108 FERC ¶ 61,041
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and NRG Power Marketing, Inc.	Docket No. ER03-563-032
Devon Power LLC	Docket No. ER04-903-000
Devon Power LLC, Middletown Power LLC, Montville Power LLC, and NRG Power Marketing Inc.	Docket Nos. ER04-464-004 and ER03-563-035
Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and NRG Power Marketing Inc.	Docket No. ER03-563-029
Devon Power LLC, Middletown Power LLC, Montville Power LLC, and NRG Power Marketing Inc.	Docket Nos. ER04-464-000 and ER04-464-001
ISO New England, Inc.	Docket Nos. ER04-23-000, ER04-23-002 and ER04-23-003

ORDER CONDITIONALLY ACCEPTING AND
SUSPENDING TRUE-UP SCHEDULES AND
AMENDED RELIABILITY AGREEMENT, SUBJECT TO REFUND,
CONSOLIDATING PROCEEDINGS, AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 12, 2004)

1. In this order, the Commission conditionally accepts, subject to refund, and suspends for a nominal period, True-Up Schedules filed by Devon Power LLC, *et al.* (Applicants)[1] in Docket No. ER03-563-032 and an Amended Reliability Agreement filed by Devon Power LLC (Devon) that was entered into between Devon and the Independent System Operator New England, Inc. (ISO-NE) in Docket No. ER04-903-000. This order also sets these two proceedings for hearing, but holds the hearing in abeyance so that the parties may engage in settlement discussions. This order consolidates these two proceedings with Docket Nos. ER04-464-004, ER03-563-035, ER03-563-029, ER04-464-000, ER04-464-001, ER04-23-000, ER04-23-002 and ER04-23-003 which were consolidated and in which hearing and settlement judge proceedings are underway. This order benefits customers by ensuring that costs paid to generating units needed for reliability are just and reasonable, while encouraging the parties to resolve issues through direct settlement negotiations.

I. Background

A. Docket No. ER03-563-032

2. This proceeding concerns four generating stations located in Connecticut that ISO-NE determined are needed to maintain reliability in the New England Power Pool (NEPOOL). ISO-NE received monthly estimates of maintenance costs, subject to refund, from the Applicants from February 27, 2003 through March 31, 2004 regarding these units.[2] The estimated maintenance costs were based on Applicants' good faith estimates of their actual reliability expenses. Since the initial approval of the estimated costs, Applicants have submitted various revisions to the agreements governing the estimated

[1] The Applicants are Devon Power LLC; Middletown Power LLC; MontvillePower LLC; Norwalk Power LLC; and NRG Power Marketing, Inc.

[2] *See* Devon Power LLC, *et al*., 102 FERC ¶ 61,314 (2003) (March 25 Order). *See also*, Devon Power LLC, *et al*., 102 FERC ¶ 61,314 (2003) (April 25 Order), which revised certain aspects of the March 25 Order.

costs, with the result that the Third Revised Cost-of-Service (COS) Agreement is currently in effect, but a Fourth Revised COS Agreement has been filed and is pending.[3]

B. Docket No. ER04-903-000

3. This proceeding concerns two of Devon's generating units (Units 7 and 8) which were initially needed for reliability purposes. On February 27, 2004, ISO-NE notified Devon that one of the units would no longer be needed for reliability purposes and that ISO-NE was therefore terminating, as of April 27, 2004, the Amended Reliability Agreement that pertained to one of the units. Devon selected Unit 8 as the unit to be terminated. Devon explains that since this unit did not have a Reliability Must Run (RMR) agreement, the unit was no longer economically viable. Accordingly, Devon states that it deactivated Unit 8 on May 28, 2004.

II. The Filings

A. Docket No. ER03-563-032

4. On April 7, 2004, Applicants filed True-Up Schedules for the True-Up Period beginning February 27, 2003 and ending December 31, 2003. The filing shows that the actual reliability costs were $11,277,321.99[4] less than the estimated reliability costs. Thus, the filing asserts that ISO-NE owes the NEPOOL participants a refund of that amount. The costs were calculated pursuant to a Reliability Cost Tracker.

B. Docket No. ER04-903-000

5. On May 28, 2004, Devon filed an Amended Reliability Agreement between itself and ISO-NE. Devon contends that, as a result of the deactivation of Unit 8, some costs previously allocated to Unit 8 should now be borne by Unit 7. The result of this proposal would be that the rate for Unit 7 would increase from $6.09 per kilowatt-month to $10.15 per kilowatt-month. This would be the new monthly applicable reliability charge. Devon requests an effective date of May 29, 2004. Devon also requests that this proceeding be consolidated with the on-going hearing/settlement proceedings in Docket Nos. ER04-23-000, *et al.*

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[3] *See* Docket No. ER03-563-027.

[4] This amount includes the over-recovery of actual reliability costs plus interest.

III. Notice of Filing and Responsive Pleadings

A. Docket No. ER03-563-032

6. Notice of Applicants' filing was published in the *Federal Register*, 69 Fed. Reg. 21,521 (2004), with interventions, comments and protests due on or before April 29, 2004. ISO-NE filed comments and a protest, and the Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel (collectively, Connecticut) filed a joint motion to consolidate. Connecticut also filed an untimely protest. New England Power Pool Participants Committee filed a motion to intervene. Applicants filed an answer and a supplemental answer.

7. ISO-NE comments and protests that it believes that the over-collection amount is approximately $16.9 million, which is about $5.7 million more than the $11,277,321.99 claimed by Applicants. ISO-NE states that it cannot pinpoint the exact source of the difference between ISO-NE's data and the Applicants' data. ISO-NE also claims that there are inconsistencies within Applicants' filing and that it is unclear how the over-collection should be credited.

8. Connecticut contends that the True-Up Schedules and worksheets filed by Applicants do not provide enough detail to determine the accuracy of the calculations. Connecticut notes that the materials submitted do not provide any details regarding the purposes of the expenditures, and instead show only a summary of costs by site. Connecticut requests that the filing be set for hearing and settlement judge procedures and that it be consolidated with the ongoing hearing/settlement proceedings in Docket Nos. ER04-23-000, *et al.*

9. In their answer, Applicants assert that the approximately $5.7 million difference between their calculation and ISO-NE's calculation can be explained by Applicants' use of the accrual method of accounting, which they contend is required by section 5.1.3 of the COS Agreements. Applicants also request that the Commission defer issuing any orders responding to Connecticut's protest so as to provide adequate time for the parties to review the documents, file supplemental comments and for Applicants to have an opportunity to respond to Connecticut's supplemental comments. Applicants filed a supplemental answer in which it clarifies that it is requesting that the Commission defer action until 45 days from the date of the Supplemental Answer.

B. Docket No. ER04-903-000

10. Notice of Devon's filing was published in the *Federal Register*, 69 Fed. Reg. 34,343 (2004), with interventions, comments and protests due on or before June 18, 2004. ISO-NE filed a motion to intervene and comments stating that Devon's request for consolidation should be granted. Connecticut filed a notice of intervention and protest

and request for consolidation. United Illuminating Company and Dominion Energy Marketing, Inc. filed motions to intervene.

11. Connecticut protests the rate increase proposed by Devon for its generator Unit 7 and asks that Devon's request for consolidation be granted. The parties agree that consolidation with the ongoing hearing/settlement proceedings in Docket Nos. ER04-23-000, *et al.*, is appropriate.

IV. Discussion

A. Procedural Matters

12. In Docket No. ER03-563-032, Applicants state that because of the complex calculations required to determine the over-recovery of Actual Reliability Costs, they were unable to comply with section 5.1.3(d) of the COS Agreements that requires True-Up Schedules to be filed by March 31 of each year, and have therefore submitted their filing one week late. Applicants have requested that the Commission grant them leave to file their True-Up Schedules out-of-time, stating that they have shown good cause for the delay and that the short delay in the filing will not delay or disrupt the proceedings. The Commission will accept the filing out-of-time.

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[5] given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find good cause to grant Connecticut's untimely motion to intervene.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Applicants' answers because they have provided information that assisted us in our decision-making process.

B. The Commission's Determination

15. In both Docket No. ER03-563-032 and Docket No. ER04-903-000, the protestors' and commentors' concerns raise factual questions concerning the True-Up Schedules and the Amended Reliability Agreement that we cannot summarily decide on the record before us. These concerns are best addressed in the hearing and settlement judge procedures that we order herein. In addition, based on our preliminary review of the

[5] 18 C.F.R. 385.214(d) (2002).

True-Up Schedules and Amended Reliability Agreement, we find that they may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed True-Up Schedules and Amended Reliability Agreement for filing, suspend them for a nominal period, to become effective thereafter, subject to refund, and set them for hearing. The Amended Reliability Agreement will become effective on May 29, 2004, as requested,[6] whereas the True-Up Schedules will become effective on June 7, 2004, both subject to refund.

16. We are also granting the requests that Docket Nos. ER03-563-032 and ER04-903-000 be consolidated with the ongoing hearing/settlement proceeding in Docket Nos. ER04-23-000, *et al.* Docket No. ER03-563-029 relates to the continuation of ISO-NE's Reliability Cost Tracker beginning on April 1, 2004, while Docket Nos. ER04-23-000 *et al.*, and ER04-464-000 *et al.*, relate to the costs-of-service under RMR contracts covering the Montville and Middletown stations, and certain units at Devon Station. As Connecticut points out, consolidation is appropriate because Docket No. ER04-563-029 will determine the Reliability Costs to be collected through the tracker in the subsequent term, and the instant proceeding will determine the over-collection that will be credited to payments due in that term. Further, since all of these proceedings involve reliability and associated cost issues, consolidation of the dockets will enable the Commission and the parties to address the issues in a comprehensive manner.

17. While we are setting the Docket Nos. ER03-563-032 and ER04-903-000 proceedings for a trial-type, evidentiary hearing, we will hold the hearing in abeyance and direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, in order to assist the parties in resolving this matter. Also, since the ER04-23-000, *et al.*, proceeding is still in the settlement judge phase, our action herein should not unduly delay those settlement proceedings. The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning 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 or provide for commencement of a hearing by assigning the case to a presiding judge.

18. We encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. We are hopeful that the Applicants, Devon and the parties will negotiate revised True-Up Schedules and an Amended Reliability Agreement and that the Applicants and Devon will file these documents together with necessary supporting data.

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[6] *See* Central Hudson Gas & Elec. Corp., *et al.*, 60 FERC ¶ 61,106 at 61,338, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

The Commission orders:

(A) The True-Up Schedules filed by the Applicants in Docket No. ER03-563-032 are hereby conditionally accepted for filing and suspended, to become effective on June 7, 2004, subject to refund.

(B) The Amended Reliability Agreement by Devon in Docket No. ER04-903-000 is hereby accepted for filing and suspended, to become effective on May 28, 2004, subject to refund.

(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 the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. ER03-563-032, concerning the justness and reasonableness of the True-Up Schedules. As discussed in the body of this order, the hearing shall be held in abeyance to provide time for the parties to resolve the issues through settlement judge procedures.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. ER04-903-000, concerning the justness and reasonableness of the Amended Reliability Agreement. As discussed in the body of this order, the hearing shall be held in abeyance to provide time for the parties to resolve the issues through settlement judge procedures.

(E) The requests for consolidation of Docket Nos. ER03-563-032 and ER04-903-000 with the proceeding in Docket Nos. ER04-23-000, *et al.*, are hereby granted.

(F) The settlement judge, or presiding judge, as appropriate, in Docket Nos. ER04-23-000, *et al.*, shall determine the procedures best suited to accommodate consolidation of Docket Nos. ER03-563-032 and ER04-903-000 with Docket Nos. ER04-23-000, *et al.*

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.