

142 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

North American Natural Resources, Inc.

v.

Docket No. EL13-10-000

PJM Interconnection, L.L.C.,
American Electric Power Service Corp.,
and Indiana Michigan Power Co.

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued January 17, 2013)

1. On October 2, 2012, North American Natural Resources, Inc. (North American) filed a complaint against American Electric Power Service Corporation (AEPSC), its affiliate Indiana Michigan Power Company (I&M) (together, AEP), and PJM Interconnection, L.L.C. (PJM) pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's Rules of Practice and Procedure,² alleging violations of PJM's Open Access Transmission Tariff (Tariff) provisions governing small generator interconnections to the transmission system. In this order, we will set the complaint for hearing.

I. Background

2. On December 11, 2007, North American submitted an application to PJM for the interconnection of the 6.4 MW Southeast Berrien landfill gas generating station

¹ 16 U.S.C. § 824e (2006).

² 18 C.F.R. § 385.206 (2012).

(Southeast Berrien Plant)³ in Southeast Berrien County, Michigan to AEP's 69 kV Buchanan Hydro-Niles transmission line (Buchanan Hydro-Niles Line). PJM assigned the Southeast Berrien Plant to queue position T-111, then conducted a Feasibility Study and System Impact Study. North American waived the Facilities Study that typically follows a System Impact Study, so PJM attached its standard Interconnection Service Agreement (ISA) and Interconnection Construction Service Agreement (ICSA) (together, Agreements) to the results of the System Impact Study for North American's review. North American signed and returned the Agreements to PJM, with a check for the security deposit, on June 24, 2008. PJM executed the Agreements on July 31, 2008.

3. In studying North American's interconnection request, PJM determined that upgrades to the Buchanan Hydro substation and Niles substation would be necessary, and that a new switching station—the Mayflower substation—would need to be constructed to interconnect the Southeast Berrien Plant. The parties elected the Negotiated Contract Option in the ICSA, with North American exercising its Option to Build the Mayflower substation. Accordingly, the Agreements allocated the construction responsibility for the work at these three facilities between North American and I&M. More specifically, North American was responsible for constructing the Customer Interconnection Facilities⁴ and the Mayflower substation, subject to I&M's oversight, while I&M was responsible for the work at the Buchanan Hydro and Niles substations.

4. On October 16, 2008, PJM sent North American the first quarterly invoice for AEP's expected work at the Buchanan and Niles Substations. North American paid the invoice and both parties subsequently commenced construction. The ISA provided a schedule of work indicating that construction would take place from October 2008 to

³ The initial interconnection request for the Southeast Berrien Plant sized the facility at 8 MW, to be generated by five 1.6 MW turbines. The request was later reduced to a three-turbine 4.8 MW facility with plans to expand to 6.4 MW by adding a fourth turbine in 2013. In light of the planned expansion, PJM studied the project as a 6.4 MW injection into AEP's system.

⁴ The Tariff defines Customer Interconnection Facilities as “[a]ll facilities and equipment owned and/or controlled, operated and maintained by Interconnection Customer on Interconnection Customer's side of the Point of Interconnection identified in the appropriate appendices to the [ISA] and to the [ICSA], including any modifications, additions, or upgrades made to such facilities and equipment, that are necessary to physically and electrically interconnect the Customer Facility with the Transmission System.” PJM, Intra-PJM Tariffs, OATT, § 1.7A.02 (1.0.0). Customer Interconnection Facilities are one of two types of Interconnection Facilities, the other type being Transmission Owner Interconnection Facilities. *Id.* § 1.14F (0.0.0); *see infra* n.5.

April 2009. Although a disagreement over North American's selection of an engineering firm that was not on AEP's list of approved firms apparently caused a construction delay, the Southeast Berrien Plant commenced commercial operations on May 18, 2009.

5. The dispute in this case involves multiple issues concerning the construction of the aforementioned interconnection facilities and PJM's management of the interconnection process and cost allocation. The parties were engaged in settlement negotiations with the Commission's Dispute Resolution Staff for more than two years. The complaint now before us was filed following the parties' failure to negotiate a settlement during those negotiations.

II. North American's Complaint

6. North American argues that AEP improperly categorized all of the Interconnection Facilities⁵ associated with North American's New Service Request as Attachment Facilities⁶ in order to avoid the consequences of designating the facilities as Network

⁵ The Tariff defines Interconnection Facilities as "[t]he Transmission Owner Interconnection Facilities and the Customer Interconnection Facilities." *Id.* § 1.14F (0.0.0). Transmission Owner Interconnection Facilities were defined as "[a]ll Interconnection Facilities that are not Customer Interconnection Facilities and that, after the transfer under Section 85.5 below to the Interconnected Transmission Owner of title to any Transmission Owner Interconnection Facilities that the Interconnection Customer constructed, are owned, controlled, operated and maintained by the Interconnected Transmission Owner on the Interconnected Transmission Owner's side of the Point of Interconnection identified in appendices to the [ISA] and to the [ICSA], including any modifications, additions or upgrades made to such facilities and equipment, that are necessary to physically and electrically interconnect the Customer Facility with the Transmission System or interconnected distribution facilities." *Id.* § 1.45H (superseded September 17, 2010) (the superseding Tariff provision changed only the cross-reference, not the actual definition).

⁶ The Tariff defines Attachment Facilities as "[t]he facilities necessary to physically connect a Customer Facility to the Transmission System or interconnected distribution facilities." *Id.* § 1.3A (2.0.0). The Tariff defines Network Upgrades as "[m]odifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider's overall Transmission System for the general benefit of all users of such Transmission System. Network Upgrades shall include: (i) Direct Connection Network Upgrades which are Network Upgrades that only serve the Customer Interconnection Facility and have no impact or potential impact on the Transmission System until the final tie-in is complete; and (ii) Non-Direct Connection Network Upgrades which are parallel flow Network Upgrades that are not Direct Connection Network Upgrades." *Id.* § 1.26 (2.0.0).

Upgrades.⁷ According to North American, AEP misrepresented the disputed work and equipment as Attachment Facilities, rather than Network Upgrades, in order to allocate one hundred percent of the disputed costs to North American.⁸ North American provides a list of Attachment Facilities associated with the Southeast Berrien Plant's interconnection and contends that the cost for these facilities should have been \$329,320, rather than \$2,598,331.89.⁹ North American also asserts that PJM concluded, in the interconnection studies, that no local or network upgrades would be required to interconnect the Southeast Berrien Plant, but that AEP nonetheless required upgrades and revealed those upgrades incrementally over several months, rather than all at once.

7. North American asserts that PJM informed North American that it would not be required to pay for upgrades beyond the point of interconnection and also that North American would be re-paid for interconnection costs beyond that point. North American states that AEP and PJM then required North American to pay for both Network Upgrades and interconnection facilities beyond the point of interconnection¹⁰ and that AEP has refused to credit North American any cash plus interest.¹¹

8. North American complains that PJM and AEP violated section 217.3(a) of the Tariff in three ways: (i) PJM and AEP required more than the minimum amount of Network Upgrades necessary to accommodate North American's New Service Request;¹² (ii) AEP required North American to build and pay for facilities that AEP would have

⁷ North American October 2, 2012 Complaint at 13. We note that, although North American directs this accusation at AEP, PJM is responsible for categorizing the various facilities in an interconnection project.

⁸ *Id.* at 16.

⁹ *Id.* at 14-15.

¹⁰ Specifically, North American contends that it was required to upgrade the Buchanan Hydro-Niles Line's reclosing system, *id.* at 23-24, breaker design, *id.* at 24-25, and relay system, *id.* at 25-28.

¹¹ *Id.* at 22.

¹² North American claims that AEP and PJM required "virtually the maximum" amount of Network Upgrades in order to modernize AEP's out-of-date transmission system. Therefore, North American argues that AEP, not North American, should bear the costs of the Local and Network Upgrades. *Id.* at 31.

constructed regardless of North American's New Service Request;¹³ and (iii) PJM did not calculate North American's cost responsibility for Network Upgrades "net of benefits" provided to the transmission system,¹⁴ i.e., PJM did not properly apply the "system benefits" test.

9. North American also complains that PJM violated Tariff section 212.4(b) in requiring an amount of security plus first quarterly invoice payment that exceeded 125 percent of the estimated construction cost for the interconnection project. North American asserts that section 212.4(b) applies in this case because AEP's construction work for the Network Upgrades took less than one month for each of the two substations and AEP anticipated this short construction timeline.¹⁵ North American also asserts that PJM owes North American a refund of the security deposit balance.¹⁶

10. North American presents multiple arguments assailing the Agreements' validity as binding contracts. Specifically, North American claims that the Agreements were non-negotiable contracts of adhesion,¹⁷ that the Agreements were subject to conditions subsequent,¹⁸ and that North American did not agree to either the charges or billing practices that PJM applied.¹⁹

¹³ According to North American, the Buchanan Hydro-Niles 69 kV system was "ancient" prior to the disputed upgrades and AEP had been planning to upgrade the system since 2008, and possibly earlier. Therefore, North American states that AEP should have constructed the disputed upgrades as part of its Regional Transmission Expansion Plan (RTEP) instead of placing the costs on North American. *Id.* at 17-19.

¹⁴ More specifically, North American claims that the required Network Upgrades benefitted AEP's nearby customers and the transmission system as a whole and that North American's costs for the Network Upgrades should, in accordance with section 217.3(a) of PJM's Tariff, be reduced by the amount of system benefits that the Network Upgrades provided. *Id.* at 32-33.

¹⁵ *Id.* at 20.

¹⁶ *Id.* at 12, 42, 44.

¹⁷ *Id.* at 38.

¹⁸ *Id.* at 41.

¹⁹ *Id.* at 39.

11. North American claims that AEP violated Section 5.0 of AEP's own Interconnection Requirements by configuring the Southeast Berrien Plant's interconnection to upgrade the Buchanan Hydro-Niles Line, rather than to address the specific interconnection requirements of the Southeast Berrien Plant. North American also alleges that AEP delayed the interconnection process by not cooperating with North American's engineering firm.²⁰ As a result, North American seeks damages for losses caused by these delays.²¹ Lastly, North American claims that AEP's design for interconnecting the Southeast Berrien Plant violated the Commission's expectation that most small generator interconnections will not require Network Upgrades.

III. Notice and Responsive Pleadings

12. Notice of the complaint was published in the *Federal Register*, 77 Fed. Reg. 61,593 (2012), with interventions and protests due on or before October 22, 2012.

13. On October 4, 2012, Exelon Corporation filed a motion to intervene. On October 22, 2012, American Municipal Power filed a motion to intervene, and AEP filed an answer to the complaint. Also on October 22, 2012, PJM filed a motion for summary disposition and answer to the complaint. On November 6, 2012, North American filed an answer and brief in opposition to PJM's motion for summary disposition.²²

14. On November 20, 2012, AEP filed an answer to North American's answer. On November 21, 2012, PJM also filed an answer to North American's answer, and North American filed an answer to AEP's November 20, 2012 answer. On November 26, 2012, North American filed an answer to PJM's November 21, 2012 answer.

A. AEP's Answer

15. AEP states that the costs of the Mayflower substation and the upgrades at the Buchanan Hydro and Niles substations would not have been incurred but for North American's New Service Request, and that North American's attempt to shift these costs to AEP and PJM's other customers directly contravenes the language of the

²⁰ *Id.* at n.13.

²¹ *Id.* at 42.

²² In addition, North American made two filings to supplement its complaint. The first supplemental filing was made on October 15, 2012 to submit Exhibit I, which was omitted from the original complaint filing. The second supplemental filing, on November 13, 2012, consisted of a signed and executed copy of the affidavit labeled Exhibit B in the original complaint filing.

Agreements and the Tariff, both of which allocate the costs to North American. AEP also argues that whether AEP's other customers collaterally benefit from the upgrades is irrelevant to North American's cost allocation.²³

16. AEP argues that applying the "but for" test from section 217.3(a) of PJM's Tariff resolves the dispute by allocating the cost of all interconnection facilities solely to North American. AEP does not dispute that most of the Mayflower facilities and the upgrades to the Buchanan Hydro and Niles facilities were beyond the point of interconnection, but AEP also asserts that the costs are North American's responsibility, nonetheless, because the facilities and upgrades were necessary to interconnect the Southeast Berrien Plant. AEP contends that North American is responsible for one hundred percent of the cost of the required upgrades because North American's New Service Request is the sole reason for their construction.²⁴

17. AEP claims that the Mayflower substation, as designed, and the upgrades to the Buchanan Hydro and Niles substations were the minimum necessary to accommodate North American's New Service Request. AEP also states that the Local Upgrades²⁵ were not in PJM's RTEP and they do not accelerate, defer, or eliminate any Local Upgrades or Network Upgrades. Accordingly, AEP asserts that North American's cost liability for the Local Upgrades cannot be reduced under the "system benefits" test of section 217.3(a).

18. AEP asserts that North American is mistaken about whether section 212.4(b) of the Tariff applies to North American's New Service Request. AEP argues that the project timeline referred to in that provision spans the construction phase, from the start of engineering to the completion of final testing after energization. AEP explains that section 212.4(b) does not apply in this case because the construction phase for the Local Upgrades were planned to, and did in fact, take more than three months to complete.²⁶

²³ AEP November 20, 2012 Answer at 6.

²⁴ *Id.*

²⁵ The Tariff defines Local Upgrades as "[m]odifications or additions of facilities to abate any local thermal loading, voltage, short circuit, stability or similar engineering problem caused by the interconnection and delivery of generation to the Transmission System. Local Upgrades shall include: (i) Direct Connection Local Upgrades which are Local Upgrades that only serve the Customer Interconnection Facility and have no impact or potential impact on the Transmission System until the final tie-in is complete; and (ii) Non-Direct Connection Local Upgrades which are parallel flow Local Upgrades that are not Direct Connection Local Upgrades." PJM, Intra-PJM Tariffs, OATT, § 1.17A (2.0.0).

²⁶ AEP November 20, 2012 Answer at 11.

19. AEP states that North American is bound by the plain meaning of the language in the Agreements and that straightforward contract enforcement requires rejection of North American's arguments. AEP asserts that North American contractually agreed to the Local Upgrades and to construct the Mayflower substation according to AEP's specifications and consistent with PJM's Tariff, good utility practice, and other applicable technical requirements and standards. AEP also contends that, even if North American could overcome the clear language of the Agreements, the facilities that AEP required were, in fact, the minimum necessary to accommodate North American's New Service Request.²⁷

20. AEP refutes North American's characterization that AEP did not design the interconnection facilities based on the specific characteristics of the Southeast Berrien Plant. AEP explains that it required the minimum configuration allowed under its Requirements for Interconnection of New Facilities manual, and that North American misconstrues the Commission's policy on small generator interconnection agreements. In addition, AEP emphasizes that it offered North American the option of interconnecting through AEP's distribution network, to reduce North American's interconnection costs, but that North American declined this offer in favor of interconnecting through the transmission system.²⁸

21. AEP also states that the pre-existing Buchanan Hydro-Niles Line was in compliance with all applicable reliability requirements, but could not accommodate North American's interconnection without compromising the ability of the system to detect faults, which would significantly degrade reliability. AEP further states that it was necessary to mirror the relays at the Mayflower substation with those at the Buchanan Hydro and Niles substations in order to interconnect the Southeast Berrien Plant.

22. AEP claims that North American cannot recover damages as a result of the alleged project delays because North American caused any such delays, the Agreements explicitly prohibit consequential damages, and the Agreements were not contracts of adhesion and North American chose not to exercise its negotiation rights.²⁹

²⁷ *Id.* at 13.

²⁸ *Id.* at 17.

²⁹ *Id.* at 23.

B. PJM's Answer and Motion for Summary Disposition**1. Motion for Summary Disposition**

23. PJM contends that North American has been afforded a reasonable opportunity to present its arguments and factual support, and if the Commission accepts those facts and views the evidence in the light most favorable to North American, the Commission can dismiss the complaint as a matter of law because PJM followed its Commission-approved Tariff in allocating costs and calculating the security deposit for North American's interconnection.³⁰

24. PJM states that, in submitting a New Service Request, North American must take AEP's transmission system as it is and fund any upgrades that would not be needed but for North American's interconnection. In addition, PJM claims that North American has not alleged, or provided factual support indicating, that the Buchanan Hydro-Niles system was in violation of any North American Electric Reliability Corporation or PJM reliability criteria. PJM contends that strict application of the "but for" test is particularly important when no such showing is made,³¹ that the Interconnection Facilities required to accommodate North American's New Service Request were the minimum necessary to maintain the system's reliability, and that PJM conducted North American's interconnection in a non-discriminatory manner.³²

25. PJM claims that it collected the proper amount for the security deposit plus the first quarterly invoice because North American's project was scheduled to take six to nine months to complete, thereby rendering the limitation in section 212.4(b) of the Tariff inapplicable.³³

26. PJM also contends that North American's cost allocation challenges are untimely because North American should have sought dispute resolution prior to signing the Agreements or asked that the Agreements be filed unexecuted. PJM asserts that the Tariff provisions cited by North American do not allow disputes to the designation of Interconnection Facilities, or to the resulting cost allocation, after filing the executed Agreements. In addition, PJM explains that the Commission's holding in *Marcus Hook*, 123 FERC ¶ 61,289 at P 30, forbids cost allocation challenges after the ISA is executed.

³⁰ PJM October 22, 2012 Answer at 6.

³¹ *Id.* at 7-8 (citing *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289, at P 52 (2008) (*Marcus Hook*)).

³² *Id.* at 8.

³³ *Id.* at 9.

Therefore, PJM asserts that North American should have challenged the cost allocation prior to executing the ISA, rather than years after North American's project was placed in service.³⁴

2. Answer

27. For essentially the same reasons presented in its motion for summary disposition, PJM contends that it did not violate section 217.3(a) of its Tariff. PJM explains that the ISA categorizes all of the facilities required to accommodate North American's New Service Request as Local Upgrades. However, PJM points out that the distinction between Local Upgrades and Network Upgrades is immaterial in this case, because, under section 217.3(a), the costs of both are allocated to the Interconnection Customer.³⁵

28. PJM disagrees with North American's contention that AEP and PJM have misapplied the small generator interconnection procedures and blurred the distinction between small and large generators. PJM insists that it properly applied the interconnection procedures and treated North American in a non-discriminatory manner.³⁶

29. PJM argues that the upgrades required were the minimum necessary to reliably interconnect the Southeast Berrien Plant in the location North American chose. PJM argues that the existing relay system could not accommodate North American's interconnection and, therefore, the upgrades to the relay systems at the Buchanan Hydro and Niles substations, and the mirrored relays at the Mayflower substation, were "but for" upgrades. Similarly, PJM argues that the Mayflower substation's two-breaker design was the minimum necessary configuration that would maintain the reliability of the Buchanan Hydro-Niles system.

30. PJM claims that North American misinterprets the "net of benefits" language in section 217.3(a) of the Tariff and that the Local Upgrades required for this interconnection provided no benefits that reduce North American's cost responsibility. PJM cites the Commission's precedents in *Marcus Hook* and *Bishop Hill*³⁷ for the premise that vague claims of benefits will not suffice and that, in this context, system benefits occur only when the required upgrade accelerates, defers, or eliminates a known

³⁴ *Id.* at 11.

³⁵ *Id.* at 18.

³⁶ *Id.* at 18-19.

³⁷ PJM Interconnection, L.L.C., 137 FERC ¶ 61,084 (2011) (*Bishop Hill*).

upgrade under the RTEP.³⁸ PJM claims that North American has failed to show that the required upgrades meet this standard and points out that, when North American submitted its New Service Request, the RTEP contained no projects for the Buchanan Hydro-Niles Line.³⁹

31. PJM argues that the Agreements are not contracts of adhesion and that North American's claim to the contrary ignores the Commission's purpose in standardizing the small generator interconnection process and allowing Interconnection Customers to propose variances from the *pro forma* agreements.⁴⁰

32. PJM asserts that it properly followed the Tariff both in billing and collecting security. PJM explains that section 212.4(b) of the Tariff does not apply to North American's project because the work covered by the security deposit was estimated to take more than three months to complete. Specifically, PJM explains that: (i) the security covered AEP's design review and construction oversight throughout the construction phase; and (ii) the Schedule of Work in the ICSA shows that the Buchanan Hydro and Niles relay work would take six to nine months. Therefore, PJM concludes that section 212.4(b) is not applicable and the sum of the security deposit and first quarterly invoice payment was not limited to 125 percent of the estimated construction costs.

C. North American's Answer to PJM's Motion and Answer

33. North American responds that summary disposition is inappropriate because North American has raised genuine issues of material fact and PJM has not met its burden to prove otherwise.⁴¹ North American also asserts that it has not had a reasonable opportunity to develop its arguments and factual support because AEP and PJM refused to provide North American information during dispute resolution proceedings.⁴²

34. North American restates many of the claims in its original complaint and adds that there was no reason for North American to seek dispute resolution before executing the Agreements, or to file them unexecuted, because the Agreements provided that the final

³⁸ PJM October 22, 2012 Answer at 23-24.

³⁹ *Id.* at 25.

⁴⁰ *Id.* at 27.

⁴¹ North American November 6, 2012 Answer at 1.

⁴² *Id.* at 2.

cost allocation would be decided at a future date.⁴³ North American also asserts that the precedents in *Marcus Hook* and *CED Rock Springs*,⁴⁴ on which PJM relies, are distinguishable from the facts of the instant proceeding.⁴⁵

35. North American also claims that the description of the work undertaken at the Buchanan Hydro and Niles substations is inconsistent with the cost estimate for that work, as calculated by North American's engineer.⁴⁶

IV. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

37. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept North American's November 6, 2012 answer, filed of right, to PJM's motion for summary disposition, but we are otherwise not persuaded to accept the answers to the answers and will, therefore, reject them.

B. Commission Determination

38. We find that the complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

39. Among the issues raised is whether the facilities for which North American is required to pay are appropriately included as part of its interconnection costs. Under Order No. 2003 and PJM's "but for" test in its tariff, interconnecting customers may only

⁴³ *Id.* at 12-13.

⁴⁴ *CED Rock Springs, LLC*, 114 FERC ¶ 61,285 (CED Rock Springs), *reh'g denied*, 116 FERC ¶ 61,163 (2000), *aff'd*, *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43 (D.C. Cir. 2008).

⁴⁵ *Id.* at 12.

⁴⁶ North American November 6, 2012 Answer at 15-16.

be assessed the costs of those facilities “necessary to accommodate” their project.⁴⁷ Material issues of fact have been raised as to whether certain of the facilities meet this definition. For example, we cannot determine, based on the existing record, whether the configuration that North American constructed at the Mayflower substation exceeded the minimum design in AEP’s Requirements for Interconnection of New Facilities manual or the minimum physical parameters necessary for a 69 kV switching station. Similarly, we cannot determine whether the upgraded relay scheme that AEP and PJM installed on the Buchanan Hydro-Niles Line exceeds the minimum necessary to accommodate North American’s New Service Request. In addition, we cannot determine whether PJM owes North American a refund of the remaining security balance, because the record does not contain sufficient facts about the Mayflower substation access road, which appears to be the source of the security dispute. We therefore are setting all of the issues raised in the complaint for a trial-type evidentiary hearing.

40. We disagree with PJM’s argument that North American’s complaint should be dismissed because North American did not file the Agreements unexecuted and failed to raise its objections with the Commission prior to signing the Agreements. The Tariff language to which PJM cites was interpreted in *Marcus Hook* to require an interconnection customer “to resolve cost allocation questions at the time it executes its ISA.”⁴⁸ However, the Commission also found in *Marcus Hook* that the Tariff does not preclude an interconnection customer from filing a complaint after an Agreement has been executed.⁴⁹ In examining the circumstances of this interconnection request, we find

⁴⁷ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at Appendix C -- Standard Large Generator Interconnection Procedures, at 5 (2003)(Interconnection Customer's Interconnection Facilities shall mean all facilities and equipment ... necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *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); PJM, Intra-PJM Tariffs, OATT, § 217.3(a) (0.0.0) (effective June 1, 2007; superseded September 17, 2010) (“Each New Service Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its New Service Request”).

⁴⁸ *Marcus Hook*, 123 FERC ¶ 61,289 at P 30 (2008).

⁴⁹ *Id.* P 33 (“It is part of the complaint process to examine how tariff provisions and limitations like section [217.5] affect the resolution of a complaint within the context of the interconnection process.”)

that North American should have an opportunity to present its case at hearing. North American is a small generator and it is alleging that, after it signed the Agreements, actual costs far exceeded the estimated costs and the facilities were overbuilt. While an interconnection customer should request a Facilities Study to obtain more accurate cost estimates and North American waived the Facilities Study, we find that given the small size of its project and the alleged significant increase in costs over the costs estimated in the System Impact Study and the Agreements that North American entered into, North American's failure to request a Facilities Study should not preclude it from having the reasonableness of these cost increases examined.

41. 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 commence. 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.⁵⁰ 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.⁵¹ 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.

42. 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 the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers,⁵² we will set the refund effective at the earliest date possible, *i.e.*, October 2, 2012, as ordered below.

⁵⁰ 18 C.F.R. § 385.603 (2012).

⁵¹ 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 the date of issuance of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

⁵² *See, e.g., Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

43. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by October 31, 2013. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs and opposing exceptions, or by June 30, 2014.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order and the ordering paragraphs below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2012), 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.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and 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 the 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.

(D) 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 these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a 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.

(E) The refund effective date in Docket No. EL13-10-000, established pursuant to section 206(b) of the FPA, is October 2, 2012.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.