

110 FERC ¶61,299  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Milford Power Company, LLC

Docket No. ER05-163-000

ORDER CONDITIONALLY ACCEPTING RELIABILITY MUST RUN AGREEMENT  
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 22, 2005)

1. On November 1, 2004, Milford Power Company, LLC (Milford) filed an unexecuted Reliability Must Run Agreement (RMR Agreement) between Milford and the Independent System Operator New England, Inc. (ISO-NE), for Milford's generation facility (Milford Station) located in Milford, Connecticut. In this order, we conditionally accept and suspend for a nominal period the RMR Agreement, make it effective subject to refund, and establish hearing and settlement judge procedures. We also direct Milford to submit a compliance filing. This order benefits customers by ensuring that generating units needed for grid reliability will continue to operate.

**I. Background**

2. In several orders issued in 2003, the Commission began addressing issues surrounding the sufficiency of New England's capacity markets and the use of RMR agreements in constrained areas of the region, particularly Southwest Connecticut. The Commission rejected several RMR agreements in these orders, expressing concerns about the effect such contracts have on the competitive market for capacity.<sup>1</sup> As an interim measure to address certain flaws in the New England capacity market, the Commission directed ISO-NE to institute revised bidding rules (called Peaking Unit Safe Harbor, or PUSH, bidding) to give low-capacity factor generating units operating in designated congestion areas the opportunity to recover their costs through the market.<sup>2</sup> Additionally,

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<sup>1</sup> See, e.g., *Devon Power LLC*, 102 FERC ¶ 61,314 (*Devon I*) and *Devon Power LLC*, 103 FERC ¶ 61,082 (*Devon II*), *reh'g granted in part and denied in part*, 104 FERC ¶ 61,123 (2003) (*Devon III*); *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,085, *reh'g granted in part and denied in part*, 105 FERC ¶ 61,324 (2003) (*PPL Wallingford*).

<sup>2</sup> *Devon II* at P 33; *Devon III* at P 25-31.

the Commission directed ISO-NE to develop and file by March 1, 2004 a permanent mechanism to implement a location-based or deliverability requirement in the installed capacity (ICAP) or resource adequacy market, so that capacity located in designated congestion areas would be appropriately compensated for reliability.<sup>3</sup>

3. In response to the Commission's directive, ISO-NE filed a proposed locational ICAP (LICAP) mechanism for implementation by June 1, 2004. As proposed, the LICAP mechanism would have added a locational element to the ICAP markets by establishing four regions with separate ICAP requirements and prices:<sup>4</sup> Maine, Connecticut, Northeast Massachusetts/Boston, and the remainder of New England. Under this proposal, capacity transfer limits would have been established to limit the amount of capacity that a load serving entity could procure from outside its region to meet its capacity obligation. In an order issued on June 2, 2004, the Commission found that, while the proposal was conceptually sound, additional revisions were necessary prior to its implementation and delayed implementation of LICAP until January 1, 2006.<sup>5</sup>

4. In 2004 and early 2005, the Commission accepted several RMR agreements and conditioned them to terminate on the day a location-based capacity or deliverability requirement is implemented pursuant to the Commission's earlier directives.<sup>6</sup> The Commission reasoned that accepting the RMR agreements for a limited term was appropriate, given that the units covered by the contracts were aging, low capacity factor units that were performing poorly under the PUSH bidding rules.<sup>7</sup> The Commission expressed confidence, however, that, once a permanent location-based capacity or deliverability requirement is established in New England, out-of-market arrangements, like RMR agreements, would no longer be necessary to maintain reliability.<sup>8</sup>

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<sup>3</sup> *Devon II* at P 37.

<sup>4</sup> ICAP obligations are imposed on load serving entities, requiring them to procure a specified amount of ICAP each month to ensure that there is sufficient capacity to supply system peak load under various contingencies.

<sup>5</sup> *Devon Power LLC*, 107 FERC ¶ 61,240 at P 1-2 (*Devon V*), order on reh'g, 109 FERC ¶ 61,154 (2004) (*Devon VI*), reh'g pending.

<sup>6</sup> *Devon Power LLC*, 106 FERC ¶ 61,264 (2004) (*Devon IV*), reh'g pending.

<sup>7</sup> *Id.* at P 18.

<sup>8</sup> *Id.* at P 28.

## II. Proposed RMR Agreement

5. Milford requests RMR treatment for Milford Station, a new, efficient two-unit combined cycle generation facility that operates at a relatively high capacity factor. Milford states that its units have a cumulative capacity of about 555 MW. Milford Unit 1 became commercial in February 2004 and Unit 2 became commercial in May 2004. Milford Station, located in Southwest Connecticut, shares use of a substation with two deactivated units, Devon 7 and 8. Devon 7 and 8 formerly provided reliability services under an RMR agreement with ISO-NE.

6. Milford requests approval of the as-yet unexecuted RMR Agreement to permit the Milford facility to continue providing reliability services, as Milford states that it is experiencing a "substantial revenue shortfall" from sales at market prices.<sup>9</sup> Milford maintains that the RMR Agreement is necessary for these units pending the implementation of a Commission-approved LICAP market design. Further, Milford notes that, if ISO-NE determines that a facility which has not petitioned to shut down under section 18.4 of the Restated New England Power Pool (NEPOOL) Agreement (RNA) is required for reliability, ISO-NE may undertake the necessary financial arrangements to ensure that the facility will remain available.<sup>10</sup> Thus, Milford states that, following formal notification by ISO-NE in August 2004 that both Milford units were needed for reliability, it negotiated the as-yet unexecuted RMR Agreement with ISO-NE. Milford maintains that the RMR Agreement is, with limited exceptions that reflect the specific circumstances of the Milford units, substantially similar to the form of the Cost-of-Service Agreement attached as Exhibit 4 to ISO-NE's Market Rule 1 (*Pro Forma* COS Agreement).

7. As proposed in this unexecuted RMR Agreement, in return for the reliability services provided by the two Milford units, Milford will receive its fixed costs for the Milford units through the ISO-NE monthly settlement process. Also, Milford will bid energy and ancillary services from the Milford units into the NEPOOL markets based on the characteristics of the units and using Stipulated Bid Costs as formulated in the RMR Agreement. Milford proposes a rate methodology to derive the Milford units' Annual Fixed Revenue Requirement which is translated into a monthly fixed cost charge. The proposed method credits certain revenues against the monthly fixed cost charge. These revenues include: (1) revenues resulting from clearing prices in excess of the Milford units' Stipulated Bid Costs; (2) ICAP revenues; and (3) other revenues from the Milford units. Milford also states that these units will be subject to reductions in the Monthly Fixed-Cost Charge for unavailability and to penalties for failure to comply with dispatch instructions.

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<sup>9</sup> Transmittal Letter at 4-5.

<sup>10</sup> See Market Rule 1, Appendix A, Exhibit 2, section 3.3.1(a).

8. A deficiency letter issued on December 22, 2004 requested, among other things, clarification of cost information and losses sustained in the market and the effect of LICAP implementation on Milford's cost recovery. In response to the deficiency letter, Milford made a supplemental filing on January 21, 2005.

9. Milford requests an effective date of November 2, 2004.

### **III. Notice of Filing, Interventions, Comments and Protests**

10. Notice of Milford's filing was published in the *Federal Register*, 69 Fed. Reg. 67,340 (2004), with interventions and protests due on or before November 22, 2004. Notice of the supplemental filing was published in the *Federal Register*, 70 Fed. Reg. 5,991 (2005), with interventions and protests due on or before February 11, 2005.

11. Timely motions to intervene, with no substantive comments were filed by: Mirant Americas Energy Marketing, LP, Mirant Canal, LLC, and Mirant Kendall, LLC; PSEG Energy Resources and Trade, LLC; PPL EnergyPlus, LLC and PPL Wallingford Energy LLC; Dominion Energy Marketing, Inc.; Select Energy, Inc.; and Bridgeport Energy LLC.

12. ISO-NE, Connecticut Light and Power Company (CL&P), United Illuminating Company (United Illuminating), NEPOOL Participants Committee (NEPOOL Committee), NRG Power Marketing, Inc., Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and Somerset Power LLC (collectively, NRG), the Connecticut Office of Consumer Counsel (CT OCC), the Connecticut Municipal Electric Energy Cooperative (CMEEC) and the Attorney General for the State of Connecticut (CTAG) filed timely interventions and protests or comments. Various protestors requested a stay of the proceedings, an evidentiary hearing, or rejection of the filing.

13. The Connecticut Department of Public Utility Control (CT DPUC) filed a notice of intervention, motion to reject, protest and motion to consolidate. NSTAR Electric and Gas Corporation (NSTAR) filed a motion to intervene out-of-time that has not been opposed.

14. CT DPUC, CT OCC, and CTAG (collectively, Connecticut Parties) and CMEEC filed timely supplemental protests.

15. On December 7, 2004 Milford and ISO-NE filed answers (December 7 Answers) to the protests. On February 28, 2005, Milford and ISO-NE filed answers (February 28 Answers) to the supplemental protests.

#### IV. Discussion

##### A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of the proceeding, the lack of undue prejudice or delay and the party's interest, we find good cause to grant, under Rule 214, NSTAR's unopposed, untimely motion to intervene in this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the December 7 Answers and ISO-NE's February 28 Answer because they have provided information that assisted us in our decision-making process. We are not persuaded to accept Milford's February 28 Answer and will therefore reject it because it repeats arguments previously made.

##### B. Hearing and Settlement Judge Procedures, Waiver of Prior Notice, Suspension Period and Motion to Consolidate

18. Milford requests that the Commission accept its proposed RMR Agreement and grant waiver of the 60-day prior notice requirement to permit a November 2, 2004 effective date. Milford states that good cause exists for the Commission to grant waiver because: (1) Milford filed its proposed tariff prior to commencement of service; (2) it was unable to file 60 days prior to the commencement of service due to ongoing negotiations with ISO-NE; and (3) Milford is not receiving just and reasonable compensation under the current ISO-NE market structure. Also, Milford argues factors present in its case that it states were present in the Commission's recent grant of waiver of prior notice in *Mirant Kendal, LLC and Mirant Americas, L.P.*<sup>11</sup> Finally, in its supplemental filing, Milford argues that waiver of prior notice and allowing the original requested effective date is consistent with Commission policy where a filing is amended in a good faith attempt to cure a deficiency.<sup>12</sup>

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<sup>11</sup> 109 FERC ¶ 61,227 at P 15 (2004) (*Mirant Kendall*), *reh'g denied*, 110 FERC ¶ 61,272 (2005).

<sup>12</sup> Milford cites *Michigan Electric Transmission Co.*, 97 FERC ¶ 61,185 at 61,847 (2001), and *Duke Power Co.*, 81 FERC ¶ 61,010 at 61,048 (1997).

### Comments

19. CMEEC and the Connecticut Parties argue that the requested waiver should be denied because the original Milford filing was patently deficient as demonstrated by Milford's 247-page supplemental filing. CMEEC states that Milford's November 2004 filing was incomplete and untimely. Connecticut Parties state that every aspect of the denial of waiver in *PSEG Power Connecticut, LLC*,<sup>13</sup> is applicable to Milford, including the fact that Milford was notified by ISO-NE of the necessity of its units for reliability in August 2004, but did not file the instant RMR Agreement until November 2004.

20. Connecticut Parties further argue that Milford's supplemental filing is deficient and should not trigger a filing date under FPA section 205. Connecticut Parties contend that, should the Commission accept the supplemental filing, the filing date can be no earlier than January 21, 2005.

21. CT DPUC, CMEEC, and CTAG argue that the Commission should reject Milford's filing or alternately suspend the proposed rates for the full five-month statutory period, set the rates for hearing, and consolidate the Milford proceeding with all pending and prospective RMR and Reliability Agreement proceedings before a single presiding judge. In support of suspension of the rates, CT DPUC states that the proposed rates would impose excessive costs on ratepayers that are more than ten percent above the just and reasonable rates. CT DPUC asserts that the best measure of just and reasonable rates for the reliability service provided by Milford is the cost of the RMR agreement for certain Devon units that were deactivated when the Milford units started commercial operation.<sup>14</sup> The CT DPUC and CMEEC state that the proposed RMR Agreement rates are more than double the charges for the reliability service that ISO-NE purchased from the Devon units. In support of the motion to consolidate, CTAG and CT DPUC state that such action would ensure that these agreements are evaluated in the context of burgeoning out-of-market payments with an examination of the cumulative impact on the ISO-NE market of multiple RMR applications.

22. Milford and ISO-NE oppose consolidation. They aver that this proceeding involves different owners and assets than other proposed agreements and unit-specific rates. Thus, they argue, Milford's RMR Agreement and other pending and future agreements do not involve common issues of law and fact. Furthermore, Milford and ISO-NE state that consolidation of proceedings would lead to delay in the resolution of discrete issues in the instant proceeding.

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<sup>13</sup> 110 FERC ¶ 61,020 (2004) (*PSEG*), *reh'g pending*.

<sup>14</sup> The RMR Agreements for Devon 7 and 8 provided for annual payments for both units (with aggregate capacity of 214 MW) of \$15.6 million, a rate of \$6.09 per KW-month.

### Commission Determination

23. In *West Texas Utilities Company*,<sup>15</sup> we explained our standard for determining whether a rate increase is excessive as compared to the rate on file and thus may require maximum suspension. Recently, in both *Mirant Kendall* and *PSEG*, we stated that *West Texas* was not applicable where the current rate on file for the RMR units was not a cost of service rate, but rather was a market-based rate.<sup>16</sup> Consistent with these findings, since Milford's current rate on file for these units is not a cost of service rate, but rather is a market-based rate, we find that *West Texas* is not applicable here. Furthermore, we find that CT DPUC's argument, that the Commission must compare the proposed rates with the former rates for Devon 7 and 8 to determine whether the proposed rates are excessive, is misplaced. We find that the Devon units are not the same units and are not even comparable to Milford in that they did not provide identical reliability service or the same amount of capacity as the Milford units. Accordingly, we will conditionally accept the proposed RMR Agreement for filing, suspend it for a nominal period, make it effective subject to refund, and set it for hearing and settlement judge procedures.

24. To provide the parties an opportunity to resolve these matters among themselves, 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.<sup>17</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>18</sup> 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 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.

25. The Commission has granted waiver for good cause in circumstances where: (1) agreements are intended to permit a generator needed to assure system reliability to operate; (2) the applicant may only learn upon short notice which units will be RMR units; and (3) the applicant may not be able to file 60 days prior to the commencement of

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<sup>15</sup> 18 FERC ¶ 61,189 (1982) (*West Texas*).

<sup>16</sup> *Mirant Kendall* at P 16; *PSEG* at P 68.

<sup>17</sup> 18 C.F.R. § 385.603 (2004).

<sup>18</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone a (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their backgrounds and experience. ([www.ferc.gov](http://www.ferc.gov) –click on Office of Administrative Law Judges).

service due to short notice.<sup>19</sup> This unexecuted agreement is the outcome of negotiations for reliability services between Milford and ISO-NE in which ISO NE has determined that these units are required for reliability. We find good cause to grant waiver in this instance. First, this agreement is intended to assure Milford's operation for reliability purposes as a reliability must run generator. Second, we note that Milford could not file the RMR agreement until it had received the proper approvals from ISO-NE and completed negotiations of the RMR agreement, pursuant to Market Rule 1.<sup>20</sup> Thus, we find that Milford could not file the proposed RMR Agreement at least 60 days in advance of the commencement of the RMR service, as parties indicate. Milford filed its proposed RMR Agreement on the same day that it received the prerequisite confirmation to file the agreement.

26. CMEEEC's argument that the size of the deficiency response should be the basis for denial of waiver is unconvincing. Further, Connecticut Parties' argument from their supplemental protest that waiver should be denied based upon the same arguments as *PSEG* is flawed. *PSEG* was denied waiver because in its filing it failed to present justification for waiver other than the lack of adequate cost recovery for its units. Also, in *PSEG*, Power Connecticut neglected to justify the three month lag between the notification of the reliability need from ISO-NE and its filing.

27. We will not grant the motions for consolidation of CTAG and CT DPUC. The Commission's standards for consolidation are not met here as there are few common issues of law and fact, because each RMR agreement presented to the Commission will be filed under unique circumstances, and each proposed RMR unit will present different costs of service. Additionally, consolidating the instant docket with currently pending and future RMR cases would not serve the goal of efficiency because the currently-pending RMR cases are on different time schedules, and it is unclear if or when additional RMR contracts will be filed with the Commission.

### C. Need for the RMR Agreement

28. As justification for seeking an RMR Agreement for its units, Milford argues that its units are needed for reliability and it is unable to recover its costs in the market. Milford states that ISO-NE issued a formal determination of the need for reliability services from the Milford units, resulting in Milford's application for an RMR Agreement under NEPOOL's Market Rule 1. Milford points to the flawed marketplace in Southwest Connecticut, with its "chronic undersupply of generation," "absence of price signals" to

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<sup>19</sup> See *Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 (2003), *reh'g pending*.

<sup>20</sup> It was not until November 1, 2004, that negotiations were completed, and Milford received the necessary confirmations from ISO-NE to file the RMR Agreement with this Commission.

new generators needed in the market, and inability of generators to recover their costs.<sup>21</sup> Milford adds that the absence of a LICAP mechanism in ISO-NE is one factor that has led to inadequate compensation for reliability services provided by Milford. Milford states that despite siting its facility in the right location, a load pocket where additional generation capacity is needed, it is still unable to recover its fixed costs.

29. Milford states that in *Devon II*, the Commission recognized the inadequate compensation problem when it authorized the use of two compensation mechanisms, PUSH bidding and RMR agreements, until a LICAP mechanism is in place. Milford states that it is an appropriate candidate for an RMR agreement because its units are required for reliability, but are unable to recover sufficient revenues in the marketplace to justify continued operation. In its initial filing, Milford asserts that from commencement of operations through September 30, 2004, it has experienced a revenue shortfall of \$33.8 million;<sup>22</sup> Milford states that it earned a total revenue net of variable costs of \$10.4 million for that period.<sup>23</sup> Milford concludes that it does not expect to receive adequate revenues from the market to recover the cost of continued operation of the Milford units.<sup>24</sup>

30. While Milford acknowledges that it is a unique RMR applicant because its facility consists of new, efficient, combined-cycle units that operate at a relatively high capacity factor, Milford states that the design and age of the units is "completely irrelevant" to the issue of whether the current capacity market in Southwest Connecticut is flawed. Milford argues that it meets the Commission's criterion for designation as RMR generators, as established in *PSEG, i.e.*, that its generators do not "have an opportunity to recover an adequate amount of fixed costs through the energy, reserves, or capacity markets."<sup>25</sup> Milford argues that it is inadequately compensated through the market even though: (1) it bids its units at marginal cost to maximize dispatch and to earn available market revenues, and has captured a high percentage of those revenues; (2) Milford's capacity and availability factors compare favorably with other new units; and (3) the installed capacity costs for its units is similar to comparable units built in the last seven years. Milford states that it earned less than \$0.05 per kW-month in 2004 in the current capacity

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<sup>21</sup> Transmittal Letter at 3.

<sup>22</sup> Attachment D at 2.

<sup>23</sup> Milford states that this \$10.4 million was derived by taking the gross revenues from this period (\$77.9 million) and subtracting the variable fuel costs (\$64.8 million) and variable O&M expenses (\$2.7 million), leaving a total revenue net of variable costs equal to \$10.4 million. Attachment D at 2.

<sup>24</sup> Attachment D at 2.

<sup>25</sup> Supplemental Filing at 3.

market.<sup>26</sup> By contrast, Milford states that each dollar of capacity paid per kW-month under a LICAP mechanism would provide Milford with \$5.7 million per year of income.<sup>27</sup> Milford states that it will not recover its cost-of-service unless capacity revenues exceed \$8.00 per kW-month.<sup>28</sup> Milford states that its units are receiving less than 0.1 percent of fixed costs through the existing ICAP market and thus Milford's current revenues are insufficient to recover its operation and maintenance (O&M) expenses, pay depreciation, pay debt service, or provide for any return.<sup>29</sup> Milford requests acceptance of the proposed RMR Agreement to ensure that its units remain available for reliability service in Southwest Connecticut.

### **Comments**

#### **1. Milford's qualifications for an RMR Agreement**

31. CTAG, CT DPUC, CMEEC, NRG and CT OCC urge the Commission to reject the RMR Agreement. CTAG and CMEEC contend that Commission acceptance of the RMR Agreement would violate Commission precedent holding that RMR agreements are to be invoked only as a remedy of last resort. CTAG states that the Commission should approve RMR agreements only in unique circumstances where older and inefficient facilities are unable to compete in the competitive marketplace.

32. CTAG notes that if Milford qualifies for RMR treatment, then all generators would qualify. CMEEC states that the approval of Milford's RMR Agreement would leave the Commission without a basis for disallowing or limiting the permissible scope of RMR contracts, either before or after LICAP implementation. CMEEC argues that the Commission should not rely on the future implementation of the LICAP mechanism to end the need for RMR agreements because generators who are unhappy with their compensation could still obtain RMR contracts after LICAP is implemented. Similarly, CL&P, CTAG and CMEEC argue that approval of the proposed RMR Agreement would signal the end of the competitive wholesale marketplace in New England; replacing it with cost-of-service regulation and a proliferation of RMR agreements. CTAG and CMEEC argue that, to remain competitive in a market where some generators are under RMR agreements, the remaining generators will also seek RMR agreements. CTAG and

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 10.

<sup>28</sup> *Id.*

<sup>29</sup> Milford cites *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) as support that the present rates are insufficient to "enable the company to operate successfully, maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed."

CMEEC point to the proliferation of filings proposing RMR treatment, currently accounting for about half of the capacity in Southwest Connecticut, as further evidence of this trend.

33. CMEEC further states that the Commission recently rejected a proposed RMR contract for PPL Wallingford Energy LLC on the basis that new, efficient units built to compete in restructured markets do not have a right to cost-of-service recovery from ratepayers. CMEEC notes that the PUSH mechanism and the LICAP mechanism were both created to address fair compensation for generators while avoiding the use of RMR agreements. CT OCC argues that Milford should employ PUSH bidding to recover its costs instead of seeking an RMR agreement.

## **2. Least Cost Alternative**

34. CTAG, CT DPUC, CMEEC, and NRG urge rejection of the RMR Agreement at issue here because, as compared with the former RMR agreement for NRG's Devon 7 and 8, the proposed rates are not just and reasonable. CTAG argues that ISO-NE is responsible for reviewing the proposed cost of RMR agreements and should have selected the least cost RMR option to meet reliability needs, here the Devon units. CT DPUC states that the Devon RMR agreement costs approximately \$15.6 million annually while the proposed RMR Agreement will cost \$81.6 million annually. CT DPUC states that neither Milford nor ISO-NE has provided justification for the four-fold cost increase. CMEEC states that because Milford failed to file an application for retirement or deactivation under section 18.4 of RNA, the current process of peer review of critical information was bypassed. NRG requests that the Commission reject the proposed RMR Agreement because it is not the least cost solution, and instead require ISO-NE to renew the prior RMR agreement with Devon 7 and 8 at the rate of \$6.09 per kW-month, rather than the \$12.28 per kW-month in Milford's proposed RMR Agreement.

## **3. Initial Months of Operation Not a Justification**

35. CT OCC, CT DPUC and CL&P state that the incurred costs from Milford's initial months of operation are not an accurate indicator of future revenue shortfalls, and thus do not provide a basis for the RMR Agreement. In support of this position, CT DPUC notes that since no basis is provided for Milford's claimed fixed cost charges, it is not possible to tell whether these are typical fixed costs or a result of abnormal start-up costs. CT DPUC also states that Milford's plan to sell the entire facility as an operational business, disproves its showing of need for the RMR Agreement. CL&P notes that expected poor early operational performance is the root cause for Milford's under recovery.

## **Supplemental Comments**

36. CMEEC and Connecticut Parties argue that the Commission reaffirmed in *PSEG* that RMR agreements serve a limited role of keeping certain units in service when ISO-NE has determined that they are needed for reliability. CMEEC and Connecticut

Parties state that, since Milford does not assert that the Milford units will cease operations due to insufficient revenues, Milford's supplemental filing fails to justify the requested RMR treatment as required to keep the units in service. Additionally, CMEEC and Connecticut Parties argue that Milford meets none of the *PSEG* criteria of age, frequent mitigation, and overall lack of ability for the units to have a fair opportunity to recover fixed costs, that justifies an RMR agreement. Further, Connecticut Parties add that Milford's continued operation during a period of alleged staggering losses and its plans to increase the capacity of one of its units belie Milford's asserted need for the RMR Agreement.

37. Connecticut Parties add that Milford's losses are inflated and fail to show that the market has not provided Milford with a fair opportunity to recover its costs. As support for this assertion, Connecticut Parties state that: (1) Milford has not shown in its supplemental filing that its limited experience is representative; (2) Milford's losses are based on its backward extrapolation of projected 2005 costs and not on actual 2004 costs; and (3) Milford includes inappropriate costs in its loss calculation including income taxes and return on rate base. Also, according to Connecticut Parties, Milford has failed to evaluate in its supplemental filing whether an RMR agreement limited to the summer months of 2005 would satisfy projected capacity deficits in Southwest Connecticut at materially lower costs than the proposed agreement.

### **Answer**

38. In its February 28 Answer, ISO-NE states that the Regional Transmission Expansion Plan determined that, without the Milford units, Southwest Connecticut would be over 470 MW short of capacity for 2005. ISO-NE adds that its publicly available analysis clearly shows that the Milford units are essential resources for Southwest Connecticut until Phase I transmission upgrades are in service in 2006. ISO-NE notes that the Connecticut Parties have an opportunity to participate in the stakeholder process if they seek to question individual reliability determinations of ISO-NE. Finally, ISO-NE states that, under section 18.4 of the RNA, no application to shut down a generator is required in order to negotiate an RMR agreement.

### **Commission Determination**

39. As noted above, the Commission will conditionally accept the RMR Agreement for filing, suspend it and make it effective subject to refund, and set it for hearing and settlement judge procedures. Also, as discussed in more detail below, we reject certain proposed components of the cost of service and require other modifications to the RMR Agreement.

40. Milford's proposed RMR Agreement presents a unique set of circumstances when compared with the previous applications for RMR agreements in New England. The Milford units are new, highly-efficient combined-cycle baseload units, that have never

been mitigated and have a relatively high capacity factor of approximately 70 percent.<sup>30</sup> By contrast, the RMR agreements we have accepted to date involved peaking units that were seldom run and frequently subject to mitigation under the current market rules. However, while we recognize these differences, we find that Milford's facility is similar to the current RMR facilities in two important respects: the facilities are needed for reliability in New England and the facility owners have not earned sufficient revenues in the market to keep the facility in operation.<sup>31</sup>

41. Protestors argue that, since Milford's units are receiving energy revenues from the market in excess of their marginal costs, Milford should not qualify for an RMR agreement. However, this argument fails to recognize that "the current situation in NEPOOL may not allow suppliers in [designated congestion areas] an adequate opportunity to recover their costs and that a location specific capacity requirement must be in place."<sup>32</sup> Milford and other similar generators in the market are currently providing reliability services without adequate compensation. However, once the LICAP mechanism, currently being addressed by the Commission, is implemented, capacity in New England will be more appropriately valued based on its location. This will allow generators, like Milford, to receive more appropriate, market-driven prices than they receive under the current market rules, and out-of-market contracts, set to expire with the start of the LICAP mechanism, will no longer be required.

42. We also will not second-guess the reliability determination of ISO-NE, the independent grid operator responsible for ensuring reliability in the region. While Milford has not stated that it will shut down its units without the RMR Agreement, the Commission has already found that, under the current market rules, submitting a request to deactivate pursuant to section 18.4 of the RNA is not a prerequisite for receiving an RMR contract.<sup>33</sup> With the reliability of the electric system in Southwest Connecticut at stake, the Commission believes that accepting and suspending the RMR Agreement, while establishing hearing and settlement judge procedures, is the most reasonable course of action.

43. Furthermore, the Commission will defer to ISO-NE's reliability determination in its selection of the Milford units over the older and lower capacity Devon 7 and 8 (units which were allowed to deactivate as the Milford facility came on-line). We note that

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<sup>30</sup> Supplemental Filing, Appendix A at 6-7.

<sup>31</sup> We note that, in 2004, Milford, after paying its variable fuel expenses, had insufficient revenue to pay the costs ordinarily necessary to keep a facility available, such as fixed O&M, Administrative and General (A&G), and taxes.

<sup>32</sup> *Devon II* at P 31.

<sup>33</sup> *Devon VI* at P 27.

each of the Milford units has a greater capacity than the Devon units combined, and that, according to ISO-NE, until Phase I of the Southwest Connecticut Reliability Transmission project is in service, there would be large capacity deficiencies without the Milford units. Thus, while several intervenors argue that an RMR agreement for the Devon units presents a less costly alternative, it is clear that the two facilities have differing characteristics, with the Devon units not meeting the region's reliability needs as fully as the Milford units. Any discussion of their relative costs is also irrelevant because the Devon units are not comparable substitutes to the Milford units in their unit characteristics, capacity, and reliability benefits.

44. In response to CT OCC's argument regarding the proposed use of the PUSH bidding mechanism for Milford to recover costs for 2005, we note that the PUSH bidding mechanism only applies to units with a capacity factor of 10 percent or less. Thus, a baseload facility like Milford's units with a capacity factor of approximately 70 percent will not be eligible for PUSH bidding.

#### **D. Cost of Service**

45. Milford proposes cost recovery for the term of the RMR Agreement pursuant to the *Pro Forma* COS Agreement.<sup>34</sup> Milford proposes a proxy capital structure of 50 percent debt and 50 percent equity and a return on common equity (ROE) of 10.88 percent, leading to an overall return on rate base of 8.7 percent. Milford calculates taxes based on 2004 conventions, fixed O&M based in part on existing third party contracts and NEPOOL Tariff rates, and depreciation based on a 20-year remaining life to derive a total annual fixed cost of \$81,622,636, which translates into a monthly fixed cost charge of \$6,801,886.<sup>35</sup>

46. Milford proposes stipulated bid cost recovery as calculated in accordance with section 3.2.9 of Exhibit 2 to Appendix A of Market Rule 1. Any excess revenues resulting from stipulated bids will offset the monthly fixed cost charge.

47. Milford has a suit pending against Alstom Power, Inc. (Alstom), its engineering, procurement and construction services provider, alleging that Alstom induced Milford to construct the plant, giving false representation of potential revenues, and thereby increased Milford's costs. Also, Milford received, as part of a partial settlement, a construction credit from Alstom toward increasing the capacity on one of Milford's units.

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<sup>34</sup> *Pro Forma* COS Agreement at §11.5.3.3.

<sup>35</sup> Exhibit No. ACH-3, Schedule 1 at 1.

48. As part of the Alstom settlement, Milford proposes a planned spring 2005 upgrade which will increase Unit 1's high operating limit from 267 MW to 288 MW and will permit the unit to burn fuel oil in addition to natural gas. As a result of this proposed upgrade, Milford states that Unit 1 will be unavailable for a 90-day period (90-day outage) during the term of the RMR Agreement.

### **Comments**

#### **i. Short Operations History and Insufficient Test Year**

49. Connecticut Parties and CMEEEC state that Milford's proposed RMR rates are unjust and unreasonable and should be set for hearing. Parties state that it is not surprising that Milford's costs might temporarily exceed its revenues due to its large capital investment and its short operating history (in full operations for only six months at the time of its original filing. Parties argue that these facts do not justify requiring retail ratepayers to provide cost-of-service support to Milford up front so that it may benefit from above-cost, market-based revenues in later years. Parties request that the Commission review new generating units' costs over a reasonable life cycle consistent with business decisions made in competitive markets and past RMR agreements.

50. The Connecticut Parties argue that five months (May-September 2004) of full operating cost experience is not an adequate basis to project 2005 test year costs nor can it produce a just and reasonable cost-of-service rate. The Connecticut Parties state that within this five-month period, monthly operating expenses varied significantly from month to month, from \$1.35 million to \$4.71 million, with variable operating expenses fluctuating even more, from \$34,000 to \$3.3 million. The Connecticut Parties contend that Milford's method of "annualizing" its existing costs (*i.e.*, multiplying costs over five months by 2.4 to get 'annual' costs) to derive the 2005 test year costs is inaccurate due to significant monthly fluctuations of costs.

#### **ii. Rate Design**

51. The Connecticut Parties argue that Milford should not be permitted to recover its purported \$351.5 million in actual development and construction costs in rate base; Connecticut Parties state Milford should recover only those costs necessary to maintain operations, or alternatively, the current book value resulting from the sale of the plant. The CT DPUC notes that Milford's \$633/kW costs are much higher than the average \$450-\$500/kW obtained from recent sales of generating facilities. The Connecticut Parties state that this discrepancy reflects either significant imprudence in the development and construction of plant, or a failure to account for adjustments in book value when the original owners defaulted on their loans and relinquished their collateral in the plant to the lenders. Connecticut Parties state that although Milford denies that a sale of the facilities is pending, there is a strong indication that the facilities are still on

the auction block, pending regulatory developments.<sup>36</sup> Connecticut Parties contend that Milford's costs of service should reflect a lower book cost of the plant due to acquisition discounts from sales. The Connecticut Parties and ISO-NE further contend that, if Milford's actual gross plant reflects costs related to defaults on its initial loan, then the Commission should lower Milford's gross plant costs of \$351.5 million. ISO-NE requests that this issue be set for hearing to determine the appropriate level of gross plant in rate base.

52. CTAG and CMEEC request that Milford's rates be set on a levelized basis. CMEEC asserts that the Commission has found in Order No. 2000 that "levelized rates are preferable in an RTO environment because all customers, regardless of when they take service, face the same price."<sup>37</sup> CMEEC states that setting short-term rates on a non-levelized basis runs the risk of significant over-recovery, because Milford could potentially operate under a levelized rate at a later date.

53. Connecticut Parties assert that the fundamental purpose of RMR agreements is to preserve reliability, not to guarantee a merchant generator full recovery of its sunk costs. Because of this, the Connecticut Parties and CTAG state that Milford should only be entitled to include either the marginal costs necessary to maintain operations or, at most, the book value of the facility after the ownership transfers or write-offs. CMEEC argues that, if the Commission accepts the proposed RMR Agreement, Milford should be limited to its actual and reasonable out-of-pocket costs incurred during the term of the agreement, such as fixed O&M and property tax expense. CMEEC argues that this treatment is consistent with the primary purpose of market competition, *i.e.*, to reward efficient suppliers and allow inefficient suppliers to exit the marketplace and, going forward, cost allocation approved in *PJM Interconnection, LLC*.<sup>38</sup>

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<sup>36</sup> Connecticut Parties cite Soma Biswas, *Auction Block: Jan. 31, 2005*.

<sup>37</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,193 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *appeal dismissed sub. nom. Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>38</sup> 110 FERC ¶ 61,053 at P 27, 30 (2005) (PJM Reliability Order) (The Commission defined going forward costs as those "costs that a generator must recover to stay in business for any appreciable period of time, such as fuel and variable costs such as labor, and the avoidable component of annual out-of-pocket direct costs."), *reh'g pending*.

**iii. Alstom Credits and 90-day outage**

54. The Connecticut Parties assert that Milford's ongoing litigation against Alstom raises serious questions about the propriety of Milford's incurred costs and that the construction credits stemming from settlement with Alstom should be included in Milford's cost of service.

55. Parties also protest Milford's request for compensation during the 90-day outage to complete gas turbine upgrades. Parties argue that the upgrades will accrue long term benefits to Milford's owners, with no long-term reliability benefit to customers, while Unit 1 will be unavailable to contribute to reliability for three months of the term of the RMR Agreement.

56. Connecticut Parties assert that Milford's RMR Agreement should reflect the long-term benefits that flow to Milford from the 90-day outage. To that end, the CT DPUC and Consumer Counsel argue that the stipulated target available hours for Unit 1 should be the same as for Unit 2 so as to prevent Connecticut customers from paying the full reliability payment for a unit that will be unavailable for 90 days. Connecticut Parties add that Milford should provide a monthly credit that offsets Alstom's invoices for O&M services.

**iv. Rate of Return**

57. ISO-NE and Connecticut Parties state that Milford's proposed proxy capital structure of 50 percent debt/ 50 percent equity is unreasonable, and its proposed 10.88 percent return on equity is unjustified. ISO-NE and Connecticut Parties assert that Milford's capital cost should reflect the realities of Milford's circumstances and should not be based on a hypothetical debt/equity ratio. Connecticut Parties state that the capital structure should reflect that Milford is a highly leveraged merchant generator. Connecticut Parties argue this is especially important where the generator temporarily accepts transitory cost-of-service regulation under an RMR agreement. The Connecticut Parties point out that the Commission developed the 10.88 percent ROE in the context of the PUSH mechanism, which is intrinsically riskier and with a higher return than the return that is assured under a cost-of-service RMR agreement. CMEEC asserts that Milford's capital costs such as return on investment should be partially offset by its market-related revenues, leaving a share of market-related revenues that would be applied against fixed costs.

58. In their supplemental protest, Connecticut Parties state that Milford's actual debt-equity ratio is approximately 70/30. They argue that the use of a proxy 50/50 capital structure and the Commission's proxy 10.88 percent ROE gives Milford a realized ROE of 13.65 percent.

v. **Miscellaneous**

59. United Illuminating asserts that all revenues from all other sources, including bilateral contracts, should be credited against the reliability rate to eliminate the potential for double recovery under the Reliability Agreement. CMEEC states that Milford's level of cash working capital is unreasonable in light of ISO-NE's weekly settlement of hourly market costs, approximately two weeks in arrears. Connecticut Parties state that Milford has assumed a combined weighted average capacity rating for both units of 553 MW, consisting of a 501 MW summer rating and a 576 MW winter rating, with winter given twice the weight of summer in the averaging. Connecticut Parties requests that the RMR Agreement reflect Milford's combined actual rating of 485 MW, as listed in ISO-NE's December 2004 Summer Seasonal Claimed Capability report. Connecticut Parties further argue that certain costs provided in Milford's supplemental filing contradict costs represented in Milford's initial work papers.

**Answers**

60. Milford answers that it has relied not only upon its actual 2004 costs to support 2005 costs, but also on known and verifiable contractual obligations with third party service providers for 2005.

61. In response to assertions that Milford's claimed gross plant of \$351.5 million is excessive, Milford states that it has used the original cost, and the Commission's regulations do not provide for a departure from original cost ratemaking when the ownership interests have changed but no sale of assets has occurred, as is the case with the Milford plant. Milford states that it used actual construction costs to determine the original cost of plant in service, and did not include delay costs or cost overruns, leading to a reduction of over \$110 million from the original cost of plant in service.

62. In its answer, Milford states that the 90-day outage increases the operating efficiency of the unit and includes a conversion to the unit to give it dual fuel capability. Milford states that these upgrades will be done during shoulder months and coordinated with ISO-NE so that it will not adversely impact reliability. Milford states that reducing its revenue requirement because of this outage will result in Milford not recovering its costs.

63. Milford argues that there is no evidence that a levelized rate methodology would result in sufficient revenues to ensure that the Milford units would remain available for reliability purposes. Milford points out that the Commission has previously rejected CMEEC's attempt to compel the use of a levelized rate for short-term reliability compensation issues.

64. Milford answers that the Commission's 10.88 percent proxy ROE is based upon a proxy group of utilities that are significantly less risky than a highly leveraged merchant generator such as Milford. Milford answers that, given that it is currently in default on its loans, its actual cost of debt would be much higher, resulting in a much higher pre-tax cost of capital of 9.94 percent, rather than the proposed pre-tax cost of capital of 8.74 percent using the proxy ROE of 10.88 percent. Milford points out that it does not issue publicly-traded stock and is not subject to traditional rate regulation and the Commission has historically accepted a 50/50 capital structure and proxy ROE in this circumstance.

65. Milford answers that its cash working capital allowance is appropriate given that its fixed costs are paid on a monthly basis, and then only after a significant time lag to allow netting of market revenues. Milford also points out that the Commission endorses the use of 1/8<sup>th</sup> of O&M for cash working capital.<sup>39</sup>

### **Commission Determination**

66. The Commission's preliminary analysis indicates that the proposed rate in the RMR Agreement has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, as noted elsewhere in this order, the Commission will conditionally accept the RMR Agreement, suspend it for a nominal period to be effective November 3, 2004, subject to refund and set it for hearing and settlement judge procedures.

67. While the hearing and settlement judge procedures established in this order should consider the entire cost of service, the Commission will rule summarily on certain other aspects of the RMR Agreement, and provide additional guidance for the ordered hearing, as discussed below.

68. With regard to the 90-day outage, RMR agreements are not intended to support voluntary economic upgrades. It is unclear from the proposal whether the upgrades resulting from this outage are economic in nature, or required to meet reliability needs under the RMR Agreement. If the upgrades resulting from the 90-day outage are required for reliability in some measure, it is not clear what portion of the upgrade is needed for reliability under the RMR Agreement. The parties should therefore address whether the upgrades are economic or required for reliability under the RMR contract, and if they are required for reliability, what share of the costs should be allocated to the RMR agreement.

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<sup>39</sup> Milford cites *Cash Working Capital for Electric Utilities*, 55 Fed. Reg. 42,584 at 32,528-29 (1990), and *Carolina Power & Light Company*, 6 FERC ¶ 61,154 at 61,245-46 (1979).

69. Further, we find that Milford has not justified the inclusion of Allowance for Funds Used During Construction (AFUDC) in its costs, nor has Milford provided the methodology in calculating its AFUDC amount. This plant was not built using ratepayer funds under a traditional cost of service approach, therefore we question whether it is reasonable to include AFUDC for merchant plants that are operating under short-term RMR agreements.<sup>40</sup> We therefore set this issue for hearing.

70. We accept Milford's cost of service approach as consistent with cost of service provisions of Market Rule 1.<sup>41</sup> 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.<sup>42</sup> We reject CMEEC's request to limit Milford's recovery under the RMR Agreement to its going forward costs since the market situation in ISO-NE is distinguishable from the situation in PJM. As stated above, the Commission has found that since ISO-NE's markets may not allow suppliers an adequate opportunity to recover their costs, a location-specific capacity requirement, namely a LICAP mechanism, must be instituted. Until the necessary LICAP mechanism is in place in New England, we have allowed short-term RMR agreements, like Milford's proposed RMR Agreement, that provide for recovery of fixed and variable costs.

71. The compensation and reliability situation in PJM is different. Specifically, the Commission found no evidence that the PJM markets fail to appropriately compensate generators during scarcity conditions.<sup>43</sup> Also, in order to receive an RMR agreement a generator in ISO-NE is not required to apply for deactivation under section 18.4 of the RNA, while in PJM a generator must apply to deactivate its unit in order to receive reliability compensation.<sup>44</sup> Finally, reliability compensation in PJM's market is not tied to modifications in PJM's market structure in the way that RMR agreements in ISO-NE are linked to changes to ISO-NE's market structure.

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<sup>40</sup> See generally, 18 C.F.R. Part 101, Electric Plant Instruction 3(17) (2004).

<sup>41</sup> See Market Rule 1, Appendix A, Exhibit 2, section 3.3.1.

<sup>42</sup> See *Mirant Kendall* at P 36; *PSEG* at P 30 .

<sup>43</sup> PJM Reliability Order at P 161.

<sup>44</sup> A unit in PJM that is needed for reliability reasons will be compensated in one of two ways. 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. A generation owner that files with the Commission is ineligible for Deactivation Avoidable Cost Credits because it has filed a specific rate to recover its costs.

**i. Rate of Return**

72. We found in *Devon IV* that a 10.88 percent ROE is a conservative proxy for merchant generating facilities.<sup>45</sup> The Commission's analysis performed to justify this ROE, using the midpoint of the zone of reasonableness, did not include any increases to ROE based on high company risks, such as default on loans. The Commission further used a proxy group of five large, integrated, publicly-traded utilities in determining this proxy ROE, rather than a group of proxy merchant generators.<sup>46</sup> We have historically justified the use of a proxy rate of return on common equity in this circumstance,<sup>47</sup> and will continue to do so.

73. However, if the hearing and settlement proceedings should determine there is merit in the protesters' position that there is an actual debt/equity ratio that can be substantiated, this is preferred over a proxy capital structure. We therefore include in the hearing and settlement judge procedures the proposed 50/50 proxy capital structure.

**ii. Miscellaneous Issues**

74. Milford is under a third party contract with Merrill Lynch in which Merrill Lynch purchases gas for use in these generating units, and any excess gas not used is marketed by Merrill Lynch in the NEPOOL market. We find that Milford must credit all revenues from other sources, such as this, to its monthly fixed costs.

75. Considering Milford's short operational history, the possibility of third party revenues offsetting fixed costs, and the potential for these projected costs and possible third party revenues to fluctuate significantly during the term of the RMR agreement, approval of this agreement is contingent upon Milford filing monthly reports with ISO-NE and affected customers. The reports should reflect monthly costs by category and all monthly revenues, such as third-party revenues from gas sales and stipulated bid revenues applied to the fixed cost, credited to those costs by category.

**E. Proposed Deviations from the Pro Forma Cost of Service Agreement**

76. Milford's proposed RMR Agreement contains certain provisions which differ from the *Pro Forma* COS Agreement contained in NEPOOL Market Rule 1. Under the proposed article 2.1, the agreement will expire, consistent with Commission direction, on the day that a LICAP mechanism applicable to the Milford units becomes effective,

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<sup>45</sup> *Devon IV* at P 23.

<sup>46</sup> See *Devon Power LLC*, 103 FERC ¶ 61,155 at P 3 (2003).

<sup>47</sup> *Devon III* at P 49, *PSEG* at P 45.

rather than on a specific date. Also, under the proposed agreement, if ISO-NE determines that a Milford unit is no longer needed for reliability, ISO-NE may terminate the RMR Agreement with respect to such unit upon 120 days' written notice to Milford. Article 3.1.2 contains additional language specifying that all revenues related to the Milford units, less any costs associated with those revenues not already reflected in the RMR Agreement, will lower the Monthly Fixed Cost payment made to Milford. Article 3.2 provides for bidding by Milford using the Stipulated Bid Cost, but differs from the *Pro Forma* COS Agreement in that it allows an exception to the bidding protocols for energy self-scheduled for testing.

### Comments

77. The CT DPUC and CMEEC state that the proposed agreement deviates materially from the *Pro Forma* COS Agreement. First, CT DPUC and CMEEC note that article 2.1 was changed to have the RMR Agreement terminate "when a LICAP mechanism applicable to the [r]esource becomes effective."<sup>48</sup> CT DPUC requests that the term of the agreement be fixed to a specific date, not remain open-ended as Milford proposes. This change is necessary, contends CT DPUC, because the Reliability Agreement could continue indefinitely if the Commission delays or a court stays LICAP implementation. Second, CT DPUC and CMEEC assert that the *Pro Forma* COS Agreement provides for only 60 days' notice prior to termination and that there is no basis for deviating from that norm to give Milford an additional 60 days of payments should ISO-NE determine the units are no longer needed for reliability. Further, CT DPUC and CMEEC state that article 3.1.2 is an open-ended provision unique to the Milford RMR Agreement. CT DPUC argues that article 3.1.2 would allow Milford reimbursement for additional costs, unspecified in the RMR Agreement and unsupported in the filing, when those costs are related to revenues garnered from services sold outside the agreement.

78. CMEEC also takes issue with changes to article 3.2 that allow bidding flexibility for energy self-scheduled for testing. Finally, CMEEC states that neither substitution of the term "Accepted Electric Industry Practice" in article 5.1 for the standard "Good Utility Practice", nor revisions to article 6.2 concerning a force majeure event, were supported by Milford

79. In its December 7 Answer, ISO-NE states that article 3.1.2 is intended to provide an incentive for Milford to pursue revenue opportunities that would lower the net costs of the RMR Agreement while preventing double recovery of incremental costs associated with those revenue opportunities. ISO-NE proposes the following clarifying language for article 3.2.1:

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<sup>48</sup> CT DPUC Protest at 18.

Less any incremental costs associated with those revenues directly related to securing additional revenue (i.e., beyond revenues earned in the NEPOOL markets) that are not already accounted for herein in the Monthly Fixed Cost Charge or Stipulated Bids. In no event may these incremental costs be greater than the incremental revenues on a case by case basis.

80. Milford, in its August 7 Answer, agrees to make a section 205 filing should it seek to net any costs not specified in the RMR Agreement under provisions of article 3.1.2. Also, Milford states that the changes from the pro forma agreement were made at the request of ISO-NE.

### **Commission Determination**

81. We reject the CT DPUC's request to alter the proposed termination provisions of the RMR Agreement to terminate on a specific date, rather than the day before a LICAP mechanism becomes effective. In the LICAP proceeding, the Commission stated that it will consider RMR agreements that are limited to a single term, expiring when the LICAP mechanism is implemented.<sup>49</sup> The proposed termination provisions of this agreement are consistent with prior Commission orders, including recently approved RMR agreements in *PSEG*.<sup>50</sup>

82. We also reject CT DPUC's request to shorten the notice of termination provisions in the RMR Agreement from 120 days to 60 days. CT DPUC is incorrect in its assertion that the *Pro Forma* COS Agreement contains a 60-day notice of termination provision. Article 2.2.1 of that agreement provides that the "ISO may terminate this Agreement at any time during the Initial Term or an Extension Term upon one hundred twenty (120) days written notice to Owner[.]"<sup>51</sup> CT DPUC has provided no support for a change from this 120-day termination provision and thus we will reject its request to shorten the notice period.

83. We agree with CT DPUC that the language added to article 3.1.2 is open-ended and not entirely clear as to what additional costs will be subtracted from Milford's additional revenues sources, thus lessening the offset against the RMR Agreement costs. However, we agree with ISO-NE that article 3.1.2 provides an appropriate incentive for Milford to seek additional revenues outside the RMR Agreement. We find ISO-NE's clarifying language addresses CT DPUC's concerns and balances the need for this incentive; therefore, we accept such revised language. Additionally, we accept Milford's

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<sup>49</sup> *Devon V* at P 72; *Devon VI* at P 25, 29.

<sup>50</sup> *See PSEG* at P 56.

<sup>51</sup> Market Rule 1, Appendix A, Exhibit 4, Original Sheet No. 7556.

commitment to file under section 205 of the Federal Power Act,<sup>52</sup> to recover any additional costs that it proposes to net from revenues. Milford is directed to modify article 3.1.2 of the agreement as shown above and submit the revisions in its compliance filing, due within thirty days from the date of this order.

84. As to CMEEC's concerns with bidding flexibility for energy used for testing the units, we find that the limited flexibility provided by article 3.2 is reasonable where the units are new and thus are expected to need some testing to meet reliability requirements. We expect that such testing will be limited, as stipulated in the RMR Agreement. Finally, we find that the changes to article 5.1 and 6.2 are immaterial.

#### **F. Other Issues**

85. The NEPOOL Participants Committee states that before the RMR Agreement was filed, there was no direct consultation through NEPOOL with stakeholders that will be affected by the agreement. The NEPOOL Participants Committee notes that this agreement was not preceded by a section 18.4 application to shut down or retire the units, and was not reviewed by the NEPOOL Reliability Committee. The NEPOOL Participants Committee explains that, in contrast to RMR agreements that are accompanied by a section 18.4 application, in the instant RMR Agreement, because there is no application to retire or shut down, no consultation occurs with the NEPOOL Reliability Committee or other NEPOOL committees. The NEPOOL Participants Committee states that in light of this proposed agreement and others that will follow, it is considering changes to Market Rule 1 to address RMR agreements that lack an accompanying section 18.4 application.

86. CTAG and CMEEC assert that, should the Reliability Agreement include costs other than going-forward costs, the Commission should condition the acceptance of the Reliability Agreement on Milford relinquishing its market-based rate authority. CMEEC states that since Milford is seeking cost-based compensation outside the parameters of its market-based rate tariff, there is no longer a need for the market-based tariff. CMEEC contends that to allow both the RMR Agreement and market-based rates would allow owners of generation facilities with newly-captive customers to pick and choose between rate regimes. CMEEC clarifies that generators with Reliability Agreements should be free to apply anew for market-based rate authority once their Reliability Agreements expire.

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<sup>52</sup> 16 U.S.C. § 824d (2000).

### **Commission Determination**

87. As stated elsewhere in this order, the Commission has determined that under the current market rules in New England, units seeking an RMR agreement with ISO-NE are not required to first apply to shut down or retire the units under section 18.4 of the RNA. The Commission views this issue as one of internal NEPOOL and ISO-NE processes, and will not address it here. We also note that this issue is currently on rehearing in the LICAP proceeding, and is more appropriately addressed in that docket. Lastly, we note that, despite the fact that facilities like Milford are not required to file a section 18.4 application, they are not relieved from providing to the Commission justification for their RMR agreements along with justification for their proposed fixed cost recovery.

88. With regard to the request that we suspend Milford's market-based rate authority, the Commission notes that article 3.1.2 of the RMR Agreement provides that any revenues related to the Milford units will be offset against the reliability payments made to Milford under the RMR Agreement. As a result, Milford may utilize its market-based rate authority to obtain revenues in the markets (outside of simply bidding at the required stipulated bid), but they must then be credited against the monthly reliability payment, benefiting customers. The Commission does not believe it is necessary to take away this option from Milford.

#### **The Commission orders:**

(A) Milford's proposed RMR Agreement is hereby conditionally accepted for filing, as modified, suspended for a nominal period, to be effective November 3, 2004, subject to refund.

(B) 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 concerning the justness and reasonableness of Milford's proposed RMR Agreement. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to conduct settlement judge negotiations.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2003), the Chief Administrative Law Judge is hereby authorized 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 by telephone within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, 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 this 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.

(E) If the 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 convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such 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.

(F) Milford is hereby directed to make a compliance filing reflecting the modifications discussed in the body of this order, within thirty (30) days of the date of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.