

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Berkshire Power Company, LLC

Docket No. ER05-1179-006

ORDER ACCEPTING COMPLIANCE FILING SUBJECT TO CONDITION

(Issued March 1, 2007)

1. On October 30, 2006, Berkshire Power Company, LLC (Berkshire) filed a refund report (Refund Report) in compliance to an Offer of Settlement that the Commission approved on September 29, 2006, which reduced Berkshire's Annual Fixed Revenue Requirement (AFRR) from \$30.2 million to \$26 million pursuant to a Cost of Service Agreement (RMR Agreement) with ISO New England, Inc. (ISO-NE)¹ Under the Offer of Settlement, Berkshire agreed to refund the excess of the amount that had been collected pursuant to the RMR Agreement since July 1, 2005. The Offer of Settlement required Berkshire to submit the Refund Report to show the calculation of refunds and the monthly payments to be made to ISO-NE pursuant to the Offer of Settlement.

2. The Offer of Settlement provided that refunds of principal and associated interest would be made in installments over a four-year period following its approval by the Commission. Berkshire's Refund Report shows that Berkshire would refund to ISO-NE a total of \$4,985,018.96, in forty-eight equal monthly installments of \$122,097.07 each. In this order, we accept Berkshire's Refund Report, subject to condition, as discussed below.

I. Background

3. On June 30, 2005, as amended on July 1 and 8, 2005, Berkshire filed with the Commission a proposed RMR Agreement between itself and ISO-NE in Docket No. ER05-1179-000, arguing that the RMR Agreement was necessary to permit the Resource to continue providing reliability services, as Berkshire had received insufficient revenue to sustain its operation.

¹ *Berkshire Power Company, LLC*, 116 FERC ¶ 61,311 (2006).

4. On September 6, 2005, the Commission conditionally accepted the RMR Agreement for filing, suspended it for a nominal period, set it for hearing and settlement judge procedures, and directed Berkshire to submit a compliance filing.² On July 14, 2006, Berkshire submitted the Offer of Settlement and accompanying documents in Docket No. ER05-1179-000 in accordance with the Commission's Rule 602.³ As noted above, the Offer of Settlement was approved on September 29, 2006⁴ in this proceeding under which Berkshire agreed to reduce the charges being collected under the RMR Agreement and to refund the excess amounts collected pursuant to the RMR Agreement since July 1, 2005 to true-up amounts that would have been collected under rates established in the Offer of Settlement.⁵

II. Notices of Filings, Interventions, Comments and Protests

5. Notice of Berkshire's filing was published in the *Federal Register*, 71 Fed. Reg. 65,483 (2006) on November 1, 2006 with motions to intervene or protests due on or before November 20, 2006. On November 20, 2006, ISO-NE filed a timely motion to intervene and comments. On November 22, 2006, Berkshire filed an answer to ISO-NE's comments.

III. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We will accept Berkshire's answer because it provides information that assisted us in our decision-making process.

² *Berkshire Power Co., LLC*, 112 FERC ¶ 61,253 (2005) (September 6, 2005 Order).

³ 18 C.F.R. § 385.602 (2006).

⁴ *Supra*, note 3.

⁵ *Berkshire Power Company, LLC*, 116 FERC ¶ 61,311 (2006).

B. Comments and Answer**1. ISO-NE's Comments**

8. ISO-NE states, with the following noted exceptions, that it accepts Berkshire's calculation of the principal and interest to be refunded as shown in Exhibit 1 of the Refund Report. ISO-NE also submits that the Refund Report cannot be accepted in its entirety because certain aspects do not conform to the Offer of Settlement as approved by the Commission. Additionally, ISO-NE proposes a fixed date for the refunds to begin because this will ensure an exact calculation of the total interest amount due.

9. First, ISO-NE states that section 27 of the Offer of Settlement states, in pertinent part, that "Berkshire shall determine the amount due as of the date of Commission approval of the Offer of Settlement without conditions or modifications unacceptable to any Party (including principal and interest calculated in accordance with section 35.19a of the Commission's regulations)." ISO-NE notes that the date of Commission approval is September 29, 2006. ISO-NE argues that Berkshire's last vertical column in Exhibit 1, which estimates amounts that Berkshire has not yet been paid, extends to November 30, 2006, and thus is outside the scope of the Commission's order and is unnecessary because this estimate extends past the date of Commission approval.⁶

10. Likewise, ISO-NE explains that the next to last vertical column in Exhibit 1, which shows the payment to be received on October 31, 2006, also extends past the date of Commission approval. Although as Exhibit 1 indicates, ISO-NE states that Berkshire was paid by ISO-NE for the month of October based on the as-filed AFRR of \$30.2 million, ISO-NE argues that any overpayment should not be included in the required refund calculation as of the Commission-approval date. Instead, ISO-NE asserts that consistent with ISO-NE's billing policy, the October 2006 payment will be recalculated using the AFRR stated in the Offer of Settlement and will be separately resettled in January 2007 pursuant to the 90-day resettlement process. Therefore, utilizing Berkshire's figures, ISO-NE requests that the Commission approve the cumulative refund amount due of \$4,642,251 million as of September 29, 2006 (*i.e.*, the Commission approval date of the Offer of Settlement) rather than September 30, 2006 as shown in the Refund Report.⁷

11. Second, ISO-NE notes that section 27 of the Offer of Settlement, in pertinent part, states that refunds will be made "in forty-eight (48) equal monthly installments beginning in the month following the month in which the Commission approves Berkshire's compliance report to the Commission and ending forty-eight months later (the 'Refund

⁶ ISO-NE's comments at 4.

⁷ *Id.* at 5.

Period’).” Additionally, ISO-NE notes that section 27 states that the “monthly installments shall include interest on the outstanding unpaid amounts of the total refund amount payable during the Refund Period.” As discussed above, if the cumulative refund amount due as of September 29, 2006 is \$4,642,251 million, then consistent with section 27, ISO-NE claims that Berkshire will owe additional interest on this total amount from September 29, 2006 until such time as the Refund Period begins.

12. In order for Berkshire to know exactly the total amount of principal and interest to go into the 48 installments, ISO-NE states that a date for the Refund Period must be specified. However, ISO-NE notes that section 27 only states that the Refund Period will begin “in the month following the month in which the Commission approves Berkshire’s compliance report.” Therefore, ISO-NE proposes that, once the Commission approves the Refund Report, ISO-NE shall promptly notify Berkshire of the exact date to begin the Refund Period. ISO-NE further proposes that, based on the date beginning the Refund Period as determined by ISO-NE, Berkshire shall re-calculate the total refund amount along with the monthly installment amounts (using the applicable interest rate under the Commission’s regulations) and shall make an informational filing containing these data with the Commission within 30 days of the Refund Report being approved.⁸

2. Berkshire’s Answer

13. Berkshire states that ISO-NE, in its comments, generally accepted Berkshire’s calculation of the amount of principal and interest to be refunded. Berkshire notes, however, the ISO-NE has proposed the following modified procedures for determination of the amount of refunds to be paid by Berkshire: (1) the principal amount to be refunded by Berkshire will be calculated as of September 29, 2006 (the date of Commission approval of the Offer of Settlement) and excess payments made to Berkshire for October 2006 will be resettled outside of the refund procedures established in the Offer of Settlement. The effect of this proposal is to reduce the amount to be refunded pursuant to the Offer of Settlement to \$4,642,251.00; and (2) following Commission approval of the Refund Report, ISO-NE will notify Berkshire of the specific dates on which the Refund Period begins and ends, after which Berkshire will recalculate the refund amount (including interest) and submit a compliance report to the Commission.⁹

14. Berkshire states that it believes that ISO-NE’s proposals are reasonable and are acceptable. Accordingly, Berkshire states that upon Commission acceptance of the

⁸ *Id.* at 5-6.

⁹ Berkshire’s comments at 2.

Refund Report and approval of ISO-NE's proposed procedures, Berkshire will recalculate the refunds to be made to the ISO-NE pursuant to the Offer of Settlement in accordance with these procedures.

C. Commission Analysis

15. The Commission will accept Berkshire's Refund Report subject to Berkshire updating its Refund Report, as agreed in its answer. The Commission agrees with ISO-NE that Berkshire should calculate the principal amount to be refunded with interest for the period of July 1, 2005 through September 29, 2006 as of September 29, 2006, consistent with the section 27 of the Offer of Settlement. The Commission also agrees with ISO-NE that interest from September 29, 2006, to the date the Refund Period begins in March, must be included in the refunds as well.¹⁰ Although the Commission accepts the Refund Report subject to condition, being that both ISO-NE and Berkshire agree on the changes necessary to update the Refund Report, we direct ISO-NE to notify Berkshire of the start and end dates of the Refund Period before Berkshire submits its compliance filing. Therefore, Berkshire can re-calculate the total refund amount along with the monthly installment amounts (with interest in accordance with section 35.19a of the Commission's regulations) to be included in its compliance filing. The Commission directs Berkshire to make a compliance filing containing these data within 30 days of the date of this order.

The Commission orders:

(A) Berkshire's Refund Report is hereby accepted subject to the above condition and Berkshire is directed to make a compliance filing within 30 days of the date of this order as discussed in the body of the order.

(B) ISO-NE is directed to notify Berkshire of the start and end dates of the Refund Period as discussed in the body of the order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁰ Consistent with section 27 of the Offer of Settlement, refunds will be made to ISO-NE in the month following the month in which the Commission approves Berkshire's Refund Report. Therefore, refunds shall begin in March 2007 on a date certain determined by ISO-NE.