focus of that recent proceeding, the subject IA does not involve an increase in capacity of existing generating facilities, a material modification to the operating characteristics of existing generating facilities, or the interconnection of new generating facilities.

## Discussion

### Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385,214 (2007), the timely, unopposed motion to intervene serves to make Rensselaer a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 384.214(d) (2007), the Commission will grant NYISO's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

### Commission Determination

11. The Commission conditionally accepts for filing the Rensselaer IA and the Amended Rensselaer IA, effective August 28, 2007, and directs Niagara Mohawk to file

[5] *Citing Niagara Mohawk Power Corp. d.b.a National Grid*, 121 FERC ¶ 61,104 at P 22 (2007).

a substitute interconnection agreement to reflect the effective date of August 28, 2007. Additionally, the Commission directs Niagara Mohawk to refund the time value of revenues collected from June 30, 1998 through August 27, 2007, and to file a refund report with the Commission to reflect the payment of refunds.

12. The Commission finds Niagara Mohawk's annual O&M fee of $109,000 to be just and reasonable. An analysis of Niagara Mohawk's 2006 Form No. 1 data would justify an annual O&M fee greater than the annual O&M fee proposed to be charged under the Amended Rensselaer IA.

13. With respect to the onset of Commission jurisdiction over the IAs and Niagara Mohawk's refund obligation, Commission jurisdiction attaches at the time the Rensselaer plant has the right to make sales to a party other than Niagara Mohawk. In *Western Massachusetts Electric Company*,[6] the Commission addressed the boundary between state and federal jurisdiction over agreements under which QFs, within the meaning of the Public Utility Regulatory Policies Act,[7] interconnect with the transmission grid. Citing 18 C.F.R. § 292.306, the Commission held that states exercise jurisdiction over direct interconnections between a QF and the public utility that purchases its entire electric output. However, where a QF may sell any of its output to a third-party utility, *i.e.*, a utility not directly interconnected to the QF, the Commission has exclusive jurisdiction over the interconnection between the QF and the directly interconnected utility, and exclusive jurisdiction over agreements affecting or relating to such service (and the rates for such service); any attempt by a state authority to exercise jurisdiction over such service and agreements (and rates) would be *ultra vires.* An agreement which releases the interconnecting utility from its obligation to purchase the QF's full output authorizes the QF to make sales that require the transmission of electric energy in interstate commerce, and any interconnection agreements affecting or relating to such sales require Commission authorization. We accordingly find that Commission jurisdiction attached to the subject interconnection agreement on June 30, 1998, the consummation date of the MRA which Niagara Mohawk concedes released it from its obligation to purchase the entire output of the Rensselaer QF and authorized the Rensselaer QF to make sales to third-party utilities.[8]

14. The effective date of the Rensselaer IA and the Amended Rensselaer IA follows 60 days from the date Niagara Mohawk first tendered this filing. Thus the effective date for the Rensselaer IA and the Amended Rensselaer IA is August 28, 2007. The

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[6] 59 FERC ¶ 61,091, *reh'g denied*, 61 FERC ¶ 61,182 at 61,662 (1992).

[7] 16 U.S.C. § 824a-3 (2000).

[8] Niagara Mohawk June 28, 2007 Filing at 4.

Rensselaer IA and the Amended Rensselaer IA indicate an effective date of August 27, 2007. Niagara Mohawk must modify its filing to indicate the correct effective date.

15. Because the proposed rate goes into effect after service has commenced, the Commission requires the utility to refund to its customers the time value of the revenues collected pursuant to section 35.19 of its regulations for the entire period that the rate was collected without Commission authorization. This is not inconsistent with the Commission's determination in *PG&E*.[9] Thus the Commission directs Niagara Mohawk to refund the time value of revenues collected from June 30, 1998 through August 27, 2007.

16. Further, the Commission's review of the Amended Rensselaer IA finds that it does not comply with Order No. 614,[10] which mandates that utilities prospectively include proposed designations for all rate schedule sheets filed with the Commission. Section 35.9(a) of the Commission's regulations[11] requires that, if a service agreement is revised or modified, the utility must file a complete revised service agreement. Niagara Mohawk must file a substitute amended IA incorporating the provisions of the Rensselaer IA still in effect with the revised provisions in the Amended Rensselaer IA and adding a new designation comporting with Commission guidelines. The proper designation of the revised IA will be Substitute First Revised Service Agreement No. 1155. Accordingly Niagara Mohawk must modify its filing to conform to Order No. 614 and section 35.9(a) of the Commission's regulations within 45 days of the date of this order.

17. Finally, the deficiency letter, noting the Commission's determinations in *Cinergy Services, Incorporated*,[12] and *American Electric Power Service Corporation*,[13] that an ISO or RTO must be a signatory to an IA in order to operate safe and reliable transmission systems and account for changed circumstances in amended agreements, stated that the NYISO must be a signatory to the Amended Rensselaer IA when the agreement was re-filed.

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[9] In *PG&E*, the Commission required the utility to refund to its customers the time value of the revenues collected from the Agreements and Interim Agreements. The point in time at which those agreements became jurisdictional was not an issue.

[10] *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs., Regulations Preambles January 1996-December 2000 ¶ 31,096 (2000).

[11] 18 C.F.R. § 35.9(a) (2007).

[12] 107 FERC ¶ 61,260 (2004) (*Cinergy*).

[13] 110 FERC ¶ 61,276 (2005), *order on reh'g*, 112 FERC ¶ 61,128 (2005) (AEP).

18. Both the NYISO and Niagara Mohawk argue that the circumstances surrounding the unexecuted IAs are unlike those in *Cinergy* and *AEP* because, among other things, the NYISO is unwilling to become a party to the IAs and has no operating protocols or procedures in place requiring it to be a signatory to a grandfathered IA where there is no increase in capacity or material modifications to the operating characteristics of the generating facilities.

19. While the Commission disagrees with the NYISO and Niagara Mohawk that the Rensselaer IA and the Amended Rensselaer IA are grandfathered or amended agreements, we do find that they are not the type of new generator interconnection agreements envisioned by Order No. 2003; rather they are more like after-the-fact interconnection operating agreements that govern the terms, conditions, and rates associated with the continuing operation and maintenance of previously constructed facilities built to accommodate the interconnection of the Rensselaer generators to Niagara Mohawk's transmission system. Accordingly, we will not require NYISO to be a signatory to these IAs. However, any interconnections involving the interconnection of a new generating facility or involving increases in capacity or material modifications to the operating characteristics of existing generating facilities interconnected to Niagara Mohawk's or any other NYISO member's transmission system will require the NYISO to be a signatory to that IA.

The Commission orders:

(A) The Rensselaer IA and the Amended Rensselaer IA filed June 28, 2007, are hereby conditionally accepted, as modified pursuant to this order, to be effective August 28, 2007.

(B) Niagara Mohawk is hereby ordered to file a revised IA, within 45 days of the date of this order, to reflect an effective date of August 28, 2007, and to comply with Order No. 614 and section 35.9 of the Commission's regulations.

(C) Niagara Mohawk is hereby ordered to make refunds to Rensselaer, as discussed in the body of this order, within 30 days of the date of this order,

(D) Niagara Mohawk is hereby directed to file a refund report with the Commission within 15 days of the date refunds are made pursuant to Ordering Paragraph (C) above.

By the Commission.

( S E A L )

Kimberly D. Bose,
Secretary.