

110 FERC ¶ 61,441
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PSEG Power Connecticut, LLC

Docket No. ER05-231-001

ORDER ON REHEARING

(Issued June 20, 2005)

1. On February 14, 2005, the Connecticut Department of Public Utility Control (with the Connecticut Office of Consumer Counsel and Connecticut Attorney General's Office) (Connecticut Parties), Connecticut Municipal Electric Energy Cooperative (CMEEC) and PSEG Power Connecticut, LLC (Power Connecticut) submitted timely requests for rehearing of the Commission's January 14, 2005 order in these proceedings.¹ On November 17, 2004, Power Connecticut submitted for filing in this docket Reliability Must Run Agreements (RMR Agreements) between itself and ISO New England, Inc. (ISO-NE). In the *January 14 Order*, the Commission accepted the RMR Agreements for filing, suspended them for a nominal period, and set them for hearing and settlement judge procedures. The Commission also required certain modifications to the RMR Agreements, and directed Power Connecticut to submit a compliance filing. In this order, the Commission denies rehearing in part, grants rehearing in part, and grants clarification. This order benefits customers by further ensuring that generating units required for reliability in New England will continue to operate in the interim period prior to the implementation of a locational installed capacity (LICAP) market.

¹ *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020 (2005) (*January 14 Order*).

I. Background

2. As we noted in the *January 14 Order*, the Commission has been addressing issues concerning the sufficiency of New England's capacity markets and the use of RMR agreements since 2003.² More recently, the Commission has issued several orders regarding a proposal by ISO-NE to establish a LICAP mechanism in New England to allow capacity located in designated congestion areas to be more appropriately compensated for reliability through the market.³ When implemented, that mechanism will add a locational element to the current installed capacity (ICAP) markets by establishing five regions with separate ICAP requirements and prices: Maine, Connecticut, Southwest Connecticut, Northeast Massachusetts/Boston, and the remainder of New England. The LICAP mechanism is scheduled to be implemented on January 1, 2006.

3. The RMR Agreements filed by Power Connecticut in the instant docket cover charges for reliability services provided by Power Connecticut to ISO-NE from the New Haven Harbor Generating Station (New Haven) and Unit 2 of the Bridgeport Harbor Generating Station (Bridgeport Harbor). Power Connecticut and ISO-NE negotiated the RMR Agreements under section 3.3 of Exhibit 2, Appendix A of Market Rule 1.⁴ Power Connecticut argued in its filing that the RMR Agreements are necessary to ensure that the New Haven and Bridgeport Harbor facilities remain in operation to support reliability and are properly compensated for providing reliability services. Power Connecticut noted that ISO-NE made the determination, on two separate occasions, that the New Haven and Bridgeport Harbor units are needed for reliable system operation. Power Connecticut also submitted affidavits in support of its contention that it has under-recovered its costs for operation and maintenance of the RMR units.

4. The RMR Agreements submitted by Power Connecticut generally took the form of the *pro forma* Cost of Service Agreement contained in Market Rule 1, with some proposed modifications. The RMR Agreements provide that Power Connecticut will be

² See *January 14 Order* at P 2-4.

³ See *Devon Power LLC*, 107 FERC ¶ 61,240, *order on reh'g*, 109 FERC ¶ 61,154 (2004), *order on reh'g*, 110 FERC ¶ 61,315 (2005); see also *Devon Power LLC*, 109 FERC ¶ 61,156 (2004), *order on reh'g*, 110 FERC ¶ 61,313 (2005) (LICAP orders).

⁴ Market Rule 1 was approved by the Commission in *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002).

paid a fixed monthly charge for providing reliability services. Under the contracts, Power Connecticut is required to submit bids for the energy and ancillary services generated by the units, with any revenues earned by the units credited against the fixed monthly charge. The RMR Agreements will expire on the implementation date of a LICAP mechanism applicable to the facilities.

5. In the *January 14 Order*, the Commission accepted the RMR Agreements for filing with certain modifications, suspended the rates contained in the agreements for one day, and set several matters related to the agreements for hearing and settlement judge procedures. In particular, while the Commission accepted Power Connecticut's general cost-of-service approach (including fixed and variable costs in the RMR Agreements), it set several components of the cost-of-service for hearing, including claimed environmental remediation costs and Spring 2005 maintenance costs. The Commission also rejected certain proposed deviations from the *pro forma* Cost of Service Agreement. The Commission also rejected a request by Power Connecticut for waiver of the 60-day notice requirement, and accepted the RMR Agreements effective January 17, 2005.

II. Procedural Matters

6. As noted above, Connecticut Parties, CMEEC and Power Connecticut filed requests for rehearing. ISO-NE and Power Connecticut filed motions for leave to answer and answers to the rehearing requests.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁵ prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept the answers filed here because they have provided information that assisted us in our decision-making process.

III. Requests for Rehearing/Clarification and Commission Conclusions

A. Need for the RMR Units to Maintain Reliability

8. On rehearing, Connecticut Parties contend that the Commission erred by relying on ISO-NE's determination that the Power Connecticut facilities are needed for reliability, and that the Commission had improperly delegated its authority to ISO-NE. First, they argue that there is insufficient evidence in the record to support a determination that the units are needed for reliability. They assert that the record contains no studies or analyses to support a reliability determination or to support any

⁵ 18 C.F.R. § 385.213(a)(2) (2004).

particular level of system reliability that is necessary to warrant an RMR contract in the first instance. Connecticut Parties argue that the letter sent by ISO-NE to Power Connecticut (stating that the New Haven and Bridgeport facilities are needed for reliability) “does not constitute the type of credible substantial evidence and reasoned analysis” needed to support a finding that the facilities are needed for reliability.⁶ Further, Connecticut Parties state that due process requires that interested parties be permitted to review ISO-NE’s reliability analysis and present rebuttal evidence, and that generally, whether the units are needed for reliability should be treated as an issue of fact and set for hearing. Finally, they assert that recent evidence submitted in the LICAP proceeding, which reveals that ISO-NE believes approximately half of the installed capacity in New England will be eligible for RMR contracts, shows that the Commission must exercise responsibility over reliability determinations.

9. Second, Connecticut Parties argue that the Commission improperly delegated to ISO-NE the determination that the facilities are needed for reliability. According to Connecticut Parties, Market Rule 1 contemplates that ISO-NE will make initial decisions about unit eligibility, while the Commission has the ultimate authority pursuant to section 205 of the Federal Power Act (FPA) to approve or deny the RMR Agreements. Connecticut Parties assert that the Commission has impermissibly subdelegated its authority to ISO-NE in this regard.

10. **Commission Conclusion.** In the *January 14 Order*, the Commission, in accepting the RMR Agreements, noted that older peaking generation units in New England have had difficulty recovering sufficient revenues under the current market rules to warrant continued operation.⁷ We noted that both New Haven and Bridgeport Harbor are older generating facilities, operating at low capacity factors, and that ISO-NE has determined that the units are needed for reliability in Southwest Connecticut. The Commission stated that it has allowed limited-term RMR agreements like those filed in these proceedings to compensate such units and keep them in service where ISO-NE has determined that they are needed for reliability. The Commission further stated that “with the reliability of the electric system in Southwest Connecticut at stake,” it was “hesitant to second-guess the reliability determination of ISO-NE, the independent grid operator responsible for ensuring reliability in the region.”⁸

⁶ See Request for Rehearing and Clarification of Connecticut Parties at 6.

⁷ *January 14 Order* at P 18.

⁸ *Id.* at P 19.

11. The Commission will deny the request of the Connecticut Parties for rehearing of these conclusions. We will not set for hearing the issues of the level of reliability needed in Southwest Connecticut or whether the New Haven and Bridgeport Harbor units are needed to maintain reliability in Southwest Connecticut. The record shows that ISO-NE complied with Market Rule 1 in entering into the RMR Agreements. Market Rule 1, the currently-effective rate schedule on file with the Commission, permits ISO-NE to enter into reliability agreements with generators. ISO-NE, in consultation with the Independent Market Advisor, determines the units that are needed for reliability but need out-of-market financial arrangements to remain available.⁹ The Commission approved these provisions when it accepted Market Rule 1, also referred to as New England's Standard Market Design.¹⁰ The Commission's review of the RMR Agreements, under section 205, included a review of the evidence presented by Power Connecticut and ISO-NE that the units are needed for reliability. Connecticut Parties ignore Power Connecticut's initial filing describing ISO-NE's 2003 reliability study,¹¹ which found that the New Haven and Bridgeport Harbor facilities are necessary for reliability. Connecticut Parties have not presented any evidence to convince the Commission that ISO-NE's study is unreliable, or that ISO-NE incorrectly determined, in consultation with the Independent Market Advisor (and reflected in the ISO's letter to Power Connecticut), that these resources are needed for reliability.¹²

⁹ See Market Rule 1, Appendix A, Exhibit 2, section 3, FERC Electric Tariff No. 3 Sheet No. 7455 *et seq.*

¹⁰ *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002).

¹¹ See November 17, 2004 filing of Power Connecticut at 5-6.

¹² We view this determination as one best addressed in the stakeholder process, given that the provisions of Market Rule 1, Appendix A, Exhibit 2, section 3.3.1(b) require ISO-NE "make available to the [NEPOOL] Markets Committee the information on which it has based its reliability determination . . . prior to finalizing" an RMR agreement. See also *Devon Power LLC*, 110 FERC ¶ 61,315 at PP 40-41.

12. Furthermore, the Commission has not delegated its authority under section 205 of the FPA to determine that the RMR agreements filed here are just and reasonable. The Commission has satisfied its responsibilities under the FPA by conditionally accepting the RMR Agreements for filing, suspending them, and setting them for hearing to ensure that the rates contained in them are just and reasonable.

B. Unavailability of Units without RMR Agreements

13. Connecticut Parties assert that the Commission erred in the *January 14 Order* by approving the RMR Agreements without “requiring unequivocal evidence” that the Power Connecticut facilities would become unavailable without the RMR Agreements.¹³ They contend that both Market Rule 1 and Commission precedent require units seeking RMR treatment to prove that they will become unavailable without the out-of-market arrangements. They assert that Power Connecticut’s use of the standard language in section 2.3 of the *pro forma* Cost of Service Agreement (requiring the generator to affirm that it is currently evaluating whether to retire, mothball, decommission, deactivate or otherwise shut-down the resource) is not evidence that Power Connecticut cannot or will not continue to operate the units. Additionally, Connecticut Parties argue that in allowing RMR contracts, the Commission should recognize that “generators should not expect to recover all their costs for each of their units all of the time,” a situation that encourages Power Connecticut to jump between full cost-of-service rates and market rates.¹⁴

14. **Commission Conclusion.** We deny Connecticut Parties’ request for rehearing in this regard. ISO-NE may negotiate an RMR agreement with a generating resource previously operating under market-based rates where it has determined that the resource is needed for reliability reasons, and may “undertake whatever financial arrangements are necessary to ensure that the facility will be available.”¹⁵ This language states that ISO-NE must make a determination that the resource must stay in service for reliability reasons; it does not require that the resource prove “unequivocally” or make any other showing that it will shut down without an RMR contract, as Connecticut Parties suggest. Since the Commission-approved procedures on file in Market Rule 1 do not require such a showing, none was required to be made. The Commission has clarified that the

¹³ Request for Rehearing and Clarification of Connecticut Parties at 10.

¹⁴ *Id.* at 10, n.2.

¹⁵ See Market Rule 1, Appendix A, Exhibit 2, section 3.3.1(a), FERC Electric Tariff No. 3 Sheet No. 7461.

relevant provisions in Market Rule 1 do not require that a generating unit apply to retire or cease operation as a prerequisite to entering into an RMR agreement.¹⁶ The statements in the LICAP orders, cited by Connecticut Parties, regarding the use of RMR agreements during the interim period before the LICAP mechanism is implemented are not to the contrary. Those orders stated that the applicable tariff provisions limit the use of RMR agreements to situations in which units are necessary for reliability and require out-of-market financial arrangements to remain available, but do not require the specific proof of “shutdown” that Connecticut Parties would impose.¹⁷

15. ISO-NE acted appropriately under the relevant tariff provisions. The affidavits submitted by Power Connecticut demonstrated its’ failure to recover its cash outlays for the operation and maintenance of the subject facilities.¹⁸ Furthermore, Power Connecticut stated in its November 17, 2004 filing that “the appropriate economic response to the current market incentives” is to retire, deactivate or limit investment in the affected units, and that the Peaking Unit Safe Harbor (PUSH) bidding mechanism would not likely address its difficulties.¹⁹ Additionally, as the Commission stated in the *January 14 Order*, “while the PUSH bidding rules have been effective for some generators, they have not had the desired effect for others,” including other generators with characteristics similar to the Power Connecticut facilities.²⁰ Given these facts, ISO-NE was within its authority under Market Rule 1 to enter into “whatever financial arrangements are necessary” with Power Connecticut to ensure that the units in question remain available, subject to the Commission’s review of the resulting agreement under section 205 of the FPA.

16. Regarding Connecticut Parties’ argument that the Commission’s approval of RMR agreements allows generators to “jump” between market-based and cost-based rate structures, we note that the Commission has addressed this contention in other

¹⁶ See *Devon Power LLC*, 109 FERC ¶ 61,154 at P 27.

¹⁷ See *id.* at P 28; see also *order on reh’g*, 110 FERC ¶ 61,315 at P 39-41.

¹⁸ See November 17, 2004 filing of Power Connecticut at Attachment B (PC-1).

¹⁹ *Id.* at 7-8.

²⁰ *January 14 Order* at P 18, citing *Devon Power LLC*, 106 FERC ¶ 61,264 at P 18 and *Review of PUSH Implementation and Results*, dated December 4, 2003 filed by ISO-NE in Docket No. ER03-563-025.

proceedings. Most notably, in the LICAP proceedings we required that any RMR agreements filed before the January 1, 2006 implementation of the LICAP mechanism terminate when LICAP is implemented.²¹ We subsequently noted that permitting only single-term RMR agreements will prevent the possibility that generators can move back and forth between the market and cost-based arrangements.²²

C. Seasonal Assistance

17. Connecticut Parties argue on rehearing that if financial assistance for the Power Connecticut facilities is warranted, the low capacity factors of the units suggest that they are not needed beyond the summer peak months. Accordingly, they contend that more limited RMR agreements providing only seasonal financial assistance are appropriate. Connecticut Parties note that in their protest, they requested that ISO-NE and the Commission examine if the Power Connecticut units are needed for reliability all of the time, or whether only certain units are needed at certain times. They assert that the Commission should set this issue for hearing.

18. In its answer, ISO-NE states that contrary to their assertions otherwise, Connecticut Parties did not raise the issue of seasonal RMR agreements in their December 8, 2004 protest, and instead made only a generalized statement that the Commission should take a close look at Power Connecticut's proposed arrangement to assure that it is just and reasonable. ISO-NE argues that the Commission should reject this seasonal argument based on the fact that the issue was not raised previously.²³

19. **Commission Conclusion.** The Connecticut Parties' argument appears to be that if Power Connecticut recovers its costs over a shorter timeframe during which the RMR units might be expected to operate (e.g., three months instead of 12), then this would represent a least-cost alternative. The Commission rejects this argument. While this could be true if the proposed cost recovery took the form of a flat monthly fee for any month when the units operate, that is not the case with the RMR Agreements at issue in

²¹ *Devon Power LLC*, 107 FERC ¶ 61,240 at P 72.

²² *Devon Power LLC*, 109 FERC ¶ 61,154 at P 29.

²³ See Motion for Leave to Answer and Answer of ISO-NE at 9, citing *Niagara Mohawk Power Corporation*, 96 FERC ¶ 61,011 at 61,044 (2001) (where the Commission stated that it looks with disfavor upon parties raising issues on rehearing "that should have been raised earlier" because it is "disruptive to the administrative process.")

this proceeding. Under the RMR Agreements, a total cost of service is developed to provide for the recovery of the fixed costs of operating the RMR units. It is unclear how a seasonal arrangement as proposed by Connecticut Parties would allow the RMR generator to recover the fixed costs of the unit, which are incurred regardless of the season. Thus, the specific timeframe when the units would operate is not controlling because, under the cost of service methodology approved by the Commission, the fixed costs would still need to be recovered.²⁴ Further, under the *pro forma* Cost of Service Agreement contained in Market Rule 1, it is actually to the ratepayer's advantage for these units to run as in-merit resources in the market as much as possible, because any infra-marginal revenues or "other" revenues earned by these units are credited against the monthly charge provided for in the proposed agreements.

D. Costs Recoverable under the RMR Agreements

20. Both Connecticut Parties and CMEEC state that the Commission erred in failing to limit Power Connecticut's recoveries under the RMR Agreements to its variable or marginal costs of operating the units, or "going forward costs." Connecticut Parties state that RMR payments need only compensate the unit owner sufficiently to maintain and operate the units to avoid shutting them down. CMEEC argues that the RMR Agreements cannot be just and reasonable because they provide guaranteed cost recovery that is more than the minimum necessary to keep the units in service, which is the purpose of the contracts. It states that limiting recovery under the RMR Agreements to out-of-pocket costs would provide Power Connecticut with a strong incentive to keep the facilities in operation and pursue revenues through the market that can be applied against Power Connecticut's other costs. Further, CMEEC asserts that the Commission's January 25, 2005 ruling in *PJM Interconnection, LLC*²⁵ confirms the validity of a "going forward costs" approach to cost-recovery under an RMR agreement. According to CMEEC, the Commission's approval in that case of a "going forward costs" approach for frequently mitigated units in PJM should also be applied here. Further, CMEEC contends that to the extent the Commission has previously approved full cost recovery, that approach should be reassessed in New England in light of the Commission's determination that a deactivation request is not a prerequisite for an RMR agreement, and because LICAP will soon be implemented. Finally, CMEEC states that the recovery of

²⁴ CT DPUC *et al.* also provide arguments but no supporting evidence regarding the seasonal operation of these units. While low capacity factor units are likely to operate during the summer peak period, they are also just as likely to be needed during winter peak periods as well as during other system emergencies.

²⁵ *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 (2005), *reh'g pending*.

“going forward costs” is substantively different than the recovery of “incremental costs,” a proposal that the Commission rejected in *Mirant Kendall, LLC*.²⁶ As a result, CMEEC argues, the Commission should not have relied in the *January 14 Order* on *Mirant Kendall, LLC* to reject the “going forward costs” approach.

21. **Commission Conclusion.** The Commission will deny the request for rehearing of Connecticut Parties and CMEEC regarding the permitted cost recovery under the RMR Agreements. In the *January 14 Order*, we stated that “in prior RMR proceedings, the Commission has permitted recovery of fixed costs and variable costs under RMR contracts as essential costs for the services that the units continue to provide.”²⁷ This approach is appropriate for RMR agreements because providing only minimum, marginal and variable cost recovery to the Power Connecticut units may not allow them to be maintained in such a manner that they can continue to operate reliably, defeating the purpose of the contracts to ensure that the units are “available” to support reliability. Additionally, the full cost of service approach is appropriate for RMR agreements that mirror the *pro forma* Cost of Service Agreement in Market Rule 1, because any infra-marginal revenues or “other” revenues earned by these units in the market are credited against the monthly charges. Providing only variable and marginal costs to these units could also limit their ability to operate reliably as in-merit resources and impair their ability to earn market revenues to be credited against the monthly reliability charge.

22. CMEEC’s reference to the recent order in *PJM Interconnection, LLC* is misplaced. In that case, the Commission considered a proposal by PJM (made at the direction of the Commission) to compensate units that have their supply offers capped under the market mitigation rules for more than 80 percent of their run hours (“frequently mitigated units”), and are thus not recovering their costs.²⁸ The PJM proposal that the Commission accepted in *PJM Interconnection, LLC* was a market-design mechanism to compensate frequently mitigated units, not a contract for reliability services like those at issue here. Here, however, generators in the position of Power Connecticut are unable to recover their costs because of the current capacity market design in New England. The units operate in a constrained area where the capacity market does not recognize scarcity, and the units are needed by ISO-NE to maintain the reliability of the system. These circumstances are far different from those in PJM and require different approaches and remedies. As a result, a comparison of the two approaches is not useful.

²⁶ 109 FERC ¶ 61,227 (2004).

²⁷ *January 14 Order* at P 30.

²⁸ See *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 at P 96-100.

23. Moreover, in *PJM Interconnection, LLC* the Commission also approved a new Part V of the PJM Tariff, which governs situations in which a generation owner wishes to deactivate but is determined by PJM to be needed for reliability, a circumstance more analogous to the situation in this case.²⁹ Under these new provisions, the unit owner is given a choice between two cost recovery mechanisms. The generation owner may file a cost of service rate with the Commission to recover the entire cost of operating the unit beyond its Deactivation Date, or it may elect to receive a Deactivation Avoidable Cost Credit proposed in section 114 of the tariff that permits the recovery of “otherwise avoidable costs.”³⁰ Therefore, CMEEC’s contention that the Commission, in *PJM Interconnection, LLC*, adopted a “going forward cost” recovery approach is misplaced, and we deny rehearing on this point. Furthermore, as we noted in *Milford Power Company, LLC*, the market situation in ISO-NE is distinguishable from the situation in PJM.³¹ Specifically, the Commission stated there, and reiterates here, that in ISO-NE the Commission has found that the capacity markets may not allow all suppliers an adequate opportunity to recover their costs without a location-specific capacity requirement.³² In PJM, however, the Commission has found no evidence that the markets fail to appropriately compensate generators during scarcity conditions.³³

24. Finally, contrary to Connecticut Parties’ argument, *Mirant Kendall LLC* has relevance to the situation here. *Mirant Kendall LLC*, which concerned RMR units in New England, rejected the “going forward costs” concept advocated by CMEEC. In that case, the Commission rejected a request by a protestor to exclude operations and maintenance, administrative and general, depreciation, and property taxes from the cost of service included in an RMR agreement.³⁴ There, as here, protestors sought to limit cost recovery so that only the “going forward costs” could be recovered. As we noted in *Mirant Kendall LLC*, the Commission has historically permitted recovery of fixed costs

²⁹ See *id.* at P 123 *et seq.*

³⁰ *Id.* at PP 124-125.

³¹ *Milford Power Company, LLC*, 110 FERC ¶ 61,299 at P 70 (2005), *reh’g pending.*

³² *Id.*

³³ *Id.* at P 71.

³⁴ *Mirant Kendall LLC*, 109 FERC ¶ 61,227 at P 36.

for the period in which the specified RMR units are in operation, because the units remain available, and the fixed costs are essential costs of the reliability service that the units provide.³⁵ Accordingly, we deny rehearing.

E. Termination Date

25. Connecticut Parties argue that the Commission erred in approving a term that ends with the implementation of the LICAP mechanism, rather than a term ending on a fixed date, because the implementation of the LICAP mechanism could be delayed beyond the anticipated January 1, 2006 date. They assert that the RMR Agreements should have a fixed ending date, so that if LICAP implementation does not occur or is delayed, Power Connecticut will be required to submit a new section 205 application for RMR treatment. Connecticut Parties also contend that definite contract terms are a basic part of contract law, and that termination of a contract on a contingency that may never occur could invalidate the contract.

26. **Commission Conclusion.** The Commission will deny this request for rehearing. When we addressed this argument in the *January 14 Order*, we noted that the Commission, in the LICAP proceedings, stated that it would consider RMR agreements that are limited to a single term that expires when the LICAP mechanism is implemented.³⁶ Additionally, we noted that terminating the agreements on the implementation of LICAP was consistent with other Commission orders on RMR agreements. Connecticut Parties have raised no new arguments that persuade us to revisit our conclusions on the term of the RMR Agreements. Connecticut Parties' argument that the expiration provisions are indefinite and could invalidate the contracts is without merit because, as the Commission has recently reaffirmed, the LICAP mechanism will be implemented on January 1, 2006.³⁷ This is a date that the Commission has established and confirmed in numerous orders.

³⁵ *Id.*

³⁶ *Devon Power LLC*, 107 FERC ¶ 61,240 at P 72; *order on reh'g*, 109 FERC ¶ 61,154 at P 25, 29.

³⁷ *See Devon Power LLC*, 107 FERC ¶ 61,240 at P 71, *order on reh'g*, 109 FERC ¶ 61,154 at P 31, *order on reh'g*, 110 FERC ¶61,315 at P 27.

F. Filing of RMR Agreements for Select Units

27. Connecticut Parties contend on rehearing that the Commission erred in permitting Power Connecticut to file an RMR Agreement for only two of its units, and not requiring that revenues from other Bridgeport Harbor units be used to offset the costs of Bridgeport Harbor and New Haven. Connecticut Parties assert that the Commission's decision on this point in the *January 14 Order* is contrary to traditional cost-of-service principles, where a revenue requirement is determined based on the aggregate costs of the utility. They state that federal courts have required the Commission when reviewing rates to investigate "the entire range" of a utility's costs and revenues.³⁸ Further, Connecticut Parties contend that Commission policy requires that in setting a just and reasonable rate, the Commission look at all components of a rate, not a single component. Because Power Connecticut's application did not include revenues for all of the Bridgeport units, Connecticut Parties argue that the RMR Agreements should have been rejected, because without those revenues the Commission is unable to determine whether RMR payments are appropriate. Connecticut Parties further assert that awarding of RMR contracts to the most expensive units produces rates that are unjust and unreasonable and are in violation of section 205 of the FPA. They suggest that the Commission should require Power Connecticut to file financial information for all of its Connecticut units, noting that Power Connecticut has a contract to provide Traditional Standard Offer service to United Illuminating Company's customer base that requires that Power Connecticut's facilities be treated as a single enterprise.

28. In its answer, Power Connecticut asserts that the federal court cases and Commission precedent cited by Connecticut Parties simply hold that the universe of costs and revenues associated with a particular service must be included in the cost-of-service, and do not support Connecticut Parties' argument. Since Bridgeport Harbor unit 2 and New Haven Harbor are the only units providing reliability service, Power Connecticut contends that it is not required to submit a cost of service for other units not covered by the RMR Agreements.

³⁸ See Request for Rehearing and Clarification of Connecticut Parties at 16-18.

29. **Commission Conclusion.** In the *January 14 Order*, the Commission fully addressed the issues raised again here by Connecticut Parties. In that order, we stated that generating stations may contain units of varying ages with different operating characteristics, and that owners often make decisions on a per-unit basis.³⁹ We also noted that in the cost of service era, wholesale sales of power were often tied to the costs and availability of specific units.⁴⁰

30. Connecticut Parties have presented no new arguments that persuade us to grant rehearing, and accordingly, we will deny rehearing on this issue. Specifically, we reject Connecticut Parties' contention that all revenues from the Bridgeport Harbor station should be considered for allocation to the Bridgeport Harbor and New Haven units covered by the RMR Agreements, regardless of which units actually earned the revenues. In addition to our conclusions in the *January 14 Order*, we note that the units subject to these RMR agreements are not part of a bundled cost-of-service rate. What Connecticut Parties are asking is that Power Connecticut be treated as if it were a utility with a bundled rate. Under those circumstances, generating units do not operate as separate and distinct profit centers and it is appropriate to calculate an aggregate rate. However, in New England (a market-based environment) each unit is bid into the market individually from the other units in the Power Connecticut fleet, and earns revenues on an individual basis based on services that it provides, whether ancillary service(s), energy, capacity, or reliability. As such, independent producers will make investment and deactivation decisions based on the financial viability of each individual unit. Therefore, it is not appropriate for their revenues to be combined when making RMR contract determinations.

31. Additionally, we agree with Power Connecticut that Connecticut Parties have incorrectly applied the cases they cite in their rehearing request regarding review of the "entire range" of a utility's costs and revenues.⁴¹ Power Connecticut correctly notes that those cases stand for the proposition that all of the costs and revenues associated with a particular service should be included when developing the rate for that service. As we

³⁹ *January 14 Order* at P 33.

⁴⁰ *Id.*

⁴¹ See Request for Rehearing and Clarification of Connecticut Parties at 16-18, citing, among other cases, *Colorado Interstate Gas Company v. FERC*, 791 F.2d 803, 807 (10th Cir. 1986); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982); *Nantahala Power and Light Company v. Thornburg*, 476 U.S. 953 (1986).

note above, utilities traditionally offered bundled service, which necessitated the consideration of all costs and revenues when developing a rate. In this case, however, Power Connecticut is providing a particular reliability service from particular generating units, which does not require that all Power Connecticut revenues from generating units within the state be included. As the Commission pointed out in the *January 14 Order*, even during the era when utilities generally provided bundled services, particular services offered from particular units were not uncommon, and in such situations, the Commission required that only the costs and revenues from those particular units be included when developing the rate.⁴²

32. The cost-of-service issues that were set for hearing in the *January 14 Order* will evaluate all costs and revenues associated with the units covered under the RMR Agreements, to determine a just and reasonable rate. Pursuant to the *January 14 Order*, the hearing procedures will ensure “that costs and revenues within the generating stations and within the Power Connecticut fleet [are] allocated correctly.”⁴³ To the extent the units within the Bridgeport Harbor station share costs, that information is relevant and will be considered as part of the hearing established in this case. This is far different from requiring that revenues from certain units subsidize other units, however, as Connecticut Parties suggest.

33. As noted by Connecticut Parties, the *January 14 Order* did recognize the need to address revenues received by Power Connecticut from the Standard Offer Service contract with United Illuminating to ensure that the appropriate revenues are credited to the units subject to the RMR Agreements, and set this issue for hearing.⁴⁴ This is far different from Connecticut Parties’ request that the Commission consider all of Power Connecticut’s revenues. Having set for hearing the issue of allocation of revenues from the Standard Offer Service contract, the *January 14 Order* did address the concerns raised by Connecticut Parties in its protest and rehearing request regarding that contract.

⁴² See *January 14 Order* at P 33; see also *Central Maine Power Co.*, 57 FERC ¶ 61083 at 61,304 (1991) (finding that in certain agreements for short-term sales, which identified the units used to provide the energy, the demand charge must be based on the fixed costs of the units providing the energy), citing *Indiana & Michigan Electric Co.*, 10 FERC ¶ 61,295 at 61,590-592 (1980) (stating principle in fuel conservation energy rates proceeding that capacity charges “shall not exceed the annualized costs of the units expected to be employed.”)

⁴³ *January 14 Order* at P 34.

⁴⁴ *Id.*

G. Return on Equity

34. Connecticut Parties request rehearing regarding the Commission's determination that the 10.88 percent return on equity (ROE) included in the RMR Agreements is appropriate. They argue that the Commission ignored evidence regarding the rates of return for "comparable low risk utilities" offered in their protest. Further, they contend that the Commission should not apply a one-size fits all approach to RMR Agreements, and should consider individual circumstances when determining the ROE. Connecticut Parties state that Power Connecticut will face little risk with cost-of-service rates during the term of the RMR Agreements. They assert that the ROE should be set for hearing, and that the Commission should consider not only the level of risk, but also the level of debt and equity of Power Connecticut.

35. **Commission Conclusion.** The Commission has explained its rationale for using a standard 10.88 percent ROE for similarly situated units in numerous orders, and addressed the issues raised by Connecticut Parties in the *January 14 Order*.⁴⁵ Connecticut Parties have presented no new arguments that would justify granting rehearing and including the ROE in the hearing procedures established by the *January 14 Order*. Nonetheless, we reiterate that these units, along with the other RMR units to which this 10.88 percent has been applied, are operating in the same region with the same market risks and similar operating characteristics that necessitate the need for the agreements in the first instance. Therefore, we continue to find that this is an appropriate and just and reasonable ROE for facilities providing reliability services to ISO-NE under RMR agreements like those filed in the instant docket during this interim period prior to LICAP implementation.

H. Suspension Period

36. Connecticut Parties assert that the Commission erred in the *January 14 Order* by not suspending the proposed rates in the RMR agreements for the maximum period, pursuant to *West Texas Utilities Company*.⁴⁶ Specifically, Connecticut Parties contend that the Commission has inconsistently applied *West Texas* to RMR agreements. They state that in *Mirant Kendall LLC*,⁴⁷ the Commission stated that *West Texas* does not apply to applicants seeking new cost-of-service rates when they previously operated under

⁴⁵ See, e.g., *Devon Power Company*, 104 FERC ¶ 61,123 at P 48-49 (2003); *January 14 Order* at P 45.

⁴⁶ 18 FERC ¶ 61,189 (1982) (*West Texas*).

⁴⁷ 109 FERC ¶ 61,227.

market-based rate authority, even if the requested increase would represent an increase of more than 10 percent per year, which *West Texas* deems to be excessive and subject to the maximum five-month suspension period. In other cases, however, Connecticut Parties argue that the Commission has “seemingly applied the *West Texas* standard to initial applications for RMR coverage in determining whether to require a more than nominal suspension of rates.”⁴⁸

37. Additionally, Connecticut Parties contend that the distinction made by the Commission in *Mirant Kendall LLC* between newly filed cost-of-service rates and previously charged market-based rates conflicts with *State of California ex rel. Bill Lockyer v. FERC*.⁴⁹ According to Connecticut Parties, *Lockyer* “makes clear that market-based rates do not escape review under the ‘just and reasonable’ standard.”⁵⁰ Connecticut Parties assert that because Power Connecticut sought in its application to increase revenues by substantially more than 10 percent (as compared to its revenues under market-based rates) under the RMR agreement, and because Power Connecticut can only claim that it does not have a previous rate on file due to a waiver granted by the Commission in a different context, the maximum suspension period under *West Texas* should be imposed.

38. **Commission Conclusion.** The Commission denies Connecticut Parties’ rehearing request on this issue. As the Commission noted in the *January 14 Order*, in *West Texas*, we explained our standard for determining whether a rate increase is “substantially excessive” as compared to the rate on file and thus may require the application of the maximum five-month suspension period. In that case, the Commission declared that it would suspend proposed rates for the maximum period where more than 10 percent of the proposed rate increase in found, after preliminary analysis, to be excessive.⁵¹

39. In the January 14 Order, the Commission found that *West Texas* was not applicable because, consistent with prior Commission orders, the current rate on file for the units subject to the RMR Agreements is not a cost-of-service rate.⁵² While the Commission held in *Devon Power LLC* that it would not impose a full five-month suspension period because its preliminary findings indicated that the rates were not

⁴⁸ Request for Rehearing of Connecticut Parties at 23, citing *Devon Power LLC*, 106 FERC ¶ 61,264 (2004).

⁴⁹ 383 F.3d 1006 (9th Cir. 2004).

⁵⁰ Request for Rehearing of Connecticut Parties at 23.

⁵¹ *West Texas*, 18 FERC ¶ 61,189 at 61,375.

⁵² *January 14 Order* at P 68.

“substantially excessive,”⁵³ it has since consistently held that it will not apply *West Texas* to an RMR agreement where the rate on file is not a cost-of-service rate. In *Mirant Kendall LLC*, the *January 14 Order*, and the more recent order in *Milford Power Company, LLC*,⁵⁴ the Commission declined to apply *West Texas* to RMR agreements where the units at issue were previously operating under other than cost-based rates, such as market-based rates.

40. This policy is appropriate because where an entity does not have a firm cost-based rate on file with the Commission and is instead permitted to charge a market-based rate that can vary, the Commission is unable to determine whether the proposed cost-based rate would be a rate increase at any given time. Since market-based rates move higher and lower based on market conditions, the cost-based rate contained in the RMR Agreements may be higher or lower, depending upon the point in time at which one compares the cost-based rate to the prevailing market rate. To rely on such an imprecise calculation to determine whether an entity’s proposed rates represent a “substantially excessive” increase and will be suspended for the maximum period creates too great a risk that the entity “will . . . be deprived forever of substantially cost-justified revenues that would have been collected in the absence of a maximum five month suspension period,” without any corresponding benefits to the public.⁵⁵

41. Connecticut Parties’ argument that the Court’s decision in *Lockyer* demands that the Commission impose a five-month suspension period is without merit. As Connecticut Parties correctly point out, *Lockyer* states that market-based rates must satisfy the just and reasonable standard. Power Connecticut’s proposed rates have not escaped review simply because the units covered by the RMR Agreements were previously operating under market-based rate authority. To the contrary, the Commission initiated hearing proceedings in the *January 14 Order* to review the proposed rates contained in the RMR Agreements and ensure that they are just and reasonable.

I. Waiver of Accounting and Reporting Regulations

42. Connecticut Parties contend that Power Connecticut should be required to comply with the Commission’s rate filing and record-keeping regulations applicable to entities that charge cost-of-service rates. Specifically, Connecticut Parties state that they seek rehearing of the Commission’s “decision by implication in accepting [Power Connecticut’s] application for RMR coverage to grant [Power Connecticut] a waiver as

⁵³ 106 FERC ¶ 61,264 at P 25.

⁵⁴ 110 FERC ¶ 61,299.

⁵⁵ See *West Texas*, 18 FERC ¶ 61,189 at 61,375.

request . . . of ‘any of the Part 35 requirements that are not applicable to RMR agreements.’”⁵⁶ Connecticut Parties assert that since Power Connecticut has requested a cost-based rate, it should comply with the Commission’s reporting obligations imposed on those with cost-based rates. Particularly, they note the Commission’s regulations requiring an entity seeking a rate change to provide rate comparison data concerning the impact of the change.⁵⁷ Connecticut Parties argue that the data provided pursuant to these regulations are necessary to allow interested parties to scrutinize Power Connecticut’s rates in the hearing established by the January 14 Order.

43. **Commission Conclusion.** The Commission denies Connecticut Parties’ rehearing request in this regard. In the *January 14 Order*, we denied a request to suspend Power Connecticut’s market-based rate authority. As we did there, we note here that Power Connecticut is still operating under its market-based rate authority. The Commission stated in the *January 14 Order* that article 3.1.2 of the RMR Agreements provides that any revenues related to the RMR units will be offset against the reliability payments in the RMR Agreements; as a result, Power Connecticut may still use its market-based rate authority to obtain revenues in the markets that would then be credited against the reliability payments. In fact, Power Connecticut is required under the terms of the RMR Agreements to submit stipulated bids, which if selected will generate offsetting revenues. Furthermore, under the RMR Agreements, Power Connecticut must submit bids at the Stipulated Bid Costs. As a result, it cannot adjust its bids to exercise market power, satisfying any market power concerns that might exist.

44. Furthermore, the Commission is not persuaded that parties at the hearing established in the *January 14 Order*, including Connecticut Parties, will not be able to adequately scrutinize the proposed rates in the RMR Agreements without imposing the reporting requirements from which Power Connecticut is exempt. The parties to that hearing will have the full spectrum of discovery rights afforded litigants in hearings held before an Administrative Law Judge at the Commission. Utilizing those discovery tools, Connecticut Parties and others should be able to obtain the facts necessary to analyze Power Connecticut’s proposed rates during the course of the hearing.

⁵⁶ Request for Rehearing of Connecticut Parties at 24, *citing* Power Connecticut’s November 17, 2004 filing at 12.

⁵⁷ Specifically, Connecticut Parties point to 18 C.F.R. § 35.13 (2004) and 18 C.F.R. parts 41, 101 and 141 (2004).

J. Clarification of “Good Utility Practice”

45. Connecticut Parties request clarification of the Commission’s acceptance in the *January 14 Order* of the substitution of the term “Accepted Electric Industry Practice” for “Good Utility Practice” in the RMR Agreements. They ask that the Commission clarify that Power Connecticut will be obligated under the RMR Agreements to follow Good Utility Practice and use the payments it receives from the contracts to maintain the units so that they are available when needed.

46. **Commission Conclusion.** In the *January 14 Order*, the Commission accepted the substitution of “Accepted Electric Industry Practice” for “Good Utility Practice” in the RMR Agreements because those terms, as defined in Market Rule 1, appear to be synonymous.⁵⁸ We clarify that while we allowed for the substitution of the term “Good Utility Practice” in the RMR Agreements, we expect that Power Connecticut, in operating according to “Accepted Electric Industry Practice,” will also continue to follow “Good Utility Practice,” given that the terms are synonymous. Additionally, the Commission expects (as it would with any jurisdictional transaction) that Power Connecticut will perform under the RMR Agreements according to Good Utility Practice, and will appropriately apply the reliability payments it receives under the contracts to ensure that the subject units continue to be available to maintain reliability in the region.

K. Waiver of Notice

47. Power Connecticut requests rehearing of the Commission’s denial, in the *January 14 Order*, of its request for waiver of the 60-day notice requirement of section 205 of the FPA and section 35.3 of the Commission’s regulations. Power Connecticut argues that good cause exists to grant waiver because under Market Rule 1, section 3.3, governing RMR agreements, it could not file the proposed agreements in August 2004, or any point thereafter, until it received a determination of need from ISO-NE and negotiated the terms of the agreements. Power Connecticut states that after receiving confirmation from ISO-NE on August 31, 2004 that its facilities were needed for reliability purposes, negotiation of the RMR Agreements and internal review of the agreements by ISO-NE commenced. According to Power Connecticut, it and ISO-NE then exchanged drafts and information, up until as late as November 17, 2004. Power Connecticut states that it received ISO-NE’s letter expressing its willingness to execute

⁵⁸ *January 14 Order* at P 59.

the RMR Agreements on November 17, and filed the contracts the same day with a requested effective date of November 18, 2004. As a result, Power Connecticut argues that as “only one of the parties to a bilateral contract,” it could not alone control the progression of negotiating the RMR Agreements, and was “innocent of any delay.”⁵⁹

48. Power Connecticut also argues that its situation is similar to that presented in *Mirant Kendall LLC*, where the Commission found good cause to waive the 60-day notice requirement for RMR agreements where the filing was intended to allow a generator needed for reliability to continue operation, and where the applicant might not have been able to file 60 days prior to the commencement of service. Power Connecticut asserts that like the generator in *Mirant Kendall LLC*, it could not file the RMR Agreements until it received necessary approvals from ISO-NE. Furthermore, Power Connecticut asserts that by filing the agreements prior to the commencement of service, it satisfied the Commission’s standard for waiver of prior notice for new service.⁶⁰ Finally, Power Connecticut argues that the Commission’s orders in *Devon Power LLC* require that its waiver request be granted, because in those cases the Commission found that the current markets rules are not producing just and reasonable rates and that generators such as Power Connecticut may file for compensatory rates.⁶¹

49. **Commission Conclusion.** We grant rehearing and find that good cause exists to grant waiver.⁶² In the *January 14 Order*, the Commission denied Power Connecticut’s waiver request out of concern over the unexplained elapse of time between the August 2004 determination by ISO-NE that the units were necessary for reliability, and the November 17, 2004 filing of the RMR Agreements.⁶³ Furthermore, as we stated in that order, Power Connecticut had only justified its request for waiver on the basis of the lack of adequate cost recovery under the current rules.⁶⁴ Power Connecticut’s subsequent discussion of the process leading up to the filing of the RMR Agreements has adequately

⁵⁹ Rehearing Request of Power Connecticut at 3-4.

⁶⁰ *Id.* at 5, citing *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, *reh’g denied*, 61 FERC ¶ 61,089 (1992).

⁶¹ *Id.* at 6, citing *Devon Power LLC*, 107 FERC ¶ 61,240, *order on reh’g*, 109 FERC ¶ 61,154. (2004).

⁶² See *Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 (2003).

⁶³ *January 14 Order* at P 67.

⁶⁴ *Id.*

explained why it could not file the contracts with 60 days notice. The procedures in Market Rule 1 followed by Power Connecticut and ISO-NE to negotiate the RMR Agreements, which are on file with the Commission in Market Rule 1, prevented Power Connecticut from filing the agreements with 60 days notice. Furthermore, the purpose of the RMR Agreements is to remedy Power Connecticut's lack of adequate cost recovery for certain units, to ensure that those units remain available for reliability needs. Additionally, we note that the Commission has recently granted waiver under similar circumstances in *Milford Power Company, LLC*.⁶⁵ The RMR Agreements will thus become effective on November 18, 2004, as requested.

The Commission orders:

(A) The requests for rehearing and clarification filed in this proceeding are hereby granted in part and denied in part, as discussed in the body of this order.

(B) The RMR Agreements filed in this proceeding are hereby revised to become effective November 18, 2004, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁶⁵ 110 FERC ¶ 61,299 at P 25.